DESIGNING LEGAL SPACE: LAW AS AN ENABLING TOOL IN COMMUNITY-BASED MANAGEMENT

Jon Lindsay, Development Law Service, FAO, Italy

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ABSTRACT

This paper explores the role of state law and legal institutions in creating an enabling environment for community-based natural resource management. As with any area of human endeavor, community-based management has sometimes succeeded in ignorance of its legal environment. Some community-based management systems have operated for many years with no formal legal underpinning, and perhaps even in direct contradiction to what is written on the law books or administered in the courts. These are, however, increasingly rare exceptions. Natural resources are the focus of increasing conflict around the world. Where community-based management efforts are subject to challenge from outside or within, the formal legal environment, for better or worse, becomes increasingly relevant. Nevertheless, in many national legal systems, the status of much community-based management remains uncertain and insecure, and a threat to its sustainability.

The starting premise of this paper is that successful community-based management requires "legal regimes that allow local community-based institutions to define, preside over and redefine the rules of resource use" (Lynch 1998). Designing such legal regimes requires careful attention to the need for certainty and flexibility. Certainty is required in defining the limits of state power, and the rights, responsibilities and remedies of local groups with respect to the state and 'outsiders.' Flexibility, on the other hand, is essential to ensure that community-based efforts reflect local conditions, cultural values and institutional choices. While important law-reform efforts are underway in many parts of the world, and some encouraging new laws have appeared in recent years, many of these still fall short both in terms of providing real protection to community-based management, and in terms providing sufficient 'legal space' within which local people can make real choices. Based upon an examination of emerging practice around the world, some general design principles are offered with respect to a number of issues, including land and resource tenure; defining the objectives of management and other planning matters; recognition of local entities and institutional structures; definition of boundaries; the security of rights; enforcement; and the relationship between different government agencies.

I. WHY LAW MATTERS

A. Law and the Fumba Mangroves

For centuries, communities on the Fumba peninsula of Zanzibar have depended on mangroves. Mangrove poles have provided a critical supply of building material for homes and boats. The rich mangrove ecosystems have supported an abundant supply of fish and other marine resources.

Today, as elsewhere in the world, the mangroves of Fumba are disappearing at a tremendous rate. Alarmed by this state of affairs, in the early 1990s the residents of Kisakasaka village, in collaboration with Zanzibar's small Subcommission for Forestry, took some modest steps to address this problem at the community level.

Villagers and foresters agreed that the crux of the problem was the free-for-all way in which the mangroves were being exploited. Increasingly, people from other parts of Zanzibar and mainland Tanzania were coming to the area, denuding large areas of poles, and using destructive techniques in doing so. And, the villagers conceded, their *own* use of the mangroves was increasingly out of control, showing little respect for local knowledge accumulated over the years about how these fragile resources should be treated. No one, in short, was taking responsibility for the existence of Kisakasaka's mangroves into the near future, let alone for future generations.

With the encouragement of government foresters, the villagers of Kisakasaka responded to this situation by designing a new approach to the management of local mangroves. They formed a conservation committee. They worked out a set of rules or by-laws, which they felt would help stabilize the situation, and give the mangroves a chance to regenerate. Cutting periods were established, closed areas were identified, harvesting limits were set. The by-laws created a simple system of penalties for violations, and a rotation system of monitoring by committee members. Finally, access to the area by outsiders was to be limited, allowed only under certain conditions and subject to an entrance fee and permit.

Zanzibar's beleaguered Sub-commission for Forestry, understaffed and under-funded, has increasingly come to recognize the essential role of communities in sustainable forest management. Similar experiments are springing up elsewhere in the islands, and a newly adopted National Forest Policy proclaims the need for more (Silima et. al 1994). There are, of course, great uncertainties. Immense economic and demographic pressures are bearing down on the new arrangement in Kisakasaka, and it remains to be seen if these can be resisted. No one knows for sure if the incentives for participation will be sufficient to overcome the costs of organization and forbearance. And it is too early to tell if the adopted rules are environmentally sound. But in view of the alternatives, these seemed like risks worth taking, to villagers and foresters alike.

There is, however, another important issue, one that has hovered in the background throughout the short history of the Kisakasaka effort – are initiatives such as Kisakasaka *legally* sustainable? Will the experiment *work* under Zanzibar law? Questions like these arose from time to time during the process of mapping out the Kisakasaka plan. But in the end this aspect received little systematic attention.

The failure to examine legal implications is not surprising. It is human nature to wish away legal complications when things seem to be going well otherwise. But had careful attention been paid to these matters, a number of soft-spots in the legal foundations of the experiment might have become apparent. Consider, for example, the following:

- All mangroves, including those in Kisakasaka, were 'forest reserves' under Zanzibar's forest law. In reserves, all decisions regarding management were to be made by the government, and all forest resources belonged to the government. While the Sub-commission for Forestry agreed to village use of the mangroves in accordance with an approved plan, nothing in the law or in the Sub-commission's informal agreement with the community seemed to prevent it from unilaterally changing its mind. *Result: The rights of the community to manage the*

mangroves and to reap the benefits of the management could be easily terminated, and were therefore legally insecure.

