The Village, the Leviathan and the Invisible Hand: Myth, Law and Common Property Governance

By Justin Rose[1]

Introduction

This paper, examining connections between myth, law and common property governance, is presented in two parts. The first begins from a proposition widely accepted within legal anthropology; that myth is a source of law in many traditional societies. Bronislaw Malinowski provides the classic statement:

> Myth fulfils . . . an indispensable function: it expresses, enhances and codifies belief; it safeguards and enforces morality; it vouches for the efficiency of ritual and contains practical rules for the guidance of man. Myth is thus a vital ingredient of human civilisation; it is not an idle tale, but a hard-worked active force . . . a pragmatic charter of primitive faith and moral wisdom.[2]

Without denying the social and economic changes of the modern era, sacred cultural narratives continue to be valued highly in many localities, linking specific groups of people in oral tradition to specific land and marine scapes. Among the many interconnected social and spiritual functions performed by traditional mythologies is frequently the underpinning of norms of access to and distribution of, and perhaps for the conservation of, natural resources. One result of this is that in many instances of common property governance there are ancient mythologies accompanying local perceptions of what constitutes legitimate authority. These themes are discussed in the first part of this paper. The discussion is augmented by the example of Pohnpei in the Federated States of Micronesia, a case study illustrating connectivity between local mytho-history, traditional authority, and sustainable common property governance.

Much common property literature focuses upon appropriate design of resource governance institutions – this is a logical process, but the logic is responsive both to political imperatives and to (visible and invisible) cultural universes. In this sense the material in the first section reminds a common property readership to remain sensitised to the cultural embeddedness of institutions.

A heightened sensitivity to cultural embeddedness of environmental governance institutions also invites reflection upon what that may mean in terms of understanding contemporary discourses now dominant in law. For adherents to these the question doesn't arise because any form of authority based, even in part, in mythological narrative should by definition be condemned to an irrational and irrelevant past. That contemporary societies differ fundamentally in this respect is supposedly among their self-defining features; modern law in particular, has no need of myth. "The very idea of myth typifies 'them' – the savages and ancestors 'we' have left behind".[3] In contrast, critical theorists for some decades have suggested otherwise; a recurring theme of this critique is that we seek transcendence in denying the possibility of transcendence, that ours is the myth of mythlessness.[4]

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[1] Environmental lawyer & PhD candidate, Macquarie Centre for Environmental Law, Macquarie University, Sydney, Australia.

[2] Bronislaw Malinowski "Myth in Primitive Psychology" (1926) reprinted in Ivan Strenski (ed) *Malinowski and the Work of Myth* (Princeton, Princeton University Press, 1992), 79-116, 82.

[3] Peter Fitzpatrick *The Mythology of Modern Law* London: Routledge 1992, ix. Also J. Habermas: "Enlightenment contradicts myth . . . enlightened thinking has been understood as an opposition and counterforce to myth." Quoted in Fitzpatrick, 44.

[4] Fitzpatrick note 3. Also Rist: The basic difference between 'other' cultures . . . and contemporary society may lie in this: 'other' societies relate their myths while we hide ours, even from ourselves. We might say this is the final conning of reason, which thus usurps the belief that should be placed in the myth itself. We act as if the triumph of Enlightenment (and rationality) and its converse, the losing battle fought by the

In turning these suggestions to the present topic, the second part of this paper inquires whether, and in what respects, contemporary environmental law and governance can be described as having a basis in "myth".[5] In particular it describes some respects in which *The Tragedy of the Commons* (*the Tragedy*) may be regarded as a founding myth of environmental law and governance, and the implications thereof.[6]

Part One -Myth, Law and Common Property

1.1 Insights from Legal Anthropology

> *[L]egal anthropology, in denouncing evolutionism, has pinpointed what may be one of the major weaknesses of Western thought, one which traditional societies have known how to avoid: that of uniformity*.[7]

Legal anthropology "sets itself the objective of understanding the rules of social behaviour but emphasises the legal domain, all the while recognising that law can never be considered in isolation; law is only one element in the cultural and social whole of any society, and is variously interpreted and used by each subgroup."[8] Montesquieu pre-empted some issues later considered by legal anthropologists, his eighteenth century ideas on the role of law in society being closer to those of today's legal pluralists than of the fathers of legal anthropology such as Bachofen, Maine and Morgan.

> [Laws] should be so specific to the people for whom they are made that it is a great coincidence if those of one nation can suit another. They should be relative to the physical qualities of the country; to its frozen, burning or temperate climate; to the quality, location and size of the territory; to the mode of livelihood of the people, farmers, hunters or pastoralists; they should relate to the degree of liberty that the constitution can admit, to the religion of the inhabitants, to their inclinations, to their wealth, to their numbers, to their commerce, to their mores, to their manners.[9]

From its inception as a discipline during the mid nineteenth century until the advent of Malinowski's functionalism and processual analysis, legal anthropology was largely the domain of armchair theorists supplying variations on a theme of social evolution driving legal development.[10] These scholars made significant contributions to the understanding of relationships between culture and legal phenomena, but their ideas on the stages through which all societies pass in their economic, social and legal development did not endure within their own discipline after empirical ethnographic study supported no such trend. Despite the debunking of evolutionism within legal

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Church of the last century, demonstrate that belief is obsolete. Gilbert Rist "'Development' as a Part of the Modern Myth: The Western 'Socio-cultural Dimension' of Development" 2 *European Journal of Development Research* 1990 10-21, 14.

5 Environmental governance is herein defined as "authority exercised over an area's environment and natural resources, whether effectual or ineffectual, formal or informal, intentional or unintentional". John Dore "Environmental Governance in the Greater Mekong Subregion." In *Mekong Regional Environmental Governance: Perspectives on Opportunities and Challenges.* Working Papers of the REPSI Mekong Regional Environmental Governance Research and Dialogue Group, Chiang Mai, Thailand, 2001,1.

6 Garrett Hardin "The Tragedy of the Commons" (1968) 162 *Science*:1243-1248.

7 Norbert Rouland *Legal Anthropology* (London: Athlone, 1994) 332.

8 Ibid, 2.

9 Charles-Louis de Secondat, Baron de Montesquieu, 1 De l'Espirit de Lois, ch.3 (Paris, 1979; orig. pub.1748) Quoted in Annelise Riles *Rethinking the Masters of Comparative Law* (Oxford: Hart, 2001) 23. Translated by Launay.

10 For example Johann Bachofen, Lewis Morgan, James Frazer, Sir Henry James Sumner Maine: Rouland note 7, 21-23, 33.

anthropology, a social evolutionary narrative remains a core component of the Western myth of law.[11]

Malinowski's displacement of normative analysis, which equated "law" with a corpus of abstract and explicit rules, in favour of processual analysis, turned the legal anthropological task towards explaining "law" not as a set of norms but as a process of settling conflicts.[12] This shift in focus also demanded analysis of cases, with much detail of legal phenomena in specific societies collected and described. Legal anthropology was originally, and remained for some decades, focused exclusively on non-Western "primitive" societies, with anthropologists delaying turning analytical attention towards their own societies until the second half of the twentieth century.[13] In the 1990s transnational legal structures were added as subjects of contemporary legal anthropology.[14]

Malinowski, using different terminology, also advanced the notion of legal pluralism, expressly recognising that law is not tied to a state or other central authority and that more than one legal order may be observable in a given society.[15] While legal pluralism now informs the theoretical frameworks of most legal anthropological study of both Western and non-Western cultures, there are many who deny the logical possibility of its existence, in the Hobbesian tradition coupling "law" inexorably to the sovereignty of the state and its monopoly on legitimate sanctioning power.[16]

For Peter Sack, "[l]egal pluralism is more than the acceptance of the plurality of law; it sees this plurality as a positive force to be utilised - and controlled - rather than eliminated. Legal pluralism thus involves an ideological commitment."[17] Others reject Sack's suggestion that the study of legal plurality cannot be decoupled from the processes and decisions involved in "use" and "control".[18] Nevertheless, Sack's ideology, as expanded in the passage quoted below, approximates the ethical basis upon which this research has been informed by the ideas and observations of scholars of legal pluralism.

