Resolving conflicts between custom and official forestry law in the southwestern Pacific

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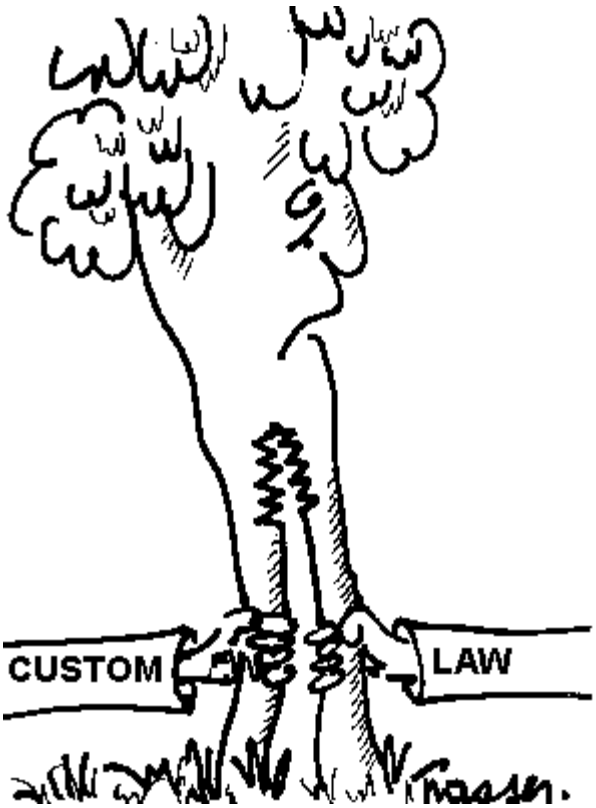
An examination of the changing balance in the role of customary and official authority in forest management in the southwestern Pacific.

Introduction

Custom - law



Governments in many of the developing countries of the tropics are heavily dependent on revenues from forest industries. However, disappointment with the overall contribution made by conventional forestry operations to national economic development, together with a growing awareness of the unsustainability of many forest management and utilization practices as they were being implemented, has led many countries to look for alternative

approaches to forest management. An important recent development is a growing recognition of the need to involve communities resident on or near forest land in forestry planning and management. Only by such direct local involvement, it is thought, can traditional knowledge and skills be brought to bear on forest management with a view to environmentally sustainable development and direct benefit-sharing in forest production by the local communities. This sentiment is echoed in the non-binding statement of principles for a global consensus on the management, conservation and sustainable development of forests, adopted at the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro in June 1992. Several paragraphs of the statement recommend participation in forest conservation and development by various partners and segments of society, including local communities, indigenous people and forest dwellers (Lanly, 1992).

The need and desire to promote direct involvement by forest residents brings into focus a fundamental clash which, in many countries, has been lying just below the surface of day-to-day government. This is the conflict between the official law of the forest agencies and the customary law of the forest communities. In developing countries the forestry system is often heavily influenced by their relatively recent colonial past, under which society was divided between the tiny elite of governors and the great mass of the governed, the economy was either "modern" or "subsistence", and the law that applied was either the introduced law of "civilized" societies or the custom of so-called "primitive" people. Perhaps the foregoing dichotomies are overdrawn, but they serve to emphasize the general points that official law and custom have served two different masters, that it has been an unequal duality, strongly biased in favour of the official system, and that an attempt to enhance the involvement of traditional communities in forest management will require a shift in the balance of power and benefits in their favour.

A country's legal system can be viewed as a compact between the state and its people for determining their method of government. The state's powers are balanced against those of its citizens, and the balance of power reflects the degree to which a country is being governed in accordance with democratic principles. This article examines the role of custom and traditional authority in a number of countries in the southwestern Pacific, noting how the balance of power is being shifted away from the state and towards the indigenous communities. The focus is on changes in policy and legislation concerning forests. The countries are mainly those where the author has worked as a consultant to governments on forest policy and legislation or related matters.

For purposes of comparison, Indonesia, the country that links Asia and the Pacific, is also examined. To conclude, a tentative hypothesis is advanced on the potential for using community forestry as a bridge between the "official law" of forestry departments and the "custom" of villagers.