- Zanzibar's forest law had been written in an era when the main objective was to keep people *out* of the reserves, *not* to involve them in management. Under a loose reading of the law, the government *might* be able to delegate substantial powers and responsibilities to communities in forest reserves. Many officials, however, did not read the law in this spirit, and instead pointed out that there was nothing in the law that gave them the explicit *right* to grant such powers to communities. *Result: The legal authority of the Sub-commission for Forestry to allow community initiatives in mangroves was perceived as uncertain.*
- The group of villagers involved in the program was largely self-selected and informally constituted. Its relationship to existing local government institutions was highly uncertain. It was also uncertain how the mangrove by-laws related to the power of townships to issue by-laws concerning resource management. *Result: The legal status of the management group and its authority to make and enforce rules was unclear.*

When the villagers and foresters were working out a plan for Kisakasaka, concerns like these, if acknowledged at all, must have seemed abstract and obscure. The community and the government were, after all, working together for once toward a common goal, in a climate of mutual trust.

But it is not hard to imagine ways in which these infirmities could come to have real-life consequences. What if other Zanzibaris, jealous of Kisakasaka's regenerating mangroves, began to argue that the villagers had no right to lay claim to a part of Zanzibar's 'national' forests? What if some Kisakasaka residents themselves began to violate the by-laws, arguing that those by-laws had no legal status? What if personnel changes within the forestry sector brought in decision-makers unsympathetic to community management – could they stop the Kisakasaka experiment with a stroke of the pen?

Experiments like Kisakasaka, in short, have emerged in a legal environment that at best was poorly suited to their objectives, and at worst could jeopardize their success.

Fortunately for such initiatives, Zanzibar has just recently adopted a new Forest Resources Conservation and Management Act, a law that may, if fully implemented, address many of these concerns. The new act provides a mechanism for drafting 'community forestry management agreements' that can be utilized for forest reserves as well as other areas suitable for community management. Procedures for the delineation of community forest areas are spelled out, as are the basic rights and responsibilities for both parties to any agreement – i.e., the community group and the Forest Department. Community groups are empowered to draft enforceable by-laws (subject to Forest Department approval) and can be recognized as legal personalities. Nevertheless, the law draws back from setting forth too many details, opting instead for a flexible approach that would allow agreements to be tailored to reflect local conditions and the aspirations of the community.

B. State Law and Community Management

The example of Kisakasaka is far from unique. It represents a modest example of a growing emphasis worldwide on the management of forests and other natural resources by local communities, groups, families and individuals. There is now a substantial body of evidence, reported in a huge literature, that local users of natural resources can in many cases manage those

resources effectively – if given the opportunity to do so, if appropriate institutions are in place or can be developed, and if the benefits are clear, significant and secure. A wide range of initiatives are taking place, with communities working alone, or in various degrees of collaboration with governments, non-governmental organizations and international agencies. The initiatives take many forms, ranging from the promotion and strengthening of long-existing community management practices, land and resource tenure systems and indigenous knowledge, to the crafting of new institutions and new partnerships between local groups, NGOs and the state.

Kisakasaka is representative in another way as well, however – in the weaknesses of its legal underpinnings (though as noted above, the recent passage of the new Forest Resources Conservation and Management Act bodes well for remedying these weaknesses in the future). This is a characteristic it shares with many if not most community management efforts around the world.

> *As much research has shown, successful local management involves the creation or perpetuation of effective local rules. Such rules may be derived from fully-elaborated systems of customary law, may be newly formulated rules created on an ad hoc basis, or may be some combination of both. The success of such rules will depend on a host of factors: are they well-tuned to current ecological realities? Do community institutions have the strength to implement them? Can they be insulated from external economic threats? This paper will not focus on such local rules per se. Instead, this presentation is concerned primarily with the relationship between local rule systems on the one hand, and state law and legal systems on the other. (By state law I am referring to legislation, regulations, rules, judicial decisions and other legal instruments enacted by or entered into by governments, whether at national or sub-national levels.)*
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> *As in any area of human endeavor, community management can take place in blissful ignorance of its legal environment, provided that (by design or indifference) the policy, social and economic conditions are favorable. Some community management systems have existed for centuries, and may continue to operate with no legal underpinning as far as state law is concerned, and perhaps even in direct contradiction to what is written on the law books or administered in the courts. And there are of course many political, social, economic and ecological variables that play a part in the success or failure of any given effort,* ***many of which state laws and legal institutions may affect only marginally****.*

Yet community-based management systems almost never exist in a state of pristine isolation. Natural resources are the focus of increasing conflict around the world. Where community-based management efforts are subject to growing threats from outside or within, and to the tugs and pulls of national and international economies, the formal legal environment, for better or worse, becomes increasingly relevant. Consequently, it appears inevitable that the presence of state law (or in many cases, the problems caused by its absence) will loom ever larger as community-based efforts receive more attention – both supportive and damaging – from outside. It is therefore important for supporters of community-based management to examine the *constraints* imposed by the state legal framework, as well as the *opportunities* it might provide for enabling community-based action.

