LEGAL FRAMEWORKS AND ACCESS TO COMMON POOL RESOURCES

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A. Introduction[1]

In recent years, local people and rural communities have assumed increasing prominence in strategies for natural resource management. In policy debates, in development literature and in the design of specific ground-level interventions, terms like community-based management, common property resources, devolution and co-management have become commonplace.

This paper briefly reviews some of the central legal issues that are associated with this shift. In doing so, its goals are limited. It does not address fundamental questions about when, where and what kind of management works, nor attempt to identify the political, social, economic and environmental ingredients for success – subjects on which there is a huge, if still inconclusive, literature.

Instead, the questions addressed here are more modest: if we assume that management and livelihood outcomes *can* in many instances be enhanced by vesting greater rights and responsibilities in local people, what implications does this have for laws and legal frameworks? How do legal frameworks typically impede or support the pursuit of such strategies? What are some common problems that need to be addressed if more favourable legal environments are to be created in the future?

The paper attempts to extract trends and lessons from the ever increasing body of laws, regulations and agreements that have emerged at all levels and across most natural resource sectors. As will be seen, some significant advances have been made. At the same time, important shortcomings and unresolved questions remain.

Legal reforms serve as a useful prism through which to view some of the persisting dilemmas that affect the overall enterprise of managing common-pool resources. On the one hand, as a number of observers have noted (eg. Shackleton, et. al., 2002), the rhetoric of community-based management has usually not been matched by action on the ground. This is mirrored in legal provisions that are often only pale reflections of the robust policy pronouncements from which they emerge. New laws frequently reveal – and can serve to entrench – a continuing ambivalence on the part of governments about relinquishing or sharing real power, and vesting significant rights in local people.

At the same time, leaving aside gaps between rhetoric and intention, both research and lessons from the field are increasingly demonstrating that community-based management is a conceptual minefield. A growing literature suggests that enthusiasm for community-based strategies has often been based on misconceptions about the nature of local communities, about the trajectory of change within those communities, about the aspirations of local people and about the social and economic sustainability of particular management approaches (amongst many others, Agrawal and Gibson, 2001; Li, 2002; Campbell, et. al., 2001; Brown, 2001). As we shall see, law itself has played a role in perpetuating some of these misconceptions. Conversely, while there are no "legal solutions" for such difficulties, attention to legal aspects will continue to be an important part of the overall search for more realistic and better grounded mechanisms and methodologies.

[1] This paper was prepared for an IDDRA/DFID Workshop on Common Pool Resources held in Portsmouth, UK in March 2003. A revised version has been published in *Forests, Trees and Livelihoods,* Vol. 14 (2004)

B. Emerging legal frameworks in support of local management

Efforts to promote greater involvement by local people in the management of different natural resources have triggered a number of interesting legal reforms over the last ten to fifteen years. The following is an indicative sampler of developments in some selected sectors[2]:

Forests: The most widespread activity may have occurred in the area of forest law. FAO estimates that as of 1999, over 50 countries had adopted policiy changes supporting local management to various degrees (FAO 1999); this number has increased in the intervening years. While not all these policy changes have been accompanied by legal reforms, the pace of forest law revision has nonetheless been noteworthy, both at the level of regulations and primary legislation. There has been a proliferation of new mechanisms for the devolution of forest management to local communities, villages, user groups or households through site specific arrangements such as co-management agreements, village forest reserves, community forestry leases and related devices. Nepal's 1993 Forest Act offers a notable early example of this approach, providing for the "turning over" of portions of national forest to local user groups who agree to manage the areas in accordance with an agreed-upon plan. A range of variations on this approach may be found in recent laws or regulations in a growing number of jurisdictions, including (to name only a few) Philippines, Laos, India (in the form of state-level Joint Forest Management resolutions), Guinea, Guinea-Bissau, Tanzania, Burkina Faso, Cameroon, Mozambique and South Africa British Columbia (Canada), Bolivia and Mexico. As will be discussed later in this paper, the relative extent to which state and community stakeholders have been allocated rights and responsibilities under these arrangements can vary significantly from country to country. In some cases, such as some of the early JFM resolutions from India, local user groups appear to be little more than the functional equivalent of forest department agents. Recent laws in Tanzania and the Gambia, on the other hand, are noteworthy for the extent to which real rights to make decisions and exercise control over local forest resources has been vested in democratic community institutions (Wily, 1998; Bojang and Reeb, 1998).

