Creating a legal framework for community-based management: principles and dilemmas

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Basic requisites for laws supporting community forestry.

With the growing emphasis worldwide on the devolution of the responsibility for management of forests and other natural resources to local community groups, the importance of an appropriate legal framework for community forestry is increasingly coming to light. State law has a necessary place in local management initiatives: it is needed to help define the rules by which community-based institutions interact with outsiders, to delineate the limits of state power and to protect both individual rights and wider societal interests such as the environment. Yet many community management efforts continue to exist in a state of legal uncertainty.

This article considers the requisites for a legal framework to support community forestry. It first looks at the example of community management of the mangroves of the Fumba peninsula of Zanzibar in the United Republic of Tanzania; the weaknesses of its legal underpinnings point out the importance of a legal framework in community management agreements. The article then suggests some basic principles that might guide the design of such a framework, concentrating on two key elements: security (instilling confidence that rights cannot be taken away arbitrarily) and flexibility (allowing legal space to make choices adapted to local situations). Finally, it identifies the central difficulties and remaining issues.

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

Villagers and foresters agreed that the crux of the problem was the irresponsible and

destructive way in which the mangroves were being exploited, both by the local people and by people from other parts of Zanzibar and mainland Tanzania. Increasingly, little respect was being shown for traditional local knowledge regarding how these resources could be managed sustainably.

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 and worked out a set of by-laws to help stabilize the situation and give the mangroves a chance to regenerate. Cutting periods were established, closed areas were identified and 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 and subject to an entrance fee and permit.

The Subcommission for Forestry, understaffed and underfunded, has increasingly come to recognize the essential role of communities in forest management. Similar experiments are springing up elsewhere on the islands, and a newly adopted National Forest Policy proclaims the need for more (Silima *et al.,* 1994). There are, of course, great uncertainties. It remains to be seen if the new arrangement in Kisakasaka can hold up under the immense economic and demographic pressures. It is uncertain if the incentives for participation will be sufficient to overcome the costs of organization and forbearance. It is also too early to tell if the adopted rules are environmentally sound.

House construction with mangrove poles in Zanzibar, United Republic of Tanzania

Another important issue has hovered in the background throughout the short history of the Kisakasaka effort: Are such initiatives 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. This is not surprising; it is natural to want to avoid legal complications, and the community and the government were, after all, working together towards a common goal in a climate of mutual trust. Yet, had careful attention been paid to these matters, a number of soft spots in the legal foundations of the experiment might have become apparent. Following are some examples:

- All mangroves, including those in Kisakasaka, are considered forest reserves under Zanzibar's forest law. In reserves, all decisions regarding management are to be made by the government, and all forest resources belong to the government. Although the Subcommission for Forestry agreed to village use of the mangroves, nothing in the law or in the Subcommission's informal agreement with the community would prevent it from unilaterally changing its mind. As a result, the rights of the community to manage the mangroves and to reap the benefits of the management were legally insecure.

- 'Zanzibar's 1950 Forest Reserves Decree was written in an era when the main objective was to keep people out of the forests, 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, instead claimed that there was nothing in the law that gave them the explicit right to grant such powers to communities. Thus, the legal authority of the Subcommission for Forestry to allow community initiatives in mangroves was perceived as uncertain.

- The group of villagers involved in the programme was largely self-selected and informally constituted. Its relationship to existing local government institutions was uncertain. In addition, townships could issue by-laws concerning resource

management, and the relation of these to the mangrove by-laws was also uncertain. In other words, the legal status of the management group and its authority to make and enforce rules were unclear.

It is easy to imagine how these weaknesses could come to have significant consequences. What would happen, for example, 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; if some Kisakasaka residents began to violate the by-laws, arguing that those by-laws had no legal status; or if the forestry sector brought in decision-makers unsympathetic to community management? The Kisakasaka effort could be brought to a halt.

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

There are prospects that the legal environment may be changing for the better. In 1996 Zanzibar adopted a new Forest Resources Conservation and Management Act which may address many of the above 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 of both parties to any agreement, i.e. the community group and the Subcommission for Forestry. Community groups are empowered to draft enforceable by-laws (subject to Subcommission 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.