Looked at from a different angle, local management initiatives *need* state law, often more than their advocates like to recognize though usually less than governments are willing to admit.

They need state law because, however robust local management systems may be, there are things that local institutions or community-based rules often cannot accomplish alone.

- For example, local institutions, acting alone, cannot ***define the rules by which they interact with outsiders***. Of course, interaction with outsiders is invariably shaped by community-based rules, and frequently governed by long-standing norms and understandings between local groups and outsiders that stand outside of state law. Highly localized community-based management systems (for example, those that operate at the level of a particular village or user group), are often nested within a wider community governed by elaborated 'customary' or non-state legal regimes that provide rules for how the smaller groupings within the larger community interact and mechanisms for resolving conflict. Thus, 'outsider' may be defined differently depending on which concentric or sometimes overlapping concept of community one is alluding to. The point remains, however, that because local groups and community-based systems are *also* nested within a state legal regime, local groups often need a *legal status* that outsiders can recognize and interact with. They need legal protection from trespass and the criminal behavior of outsiders. They need state law to give legal recognition to community-based rules and to tell outsiders that they have to abide by those rules.
- Local rules also cannot ***define the limits of state power***, that is the extent to which the state will respect local autonomy and where and under what conditions it will retain the power to intervene. In the best scenario, community groups, other components of civil society and government will work together to define these limits. Nevertheless, unless these limits are spelled out in state law, or somehow recognized by the state legal system, there is little that community-based rules alone can do to enforce them.
- State law may play an important role in providing ***basic protections for individuals*** against the abuse of local power. The extent to which state law *should* intervene on behalf of locally oppressed people, or can be effective in doing so, is of course problematic. Nevertheless, especially in constitutional settings where the state has pledged to uphold some basic human rights, it is hard to see how state law can escape this responsibility altogether. In many parts of the world, people oppressed by their own communities turn for support (though sometimes more symbolic than instrumental support) to concepts of equity or social justice that are articulated in state law.
- Finally, state law is needed to provide ***basic guidelines for protection of important wider societal interests***, such as environmental protection. Here, again, the problem is one of balance. The call for vesting stronger and more secure property rights in local communities is sometimes portrayed as dangerous because government will lose its power to protect wider interests. Yet such an argument is clearly spurious. No private property right is absolute, and government always retains a regulatory function by which it can act to protect legitimate interests of outsiders, including future generations (Lynch 1998). The problem lies in trying to define those interests. Governments frequently have an excessively expansive and detailed vision of the 'national interest,' with the result that local autonomy and decision-making with respect to resource management can be drastically undermined. National interest has often been defined as if the needs and aspirations of local people were not part of the equation, and that national interest can only effectively be defended by the state defining all rules of resource access and use.

To point out in a generic way why state law has an important role to play in effective community-based management is not to say that it actually plays this role in all or even most cases. Law in fact does many of these things quite miserably or not at all. Despite the rapid

proliferation of rhetoric in support of community management, despite the bandwagon effect in many countries and international organizations, many if not most community-management efforts continue to exist in a state of legal uncertainty and insecurity (Bruce 1998). It is still the case that in many parts of the world, legal regimes do not provide a way for local people to establish enforceable legal rights to the resources on which they depend, or to play a meaningful part in planning and managing those resources. Many national laws continue to reflect a state-centric approach to resource management and a restricted philosophy of property rights that has tended to undermine existing community-based systems, and that has seriously constrained local people and progressive government officials in the search for *new* community-based solutions.

There have always been exceptions to the above generalization. And perhaps more importantly, some encouraging legal developments are beginning to take place in many parts of the world, where laws are being designed that are more supportive or at least less hostile to community initiatives. Though it is difficult to summarize the wide-range of different approaches that are emerging, it is possible to identify several different approaches:

- Laws that recognize local ownership (or other substantial property rights) over land and/or natural resources based on historical claims. These would include laws that provide for the recognition of long-standing land claims of indigenous communities as in ancestral domains legislation in Philippines or native title laws in Australia.
- Laws that provide mechanisms for a site-specific delegation to local people of some measure of management responsibility over state land and/or resources, either on an indefinite basis or for a particular term. Such delegation is usually spelled out in some sort of plan or agreement. Under this category would fall most joint management or co-management arrangements, such as joint forest management in India and similar programs in a growing number of other countries.
- Laws that promote decentralization. Depending on the nature of the decentralization program in a particular country, it *may* result in a greater involvement of local community-based institutions in resource management. This is less likely to be the case, however, where devolution is in essence simply a delegation of authority to local units of central governments (Ribot 1997).

These examples do not define hard and fast categories. Indeed, the first two broad approaches might be said to represent a spectrum, consisting of a variety of situations characterized by more or fewer 'sticks' in the bundle of rights held by community-based managers. In between these two ends of the spectrum we find many types of intermediate approaches, such as laws that allow for village titles over common property resources in Tanzania (Wily 1997). A co-management regime may be especially useful in cases where there is no easily identified community with a well-established historical claim to an area, or where local institutions are relatively weak and community-based rules are non-existent or operating ineffectively, etc. In some cases, however, the emphasis on co-management as opposed to the recognition of more significant community property rights may simply reflect the political reality that most government agencies are reluctant to cede the ownership of government resources, however that ownership may have been acquired in the first place. In some cases two or more of the approaches described above may operate simultaneously. For example, the recognition of indigenous rights over land may be on such a large geographic scale that a co-management approach might still be useful between the governing body of the overall domain and smaller groups involved in the management of discrete areas within the domain.