Land rights: The legal environment for the management of forests and other common-pool resources has also been affected by developments in the area of land law, which has witnessed significant advances in the legal recognition of indigenous land rights and customary land tenure arrangements. These developments have taken different forms, reflecting the widely varying contexts in which they have occurred. In Latin America, Australia, Cambodia, Canada, the Philippines, the Russian Federation and several other countries, important new laws recognize, or provide mechanisms for the recognition of, long-standing land claims by ethnically distinct indigenous groups. In Africa, the debate has revolved around how to strengthen the rights of people holding land within the customary sector, which in many African countries is a substantial majority of the population. Important attempts to accomplish this have emerged in Tanzania, Mozambique, Uganda, Niger, Mali and elsewhere. These laws are significant for common-pool resources because they recognize that a community's relationship with land is more than just an aggregate of individually occupied and used plots; it is a system that includes land-based resources used in common, such as pastures, water and forests. The need for legal protection does not stop at the border of cultivated or inhabited parcels, but extends into other components of the system as well. (FAO, 2002a)

[2] The emphasis here, with a few exceptions, is on developments within national and sub-national, as opposed to international, law.

Wildlife and biodiversity: The management and utilisation of wildlife by local stakeholders has received a significant amount of attention in a number of countries. Zimbabwe's CAMPFIRE programme was given regulatory sanction by 1988 regulations which vested management authority in Rural District Councils. By virtue of these regulations, RDC's were deemed to have the same ownership over wildlife in communal areas as Zimbabwe law already vested in private landowners in commercial areas. (FAO, 2002b) A variety of approaches designed to enhance local participation in decision-making and to allow some degree of benefit sharing have appeared elsewhere in Africa, including Conservation Trusts in Namibia, wildlife management associations at the level of the *commune* in Mauritania and village hunting areas in Burkina Faso. Laws concerning national parks and other protected areas have also been an area in which some recent reforms have recognised an increasing, though still limited role for local people. With respect to other aspects of biodiversity, access to genetic resources has received increasing attention at the international level, epitomised by the recent adoption of the International Treaty on Plant Genetic Resources, which among other things calls for the development of national legislation that protects traditional knowledge, establishes the rights of farmers and local communities to participate in decision-making at the national level and the sharing of benefits arising from the use of plant genetic resources. (FAO, 2002a)

Fisheries: Recent fisheries legislation has expanded the scope of involvement of stakeholders in three main areas: (i) consultation, whereby the management authorities solicit the views of persons who are interested in or could be affected by the management decision, so that their views can confirm or cause an amendment to the proposed management decision or regulation as appropriate; (ii) formal representation of stakeholders on consultative, advisory or decisionmaking institutions within the fisheries management framework; and (iii) devolution of management or implementation powers, or both, to lower-level governments and stakeholder communities or groups. With respect to devolution, the transfer of fisheries management functions to communities or to lower-level governments, has been slowly gaining prominence in fisheries laws (as well as generating controversy) over the last decade. Canada, New Zealand and the United States have developed schemes to recognize or give deference to native or aboriginal rights to fish or manage fisheries. The Philippines formalized the decentralization of fisheries management powers to municipalities in 1991 through legislation and consolidated it in subsequent legislation in 1998. In the Marshall Islands, Local Government Councils are responsible for the management, development and sustainable use of the reef and in-shore fisheries, extending up to five miles seaward from the baseline from which the territorial sea is measured. In Malawi, co-management programmes have been introduced whereby local-level institutions and the Department of Fisheries jointly make decisions. (FAO, 2002a) Co-management schemes are also featured in legislation from Sri Lanka, South Africa and Albania, to name a few.