> It is not blind to the strengths of state law and the weakness of people's law. It merely insists that all forms of law have their limitations and that none has advantages which are so overwhelming that it would be justified to grant it a monopoly or a position of hegemony. The aim of legal pluralism is not the elimination of some forms of law and the fostering of others but a situation where different forms of law cooperate, each performing the task or tasks for which it is best suited and in a way which maximises potential.[19]

While legal plurality, broadly defined, is recognisable everywhere, it is very often found in analyses associated with colonial and post-colonial situations.[20] This is the case with the analysis of the

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11 Rouland note 7, 332 (for debunking of evolutionism) and Brian Tamanaha *General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001) 52 for prevalence of legal evolutionary perspective. Also Fitzpatrick note 3.

12 Rouland note 7 36-40.

13 Sally Engle Merry "Anthropology, Law and Transnational Processes" *Annual Review of Anthropology* (1992) 357-379, 360-361.

14 Ibid.

15 Rouland note 7 46-47.

16 Franz Von Benda-Beckmann *Legal pluralism and social justice in economic and political development* Paper presented to the IDS International Workshop on the Rule of Law and Development, London, 1-3 June 2000, 5-6.

17 Sack P "Legal Pluralism: Introductory Comments" in Sack P & Minchin E *Legal Pluralism: Proceedings of the Canberra Law Workshop VII* (Canberra: Australian National University, 1986) 1.

18 See for example von Benda-Beckmann Note 16, 7: "[L]egal pluralism . . . does not suggest any moral or political preference for or against any specific plural legal constellation or their components or how it would relate to 'social justice'." Also McLachlan C *State Recognition of Customary Law in the South Pacific* (University College London, PhD thesis, 1988), 43.

19 Sack note 17, 3.

20 Two examples are McLachlan C Note ? and von Benda-Beckmann note ?.

Federated States of Micronesia (FSM) in the following sections. FSM is an example of a jurisdiction where institutions of formal governance transplanted from the United States of America co-exist with ancient, community and village-based systems. The operation of these customary authority systems "entails a fundamentally different comprehension of the nature and exercising of power and authority than that understood in the modern Western intellectual tradition"[21]. In the words of Brian Tamanaha, "[l]aw in Micronesia is an extraordinary flux and flow of contrasting thought and meaning, inside and outside the legal system".[22]

Progressing to myth, the first issue noted is the constitutional relationship between myth and law. Malinowski suggested the myths of origin, the creation myths, contained the legal charter of the communities to whom they applied.[23] That myth is a foundation of law in many traditional societies is now uncontroversial. Rouland's 1988 text *Legal Anthropology* provides an example: "Myth is narrative in which the fundamental explanations regarding the creation of the universe, the origins of life in society and the main rules by which society is governed all reside". [24] As emphasised by Franz Boas, myth "is not fixed beyond historical contingency, but rather that it exists as a shifting mosaic of fragments subject to social pressures."[25]

There are many theories and opinions within anthropology regarding the function of myth in society and culture, of which only a few broad themes are here outlined.[26] The first are suggestions that myth bounds reason, providing its adherents the certainty of discerning the apparent limits their world:

> Malinowski's Trobianders are business-like men, very much of this world; and if they believe stories about original witches it is because like all men they run up against the limits of reason and fact. To legitimate their institutions they need some sort of charter that is beyond fact, beyond reason and refers to events beyond memory and ordinary time.[27]

Myths are seen as reflecting and reinforcing connectedness in social life wherein spirituality may be inseparable from law, which may be inseparable from past events, which may be inseparable from social and economic interrelationships. "The same myth may contain the reason why the moon is at a particular distance from the earth and the reason why a man should take a wife from one group and not another. . . myths unite those areas that are disjointed in modern thought".[28] This is exemplified by indigenous Australian cultures maintaining their *Dreaming*, a concept fusing spiritual and normative aspects, tied to the re-telling and ritual re-enactment of socio-ecological narratives (myths). It has been described as a "timeless continuity" connecting people to each other and to the natural world.[29]

> Aboriginal people bring a large bundle of issues into their conversations about environments, issues that lie outside western concepts of environment. People insist upon talking about them because they hold them to be law. *Put another way, the connections between and among living things are the basis for how ecosystems are understood to work, and thus constitute laws of existence and guidelines for*

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21 Petersen G "Ponape's Body Politic: Island and Nation" (paper presented at the *Conference on Evolving Political Structures in the Pacific Islands*, Institute for Polynesian Studies, Brigham Young University, Hawaii, 1982) 10.

22 Tamanaha B *Understanding Law In Micronesia. An Interpretive Approach to Transplanted Law* (Leiden: Centre of Non-Western Studies, 1993) 1.

23 Malinowski note 2.

24 Rouland note 7 157.

25 Ibid 218.

26 A more extensive discussion may be found in Andrew Von Hendy *The Modern Construction of Myth* (Bloomington: Indiana University Press, 2002) chapters 4, 9 and 10.

27 P.S. Cohen quoted in Fitzpatrick note 3, 23-24.

28 Rouland note 7 157.

29 Peter Thorley "Current realities, idealised pasts: Archaeology, values and indigenous heritage management in Central Australia" 73 *Oceania* (2002) 114.

> *behaviour*. . . . In my work on ethnoecology with Aboriginal people, my teachers have refused to cut up the world the way academic disciplines do. They say that connections are what matter.[30]

Finally, in identifying limits myths also identify the contradictions arising from those limits. This is particularly emphasised in the interpretive work of Claude Levi-Strauss, who stands somewhat apart in providing a structural theory of myth. Levi-Strauss concluded the purpose of myth was to provide apparent resolution to these contradictions.[31] Or, as interpreted by Cohen:

> The rules which govern everyday life are always, in some respects and to some extent, in doubt: real history, real patterns of migration and settlement, real claims to property and power, always involve inconsistencies and irreconcilable demands: myths, in recounting the events of an invented or partly invented past, resolve these inconsistencies and affirm one set of claims against another. The introduction of imaginary events takes the point of origin out of the realm of memory: and the introduction of unreal events gives the story a quality which transcends the mundane.[32]

The following sections situate the material presented thus far in the specific context of Pohnpei, one of the four states of the Federated States of Micronesia (FSM).

1.2 Introducing Pohnpei

Pohnpei is the largest island in FSM (land area 343.7 km^2, 34,486 persons in 2000), situated seven degrees north of the equator, approximately 3000 kilometres east of the Philippines. Its extinct volcanic peaks rise to 750 metres above sea level, and it receives around 4,500 millimetres of rain annually.[33] Pohnpei's indigenous people were first visited by European adventurers in the seventeeth century, and thereafter followed successive waves of whalers, missionaries, merchants and colonisers.

Administered in turn by Spain, Germany, Japan and the United States prior to a negotiating conditional independence in 1985, most of the societies that comprise the FSM, including Pohnpei, retain strong connections to traditional forms of authority.[34] This is acknowledged while also emphasising that much cultural and institutional change has occurred in FSM, precipitating a high degree of identification with Christian and secular US norms and values. The legal constellations in the FSM are clearly plural; there is coexistence and interaction of multiple legal phenomena (state and non-state) that each have independent capacities to act and react.

1.3 Isokelekel and the Sau Deleurs

In keeping with the theme of myth, this section commences by outlining of one of Pohnpei's central mythic narratives.