II. DESIGNING ENABLING LAWS: PRINCIPLES AND DILEMMAS

The emergence of new legal techniques in a number of countries should not obscure the fact that there are many others where little progress has been made. And in most countries where progress has been made, the progress has been ambivalent and not supported by enough political and social will to make it a reality. There remains, in the words of Owen Lynch, an urgent need to design legal frameworks that "allow local community-based institutions to define, preside over and redefine the rules of resource use" (Lynch 1998).

The purpose of the remainder of this paper is to suggest some basic principles that might guide the design of an improved legal framework for community-based management, and to identify some of the central difficulties and remaining issues that confront this task.

The search for broadly applicable principles may seem like a risky undertaking in view of the wide diversity of approaches falling within the ambit of community-based natural resource management, a diversity that is reflected and reinforced by the wide variety of legal arrangements (existing or proposed) that might apply. The promotion of community management may in some cases involve the recognition or revival of pre-existing management systems or existing community-based tenure regimes; in other cases, it may involve the creation of new systems and new rights. There is a sliding scale in terms of the level of government involvement or oversight – in some situations, community ownership or control of an area may be acknowledged, with government only playing the role of regulator of environmental and other aspects; in other situations, government may assert and retain ultimate ownership and control of the resource, but allow some degree of community management subject to site-specific agreements. All of this takes place against the backdrop of vastly different legal traditions and doctrines, and in the context of legal systems of vastly differing capacities.

This extreme variety warns us against searching for legal models that are easily transferable from one country to another. This is a dangerous pursuit in any field of law (Lindsay et. al. 1998). The danger is greatest in a subject matter such as community-based management, which is inherently characterised by local variation. Workable laws that effectively support community-based management will vary widely depending on the peculiarities of existing legal and institutional arrangements, and the nature and extent of community management models and objectives in particular settings. For example, community participation in the management of a protected area may involve rights that are significantly restricted compared to community management of a village forest maintained largely for local uses. Working out fair and sustainable leasing arrangements for bhabbar grasses in Haryana may seem to have little in common with the effort to define ancestral land rights in Philippines.

Nevertheless, there are certain key substantive principles that are central to the task of improving the legal environment for community-based management, however varied the situation, and however significant or restricted the rights that have been devolved or recognised.

To begin with, I would suggest that governments, civil society and international donors need to start with from a central premise – ***that local people have a fundamental right to participate meaningfully in the management of local resources on which they depend.*** This formulation is useful because it provides a way of unifying very diverse situations. It applies to indigenous communities in Peru, who may have long historical relationships with local land and resources. But it also applies to small clusters of resettled freedom fighters in Eritrea, who may never have met each other or even seen the area in which they have been settled before. Both these

communities share equally in this fundamental right, although the nature of their participation may be different because of their different capacities and histories. This formulation reminds us that community-based natural resource management is *not* – as some of its champions *and* critics seem to think – just a way of rewarding homogenous, cohesive, ecologically sensitive communities that have long-standing claims to easily identified land areas. If it were, then community-based management would be out of the question in almost all parts of the world. Community-based management *is* about building upon community-based laws and institutions where they are strong, but it is also about local people and their allies working to design *new* institutions where they are needed. At its best, it is not fixated on the past although it can learn lessons from the past – it is a future looking strategy for coping with the often messy realities of modern life.

Laws designed to promote this overarching principle can usefully be evaluated by reference to various criteria that fall into two broad categories – the need for *security* on the one hand, and the need for *flexibility* on the other. Community-based managers, whatever the setting, need secure and certain rights. At the same time, they also need the flexibility, the *legal space,* to exercise choice in a way that reflects their unique needs, conditions and aspirations. In both these two areas – security and flexibility – laws in most countries of the world leave much to be desired.

A. Security

As already stressed, community-based management can take many forms, and the nature of the rights local people have with respect to the resource can vary considerably from model to model. Nevertheless, one principle should apply in any context, however limited or extensive the rights granted under a particular programme may be. For any individual community effort to be successful, it must not only provide a realistic hope of significant benefits – it must instil confidence that the rights to those benefits are secure and cannot be taken away arbitrarily.