Water: Water users groups for the development and management of sources of irrigation water are widely known and now provided for in the legislation of most Latin American and many South Asian countries. Customary law regarding user participation also plays a dominant role in some jurisdictions, such as the island of Bali (Indonesia), and in many oases in the Saharan and Sahelian regions of Africa. Apart from these well-known and established trends, water users are increasingly being called upon by legislation to participate (a) in the micromanagement of water resources under stress and (b) in the

internal structure of the government water administration. (FAO, 2002a)

Decentralisation: Finally, often running concurrently with sectoral developments has been the widespread reform of local government policies and laws over the last decade. There are numerous examples of such reforms (some already described above) that have placed new responsibilities and rights for the management of various resources in local government bodies, from the *panchayat* law reforms in India after 1993, to the Philippines' Local Government Code of 1991, to important decentralisation laws in Bolivia, Senegal and elsewhere. As discussed in D(2), below, the simultaneous rolling out of decentralisation and sectoral devolution agendas have at times complemented one another, while at other times they have led to jurisdictional and institutional conflicts and confusion.

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It is important that the above survey does not convey the wrong impression. The emergence of new legal techniques in a number of countries should not obscure the fact that there are many other parts of the world where little progress has been made. And where legal frameworks have been reformed, the results have often been ambiguous, technically unsound, contradictory and/or not supported by enough political and social will to make a substantial difference on the ground. These are shortcomings that will be explored in the remainder of this paper. Nevertheless, it is undeniable that access to and management of common-pool resources by local people has received increasing attention in national legal frameworks over the past few decades. This trend is likely to continue for the foreseeable future.

Why have advocates of community-based management felt that legal reform is a necessary part of moving the agenda forward? One part of the answer (subject to immense variation and qualification across legal systems, societies and resource types) is that legal frameworks have not typically been friendly to local management. Indeed, in many parts of the world, the overall trend in modern times has been an assertion of government legal control over common-pool resources at the expense of local practices and local perceptions. While some resource usage by local people (usually for subsistence purposes) has often been given some degree of legal recognition, most laws have provided little scope for local people to play a meaningful part in the planning, management and allocation of resources on which they may have depended for generations – and which, in some cases, they may have actively managed and protected in accordance with long-standing traditional rules.

Thus, in the case of forest laws, the state has often taken on the management role itself through the creation of state forests or has treated forest land as "vacant" and hence free of non-state property interests. National law may simply leave the tenurial status of forest areas unclear, giving weak or no legal protection to existing customary norms concerning access and control, and providing no alternative mechanisms by which local groups or individuals might assert effective control. And because state institutions are frequently ill-equipped or unmotivated to exercise the legal power they have assumed, the result is frequently an open-access situation.

Recent laws, if nothing else, have created some important chinks in this prevailing paradigm. But how profound a shift is this really? The answer to this question is complicated by the fact that the main impetus for promoting greater local management may come from a number of different directions (Arnold, 1999):

- It may originate from a conviction that local management leads to more effective conservation;

- It may be driven by local livelihood objectives;
- It may be a response to local demands for freedom and decision-making;
- It may be related to overall governance reforms.

Depending on what mix of motivations prevails, these considerations may offer up quite different ideas of what the goals of participation should be, how participation should be structured and who should participate.

In fact, what is emerging is, not surprisingly, a wide spectrum of approaches. At one end of this spectrum, perhaps the end with the highest cluster of examples, one finds narrowly defined participatory processes, with a time-bound sectoral agenda driven almost entirely from outside. At the other end are models that seek to nest local management within a vision of local democracy, with more explicit links to overall governance issues. Some observers have described this as a distinction between *resource-based management* and *community-based management* (De Wit, 2001). In the former, the starting point is a particular resource, and the strategy focuses on matching a suitable group to that resource in order to attain certain management objectives. In the latter, the starting point is community empowerment, an important part of which must be greater community decision-making power over local resources. (Wily, 2000)

D. Critical issues in assessing legal frameworks

This section examines in more detail some ways that emerging legal frameworks for the local management of common-pool resources deal with two clusters of issues:

- *Defining the nature, scope and security of rights vested in local people* – what are people empowered to do? to what extent can people count on their rights being respected, protected and exercisable?