The Sau Deleurs had ruled the island of Pohnpei as a tyrannical dynasty for years beyond memory.[35] Saudemwohi was the last of Sau Deleurs. A cruel and unjust man, he was hated both

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30 Deborah Bird Rose, "Ecological Humanities in Action: An Invitation" 31-32 *Australian Humanities Review* 2004.

31 Claude Levi-Strauss "The Structural Study of Myth" reprinted in Thomas Sebeok (ed) *Myth: A Symposium* (Bloomington: Indiana University Press, 1965) 105.

32 P.S. Cohen quoted in Fitzpatrick note 3, 24.

33 Zicus S *Carolines Tropical Moist Forests* (Internet document http://www.worldwildlife.org/wildworld/profiles/terrestrial/oc/oc0101_full.html#just World Wildlife Fund, 2001) 1.

34 The independence is conditional in the sense that it is limited under the terms of the Compact of Freedom of Association between the Federated States of Micronesia and the United States of America. FSM is a member of the United Nations and, for most intents and purposes, is sovereign and independent.

35 Glenn Petersen *Lost in the Weeds: Theme and Variation in Pohnpei Political Mythology* (Manoa, Center for Pacific Island Studies 1990) 34-40. Petersen relies on Hambruch 1936, Hadley 1981, Bernart 1977, Silten,

by Pohnpei's gods and people. Nansapwe, the Pohnpei thunder god, committed adultery with Saudemwohi's wife. Saudemwohi was greatly angered and imprisoned Nansapwe, releasing him only after the god continued an incessant thundering from his confinement. Upon being released Nansapwe fled to Upwind Katau where he had an incestuous union with a clanswoman, impregnating her with the juice of a bitter lime. Isokelekel, Pohnpei's culture hero, was the child conceived from this miraculous union.

Isokelekel was semi-divine and born with the purpose of avenging his father's suffering and emancipating Pohnpei from the Sau Deleurs. During his childhood Isokelekel knew of his destiny and danced with his friends to prepare themselves for battle. While still a young man Isokelekel embarked for Pohnpei in a giant canoe with 333 warriors, as well as a number of women and children. Various stops made by the raiding party on other islands while making their way to Pohnpei gave rise to other mythic tales. In particular, before proceeding to Pohnpei they stopped at nearby And atoll where they learned details to assist their invasion.

Upon arriving in Pohnpei, Isokelekel and his companions made their way to Madolenihmw where Saudemwohi ruled. Despite a premonition that Isokelekel had come to wreak vengeance upon him Saudemwohi greeted the travellers with hospitality. After a time, a children's quarrel escalated into a bloody battle. At first Isokelekel had the upper hand, but his men were forced to retreat when the Sau Deleur's side regained the advantage. The day was won for Isokelekel when one of his lieutenants speared himself in the foot in order to anchor it to the ground; a symbolic act of heroism that prevented further retreat and rallied his companions to a triumphant victory. Saudemwohi fled into the interior of the island and dived into a pond where he was transformed into a fish, surviving to this day but never eaten by Pohnpeians.

Pohnpei's contemporary system of traditional leadership is Isokelekel's legacy. After his victory Isokelekel summoned the leaders of the island's districts to gather to him where they discussed the future political administration of the island. In consultation with the others Isokelekel decided that in place of the single paramount Sau Deleur there would henceforth be five *wehi* (kingdoms), each with their own paramount ruler. He adopted for himself the title of *nahnmwarki* (paramount ruler) of Madolenihmw and appointed four others to be the Nahnmwarkis of Kitti, U, Nett and Sokehs respectively.

The first interpretive issue to note is that the paragraphs above are no more than a shadow-in-outline as compared to the narrative richness and texture that would be experienced by a Pohnpeian hearing a version of the tale, with additional or alternate elements specific to their own locality, recounted by a skilled orator in the vernacular *in situ*. Secondly, it is part of a mythology that is unique to Pohnpei and in its detail of significance only to Pohnpeians. This author disagrees with those theorists who suggest that myth has a pan-human element.[36] Moreover, while suggesting that the myth of *Isokelekel and the Sau Deleurs* is of continuing significance to Pohnpeians it is re-emphasised that substantial culture change has occurred in Micronesia during the past century, ensuring that the significance of traditional mythohistory is transforming, due in large part to the widespread adoption of both Christian and Western belief structures.

In interpreting meanings borne by the myth other scholars are relied upon, most notably anthropologist Glenn Petersen. The myth suggests Pohnpei's indigenous political system was designed through a series of deliberate considered choices. Most of the texts in which the myth is recounted describe the post-Isokelekel era as one characterised by greater individual freedom, as

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1920s. From these sources Petersen describes many variations of the myth. This account simplifies the tale, drawing on the most common elements.

[36] Such as Ernst Cassirer, Mircea Eiade, Joseph Campbell or (arguably) Carl Jung: Segal Robert *Jung on Mythology* (New Jersey: Princeton University Press 1998) 32-34.

well as greater freedom for clans and villages from their high chiefs.[37] The myth speaks against the dangers of centralised governance and the resulting reform is one of political decentralisation achieved both by dividing the island into five kingdoms, and also by changing the role of the rulers from one in which emphasis is on their own welfare to one in which their goal is to "care for the people".[38] The final interpretive theme worthy of mention at this juncture is that the myth of *Isokelekel and the Sau Deleurs* is consistent with other chapters in Pohnpei's mythohistory in which important change-catalysing events involve actors arriving from outside the island; Pohnpei has a long history of accepting and absorbing external influence.[39]

1.4 Pohnpei's Watershed Forests

Undisturbed rainforest was Pohnpei's original condition when first settled, but two-three millennia of human habitation has resulted in significant modification to the coastal areas, where the vegetation is now almost completely secondary. Fortunately for modern Pohnpeians the agricultural systems developed over centuries by their ancestors, while irreversibly altering lowland forest ecology, did not terminally interfere with the provision of ecosystem services. "[T]raditional agroforestry practice on Pohnpei emphasises the maintenance of forest cover, [but] the species composition is altered in favour of plants with social or economic value."[40] Pohnpeian agriculture is characterised by extraordinary cultivar diversity, providing these systems with inherent resilience against factors such as disease and climate change.[41]

Fundamentally for present purposes, by maintaining a diversity of vegetative cover in coastal areas, Pohnpeians have avoided severe degradation of the mangroves, sea grass beds, coral reefs and inshore marine areas that continue to provide both products of high economic and cultural value, as well as protecting the island from extreme weather events.

In the case of the watershed forests, it is only in recent times that significant alterations have taken place.

> [A] combination of strong traditional respect for the upland forest, heavy human depopulation during the past century, and relatively difficult access to inland areas has, until recently, spared the upland forests of Pohnpei from much of the disturbance and destruction that has occurred in the island's lowlands and on other Micronesian islands.[42]

In recent times however, disturbance and destruction has arrived in Pohnpei's watershed. From the mid-1960's both the rising population and the continuing wave of economic and social changes washing over the archipelago has impacted upon upland land uses. Analysis of aerial photographs from 1975 indicates that Pohnpei then had 15,010 hectares of intact upland forest, covering more than forty percent of the land area. By 1995 this figure had dropped to 5,170 hectares (14.5%), and 4,100 hectares in 2002 (11.6%).[43]

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37 Petersen note 35, 44-48.

38 Ibid 44.

39 Ibid 58.

40 Chris Dahl & William Raynor "Watershed Planning and Management: Pohnpei, Federated States of Micronesia" (1996) 37 *Asia Pacific Viewpoint* 235-254, 237.

41 For example, amongst the 130 species used in Pohnpeian agroforestry there are 179 yam cultivars, 130 breadfruit and 50 banana cultivars. The Nature Conservancy "The Federated States of Micronesia: Jewel of Pacific Biodiversity" in Federated States of Micronesia *Proceedings of the 2nd FSM Economic Summit* (Pohnpei: FSM Government, 2000), 167.