> *Security is, of course, in part a state of mind. Where relations have traditionally been good between community and government, local people might feel secure enough to participate simply on the basis of a promise from local officials. Sometimes a sense of security is derived from the fact that a particular management arrangement is part of a donor-funded project, thus unlikely to be derailed as long as the flow of funds is assured. In other situations, communities may not feel secure no matter how carefully and strongly their rights are set forth in legal documents. Nevertheless, while perceptions of what constitutes security may vary, some key attributes can be identified that provide guidance the designers of substantive legal provisions. It should be noted that this list is not exhaustive; at the same time, not all of the listed criteria may be relevant to any given situation. They are offered here simply as an indicative sample of the types of considerations that should be taken into account in the attempt to design secure legal rights.*

1. **Security requires that there be *clarity* as to what the rights are.** Confusion as to one's rights can significantly undermine the effectiveness and enthusiasm with which those rights are exercised. Of course, there are any number of examples in laws from around the world of rights so vaguely described as to be virtually meaningless. Striking examples include laws that state that "customary rights of forest-dwellers will be respected *as much as possible*" or "customary law shall be respected *unless the national interest requires otherwise."* Perhaps more significant is the uncertainty that pervades many co-management arrangements, where rights and responsibilities have supposedly been negotiated and tailored to local conditions. Part

of this is a failure of communication and understanding. Part of it is a matter of politics – it may suit some people in power for rights to be vaguely defined. But part of it is a matter of drafting, both in legislation and regulations and in local level agreements that govern specific community-based initiatives. Examples from India and elsewhere, for instance, testify to frequent confusion about the way in which benefits are to be shared, leading to false expectations and possible disillusionment.

2. ***Security requires certainty that rights cannot be taken away or changed unilaterally and unfairly***. In almost any situation, of course, there are circumstances where rights can be taken away or diminished, but conditions for doing so need to be fair and clearly spelled out, the procedures for doing so need to be fair and transparent, and the issue of compensation needs to be addressed. In the case of a co-management arrangement, it is important the threshold be high, that termination by government not be an option unless there have been serious and persistent violations, and a failure to remedy those violations after notice. But many legal provisions governing co-management fail to meet this standard, apparently giving the power to government to decide that a co-management agreement can be terminated for any reason, or for difficult to define reasons such as the notion that the agreement is no longer 'viable.' This type of insecurity may be exacerbated by the type of legal instrument that enables the establishment of co-management arrangements to begin with. In the case of India, despite several attempts to amend the Forest Act of 1927 to provide a firm legal basis for joint forest management, the program continues to be a creation of state notifications and administrative orders. While this does provide an opportunity for flexibility in responding to experiences and problems encountered in implementation, it also fosters a sense among some government officials that the rights of participants are malleable and temporary and can be changed unilaterally by government if it decides that conditions warrant (Kant and Cooke 1998).

3. ***Security is enhanced if the duration of rights is either in perpetuity or for a period that is clearly spelled out and is long enough for the benefits of participation to be fully realized.*** If rights are to be in force only for a particular period of time – as in some co-management arrangements or community forestry leases, for example – care should be taken to ensure that agreements are at least as long as is realistically required to reap the benefits of participation. Some of India's joint forest management notifications, for example, prescribe terms that range between five and ten years, or are tied to a growing cycle. Such provisions (which are not untypical of co-management in other countries as well) could create the impression of a 'one-shot' approach that could undermine the community sense of ownership of the resources in question and weaken its long-term attitude towards management (Lindsay 1994).

4. ***Security means that rights need to be enforceable against the state (including local government institutions)*** – that is, the legal system has to recognize an obligation on the part of the state to respect those rights. Again, this arises especially (although not only) in the context of co-management arrangements. It is uncertain in many contexts – and, to my knowledge, largely untested – whether co-management agreements are in fact viewed under law as containing enforceable contractual obligations on the part of the state (Eggretz 1996).

5. ***Security requires that the rights be exclusive***. The holders of rights need to be able to exclude or control the access of outsiders to the resource over which they have rights. Use of the word 'outsider' is, of course, potentially problematic. Exclusivity does not mean that there are no people outside the principal group responsible for management that might have certain rights that need to be respected. Distant or sporadic users of a resource may have legitimate historical claims that need to be accommodated, and to the extent those rights are respected by the rules that are

adopted, it would be wrong to refer to those users as outsiders in the sense that word is used here. What exclusivity does mean is that once the holders of rights have been defined, other users cannot be imposed on the group against its will. This means that government, for example, cannot assign rights to others over the same resource (such as assigning mining concessions in a community forest). It also means that government needs to recognize the power of the community group to apply its rules to outsiders, and where necessary, to assist in the enforcement and protection of the group's rights from outside interference.

6. A corollary to exclusivity is that ***there must be certainty both about the boundaries of the resources to which the rights apply and about who is entitled to claim membership in the group***. (The issues of delineating the resource and identifying the group of rights-holders are discussed below).

7. Another corollary to exclusivity in the co-management of government land is that ***the government entity entering into the agreement must have clear authority to do so.*** An agreement should only reflect promises on the part of government that the responsible authority is empowered to fulfill. For example, a contract between a government agency and a community-based management group concerning government land cannot create a right to exclude if the agency did not have the power to delegate that right in the first place. Other sectors of government may have powers over the same land and be in a position to take action that would be contrary to the principle of exclusivity if they were not included in the agreement themselves. This problem may seem a bit remote, but there are not infrequent instances of co-management agreements foundering on the shoals of inter-agency jealousies or turf battles, and a lack of clarity as to which government agency had control over which piece of land.