LAW AND COMMUNITY MANAGEMENT

The Kisakasaka case is not unique in the weaknesses of its legal underpinnings. Many, if not most, community-based management efforts around the world lack the legal support needed to 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.

Of course, community management can take place in oblivion of its legal environment, provided that (by design or indifference) the policy, social and economic conditions are favourable. Some community management systems have existed for centuries and may continue to operate with no legal underpinning in terms of state law, and perhaps even in direct contradiction to it.

Yet community-based management systems never exist in a state of isolation. As natural resources are the focus of increasing conflict around the world, community-based management efforts are receiving more scrutiny (both supportive and threatening) and are becoming more subject to the influences of national and international economies. In this context, law-or the problems caused by its absence - will become increasingly relevant.

Looked at from a different angle, local management initiatives need state law (sometimes more than their advocates like to recognize, although usually less than governments will admit) because it provides a support that local institutions or community-based rules often cannot provide alone:

- Community-based institutions cannot alone define the rules by which they interact with outsiders. Local groups often need a legal status that outsiders can recognize and legal protection from trespass and destructive or criminal behaviour of outsiders.

- Local rules cannot define the limits of state power, that is the extent to which the

state will respect local autonomy and when it will retain the power to intervene. In the best scenario, community groups, other components of civil society and government work together to define these limits. But unless these limits are spelled out in state law, there is little that community-based rules alone can do to enforce them.

- State law may have an important role in protecting individuals against the abuse of local power - although the extent to which state law should intervene on behalf of locally oppressed people, or can be effective in doing so, is problematic.

- State law is needed to provide basic guidelines for the protection of legitimate interests of other stakeholders, including future generations, and important wider societal interests, such as the environment - although the government view of the "national interest" may sometimes undermine local autonomy and decision-making by failing to take into account the needs and aspirations of local people (Lynch, 1998).

However, while state law should have important roles in creating an enabling environment for community-based management, it has usually failed to fulfil these roles effectively in most countries of the world. Many national laws continue to reflect a state-centred approach to resource management and a restricted philosophy of property rights which has tended to undermine existing community-based systems and has seriously constrained local people and progressive government officials in the search for new community-based solutions (Bruce, 1999).

Yet, recent years have witnessed the emergence in an increasing number of countries of important new laws designed to be more supportive of, or at least less hostile to, community initiatives. These include:

- laws that recognize local ownership or property rights over land and/or natural resources based on historical claims (e.g. ancestral domains legislation recognizing long-standing land claims of indigenous communities in the Philippines, native title laws in Australia, indigenous land rights laws in a number of Latin American countries);

- laws that provide mechanisms for 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 (e.g. joint forest management in India and most other joint management or comanagement arrangements);

- laws that promote devolution of authority to local government units.

Fuelwood collection in Zanzibar, United Republic of Tanzania

Some laws of the last type may result in a greater involvement of local community-based institutions in resource management. But this is not necessarily the case, especially where decentralization simply delegates authority to local units of central governments or where local government institutions are more accountable to higher levels of government than to the local population (Ribot, 1997). Some cases show more promise, such as Tanzania's new Village Land Act, which vests significant control over common property resources in village institutions for management, in accordance with community by-laws (Wily, 1998).

DESIGNING ENABLING LAWS

Against a backdrop of extremely diverse legal traditions, doctrines and capacities, it may not be wise to seek broadly applicable basic principles on which to found an improved legal

framework, or to search for legal models that are easily transferable from one country to another. Workable laws that effectively support community-based management will vary widely depending on the nature of the existing legal and institutional arrangements, community management objectives in a given setting and a wide range of social, political and economic factors.

Nevertheless, two key principles can be defined as central to the task of improving the legal environment for community-based management: security and flexibility. Laws in most countries leave much to be desired in both areas.

Security

For any community effort to be successful, it must both provide a realistic hope of significant benefits and also instil confidence that the rights to those benefits are secure and cannot be taken away arbitrarily.

Security is, of course, partly a state of mind. Where relations between community and government have traditionally been good, local people may feel secure enough to undertake management simply on the basis of a promise from local officials. In other situations, where people have a fundamental distrust of state law and legal institutions, communities may not feel secure no matter how carefully and strongly their rights are set forth in legal documents. Law cannot ensure security in inherently insecure environments.