42 Dahl & Raynor note 40, 237.

43 Pohnpei Watershed Project Team *Pohnpei's Watershed management Strategy 1996-2000: Building a Sustainable & Prosperous Future* 2nd Edition (Pohnpei: The Nature Conservancy, 1996) 3.

1.5 Pohnpei Society

Socially, Pohnpei is divided into about two hundred *kousapw* – localised collections of farmsteads, whose members are bound to the leadership of a *soumas* (chief). Kousapw, with populations ranging from about 50 to 300, were originally organised around landholding matrilineages, but today their boundaries are derived according to territorial reference. Pohnpei itself is also divided into five *wehi* (paramount chiefdoms), each ruled by a *nahnmwarki* (paramount chief), their boundaries mirrored today by those of the municipal governments.[44] In keeping with the Pacific-wide tendency for traditional land tenure systems to provide a diversity of natural resources to each community, the boundaries of both the wehi and kousapw form radial divisions, extending from the uplands, through the coastal areas, to the tidal zone.[45] The result is that virtually every local community in Pohnpei possesses an active interest not only in watershed management, but also in the management of the island's other ecological zones. Land, and rights to land, have a fundamental importance in Pohnpei. People's attachment to land symbolises group identities; linking people in the present, and to their past and their future.[46]

Each kousapw, through the agency of the soumas, owes allegiance to the nahnmwarki of the wehi in which it is situated, these affiliations being reinforced by rituals of exchange, tribute and redistribution of produce.[47] The preparation and undertaking of these rituals, typically centered on feasts, are the most regular and obvious display of chiefly authority in modern Pohnpei. They require significant contributions of labour and produce from all involved, which is provided as tribute to the highest ranking title holder present. Fundamentally however, in Pohnpei, "accumulation serves only as preparation for distribution"[48], and most goods offered as tribute at feasts are reallocated to the participants and are ultimately consumed in family households.

Glenn Petersen, a long-time scholar of traditional Pohnpeian politics, identified even within Pohnpei's somewhat decentralised customary hierarchy "a fundamental tension between centralization and autonomy".[49] His research indicated that, while power relations fluctuated over time, the paramount chiefdoms were largely ritual in nature with the local chiefdoms serving as the primary sites for political mobilisation. "Sections (kousapw) are the fundamental Ponapean communities, and most basic Ponapaen social activities that reach beyond the level of individual families are organised within and through sections."[50] Given this fact, coupled with the community-oriented accountability structures that are built into the traditional hierarchies and the regular (often daily) interactions with the soumas, Petersen's assessment is that the exercising of customary authority in Pohnpei is highly responsive to community needs and wishes. "[T]he true locus of authority in Ponapean communities is the community itself. An able chief is respected and listened to, but he founds his authority upon his own ability to listen."[51]

While in pre-contact times villagers may have simply abandoned a very unpopular soumas, during the past century the ultimate source of accountability within Pohnpei's traditional leadership system has been the removal of titles. This may occur, particularly in the lower ranks, if the holder fails to participate in or contribute adequately to community events.

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44 A narrative describing an origin of Pohnpei's structure of traditional political authority is outlined in the *Isokelekel* myth in section 1.3.

45 Dahl & Raynor note 40, 239.

46 Fr Fran Hezel "Land: Is it Time for a Change in Direction?" (2000) 23 *Micronesian Counselor* 1-2.

47 Petersen G "Ponape's Body Politic: Island and Nation" (paper presented at the *Conference on Evolving Political Structures in the Pacific Islands*, Institute for Polynesian Studies, Brigham Young University, Hawaii, 1982), 12-13.

48 Ibid, 15

49 As summarised by Dahl & Raynor note 40, 238.

50 Petersen note 47, 4.

51 Ibid, 18.

Instances of title removal are becoming rare however, a fact that has caused some observers to comment upon the erosion of legitimacy of Pohnpei's traditional leadership.[52]

Long-time Micronesian social commentator Fran Hezel, writing fifteen years after Petersen, argues that with the erosion of title removal as a response to chiefly misconduct, also eroded is "the reciprocity that has always been a hallmark of the relationship between traditional chiefs and their people."[53] Despite this erosion of customary accountability, Hezel and others agree that Pohnpei's traditional leaders still command considerable political authority, manifested both in the exercise of their ritual customary prerogatives, and more widely through both formal and informal participation in governmental decision-making.[54]

Pohnpei's traditional leaders claim that in the past they were in the past responsible for controlling aspects of natural resources use, in addition to the allocation of settlements.[55] Independent historical evidence of this is unavailable. The continued existence, however, of customary titles such as *Sou Madau*, "Master of the Ocean", and *Souwel Lapalap*, "Great Master of the Forest", in turn support prior existence of a customary resource management role.[56] Regardless of the pre-contact situation, the assertion of state authority over natural resource regulation has lead to a general withdrawal of traditional management in this sphere.[57]

Pohnpeians traditionally believed that both the upland forest and the marine space were imbued with supernatural significance:

> Both marine and forest resources, by virtue of their location outside the sphere of human influence (*nansapw*), were believed to be controlled by spirits, or *eni*. It was believed (and to some extent the belief persists) that lack of respect for these *eni*, either through not following proper etiquette while in these zones or through improper use of resources, was punished supernaturally by severe illness or even death.[58]

The existence, in the past and present, of such beliefs is important, but should not be assumed to imbue Pohnpeians with a strong "conservation ethic".

1.6 Resource Tenure and Forest Use

Traditionally, the upland forests, like the rest of the island, were regarded notionally to be the property of the nahnmwarki of the wehi in which it was situated. All coastal land was entrusted to specific families by the nahnmwarkis, but the marine space and the watershed forest was regarded to be *luhwen wehi* (the remnant of the kingdom) and was never apportioned to any specific group.[59] In the uplands, while the great majority of the area remained in its natural state, anyone who sought to

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52 Fran Hezel "A Hibiscus In the Wind: The Micronesian Chief and His People" (1997) 20 *Micronesian Counselor*, 4.

53 Ibid.

54 Consider the 1998 comments of former FSM President John Haglegam: "The paramount chiefs were, and still are, the undisputed rulers in their kingdoms. The boundaries of the five municipalities followed the traditional boundaries of the old kingdoms. This ensures the authority and legitimacy of the paramount chiefs remain unquestioned within the municipalities, despite the election of municipal chief magistrates. The traditional chiefs in Pohnpei have created their own council which has allowed them to exert influence on state policy. Haglegam J, *Traditional Leaders and Governance in Micronesia* Australian National University State, Society and Governance in Melanesia Project Discussion Paper 98/1 (Canberra: ANU, 1998), 4.

55 Ogura C *Watershed Management on Pohnpei: Lessons for Enhanced Collaboration* (A thesis submitted in April 2003 in partial fulfillment of a MSc degree at the University of Michigan) Unpublished, but available on the internet at: http://www.snre.umich.edu/ecomgt/pubs/pohnpei.htm, 53, 57 and 86.