8. ***Security requires that the law recognize the holder of the rights.*** That is, the law should provide a way for the holder of the rights to acquire a legal personality, with the capacity to take a wide range of steps, such as applying for credits, subsidies, entering into contracts with outsiders, collecting fees, etc. (This issue is discussed in greater depth below).

9. Finally, and perhaps most dauntingly, ***security requires accessible, affordable and fair avenues for seeking protection of the rights, for solving disputes and for appealing decisions of government officials.***

There is nothing surprising about the items on this list, and nothing about them is unique to the community-based management context. Some or all of these are attributes of security that any person or group having important private rights is likely to want and need. At the same time, we cannot ask too much of law. Law cannot *ensure* security in inherently insecure environments. For example, where people have a fundamental distrust of state law and legal institutions, reforming laws may have only a marginal effect at first in improving the sense of security. We need to keep in mind that fixing law may be a necessary condition in the long term, but not a sufficient one. Yet what is striking for our purposes is how poor most state legal regimes are in providing the basic elements of security to community-based management initiatives. In too many cases, government seems to be given very broad discretion to change its mind, to decide that it is time to take the ball and go home. So long as government signals to community managers that *it does not take their rights seriously*, it is likely that community managers will not either.

B. Flexibility

Let me turn to the other part of the equation, the need for flexibility in law. Community-based natural resource management is about local choices and local adaptation. These qualities are, of course, put at risk if an excessively rigid, uniform approach, dictated by outsiders is applied. Yet it is remarkable how often this truth is ignored. There is, it seems, often a sort of 'tyranny of participation' at work in the way governments approach the subject of community-based management. A particularly graphic example of this was provided by the head of the Forest Department in one country who stated that "to get people to heaven, you need to pull them up to heaven by the scruff of their necks – we need to force these people to participate, and tell them how to do it." This is of course an extreme case, but we can all recognize more subtle forms of this phenomenon within our own governments and organizations and perhaps even within ourselves. It is a phenomenon that should be struggled against in designing legal frameworks.

Yet in many legal regimes around the world, the tendency is to put serious obstacles in the way of flexibility. In this area of lawmaking, it is particularly important to think of law as an *enabling tool,* not as an elaborate set of rules that prescribe or dictate solutions to local problems. At the same time, protecting flexibility in law is not an easy task, and some very serious dilemmas need to be faced. Obviously, even if it is both just and efficacious for state law to 'pull back,' and allow community-based rules (including in some cases deeply entrenched and long-standing systems of 'customary' law) to flourish according to their own dynamics, flexibility can never be unlimited. Both the wider society outside local groups, as well as individuals inside the group have interests that need to be taken into account. Protecting these interests while still leaving the necessary space for real local decision-making and choice requires very delicate balancing.

While the need for flexibility – for providing legal space for meaningful choice – is a principle that should guide all aspects of the design or support of community-based management, I will examine it here with respect to three areas – with respect to planning and management; with respect to the structure of local groups; and with respect to the identification of group membership and jurisdiction. All of these are closely interrelated, especially the last two.

1. ***Legal regimes should allow flexibility in deciding what the objectives of management should be and the rules that will be used to achieve those objectives.*** Successful natural resource management obviously needs to be sensitive to local ecological, social and economic variations. It is also obvious that participants in management must perceive the benefits of participation to outweigh the costs. These axioms are likely to be violated where outsiders presume to know what local people want, need or deserve. And yet in practice, we know this is frequently what happens. We hear tales from many places about management decisions made within 'participatory' management contexts that do not reflect basic realities about what local people want or need in terms of species, products, etc.

What is striking when one looks at even some of the most progressive new laws supporting community based management is how jealously government holds on to the decision-making function. This expresses itself in a number of ways. Often the legal requirements for doing a management plan are quite complex, and likely to be alien to what communities are used to and perhaps what the situation requires. Frequently regulations regarding co-management continue to vest almost all management decisions in government. There may be requirements for consultation with villagers, etc., but at the end of the day, the decision rests with forestry, fisheries or livestock officers, and *they* are ultimately responsible for producing the plan. This

kind of close control may be necessary in some delicate environmental situations, but in many instances it is driven more by a long-standing belief that "we government experts know better." Law alone cannot eliminate this tendency of officials to impose planning and management decisions but the way that laws are drafted can help tip the balance away from perfunctory consultation to greater local ownership of the planning process.

It is also noteworthy how much the range of choice in community-based natural resource management is influenced by the preoccupation of different sectors, within government and international organizations. In any given location, we might find any number of overlapping participatory strategies, prescribed by different sectoral policies and legislation governing water, forestry, fisheries, livestock, etc., leading to the creation in some places of separate and competing local institutions and (as one Swazi farmer explained to the author) a sort of "exhaustion with participation." There is a tendency for outsiders to look at resources in a compartmentalized way, which does not match up well with the way local people themselves see their resources. What more and more research is bringing to our attention is that there are often *many* possible environmental futures for any given area of land and water, and it is not always obvious that one should be preferred over another. Why grow timber on that piece of land? Why not fruit trees? Why not more grass? Why not agriculture? Why not some sort of unique mixture of uses? These are all fair questions. But the categories and labels we use in law can sometimes fix that choice for us. As one study of co-management of government forest land in southern Africa showed, most of the decisions about what future was appropriate had already been made, leaving very little on the table for negotiation (Matose 1997). Sometimes the simple accident that land falls under the purview of one government agency and not another means that it's destiny is fixed, and there is little room for real choice by local people.