- *Identifying the rights holders* – in whom are rights and responsibilities vested? Who belongs to a "community" for purposes of community-based management?

1. Defining the nature, scope and security of rights

There are a number of ways in which rights over common-pool resources are categorized. The now-classic formulation describes four categories of rights regimes: state property, private property, common property and open access. An important critique of this formulation finds fault with the treatment of common property as a special category of rights, with characteristics that are somehow fundamentally distinct (and by implication less robust) than private property rights. These critics propose instead that common property rights are in fact a type of private right, the distinction being that they are held by a group instead of by individuals. Hence, while the exercising of common property rights may require attention to internal institutional complexities that are not present in the case of individualised rights, such rights are worthy of being treated legally on par with any other private right (Lynch, 2001)

Observers sometimes equate the persisting legal vulnerability of common property regimes with the fact that so many of them are found in situations where the state continues to claim ownership of the underlying resource. Hence, in Nepal for example, the "ownership" of forest land remains in the state, even as community management arrangements vest various rights over that land to local groups. To some, this is a fundamental design flaw – so

long as full ownership of the resource is unattainable by local people, then rights will always be insecure.

There is a lot to be said for this argument. But it may underplay the extent to which secure and meaningful rights can sometimes be achieved, and may need to be strived for, even where the form of tenure is less than full ownership, particularly in political contexts where ownership as an option is simply not on the table. One can conceive of leasehold systems where rights are so long-term and where the lessee has such power to use and dispose of the property as he sees fit that the leasehold right is the functional equivalent of ownership. Conversely, since in no legal system private rights are absolute (Lynch, 2001), the fact that a person "owns" property does not necessarily prevent the imposition of regulatory limitations that can in some instances quite substantially restrict the exercise of his rights. For example, the fact that stools (traditional authorities) "own" forest reserves in Ghana has not prevented them from being effectively excluded from the management of those forests, a task which the central government has taken upon itself.

Some therefore find it more useful to focus on breaking property rights into several component parts, and asking what combination of these components best meets the needs and aspirations of a prospective rights holder. We focus on two issues here: the extent to which local resource managers are given real rights to make meaningful choices; and the extent to which those rights are secure.

a. Does the legal framework support the right of local people to make meaningful choices?

The management of any resource obviously requires a balance between the interests of various stakeholders. In local management settings, the proper balance between local choice and the broader public interest may be highly contested. The arguments for greater local choice may be more or less compelling depending on a wide number of variables, ranging from the nature of the resource, to the externalities of resource extraction, to the capacity of the community. Hence, it is difficult in the abstract to evaluate a law in terms of the extent to which it unduly limits local decision making.

However, evidence from the field suggests that the attempt to balance local[3] and broader interests is often skewed by an exaggerated definition of the public or national interest. Deciding where local choice should prevail and where it can legitimately be trumped by wider interests has seldom been given the reflection it deserves in the design of legal frameworks. 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. If we look at forest laws, for example, this expresses itself in a number of ways:

- ***Limits imposed by land classification.*** In many parts of the world, the "legal" definition of land as forest may have little to do with what actually exists on the ground in terms of tree cover, the potential of the land for forestry, or the importance of keeping the land under forest. In some extreme cases, forests may be a sort of catch-all legal category that includes virtually all land that is not privately occupied. More frequently, the definition of land as forest or non-forest is largely a matter of whether

[3] References here to "local interests" are made for purposes of convenience, and are not intended to obscure the often widely different interests in a resource that may exist within a local management group or community. This issue is simply deferred until sub-section 2, below.

the government has taken the steps prescribed by law for classification. In the case of marginal or "waste land", designation as forest or non-forest may at times be a matter of administrative convenience, or an artefact of the balance of power between different government institutions. Once land has been designated one way or another, any later redesignation intended better to reflect on-the-ground realities may be constrained by the natural desire of institutions to maintain control over their domain. From the perspective of participatory management, the result is that options for management are "frozen" into place by predefined legal and bureaucratic categories, not because of a careful evaluation of current environmental, social and economic conditions and priorities.