The following is a sample of the considerations that should be taken into account in the attempt to define secure legal rights. It is striking how inadequately most state legal regimes provide these basic elements of security to community-based management initiatives.

This list is not exhaustive, and not all of the listed criteria will be relevant to any given situation:

· ***The rights must be clear.*** Laws from around the world have been known to describe rights so vaguely as to be virtually meaningless. Examples of vague wording include phrases such as "customary rights of forest-dwellers will be respected *as much as possible"* or "customary law shall be respected *unless the national interest requires otherwise".* Ambiguity could be a failure of communication, understanding or drafting or could sometimes be politically intentional.

· ***There must be certainty that the rights cannot be taken away or changed unilaterally and unfairly.*** Almost all legal structures recognize circumstances under which rights can be taken away or diminished, but conditions and procedures for doing so need to be fair and clearly spelled out and the issue of compensation needs to be addressed. In co-management arrangements, it is important that unilateral termination by government not be an option unless there have been serious and persistent violations and a failure to remedy those violations after notice (cf. Kant and Cooke, 1998).

· ***The rights should be ensured either in perpetuity or for a clearly defined period long enough for the benefits of participation to be fully realized.*** Comanagement arrangements or community forestry leases that prescribe terms of only five to ten years or that are tied to a growing cycle (as in some of India's joint forest management notifications, for example) can undermine the community's sense of ownership of the resources in question and weaken its long-term attitude towards management (Lindsay, 1994).

· ***The rights need to be enforceable against the state (including local***

government institutions). The legal system has to recognize an obligation on the part of the state to respect the rights. It is uncertain in many contexts - and largely untested - whether comanagement agreements, in particular, are in fact viewed under law as containing enforceable contractual obligations on the part of the state (Eggertz, 1996).

· ***The rights must be exclusive.*** The holders of rights to a resource need to be able to exclude or control the access of outsiders. Government should not be able to assign conflicting rights to others over the same resource (such as assigning mining concessions in a community forest). Government also needs, where necessary, to assist in the enforcement and protection of the group's rights from outside interference.

· ***There must be certainty about the subjects of the rights.*** It is essential both to clarify the boundaries of the resources to which the rights apply and to define who is entitled to claim those rights.

· ***The government entity entering into the agreement must have clear authority to do so.*** For example, a government agency cannot give a community-based management group an exclusive right over government land if the agency itself does not have the right to exclude and the power to delegate that right. Comanagement agreements have sometimes foundered on disagreement or lack of clarity as to which government agency had control over the resource in question.

· ***The law must recognize the holder of the rights.*** The holder of the rights should be recognized as a legal personality with the capacity to take a wide range of steps, such as applying for credits or subsidies, entering into contracts with outsiders or collecting fees.

· ***The law must provide for protection of rights.*** It must provide accessible, affordable and fair avenues for seeking protection, solving disputes and appealing decisions made by government officials.

Flexibility: legal space for meaningful choice

Community-based natural resource management is based on local choices and local adaptation. These qualities are put at risk if an excessively rigid, uniform approach is applied. In this area of lawmaking, it is particularly important to view law as an enabling tool, not as an elaborate set of rules that prescribe or dictate solutions to local problems. It is remarkable how often this principle is ignored.

Protecting flexibility in law is not an easy task. Even if it is both just and efficacious for state law to allow community-based rules, including long-standing systems of customary law, to flourish according to their own dynamics, flexibility cannot be unlimited. Both the wider society beyond the local group and 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 flexibility should be considered in all aspects of the design or support of community-based management, it is examined here with respect to three interrelated areas: planning and management; the recognition of local groups; and the identification of group membership and jurisdiction.

Management objectives and the rules that will be used to achieve them. Even in some of the most progressive new laws supporting community-based management, government often

jealously holds on to the decision-making function. Law alone cannot eliminate the tendency of officials to impose planning and management decisions, but the drafting can help tip the balance away from perfunctory consultation to greater local involvement in the planning process.

The range of choices in community-based natural resource management is influenced by the preoccupations of different sectors, with numerous overlapping participatory strategies and separate legislation governing water, forestry, fisheries, livestock, etc. The categories and labels used in law - for example, the accident that land falls under one government agency and not another - can sometimes nullify choice. A study of comanagement of government forest land in southern Africa, for example, showed that most of the decisions about what future was appropriate had already been made, leaving very little on the table for negotiation (Matose, 1997).