56 Dahl & Raynor note 40, 239-240.

57 Ibid, 240. Ogura note 55, reports that Pohnpei's traditional leaders are seeking to regain these functions.

58 Dahl & Raynor note 40, 239.

59 Ibid.

do so could "secretly" work agricultural plots known as *wahn kiki* (product of the fingernails), upon which no tribute was payable to the chiefs.[60] "'It was almost considered public domain where anyone could grow subsistence crops and not rub the Nahnmwarki's nose in the fact . . . .' *This 'public domain' was more accurately termed common property.*"[61] In addition to the wahn kiki, traditional land uses in the upland forests included hunting (mainly of birds) and collection of non-timber forest products such as traditional medicines. When population growth within a community demanded it, the Nahnmwarki could make an allocation of luhwen wehi for settlement purposes. When this occurred it involved plots that had been "humanised" over time through agriculture.[62]

At this juncture it is important to note that state legal ownership of the "public lands", originally annexed by the Japanese in 1933, retained by the Americans and passed on to the Pohnpei State Governments at independence, has never been translated into effective control. While recognising that these areas, which include Pohnpei's watershed and inshore marine areas, are clearly *de jure* state property, they also remain *de facto* common property.[63]

From the mid-1960s, a rapidly growing economy and continuing population increase have combined to intensify resource use in Pohnpei's watershed. Expanding populations have lead directly to increased settlement in upland areas, with the settlement being preceded, as in traditional times, by cultivation. Tree clearing for plantings of *piper methysticum*, termed *sakau* in Pohnpeian and consumed as a mild narcotic beverage throughout the Pacific island region, is the single greatest cause of upland forest conversion.

> Traditionally consumed only by the higher ranking members of society, since WWII, prohibitions against consumption by the general populace have been relaxed. Sakau has since emerged as the premier cash crop for the many of the island's population who have little prospect of finding wage employment.[64]

Traditionally, sakau cultivation occurred at lower elevations, but as the recreational use of sakau has increased, farmers have chosen to plant upon the higher, steeper slopes where it grows faster and is less likely to be stolen.[65] In addition to the lost habitat, the steep land planted in the shallow-rooted sakau suffers incremental soil erosion, and during major storm events mass erosion may occur.[66] Other causes of forest degradation are also related to increased settlement, such as road construction and intensified hunting pressures.[67]

Figure 1 in appendix 1 provides a summary of social and economic factors that have lead to watershed degradation in Pohnpei.[68] This flow diagram was prepared by the Nature Conservancy's (TNC) FSM Office as part of a grant application submitted to the Global Environment Facility in 1998. As revealed in the figure, the threats to upland forest on Pohnpei are complex; many of the boxes at the periphery of the flows, such as decreasing work ethics and ineffective governments, are themselves the result of a range of complex factors. The conclusions represented in the diagram were summarised by FSM TNC Director Bill Raynor in a 1998 report to the World Bank as follows:

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60 Ibid.

61 Ibid, quoting: Emerick R.G. *Homesteading on Ponape: A study and analysis of a resettlement program of the United States Trust Territory Government in Micronesia* (1960) Ph.D. Thesis, University of Pennsylvania, Ann Arbor: University Microfilms, 45. Emphasis added.

62 Dahl & Raynor note 40, 242.

63 Ibid, 239.

64 Raynor W *The Pohnpei Community Natural Resource Management Program* (A Case Study Report for the World Bank Community-Based Natural Resource Management Initiative) 2.

65 Dahl & Raynor note 40, 241-243.

66 Ibid, 243.

67 Pohnpei Watershed Project Team note 43, 3.

68 The Nature Conservancy *Community Conservation and Compatible Enterprise Development on Pohnpei, Federated States of Micronesia* (Application to the Global Environment Facility for a Medium-Sized Grant, 1998, unpublished), 36.

"The overall result is that Pohnpei's rural communities, governed by largely dysfunctional local institutions, are struggling to maintain an acceptable quality of life in the face of an increasingly degraded ecosystem."[69]

1.7 Law, Myth and the Governance of Pohnpei's Watershed Forests as Common Property

In the early 1980's it became apparent to both the Pohnpei State Division of Forestry and the United States Department of Agriculture (USDA) that inappropriate use of Pohnpei's upland forests by settlers and sakau growers had all the elements of a classic Hardin commons dilemma;[70] unregulated public land, 'open to all', was being subjected to unplanned settlement and detrimental agricultural uses. Participating resource users received direct benefits from their efforts, while only suffering delayed and indirect costs of the resulting environmental degradation.[71] The seemingly obvious solution was to exercise the state's legal authority to restrict and regulate human activities within the watershed forest.

With technical assistance provided by the USDA, the Pohnpei State Government responded by enacting the *Pohnpei Watershed Forest Reserve and Mangrove Protection Act 1987* (hereinafter "1987 forest law"), a classic legal expression of the Leviathan response to a commons dilemma.[72] Section 5 provides:

> The Pohnpei Public Lands Authority is hereby empowered, authorized and instructed to dedicate and vest the control and use rights in the following delineated public trust lands to the State Government, to be managed as a watershed forest reserve: all public lands within the green line on the attached USGS topographic map.

The boundaries of this 'watershed forest reserve', as revealed on the USGS map, include 5,100 ha of forest within the uppermost reaches of Pohnpei's watershed. Section 6 further defines 'important watershed areas', which were the forested slopes below the watershed reserves where soils were identified by the US Soil Conservation Service as highly erodible. The 1987 forest law included severe restrictions upon land uses within both of these zones.

Harding accurately describes the 1987 law as a "very strong legislative statement", with "ringing declarations of the value of environmental protection".[73] It was based upon sound scientific data and sought to implement regulatory methods well-tested in US jurisdictions.[74] In 1987, it seemed to officers of the Pohnpei Department of Resource Management and Development, and their technical advisors, that the only task remaining to ensure sustainable governance of Pohnpei's watershed forests was enforcing the new law. A contrary reality soon became apparent to those charged with enforcement responsibilities:

> Forestry officials, ecstatic about the passage of the law, held a series of poorly-attended municipal information meetings and then set out to mark the boundaries of the Watershed Forest Reserve with the assistance of GPS technicians from the US Forest Service. However, boundary survey teams were turned back by angry villagers with guns and machetes who considered the reserve a government land grab in direct conflict with traditional Pohnpei resource use and authority.[75]

Viewed from a customary perspective, passage of the 1987 forest law represented the completion of the Nahnmwarkis' disenfranchisement by the Pohnpei State Government, fifty-five years after

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69 Raynor note 64, 2.
70 Hardin note 6.
71 Dahl &Raynor note 40, 241-243.
72 *Pohnpei Watershed Forest Reserve and Mangrove Protection Act 1987* (S.L. No. 1L-128-87).
73 Harding E *Federated States of Micronesia Review of Environmental Law* (Apia: South Pacific Regional Environment Programme, 1992) 80-81.
74 The law was based upon that of Hawaii: Ogura note 55, 22.
75 Raynor note 64, 2.

the Japanese colonial administration first claimed the upland forests as state property. For many Pohnpeian villagers passage of the law was a betrayal and final abandonment of Isokelekel's legacy. Thus, the law's requirements, "failing to recognize traditional Pohnpeian resource use in the upland forest areas, were almost universally rejected."[76] Physical placement of indicators to mark the watershed forest reserve boundary was necessary to implement the management regime, but an ongoing state-citizen stand-off prevented this from occurring anywhere for the first fourteen years of the law's operation.

Following the failed attempt at enforcement of the 1987 forest law, government agencies and concerned NGOs undertook a re-evaluation of the watershed conservation strategy. This involved a thorough process of consultation and participatory planning that reoriented watershed management towards government-NGO-community collaboration. All stakeholders, including traditional leaders, contributed to and approved the *Pohnpei Watershed Management Strategy 1996-2000,* which was followed by implementation of the GEF-funded *Pohnpei Community Conservation and Compatible Management Project 2000-2004.*[77] While the activities associated with these programmes have raised awareness among resource users of the issues associated with forest clearing and have succeeded in slowing the rate of forest degradation in many locations, the formal legal situation remains as it was in 1987.

The community-based watershed management program has been described in detail elsewhere, including as a common property management case study.[78] The present aim is not to repeat these descriptions, but rather to focus upon the legal aspect, noting links between myth, law and common property governance.