- ***Limits imposed by planning requirements and pre-defined objectives.*** Even where the management of local land for forest purposes makes sense from both an ecological and social point of view, the modalities of participation may severely limit the range of management options that are available to local people. A common feature of community forestry programmes is the requirement that user groups formulate management plans for the area in question, and carry out management accordingly. Critics point out that in a number of instances, these planning requirements are highly complex, and require a type of expertise to prepare that only a trained forester can provide. As one observer of Nepal commented: "The writing of FUG (forest user group) constitutions is a forest rangers' task, since it requires the rigid use of legal language and the establishment of an inventory and a maximum sustainable yield." (Tanaka, 2002). Again, management options may be pre-determined by the need to link local plans to regional forestry objectives, over which local people are likely to have little say. Hence, the utility of prescribed planning processes as a framework for expressing local needs and aspirations is highly limited, and planning becomes by default the role of outsiders.

  In response to concerns like these, some analysts argue that legal frameworks need to be reformed to reflect a much more sensible approach to defining the scope of "local" decisions, and a more rigorous and narrower identification of the priorities that might justify outside interference in local decisions. Ribot, for example, calls for setting "minimal environmental standards" against which local management activities can be judged, rather than imposing complex planning requirements. A number of recent laws, including those from Tanzania and the Gambia have introduced simplified planning procedures in the context of community management in an effort to ensure greater local ownership of the decision-making process.

- ***Limits imposed on the way the benefits of participation are defined, used and shared.*** This is closely related to the previous point. If genuinely asked what benefits are of value to them, local people might well indicate a wish to manage a forest area in a way that results in the generation of a different mix of benefits than would be promoted by a professional forester. The definition of the benefits to be

focused on may also affect the way in which the costs and benefits of participation are shared across different sub-groups within a local community. Closing the commons exclusively for forest regeneration may support the goals of the forest department and may enrich the community in the aggregate, but might place disproportionate burdens on the poor.

Laws may affect the realisation and use of benefits in other ways as well. For example, they may require that some percentage of benefits are invested back into the resource or into certain types of community development activities. They may also require that any marketing of products from a community managed resource take place through certain specified channels.

b. Are the legal rights of local people secure?

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 --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. This principle applies however limited or extensive the rights granted under a particular programme may be.

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 undertake management 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 – a type of security that may prove illusory in the long run. In other situations, communities may not feel secure no matter how carefully and strongly their rights are set forth in legal documents. (Lindsay, 1999)

Some indicators of insecurity to look for in legal frameworks include the following:

- ***The threat of unilateral termination or changes in midstream.*** In a number of settings, the security of a local management arrangement may be weakened by apparently wide powers on the part of the government to terminate the arrangement. The grounds for termination may be poorly defined or vaguely spelled out, with the result that a significant amount of discretionary power is vested in a government agent. Fisheries co-management in Sri Lanka is a case in point, where wide discretion is given to the Minister to terminate an agreement where he or she determines it is appropriate to do so. At the heart of this phenomenon is a lingering tendency to treat community management arrangements as a favour bestowed by government, as opposed to a legally binding agreement. In the case of termination contested by the community group, the law may limit recourse to various levels of officials within the relevant ministry, which to some extent is like vesting the power to arbitrate contract disputes in one of the parties to a contract.

  A number of recent laws have included provisions to reduce the potential for inappropriate

termination. In some instances, such termination requires the payment of compensation (eg, Zanzibar Forest Law). In other instances, laws now contain much clearer criteria for determining whether a serious breach has occured that would allow the government to take some disciplinary action, and steps for inquiry, notice and review are spelled out in detail.

Insecurity arising from the unilateral actions of government may not apply simply at the level of individual local arrangements – it can permeate the legal framework for local management. Government foresty policy changes in Nepal and Laos, for example, are frequently cited as examples of government back-tracking that could make the effective realistion of benefits difficult for those who agreed to participation when the rules of the game were more favourable. 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 programme continues to be a creation of state government 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, cited in Lindsay, 1999).

- ***Short duration of rights.*** A sense of security is naturally undercut to the extent the rights are short in duration. This arises in the case of some leasing or co-management arrangements where terms may be imposed that are short enough to call into question whether the benefits of participation can be fully realised by those incurring the initial costs.