Custom and official forestry law

Regarding the role of custom in a country's legal system, in the southwestern Pacific there is a rough east-to-west gradation from the strongly pro-custom countries of Polynesia - e.g. Western Samoa westward through the Melanesian chain - Fiji, Vanuatu, the Solomon Islands and Papua New Guinea - and into the less custom-oriented countries of Southeast Asia, Indonesia being the linking country. That east-to-west progression will be followed in this treatment.

Western Samoa

Western Samoa is a small, isolated country, much of which is rough and mountainous. Its economy is dominated by village-based agriculture. In recent years the relative rate of forest clearance has been far greater than that of the Amazon rain forest in Brazil (Government of

Western Samoa, 1991). Nearly two-thirds of the annual loss of forest is attributed to agriculture or other clearing (as opposed to commercial logging). The Polynesian population is highly homogeneous, and *fa'a Samoa* (Samoan customs and tradition) underpins a social organization that places greater importance on the dignity and achievement of the kinship group than on its individual members.

Western Samoa is possibly unique for the extent to which customary laws and institutions have been incorporated into the modern system of government. A constitutional prohibition on the alienation of customary land (except on a temporary basis for public purposes) ensures that some 80 percent of the country is entrenched under the domain of custom. The basis of the *fa'a Samoa* is the *matai* system of chiefly titles, under which the holder of the *matai* title is the temporal custodian of the descent group's property and exercises authority over its members and landholdings.

Each village is governed by a *fono*, or council of *matai* chiefs, which makes decisions on all village matters beyond the scope of individual kinship groups. The most important traditional institutions are given formal legal recognition, in particular those relating to village government.

Six southwestern Pacific countries: basic data

Country	Land area (km²)	Population (1990)	Forest regime
1. Western Samoa	2 395	157 700	Nearly all on customary land
2. Fiji	18 272	725 000	Nearly all on customary land
3. Vanuatu	12 190	146 400	All on customary land
4. Solomon Islands	27 556	324 000	Nearly all on customary land
5. Papua New Guinea	462 243	3 528 500	All on customary land
6. Indonesia	1 918 663	184 600 000	Under state control

Sources: For countries No. 1-5, SPC (1992); for Indonesia, Collins, Sayer and Whitmore (1991).

As most remaining natural forest is on customary land, and most of the annual loss of forest is caused by villagers clearing their land for agriculture, improved management of the natural forest of Western Samoa is going to depend upon a high level of involvement of local communities in the planning process. Unfortunately, the present forest legislation is not adapted for such an approach.

The Forests Act 1967, which closely followed a 1949 New Zealand law, is an example of "old style" forestry legislation. It gives the government full control over commercial timber operations by prohibiting the sale of trees except in accordance with a licence granted by the government. Licences can be granted over any class of land and are subject to a payment of royalties to the landowners. In the case of customary land, the landowners can request the grant of a licence to a person or the government may itself take out a licence or lease over the land and subsequently allocate it to a licensee of its choosing. This approach relegates landowners to the role of passive bystanders, who merely receive royalty cheques as their timber is removed. Other parts of the Forests Act aim at conservation and watershed protection but they depend very much on state intervention for these purposes. If the state does not own the land, it must either acquire it (by compulsion, if necessary) or set it aside as "protected land" for periods of up to five years, paying compensation to any persons whose interests are impaired (FAO, 1991). Such measures make no attempt to invoke community interest in conservation and protection or include people in decision-making on the management of their resources.

The government review of forestry policy in Western Samoa, which is currently in progress,

sees a role for community forestry but only with respect to "forest resource development" to complement the state-run plantations. This is regrettable for it overlooks the vital role that Samoan communities could play in the economic management of the remaining natural forests as well as in forest conservation and watershed protection. The forestry review is still under way so there is time to broaden the approach to forest management and take advantage of the unique strength of the country's village government system.