2. ***Flexibility is required in regard to how state law handles the recognition of local groups.*** It has already been mentioned that community managers need some sort of legal 'personality' that is recognized by state law. The difficulty is how to spell this out in law. There has a been a tendency for outside law to prescribe in too much detail the structure of local organizations and the rules by which they operate. This is perverse, since one of the assumptions of community-based natural resource management is that it is best to build upon local institutions that have roots in local values and practices. If law now tries to squeeze these institutions into forms that are too complex and alien to a local situation, and then tries to standardize that form across many different social settings, the result could be to create institutions that have little legitimacy among their members.

It is instructive to look at this issue in the context of native land rights in Australia. Australian law is interesting because it illustrates two quite different approaches to the problem of group recognition. One approach is epitomized by the Aboriginal Councils and Associations Act. The law, which was drafted to provide for the establishment of legal forms for indigenous groups to hold native titles, was intended to allow indigenous groups "to develop legally recognizable bodies which reflect [Aboriginal people's] own culture and do not require them to subjugate this culture to overriding Western European legal concepts." As one study has shown, however, this goal fell down in the hands of lawyers and officials who were unable to break free from the concepts, processes and general approach with which they felt comfortable. The result was a law that gave almost no room for local cultural variation in corporate structures and decision-making processes, and in fact caused groups to lose control over their affairs. By contrast, some state laws adopted in the 1990s, including the Native Land Titles Act are much more geared to the recognition of existing institutional forms, providing very basic requirements and guidelines, but

leaving the details of internal group functioning up to the group itself. These latter laws are notable for their recognition that state law should not try to codify the community-based laws of indigenous groups, recognizing that to do so would threaten their inherent adaptability and the inevitable processes of change over time (Fingleton 1998).

I concede that this is a very difficult area and that legal recognition of community-based institutions can have unexpected consequences. Even if done carefully, recognition almost always *changes* the entity that has been recognized in some way. Moreover, legal recognition of local leadership arrangements can be a device by which elite in a community further enhance their own power, at the expense of weaker sections. There is also a tendency on the part of some advocates of community autonomy to become so fixated on keeping state law out of the internal workings of a group that they cannot hear when people themselves are asking for intervention. This issue emerged at recent series of consultations in Swaziland, where the power of traditional leadership is still very strong, but the system of chiefs is under increasing pressure of conflicts within and outside local communities. Speaker after speaker proclaimed that they do not want to abandon their tradition. But, they continued, we are no longer sure we know what chiefs can and cannot do, and we fear that customary controls on chiefly discretion are falling by the wayside. We don't want government law to tell us what to do; but we would like some basic guidelines, some help in holding our leaders accountable. One thing that was particularly striking about these comments was that many of the speakers were chiefs themselves.

3. Flexibility is needed in the definition of management groups and areas of jurisdiction. The need for *certainty* with respect to these issues has already been mentioned. The question is *how* should state law address the issue of *what group* has authority over *what resources* in *what area*? These are extremely difficult issues. There are a number of tendencies we can identify in laws around the world. One approach is for law to designate on a uniform basis a *local body or authority* that would have control over a *pre-defined area,* say a district or village council. Another approach, one that we find especially in the context of co-management situations, is to provide for the recognition of different groups formed around different functions and objectives. The Nepal Forest Law, for example, refers to user groups who will have forest land turned over to them. These are essentially self-defining groups, and neither the membership of the group nor the demarcation of the area they manage need have anything to do with local government boundaries – in fact, the Nepal legislation specifically states that a community forest area can overlap the boundaries between adjoining *panchayats.*

> *There are advantages and disadvantages to both approaches. In the case of devolving authority to local government units, it is easier to define in legislation because there are uniform structures in place everywhere. However, vesting power in a local government body is no guarantee that local people will really have more of a say in local resource management, unless those bodies are designed to be democratic, representative and accountable (Ribot 1997). Moreover, natural resources and the way that people use them often have little respect for administrative boundaries (Emsail 1997). A fluid method of defining the responsible group creates a possibility of finding those institutions and those people who according to their own perceptions and needs should have control over local resources, often based on long-standing traditional relationships. So the emphasis here is on self-definition. Still, the law may be legitimately concerned, it seems to me, about whether some person or group is being unfairly denied an opportunity to participate. And the empowering of local groups of users without efforts to coordinate with local units of government can in some cases result in the emergence of debilitating institutional conflict. Indeed, there is not*

infrequently a sort of dissonance between the seemingly complementary agendas of decentralization and community-based management (often driven by sectoral line ministries) that will need more careful attention as both agendas gain momentum.