- ***Unclear rights to exclude others from the resource and to enforce rules against outsiders.*** The right to exclude is one of the classic attributes of a property right. Local rights holders need to have the right to control the access of outsiders to the resource, and need to be able to call upon government to help enforce this right as would any other private property owner. Yet in a number of legal frameworks for community-based management, the right to exclude is not clearly established. (Of course, the definition of who is an “outsider” is itself a difficult question, as will be discussed below).

2. Identifying the rights holders

Who are the rights holders, how do they govern themselves, and how do they fit into larger governance frameworks? These questions have been at the centre of a growing and extremely trenchant critique of the way “community” and associated concepts have been used in development circles. Community-based approaches, the criticism goes, have often been predicated upon a vision of the community that oversimplifies, romanticizes, misinterprets and caricatures local realities. It obscures the co-existence of several communities that people belong to at the same time for different reasons, the velocity of change within many communities, and the often vast inequalities and power differences.

For legal drafters, group definitions are important and unavoidable for a simple reason: if law is going to vest or recognise

rights and responsibilities in a group or entity, it obviously needs to identify, or provide a process for identifying, who or what that group or entity is. Laws cannot *cure* the complexity of designing community-based strategies that take into account the realities of modern community dynamics. On the other hand, if done badly, legal definitions do have the capacity to exacerbate some of the misconceptions and over-simplifications referred to above.

In recent laws and regulations, we find a variety of different models:

- ***The user group model:*** This is epitomised by the Nepal Forest Law, but is common elsewhere, too, in all resource sectors. In theory, these are self-identifying groups of households, united by a common interest in a particular resource. Again, in theory, there need be no convergence between such groups and other local community identities and institutions or administrative arrangements – in Nepal, for example, the law states that user groups may straddle *panchayat* boundaries, and that households can be members of more than one user group.

- ***The adjacent community model:*** This may be very similar to the user group model, except that there is an attempt to define ahead of time the pool of eligible potential participants by reference to some geographical limitations. Thus some of the Joint Forest Management resolutions in India talk in terms of villages adjacent to a forest – this is the pre-defined unit from which forest protection committees may emerge.

- ***Indigenous or community land-holding model:*** Here (again, in theory) the impetus is quite different from the first two models. Local resource management in this model is incident to a much deeper struggle by local people for self-determination based on historically verifiable notions of community-self identity and territorial control. The Mozambique Land Law and the Philippines Indigenous Peoples' Rights Act are two recent examples. Both laws contain quite elaborate procedures by which groups identify themselves and negotiate their territorial limits with adjoining people. To varying degrees, land tenure and management within identified areas are recognised as being governed by the customary law of the identified community.

- ***Local government model:*** Finally, local management may be part of a wider agenda of decentralization, and laws may vest resource management rights in local governments. The extent to which such governments represent a local vision of community or can serve as a platform for true local participation varies significantly. Ribot (2002) has shown how in West Africa, much of the decentralisation of forest and land management has not been accompanied by downward accountability to the people themselves. But there are at least potentially happier examples. As described by Wily (2000), for example, the Tanzanian land, forestry and local government laws, taken together, represent a potential merging of robust local democracy with the assertion of community property rights over local resources.

Looking across this crude typology of (often overlapping) legal approaches, we can identify recurring problem areas issues associated with several or all of them. What follows is just a sample.

a. Do group definitions help ensure the inclusion of all local stakeholders with legitimate claims to the resouce?

Defining who belongs to a community or to a community-based group means, of course, at the same time defining, either explicitly or by implication, who does not belong. And there is enough evidence now to suggest that narrow or uni-dimensional definitions can unfairly exclude people with a long-standing stake in the resource. The classic examples are cases of secondary or transient users of a resource suddenly finding their access cut off – a problem that has beset JFM in India for example from the beginning. This type of exclusion may be driven by politics and power grabs, but it is exacerbated by a tendency to resort to simplistic one-to-one legal relationships between narrowly-defined communities and particular resources. Local groups may themselves seize upon the opportunity such laws provide to exclude long-term but distant users, as Baviskar (1999) has shown in the case of the Great Himalaya National Park in Himachal Pradesh, India.