Fiji and Vanuatu

To the southwest of the Samoan Islands lies Fiji, a country with both Polynesian and Melanesian traditions. Here, too, more than 80 percent of the land is under customary tenure, and customary law is constitutionally incorporated into the country's legal system. Its forestry legislation is also currently under review, as part of a fundamental reform of the forestry sector aimed at achieving more active and thorough participation by Fijian landowners (FAO, 1992). At present, timber rights are acquired on customary land through the medium of the statutory Native Land Trust Board a protective but rather paternalistic mechanism.

Further west, Vanuatu's 1980 independence constitution declares that all land in the country belongs to its indigenous customary owners, and that rules of custom are to form the basis for the ownership and use of land. In 1982, a new Forestry Act was passed, one of the guiding principles for which was that a proper legal basis should be provided for large-scale commercial logging operations, both in natural forests and plantations, under joint venture arrangements between customary landowners, the government and commercial operators (FAO, 1981). In both Fiji and Vanuatu, a shift in authority towards the customary sphere of operations is necessary to meet the stated demands for community participation in the planning and implementation of forest management.

Solomon Islands

According to the 1978 constitution of this Melanesian island nation (with a few Polynesian outlying islands), customary law is expressly recognized as part of the national legal system. Some 90 percent of the population live in rural areas and the traditional community structure remains strong. Almost 85 percent of the country's land area is owned by traditional kinship groups under customary tenure, including a similar proportion of the nation's natural forests. Timber is the second largest export earner after fish. On customary land, where the great majority of commercial forestry operations are conducted, royalties paid to customary landowners comprise a significant proportion of rural incomes. Under the combined pressure of government revenue requirements and local demands for cash, the country's forests have been heavily exploited over the last decade. In 1991, 13 foreign companies were operating under logging licences -12 of these on customary land - with quotas authorizing the removal of more than 1 million m^3 of logs per annum. This figure far exceeds the sustainable yield so, without a dramatic improvement in its approach to forest management, the Solomon Islands' rich tropical timber resource will soon be a thing of the past.

A distinctive feature of Solomon Islands forestry is the legal power of customary landowners to negotiate directly with logging companies for the sale of their timber rights. But it was not always so: during a ten-year period around independence, the forestry law was completely transformed from one where a logging licence could only be issued for timber that the government either owned or had acquired to one where all native forests were thrown open to logging, under agreements to be negotiated between the customary landowners and the logging company (FAO, 1989). The great irony of this exercise is that, while it was carried out for the cause of enhancing the position of customary landowners, its consequence has been logging operations that "damage the very fabric of village society, leaving behind divided and demoralized communities" (ibid.).

In Fiji more than 80 percent of the land is under customary tenure

A valuable lesson can be learnt from this costly experience. The colonial forestry law placed the state in a dominant position but it was of a very narrow scope, virtually shutting out access to the valuable forest resource on customary land. After independence, moves to increase landowners' powers of self-determination coincided with an extension of the industrial forestry regime to all forest land in the country. The result was a shift in the balance of power from the state to the customary landowners. The state lost its ability to plan for the forestry sector - the pattern of logging is now a consequence of initiatives by logging companies and landowners rather than a nationwide strategy. Nor can the state service the sector effectively, for the pace of logging far outstrips the administrative resources available for monitoring and enforcing licence conditions, environmental controls and even revenue collection. Neither the state nor customary landowners benefited from the new arrangements; this is strong evidence that shifting the power balance in favour of the customary landowners' sphere of operations will not, by itself, produce greater benefits for them.

During 1988 and 1989, with technical assistance from FAO, the Solomon Islands Government reviewed its forest policy and legislation, and a new forest policy was adopted. Unfortunately, although the adopted policy calls for a replacement of the existing forestry legislation, and although draft legislation also prepared under the FAO project has been available since 1989, progress in this essential reform has stalled. As a result, the government is trying to implement a new policy by using outdated and inappropriate legislation. At the time of writing, elections for the national parliament are due and the incoming government must address forestry law reform urgently if the current wasteful and disruptive approach to forest management is to end. The Solomon Islands is ideally placed to adopt cooperative joint venture forestry between landowning communities and other interests but, if present trends are not arrested, only unattractive forest will be left for such initiatives.