III. MAKING LAW REFORM MEANINGFUL

Most of these remarks have focused on the *substance* – the principles and conceptual framework – of law. I would like, in closing, to touch briefly on the search for ways to *enable the enabling potential of law* – that is what are some of the techniques and processes that could be applied to the making of law and its implementation that can help make it usable, a meaningful presence rather than a well-intentioned but ultimately empty gesture. In the time available, these can only be alluded to in a somewhat crude fashion.

First, it is important to ensure that the design of law – from national legislation down to local level agreements – is governed by the needs, aspirations, insights and capacities of the intended users of the law, that it is not driven by the preconceptions of lawyers, donors and other outsiders, however well intentioned. This means opening up the process of lawmaking much wider and much earlier than is the case in most countries – i.e., it is not sufficient simply to hold a few workshops at the end of the drafting process. It would be incongruous indeed for a process designed to elicit participation to be imposed from above without participation in its design. Yet, while this principle might seem intuitively obvious, it requires emphasis because – even in many democratic societies – the concept of really engaging affected people in the lawmaking process from the beginning of that process is either ignored or viewed with alarm. It means that lawyers need to learn to work to demystify law, to make its concepts and language accessible. It means that local managers and their allies, on the other hand need to train themselves better in the language and processes of law, not all of which, incidentally are bad and twisted creations of devious legal minds. This is not a recommendation that flows only from a belief that people should have the right to be involved; I simply think that without this there is no realistic hope of passing laws that reflect reality and are capable of being used. A corollary of this is that law reform in support of community-based management should not be seen as a one-shot affair. It is an ongoing process that needs constantly to respond and adjust to feedback from the field.

Second, the capacity of people to understand and use the law needs to be enhanced. Obviously this applies to educating local managers. But it applies as well to government bureaucracies, police forces and judges (1). Of course, at the end of the day, it is not going to be laws that persuade government officials to give real space to local initiatives – it is going to depend on changes in attitudes and professional styles. Law can influence these changes, but it cannot force it to happen.

Third, there is an obvious need to find ways of improving the machinery of law. A relatively independent judiciary is critical. But if community managers had to depend on most court systems to be the defenders of their rights, they would be in trouble. These remarks have been painful silent about the need to design new ways of dealing with disputes. But clearly this will be a vital part of making changes in the substantive content of rights a reality.

Fourth, we need to be realistic in our expectations. Law is often an inefficient and unpredictable way to accomplish change. Any attempt through law to make massive changes from what is on the ground will simply be ignored. Laws should not be enacted that rely upon resources that government does not have or that require a massive redesign of institutions that is simply unlikely

to take place. It is counterproductive to legislate away all the messy and unpalatable aspects of life – this has never worked and never will. Passing laws that don't have some realistic chance of being implemented and of meeting at least some of their main objectives is a sure way to undermine further any residual faith in the rule of law.

Being realistic also means critically examining the various shorthand terms we use when discussing community-based natural resource management, and in designing legal strategies that support it. These can often obscure a messy reality and can have the effect of making decisions for people that they do not want to make. These remarks, for example, may well be accused of focusing on a supposed tripartite relationship between state, communities and resources. Obviously, the positing of such a relationship, while perhaps useful as an organizational device, ludicrously oversimplifies reality. What communities are we talking about, for example? In almost every situation I can think of, there are overlapping and often conflicting ideas of community, often bearing little resemblance to what outsiders see or want to see. Different groups or individuals within a community may have very different relationships with local resources, and very different visions of what the ideal future for their area should be. Even state law is not a homogenous thing, but a composite of many different, often competing elements. And left out of this tripartite scheme are any number of additional relationships with other people and institutions at local, national and international levels, all of whom may have legitimate claims to be stakeholders in the resources in question. In view of these complexities, it seems to me that we should think of the potential of law reform, not as a search for a correct *answer*, but as a search for *processes* by which stakeholders can fairly and transparently negotiate and re-negotiate with one another (2).

Finally, a closing question about priorities. It may be asked whether the emphasis on the substantive detail of law is justified. Isn't the real struggle still to get people in government and civil society to accept the idea of community-based natural resource management in the first place? Yes, indeed. We should not forget that much of what this paper assumes as centrally important is considered marginal by very many people in international organizations and governments around the world. Community managers and their allies must make strategic choices about priorities, and must consider in any given context whether for the time being it is better to work with imperfect legal instruments and concentrate on persuasion and building alliances rather than pushing immediately for legal changes that may, in some circumstance, upset delicate coalitions. Nevertheless, I would argue that the search for legal regimes that provide *meaningful, secure and flexible* rights to community-based management is not second-generation task, that it is fundamental if community-based management is to become sustainable and widespread strategy, rather than the ad hoc approach it has been in many countries so far.

Endnotes

(1) The empowering potential of law and policy should not be viewed solely from the perspective of community-based groups, but from the perspective of progressive government officials as well. Indeed, the impetus for law reform has in some contexts come from government officials themselves, because of the constraints that law puts on their capacity to respond to and support community initiative (Shah 1998).

(2) The environmental entitlements literature, epitomized by the works of Mearns, Leach and others has done much to broaden our thinking in this regard. See, for example, Leach et. al (1997).

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