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 been a tendency for law to prescribe in too much detail the structure of local organizations and the rules by which they operate. One of the assumptions of community-based natural resource management is that it is best to build on local institutions that have roots in local values and practices; it is contradictory, therefore, for law to try to squeeze these institutions into standard forms that are complex and alien to the local situation.

For example, in Australia, the Aboriginal Councils and Associations Act of 1976, establishing 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". However, as drafted, the law gave almost no room for local cultural variation in corporate structures and decision-making processes, leading some critics to argue that it has in fact caused groups to lose control over their affairs. By contrast, the Native Land Titles Act, adopted in the 1990s, gives greater recognition to existing institutional forms, providing very basic requirements and guidelines but leaving the details of internal group functioning to the group itself (Fingleton, 1998).

Legal recognition of community-based institutions can have unexpected consequences. For example, it can be used by elite groups in a community to enhance their own power at the expense of weaker elements. Community members may require basic guidelines to help in holding their leaders accountable.

Definition of management groups and areas of jurisdiction. It is extremely difficult to resolve how state law should define what group has authority over what resources in what area. One approach is for law to designate a local body or authority that would have control over a pre-defined area, for example a district or village council. Another approach, found especially in the context of comanagement situations, is to recognize different groups formed around different functions and objectives. The Nepal Forest Law of 1993, for example, turns forest land over to essentially self-defining groups, which are unrelated to local government boundaries.

The first approach is easier to define in legislation because there are uniform local structures already in place. However, vesting power in a local government body does not guarantee that local people will have more say in local resource management, unless that body is designed to be democratic, representative and accountable (Ribot. 1997). Moreover, natural resources tend to be indifferent to administrative boundaries (Emsail, 1997).

In many contexts there may be no single concept of what constitutes a "community", and a particular area may be subject to the overlapping legitimate claims of various groups to

various types of resource use. Flexibility heightens the possibility of tailoring local arrangements to reflect the often long-standing associations between local people and resources and the multiplicity of interests that may be involved.

MAKING LAW REFORM MEANINGFUL

Several broad principles could help guide the effort to make law a meaningful presence rather than a well-intentioned but ultimately empty gesture.

First, it is important to endeavour to ensure that the design of law - from national legislation down to local agreements - is governed by the needs, aspirations, insights and capacities of the intended users of the law, and that it is not driven by the preconceptions of lawyers, donors and other outsiders, however well intentioned. It is incongruous for a process designed to elicit participation to be imposed from above without participation in its design. While this principle might seem intuitively obvious, it requires emphasis because - even in many democratic societies - the concept of engaging affected people in the law-making process from the beginning of that process is either ignored or viewed with alarm. Lawyers need to make the concepts and language of law accessible, while local managers and their allies need to acquire training in the language and processes of law.

Second, the capacity of people to understand and use the law needs to be enhanced. Education is needed not only for local managers, but also for government bureaucrats, police forces and judges. The empowering potential of law and policy should not be viewed solely from the perspective of community-based groups, but also from that of progressive government officials. Indeed, the impetus for law reform has sometimes come from government officials themselves, because of the constraints that law puts on their capacity to respond to and support community initiative (Shah, 1998).

Third, the machinery of law must be improved. A relatively independent judiciary is critical but, in most countries, community managers cannot look to the court system for defence of their rights. The design of new ways to deal with disputes will be vital to making substantive changes in rights.

Fourth, expectations need to be realistic. Laws that attempt to change too much will be ignored. Laws should not be enacted if their application depends on resources that government or communities do not have or requires a massive redesign of institutions that is unlikely to take place.

Finally, community managers and their allies must make strategic choices about priorities and the justification of emphasizing the substantive detail of law. They must consider whether, for the time being, it is better to work with imperfect legal instruments and concentrate on persuasion and building alliances rather than to push immediately for legal changes that may, in some circumstances, upset delicate coalitions.

The search for legal regimes that provide meaningful, secure and flexible rights to community-based management is fundamental if community-based management is to become a sustainable and widespread strategy rather than an ad hoc approach.

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