The legal inertia on Pohnpeian watershed management noted above is not for want of attempted reform. In 1996, one of the outcomes of the island-wide watershed planning process was a draft bill including a system of watershed planning committees in a co-management arrangement. This was introduced to the state legislature but was not passed.[79] Previously, the Attorney-General had refused to approve regulations necessary to implement the 1987 law because these included elements of a co-management regime.[80] These reform attempts are dealt with in detail elsewhere, it being sufficient for present purposes to note that the Pohnpei State Government leaders were reluctant to re-visit any form of watershed regulation, due almost certainly to the controversy and conflict surrounding the initial attempt.[81]

A legal component was included in the package of GEF-funded project activities that commenced in 2000. Due to the reluctance of the Pohnpei State Government to venture again into the politically dangerous area of watershed regulation, the organisation facilitating the project (the Nature Conservancy) persuaded the Madolenihmw Municipal Government to implement a co-management system within their area. The TNC facilitated a participatory process of legal development in 2000-2001 and the law was passed in 2002. The form of this law, its attempted implementation, and eventual abandonment, has been described by this author elsewhere.[82] Suffice for present purposes to note that there were three primary reasons for the failure of municipal –level co-management in Madolenihmw: Firstly, the municipal government had virtually no technical capacity to assist or oversee a structured natural resource management system of any kind, much less assist local groups to do so. Secondly, the people of Madolenihmw regarded the municipal government, despite its good relations with the traditional leadership, to be

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76 Ibid.

77 Ibid 2-3.

78 Dahl & Raynor note 40. Justin Rose, *Ph D Thesis in Law*, Macquarie University, *in preparation for 2006 submission* Ogura note 55 does not apply a common property analysis, but her research documents many relevant elements.

79 *Pohnpei Rain Forest, Watershed and Mangrove Cooperative Protection Bill 1997*

80 Ogura note 55, 45-49.

81 The Nature Conservancy note 68, 23.

82 Rose note 78, chapter six.

insufficiently empowered to make laws with regard to land conservation and management. Finally, the legal model applied was adapted from a Samoan example and sought to impose complex institutional structures foreign to Pohnpeian mores.[83]

While the experiment with formalised co-management at the municipal level was abandoned, with the agreement of traditional leaders the watershed boundary line in Madolenihmw has been marked and sakau planting above the line has significantly reduced. The watershed boundary line has been marked in U Municipality also, where watershed monitoring reveals a remarkable reduction in upland sakau farming. Watershed monitoring in 2001 indicated there were 1741 new forest clearances for sakau plantings in U, in 2004 there were fewer than 100 new clearings.[84] This is an improved outcome with which any environmental governance agency would be satisfied. The turning-point in watershed conservation in U Municipality is pivotal to the present argument: it was when the Nahnmwarki made it known throughout the municipality in 2003 that "any man who planted sakau above the watershed boundary line will lose his title, or if he has no title the father will lose his title, or if the father has no title, the soumas will lose his title".[85] This edict resulted in a 95 per cent reduction in forest clearing, as shown by systematic on-ground monitoring.

The reason for the difference between the outcomes in Madolenihmw and U on the one hand, and in the three other municipalities where the watershed line remains unmarked is substantially reliant on the attitude of the respective traditional leaderships. The traditional leaders of Kitti Municipality, in particular, continue strong resistance to restrictions on watershed boundary marking despite there having been a series of severe landslides in their area in the past three years.[86] The differing attitudes of the traditional leaders are in turn related to the success or failure of the cooperative dialogue that has been ongoing since the early 1990s.[87]

Pohnpei watershed management is a case study that bears out the legitimacy and utility of the combined contributions of common property governance scholarship, but it also exemplifies the prevalence of locality-specific idiosyncrasies of common property management in practice, and of the cultural embeddedness of legal institutions, especially those exercising control over land and natural resources. With regard to the latter, this is evidenced most obviously by the impressive traditional authority exercised by the Nahnmwarki of U. The effectiveness of the title removal edict is due to numerous factors; the high symbolic value of traditional titles in Pohnpeian community life; the wish to avoid bringing shame on one's family or kousapw; the consistency of the edict with the core messages of community outreach and educational initiatives ongoing since 1992; and finally its consistency with the 1987 forest law.

Of the four reasons suggested above for the effectiveness of the title removal edict in U, the first two point towards an ongoing importance of traditional authority in Pohnpei in a general sense, and with regard to sustainable management of the watershed forests as common property particularly. The connections of the people of Pohnpei to their land are not simply economic; they are in many cases symbolic of the people themselves and of their relationships to one another.[88] In turn, control of the Nahnmwarkis over the watershed forests symbolises and embodies the unity of the wehi and the inherent legitimacy of the traditional institutions which are formative of rural Pohnpeian communities.[89] In linking these observations to Pohnpeian mythohistory it would be crude to

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83 *Personal communication*, Bill Raynor, Director, the Nature Conservancy Micronesia Region, Pohnpei 2005.

84 *Personal communication*, William Kostka, Director of Conservation Society of Pohnpei, Pohnpei 2005.

85 Ibid.

86 Ibid.

87 This is in turn related to the personal networks and community connections held by the directors of the Conservation Society of Pohnpei and the Nature Conservancy in U and Madolenihmw respectively.

88 Hezel note 46.

89 Glenn Petersen "Nan Madol's Contested Landscape: Topography and Tradition in the Eastern Caroline Islands", 1995 *ISLA: A Journal of Micronesian Studies* 3:1, 105-128.

suggest simply that the authority is derived in a direct sense from the myth. It is perhaps more accurate to suggest that the *Isokelekel* myth provides foundational endorsement of the Nahnmwarkis' control over the watershed forests, reinforced by ongoing social practice, ritual and reciprocity, all of which are symbolic of community unity and resilience in the face of rapid social, economic and ecological change. This assessment bears resemblance to Petersen's final conclusion to his monograph on Pohnpeian mythohistory.

> The grand, overriding theme of this history, rising up through the welter of contradictory details and ultimately expressing the deepest inclinations of the Pohnpei people, is that of local autonomy. Great leaders and complex political systems come and go. But local communities, whether they be organised as kinship groups or chiefdoms, persist. True cultural continuity can be found in Pohnpei resistance to political centralisation, and the perpetual recreation of self-respect and shared dignity.[90]

The third reason for the effectiveness of the title removal edict in U considers the impact of external interventions by NGOs and government agencies. From the early 1990s onwards interventions sought both to educate community representatives and members regarding the possible implications of continued watershed degradation, as well as involving them in local-level participatory planning processes. The aim of the latter is the implementation of community development strategies which includes both sustainable natural resource management as well as alternative income-generating options. These programmes are described in detail elsewhere.[91] The issue of present importance is that while the overall impact of these programmes is difficult to measure, it is safe to suggest that their educational components were sufficiently successful such that when the Nahmwarki of U announced a ban on upland sakau planting, the core reasons were generally understood.

Finally, the title removal edict in U represents a reconciliation, a coming together, between state law and traditional authority on the issue of sakau planting in the upland forests. Petersen's research suggests that a recognised trait of Pohnpeian political culture is to maintain alternative sources of authority that can be used to justify alternate courses of action.[92] In traditional terms this would entail oscillations of allegiance between wehi and kousapw, or in the division of kousapw.[93] In contemporary terms this may manifest also in finding conflicts between state and traditional rules for resource governance. The obvious example is of sakau growers planting in the uplands, a sub-group empowered by the widespread opposition among traditional leaders to the 1987 watershed law to continue their activities in defiance of the State Government. Indeed, the plantings could be interpreted as a continuance of the traditional wahn kiki practices, in turn legitimating and exemplifying the tenurial claims of the nahnmwarkis. By issuing the ban under threat of title removal the Nahnmwarki of U brought these alternate sources of authority into agreement upon this basic yet important issue; an act that both removed any suggestion of (customary or legal) legitimacy from future clearings, and reinforced his position as sovereign over the watershed forests of his *wehi*.