Papua New Guinea

By far the largest of the Melanesian countries, Papua New Guinea consists of half the island of New Guinea (the other half being the Indonesian province of Irian Jaya) and adjacent archipelagoes in the Bismarck and Solomon Seas. Papua New Guinea ranks with Indonesia, Malaysia and the Philippines as the four major timber-producing countries of the Asia and Pacific region, although its forests are of generally more diverse species composition, lower commercial density and poorer accessibility. Some 98 percent of the country's area is under customary tenure and, as with the other independent Pacific Islands, custom is part of the national legal system. Large-scale timber production in Papua New Guinea began only in the late 1970s but, by 1983, the country was exporting more than 1 million m^3 of roundwood annually, thus becoming the third most important log exporter in the region. However, this rapid rise came at a huge cost as, in the rush for revenue, planning in any meaningful sense was abandoned, politicians and officials were corrupted, landowners and public revenues cheated, and the social and physical environment devastated (Government of Papua New Guinea, 1989).

Large-scale timber production in Papua Hew Guinea began in the late 1970s

Papua New Guinea's forestry problems arose out of a combination of rapid deregulation of the arrangements for gaining commercial access to the forests and poor administration of what controls remained. Before independence, the colonial administration maintained a tight control on forestry operations, insisting that all logging arrangements on customary land be mediated by the government.

Whereas in Western Samoa and the Solomon Islands the landowners could deal directly with the logging company (although operations could not begin without a licence from the

government), in Papua New Guinea the government first purchased the timber rights from the customary landowners and then disposed of them according to its plans for the industry. In 1971, however, a private member of the legislature succeeded in enacting the Forestry (Private Dealings) Act. This law created a chink in the government's monopoly on access to forests through which, from the late 1970s, a torrent of dealings was to flood. While, as its title indicates, the new law enabled the customary landowners to dispose of their timber directly to any person, the government still retained some control: it had the sole power to designate a "Local Forest Area" so that private dealings could proceed; and a requirement remained for government approval to validate a deal. However, the necessary approvals could virtually be taken for granted. It is not surprising that landowners sought to handle timber rights sales directly but the sorry story shows that, when they entered into private dealings, they were just as effectively and disadvantageously separated from their resources as they had been when the government was the sole broker..

A new National Forest Policy was followed by: the enactment of the Forestry Act in 1991; an administrative overhaul under which the forestry authority was organized as a corporation; and the introduction of decentralization in planning and decision-making. A National Forest Plan is to be prepared, based on a national forest inventory, one component of which will be a statement of the annual allowable cut (AAC) for each of the 19 provinces. Customary landowners will still have two options: to enter into logging agreements with third parties directly or to dispose of their timber rights to the new corporate forest authority. However, the National Forest Plan will define the scope of permissible forestry operations in each province.

The new arrangements are complex, time-consuming and bureaucratically demanding, there being at least 11 statutory steps between an area identified as a production forest and the issue of a timber permit. Still, the previous forestry administration was characterized by hasty and ill-considered actions, so a period of consolidation will not hurt. A significant element in the new Forestry Act is the introduction of a general requirement for customary landowning groups to be legally incorporated before negotiations for a forestry agreement can begin. Papua New Guinea has a unique law: the Land Groups Incorporation Act, designed to allow legal recognition of the corporate nature of clans and other traditional landowning groups as well as to make provision for these groups' decision-making with regard to land and other natural resources. Such provision is vital if the powers of customary landowners are to be enhanced.