Laws can help reduce the possibility of this happening by defining a careful process of identifying all those with legitimate interests in the resource.

b. Does law allow the use of locally-appropriate institutional forms?

There has a been a tendency for law to prescribe in too much detail the structure of local organizations and the rules by which they can operate, a tendency that runs counter to the premise that local institutions work best that have roots in local values and established practices. Requiring these institutions to adopt forms that are complex and alien to a local situation tends to create institutions that have little legitimacy among their members, a phenomenon that is now well documented in a number of contexts (see Fingleton (1998) for Australia and Papua-New Guinea; Cousins and Hornby (2001) for the Communal Property Associations Act in South Africa; Jacobs and Hirsch (1998) for native corporations in Alaska; Sarin et.al. (2003) for Uttarakhand). It can provide opportunities for more sophisticated group members to gain advantage by manipulatiing unfamiliar legal forms. It can also lead to debilitating delays in the initiation of legally-recognised local management.

Law drafters and governments also often prefer community management groups to look more or less the same in terms of their make up, structure, size and jurisdictional areas. Imposing such a vision, however, can come at the cost of the diversity and can be particularly counter-productive where one of the goals has been to build upon existing institutions and management arrangements that have in fact been working (Sarin et. al., 2003).

c. Does the legal framework reflect local perceptions of legitimacy?

Approaches that explicitly try to give expression to local visions of community run risks of their own. State recognition of customary or community-based institutions does not usually require the codification of customary law; indeed, it is widely argued that codification could have the undesirable effect of undermining the flexibility and adaptability of local systems. But formal recognition does require identifying, with some degree of precision, the community whose rights are being recognized, the area over which it has legitimate claims and the local institutions or decision-making processes that are entitled to respect by formal legal institutions. If carelessly done, formal recognition may unduly privilege one of several competing local visions of what constitutes the community, and what rules or authorities are legitimate. This is exacerbated where outsiders automatically make a connection between a community and certain conspicuous symbols of the

community – for example, by attributing greater power to chiefs than would be considered legitimate by the community itself. In Ghana, for example, there is a tendency of outsiders and government to assume that vesting of more rights in stools is the same thing as vesting more rights in local communities. One of the unique features of an earlier (and now discarded) version of the Land Rights Bill in South Africa was its attempt to ensure that community representation was determined on the basis of a community's own consensus as to legitimacy, rather than reaching the automatic assumption that legitimacy rests with the chief.

d. Does the legal framework effectively protect individual rights without undermining group autonomy?

In some contexts, custom may run counter to a vision of human rights enshrined in a national constitution or other national laws, particularly where it comes to the treatment of women and minorities. Laws such as the Mozambique Land Law therefore require courts to apply customary law only to the extent it is consistent with the constitution. While unexceptional as a principle of constitutional law, in practice its implementation may prove difficult. A similar dilemma arises when it comes to ensuring minimum levels of accountability and transparency within local structures. In many rural communities, traditional checks and balances on the exercise of power may be eroding and rules may be undergoing reinterpretation in ways that favour the elite. In such instances, calls for some degree of formalization of internal rules and for a clearer legal definition of the powers and responsibilities of community leaders may come from within communities themselves. Again, the challenge lies in identifying the right level of intervention to address such concerns while still promoting local processes. How far should law intervene in this respect? How far *can* it intervene without fundamentally altering the very institutions it purports to empower? (FAO, 2002a)

e. Is the law clear about the roles of different local institutions?