1.8 Concluding Observations

Analysis of the Pohnpeian watershed experience as an example of common property management has been undertaken elsewhere by this and other authors.[94] For reasons of brevity the conclusions of these analyses cannot be here reiterated, even in summary. It is suffice for present purposes to note

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90 Petersen note 35, 78.

91 Ogura note 55.

92 Glenn Petersen "On Checks and Balances within the Federated States of Micronesia's Presidential System" presented at *Political Culture, Representation and Electoral Systems in the Pacific Conference*, Vanuatu 2004. Glenn Petersen "Ponape's Body Politic: Island and Nation" (paper presented at the *Conference on Evolving Political Structures in the Pacific Islands*, Institute for Polynesian Studies, Brigham Young University, Hawaii, 1982) 10.

93 Ibid.

94 Note 78.

that leadership, of both government and community institutions, is consistently identified as a decisive factor in Pohnpei. The following concluding observations focus upon the theme of the intersecting of myth, law and common property governance.

The first issue noted is that Pohnpei is just one example among many of contemporary intersections of myth, law and common property governance. In many instances these linkages are concealed, such as that of the Batak of Palawan (Philippines) as reported in the *Common Property Digest*, who chose to avoid revealing in negotiations with government officials the connections between their traditional agricultural systems and their spiritual beliefs relating to the origin of rice and its cultivation.[95] In other cases myth is expressly drawn upon, such as in the Micronesian State of Yap wherein a mythical narrative likening the three paramount customary political divisions to stones (*nguchol*) supporting a cooking pot, is maintained via oral tradition as an important reminder of the need for balance, compromise and power-sharing in political affairs.[96] The Yap Biodiversity Strategy and Action Plan uses the myth, together with its embedded cultural and linguistic significations for Yapese, in explaining the concept of ecological sustainability as "the third *nguchol*" upholding development, along with economic and social concerns.[97] In another example the people of Big Bay on the island of Espiritu Santo in Vanuatu continue to credit their mythical snake spirit guardian Alawuro with the protection of their area from outsiders.[98]

The ongoing authority of the Nahnmwarkis with regard to watershed forests in Pohnpei has presented both challenges and opportunities to sustainable watershed management. No scholarship on appropriate institutional design for common property management could have suggested or predicted either the re-assertion of traditional authority over natural resources in the form of the edict banning upland sakau plantings in U, or its ultimate effectiveness. Nor would the issuance of the edict conform to any "universal" standards of democracy, transparency, accountability or other formulations of "good governance".[99] Regardless of these facts, it was a highly effective institutional response in U. Perhaps these observations add weight to the prioritisation of locally-developed solutions to the institutional challenges of common property management, and provide grounds to be suspicious of those approaches seeking to apply universal evaluative frameworks or prescriptive institutional models.[100]

The final concluding observation is simply to agree with Bill Raynor and William Kostka who lucidly summarise the most fundamental issue illustrated by this case study of myth, law and common property governance:

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95 Dario Novellino "Our Views and Their Views of Conservation" 76 *Common Property Digest* (2006) 10.

96 Margorie Falanruw "Pacific Canaries" 15 *Our Planet: Magazine of the United Nations Environment Programme* (1999).

97 Yap State Government *Chothowliy yu Waab: Yap State Biodiversity Strategy and Action Plan* (Colonia: Yap SG, 2004) 7.

98 Tory Read *Navigating a New Course; stories in community-based conservation in the Pacific islands* (New York: United Nations Development Programme, 2002) 33.

99 For a standard formulation of "good governance" as promoted by bilateral and multilateral donors of international development assistance see: AusAID *Good Governance: Guiding Principles for Implementation* (Canberra, AusAID 2000). For an analysis of the concept see Peter Larmour *Making Sense of Good Governance* State Society and Governance in Melanesia Discussion Paper 98/1, Canberra ANU, 1998, 4. For a critique from an African perspective see James Gathii "Retelling Good Governance Narratives on Africa's Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes Between Markets and States" 45 *Villanova Law Review* 971 (2000). For a formulation with some sympathy to common property and traditional law see Grazia Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation* (Gland: World Conservation Union, 2004) 18.

100 This argument has been made elsewhere with regard to Pacific-wide programmes administered by regional agencies. See Justin Rose "Community-Based Biodiversity Conservation in the Pacific: Cautionary lessons in regionalising environmental governance" paper presented to the *3rd Annual IUCN Academy of Environmental Law Colloquium*, Sydney, Australia July 2005.

> Most importantly, the [recent watershed management reform in Pohnpei] has provided a bridge between the Western conventional centralized approach to resource management adopted by the young government and the Pohnpei traditional community resource management system, characterized by decentralization and consensus-based decision-making based on thousands of years of traditional knowledge. In a sense, the approach is an act of reconciliation, reconfirming those aspects of both political systems that are considered legitimate.[101]

Part Two - Myths of Common Property Governance in Contemporary Environmental Law

2.1 Introduction

Upon reading the account of law and governance of Pohnpei's watershed forests provided in the previous section many legal scholars would locate the core problem to be in the backward nature of Pohnpeian society and in its weak governance institutions. Such perspectives may note that the 1987 law was based upon sound scientific data and sought to apply well-tested regulatory methods. In a jurisdiction with adequate respect among the citizenry for the rule of law and a government with sufficient political will to ensure sustainable watershed management, the implementation problems would not have arisen or would have been resolved summarily. This perspective would regard the ongoing influence of Pohnpei's traditional leaders, and their support for opposition from resource users to implementation of the 1987 law, to be a primary cause of forest degradation. Traditional ecological knowledge and customary norms might be relevant with regard to accompanying participatory processes, but are certainly not themselves *sources of law*. The sakau planting edict in U Municipality would in this view be an undemocratic and dictatorial anachronism; a type of solution to be discouraged on principles of "good governance".

Evolutionism in legal theory commenced a millennium before its biological counterpart and contrary evidence and arguments cannot be here pursued.[102] The point to note at present is that the authority exercised by Pohnpeian *nahnmwarkis* would not be considered "law" according to the positivist, formalist body of legal theory informing contemporary environmental law. In this perspective, without express recognition in the laws of the State of Pohnpei, whatever authority the *nahnmwarkis* exercise it is not "legal" in any civilised sense. Moreover, the possible or partial foundation of that authority in irrational tales of ancient heroes would render it further removed from the realm of legitimate legal concern.

This part does not confront these attitudes directly, seeking instead to invert the typical modern/traditional hierarchy and trajectory by briefly considering those perspectives in critical philosophy, legal theory and sociology suggesting that contemporary environmental law may also have a basis in myth. Specifically, this part asks whether, and in what respects, Hardin's *The Tragedy of the Commons* (hereinafter *the Tragedy*) could be considered a foundational myth of contemporary environmental governance. Accordingly, the following section provides a brief recounting of Hardin's little epic adapted to a narrative outline format.

2.2 The Tragedy

The *Tragedy of the Commons* first happened in a pasture in peaceful Anyland. Peace had come only recently to Anyland, because its people had been cursed for centuries by tribal warfare and

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101 Bill Raynor and William Kostka *"Back to the Future: Using Traditional Knowledge to Strengthen Biodiversity Conservation in Pohnpei, FSM" a paper presented to the* Building Bridges with Traditional Knowledge Conference, *Honolulu, June 2001*, 22.

102 See Tamanaha's discussion at Brian Tamanaha *General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001) 51-55.

disease.[103] But the dark times were over and the Anylanders were at last thriving. It was in these circumstances, in a common pasture near a peaceful, disease-free Anyland village that the logic of the commons remorselessly generated its tragedy.