Indonesia

This large country, mostly in Asia but partly in Melanesia, is in the process of implementing a reform of its forestry sector under the Tropical Forests Action Programme. The Indonesian Forestry Action Programme calls for improved management practices in all categories of forest, particularly for the role of the private sector to be modified from exploitation to resource management and for the involvement of local communities to be enhanced. Of the 1988 population, estimated to be 176 million, about 62 percent live in the inner islands (Java and adjoining islands) which together make up only 8 percent of the nation's land. The remaining outer islands account for close to 60 percent of all the forested area in

Southeast Asia and more than 90 percent of all forests in Indonesia (World Bank, 1990). Under the Indonesian Constitution, land and other natural resources are controlled by the state for the greater prosperity of the community. Therefore, while Indonesia's legal system recognizes rights to own land under customary law (*adat*), of far greater importance - so far as enjoyment of these rights is concerned is the state's overriding authority to control the use of land to protect the public interest. State planning assumes central importance, land can only be used according to its use classification and this can be changed regardless of the landowner's wishes. The state's sphere of operations is clearly paramount and the scope of custom is defined by the planning decisions of the day.

Under the Basic Forestry Law of 1967, there is a general plan for forest development and conservation, by which all forests in the country are classified as either protection or production forests, forest reservations, or conversion forests (i.e. areas suitable for eventual conversion to non-forest uses). The government has used its constitutional authority to allocate resources under programmes aimed- at agricultural and economic development and the alleviation of population pressures and poverty. Forests have therefore been cleared for timber production and for "transmigration" (resettlement from land-short areas), but the government is becoming conscious of the need to reform its policies and laws to recognize the multiple roles of forests and the potential for improved management (including by community participation) of the national forest estate. It is time that it should do so, for there is a long-standing concern that Indonesia's very valuable forests have been degraded under destructive logging practices encouraged by a slack enforcement of the forestry law (World Bank, 1990).

Conclusion

Countries may consider reforms that increase community participation in forestry planning and management for different reasons, some possibly hoping for increased productivity and economic returns, others aiming for the political and social goals of greater democracy and self-reliance and yet others seeing it as essential for environmentally sustainable development. Without taking a view on the need to shift towards community participation, this article seeks to make the point that such a shift will be unproductive unless accompanied by a shift in the balance of power between the state and the forest-using communities (although this is not, in itself, a sufficient condition for success). The main focus here is on the official forestry law, for that is the "compact" that balances rights, powers and opportunities with the status quo, at present heavily biased in favour of the state, its officials and its clients.

Given the present inequality between official law and custom, any redressing of the imbalance between the state and its people will have to be done by the state, using the official law. The foregoing examination of the Pacific Islands shows that, with strong traditions and the prominent place of custom and customary land in their affairs, the recent trend has been towards increasing the landowner's powers over forest management. Western Samoa is only now embarking on this process, although the country has long been well equipped with a village government system to handle wider forestry functions and powers. The evidence outlined above suggests that the Solomon Islands has probably gone too far in increasing landowners' powers at the expense of state intervention. Papua New Guinea has been down that path and now seems to be retreating with its fingers badly burnt. Vanuatu is seeking to combine the interested parties customary landowners, the government and commercial operators- in joint ventures, while Fiji is reviewing its present system of routing all forestry transactions through the specialist Native Land Trust Board.

If the Pacific Islands' experience shows the dangers of too little state involvement, the case of Indonesia shows that maximizing state controls is no guarantee against destructive forestry operations. What seems to be required is a better balance of state and community involvement - both in quantity and quality.

As a candidate for a new balance between the state and forest-using communities between public and private interests - the concept of community forestry commends itself. There is some danger in using this term for, with its newly found popularity, it is starting to mean all things to all people (Gilmour and Fisher, 1991). Here, the term is used in a wide sense, embracing at one extreme the recognition of rural people's rights to forest access for subsistence purposes and, at the other, some form of industrial forestry based on a joint venture with customary landowners. What is taken to be community forestry's defining characteristic is that the forest-using community participates directly in forestry decision-making and benefit-sharing. The shift in power to the customary sphere need not - indeed,

should not - be absolute, but it must be a real and meaningful shift.

Countries around the world are increasingly embracing community forestry as part of their national forestry regimes but, unless their legislation and forestry administrations are thoroughly overhauled so as to guarantee direct forest-user participation, it will have been adopted in name only and will produce none of the expected or desired benefits. If community forestry is to be a strategic bridge across the gap between official forestry law and its constituency and custom and its constituency, many legal and administrative - and, especially, attitudinal - adjustments will be necessary.

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