Finally, different laws expressing different visions of the relevant "community" for the management of a particular resource may be in operation in the same location at the same time. This can be one outcome of the fact that devolution is often a central feature of various sectoral agendas, at the same time that it is being advocated in the context of overall governance reform. Not infrequently, these two processes are not carefully synchronised, either at the level of practice or of policy. Hence, specialised committees like wildlife or forest protection committees, supported by line agencies of the central government, may find themselves in an awkward relationship with local democratic structures. Throughout the history of JFM in India there has been a serious debate about the extent to which forest user committees should be independent of, or subsumed, by *panchayats*. Those in favour of independence have sometimes argued that the special needs of vulnerable sections of society – women, tribals, scheduled castes, ie, those most dependent on forests – would be jeopardized if the management were turned over to faction-ridden, corrupt, local democracies. Failure to do so, others counter, would demonstrate how thin the commitment is to the ideal of local democracy. And furthermore, why should local resource management – even by vulnerable people – be accountable to outside bureaucrats rather than to the wider local community itself?

D. Looking forward

What are some ways forward in improving legal environments for the management of common pool resources in ways that benefit the rural poor? The issues already outlined

in this paper could serve as the starting point of agenda for more systematic analysis. In addition, four other important areas of focus may be commented on briefly in closing:

1. The need to understand better the role of legal frameworks and law reform

In preparing this paper it was not possible to write meaningfully about whether a particular law was "successful" or "unsuccessful". The success or failure of a particular management arrangement within a particular legal environment gives only a partial glimpse of the answer. Where political, social, economic and ecological conditions are unfavourable for motivating and sustaining local management, a supportive legal framework will almost certainly not make much difference. Similarly, even where bad law prevails, it may be possible for important successes to be achieved if the political will and incentives for action are sufficient.

In short, we need to understand better the actual effects of legal frameworks and reforms, how they play out in action, how they are perceived and misperceived by relevant players. There has not been a lot of systematic research of this type, in part reflecting the difficulty of separating out the variables that are strictly "legal" and the fact that lawyers are professionally and tempermentally ill-equipped to conduct such research.

I am not myself technically competent to make suggestions as to the design of such research, which needs to be a joint exercise between legal specialists and social scientists. But it is possible to identify a glaring gap in the work of agencies that support the development of law reforms – namely, the failure to promote the monitoring and evaluation of the implementation of new laws after they have been passed. More concerted efforts to carry out such work would provide an immense amount of useful information that could feed back into subsequent law reform activities, yet it is, as far as I know, hardly ever done. This would involve, inter alia, developing a baseline and methodology for such monitoring and evaluation during the process of drafting the law itself, which again is something that is almost never done.

2. The need to improve the ways in which laws are made

This point is so obvious that it may not need much belabouring. The drafting of sound and workable law requires genuine involvement of all categories of stakeholders – government and non-governmental institutions, central and local institutions, communities and local forest-dependent people, private sector organisations, etc. This is not a recommendation that flows only from a belief that people should have the *right* to be involved. Instead, the point being made here is a practical one – without this involvement, there is simply little hope of passing laws that reflect reality and are capable of being used and implemented.

There are emerging "best practice" cases that could be studied for a more systematic extraction of lessons and techniques. One is documented by Tanner in his detailed account of the drafting of the Mozambique Land Law (Tanner 2002). According to Tanner, the law emerged from an unparalleled process of dialogue and collaboration between government, civil society and technical specialists. The process was based on a thorough analysis of the social and economic norms and practices that dominate land access and management. As such, it was an imaginative attempt to design a legal framework resting on sound sociological foundations and reflecting societal aspirations.

3. Improving stakeholder capacity to understand, use and apply laws

Again, the point here is obvious and yet its importance is frequently under-appreciated. Laws that ostensibly empower people will remain empty shells unless they are used. Often they remain underused because people have not developed the understanding and tools to exercise or insist upon their new or confirmed rights, and government is ill-equipped to administer such rights. There is now some scattered international experience with legal literacy campaigns in various natural resource contexts, aimed at rural resource managers and their advocates, judges, lawyers and administrators, and non-governmental organizations. This is an area that requires considerably more emphasis.

4. Improving the cross-fertilisation of ideas and sharing of techniques across resource sectors

Finally, there is a need for legal experts experienced in different natural resource fields to share and evaluate ideas and techniques. This observation is intended simply to underscore one of the explicit rationales for this workshop. In law, as in other disciplines, learning continues to be organized largely (though not exclusively) by sector, a fact that is evidenced by the current papers disproportionate reliance on forestry and land examples.

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