Village herdsmen grazed their animals on the common pasture. At first there were only a few herdsmen and a few animals, but over time the numbers of both grew. The looming tragedy was the overgrazing of the pasture resulting in long-term reduction of overall productive capacity. Faced with this tragic possibility the herdsmen, each being rational, asked of himself "What is the utility to me of adding one more animal to my herd?" The answer that each herdsmen gave to himself, remembering they are all rational men, was "The positive component is the entire proceeds of the sale of one animal. The negative component is the degradation to the pasture caused by the additional animal, however, since the effects of the overgrazing are shared by all the herdsmen, I will personally suffer only a fraction of it."[104] The conclusion reached by each and every rational, uncommunicative herdsman sharing a commons is that the only sensible course for him to pursue is to add another animal to his herd.

> Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit – in a world that is limited. Ruin is the destination to which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.[105]

There are two ways for Anylanders to escape the tragedy and both involve relinquishing the commonness of property. The first solution is to allocate private property rights for the pasture thereby creating market-based incentives for the owners to manage their herds giving due regard to long-term productivity. The second solution, presented both as an alternative or an addition to the first, is to convert the common property to property regulated in the public interest by the state. The latter is occasionally known as the "Leviathan" solution.[106]

2.3 The Influence of the Tragedy on Environmental Law and Governance

Garrett Hardin's original article published in *Science* magazine has been described as a "neo-Malthusian pamphlet", and while not an extraordinary feat of either original scholarship or literary excellence, it is one of the most often-cited scientific papers written in the last five decades, stimulating much interest in many disciplines including law.[107] Hardin claimed that it "became required reading for a generation of students and teachers seeking to meld multiple disciplines in order to come up with better ways to live in balance with the environment."[108] Ostrom suggested "[T]he tragedy of the commons has come to symbolize the degradation of the environment to be expected whenever many individuals use a scarce resource in common".[109]

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103 This narrative is constructed closely upon Hardin's original *Science* article: Garrett Hardin "The Tragedy of the Commons" (1968) 162 *Science*: 1243-1248. Hardin specified no location; I have called this non-place "Anyland".

104 This is a close adaptation of Hardin's original formulation.

105 Hardin note 103.

106 For example, Garrett Hardin "Political Requirements for Preserving Our Common Heritage" in *Wildlife and America*, Bokaw H (Washington DC: Council on Environmental Quality, 1978) 314.

107 Elinor Ostrom, Thomas Dietz, Nives Dolšak, Paul C. Stern, Susan Stonich and Elke Weber (eds) *The Drama of the Commons* (Washington DC: National Academies Press, 2002) 6. Ostrom notes that Aristotle made similar observations ("what is common to the greatest number has the least care bestowed on it") as did William Forster Lloyd (1833) and H Scott Gordon (1954): Elinor Ostrom *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990) 2-3.

108 Garrett Hardin "Extensions of "The Tragedy of the Commons" 280 *Science* (Issue 5364) 682-683, 1 May 1998 at 682.

109 Ostrom note 107, 2

The trajectory of this intellectual activity is revealing. The initial post-Hardin work of resource economists indicated strong support for Hardin's thesis of freedom in a commons bringing ruin to all, stressing "the importance of unitary ownership—including privatization as well as government ownership".[110] These conclusions were influential in supporting policy innovation, driven in many cases by multilateral financial institutions, which ultimately resulted in legislation, particularly in developing countries, that transferred land and natural resources from their previous property rights regimes to government ownership.[111]

The body of academic literature addressing instances of common property management has grown enormously since that time. A now widely-accepted suggestion is that *the Tragedy* provides a model adequately describing situations of "open access", but the empirical evidence drawn from contexts of genuinely group *owned* property suggests that these succeed or fail by virtue of many interconnected ecological, social and economic factors.[112] Much common property literature is highly critical of the post-Hardin nationalisation of natural resources:

> [T]hese transfers of property rights were sometimes disastrous for the resources they were intended to protect. Instead of creating a single owner with a long-term interest in the resource, nationalizing common-pool resources typically led to (1) a rejection of any existing indigenous institutions—making the actions of local stewards to sustain a resource illegal; (2) poor monitoring of resource boundaries and harvesting practices because many governments did not have the resources to monitor the resources to which they asserted ownership; and (3) de facto open access conditions and a race to use of the resources.[113]

As a result of these historical experiences, the solution of government regulation to the "commons dilemma" has been repeatedly called into question as universally productive, a situation mirrored in the privatisation realm by the prevalence of imperfect and under-informed markets.[114]

The environmental law academy, which has a noted aversion to theoretical innovation, is among the last of the disciplines concerned with governance of land and natural resources to remain constricted by the logic of *the Tragedy* and its dual solutions.[115] *The Tragedy* is often introduced to students in the first session of an Environmental Law or Natural Resources Law university course, and while perhaps rarely mentioned thereafter, the regulation/privatisation dichotomy/continuum of institutional responses remain permanent themes.

Environmental law commentators write of "the reinvention of environmental law" by the application of mechanisms, such as emissions trading schemes, wherein the incentives of efficient production, rather than state coercion, drive improvements in outcomes.[116] These narratives suggest environmental law was invented in the twentieth century as a response to uncontrolled

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110 Ostrom et al note 107, 11..

111 Ibid.

112 Arun Agrawal, "Sustainable Governance of Common Pool Resources: Context, Methods and Politics" (2003) *Annual Review of Anthropology*, 244.

113 Ostrom et al note 107, 11.

114 Baland & Platteau *Halting Degradation of Natural Resources: Is There a Role for Local Communities?* (FAO, Rome, 1996). Chapter 3 of *Halting Degradation* discusses the theory and practice of property rights responses to commons dilemmas, and preconditions for their efficiency.

115 On aversion to theory see: Tranter K "Return to Green Foundations: Liberation and Survival" (1999) 8 *Griffith Law Review* 280-316; and Richard Brooks "A New Agenda for Modern Environmental Law" (1991) 6 *Journal of Environmental law and Litigation* 1, 12.

116 Rena Steinzor "Reinventing Environmental Regulation: The Dangerous Journey From Command To Self-Control", 22 *Harvard Environmental Law Review* (1998) 103. Neil Gunningham & Darren Sinclair *Leaders and Laggards: Next Generation Environmental Regulation* (Sheffield: Greenleaf Publishing, 2003)

resource use, pollution and ecosystem degradation.[117] The first generation of coercive regulatory mechanisms achieved important improvements in practices, but further improvements will be most effectively sought by gearing institutional responses to market-based incentives.[118] There is little opposition to greater targeted use of market incentives in environmental governance, but nuanced perspectives recognise that the state will always maintain an enforcement role of some description. These contributors suggest the aim is finding an appropriate "regulatory mix".[119] What is important to note here is that *the Tragedy's* logic encompasses all points on a "command-and-control > market mechanisms" continuum of environmental law responses.[120]

Few legal commentators have grappled with the implications for their discipline of the findings reported in common property literature recognising the potential of the local polity as a source of legitimate authority in the interests of sustainable natural resource governance.[121] Elsewhere, this author has suggested that legal pluralism provides an appropriate thematic lens through which legal observers may view the widespread paradigm shift towards participatory natural resource governance.[122] One way a legal pluralist perspective may justify a legitimate role in natural resource governance for the local polity is in suggesting that it has its own intrinsic "rationality"; a unique *logos* founded upon a unique *mythos*. As a means of complementing those arguments, the remainder of this paper examines arguments suggesting contemporary discourses in law and governance are themselves founded in *mythos*. This focuses specifically upon an enquiry into "mythic" elements of *the Tragedy*.

2.4 Modern Constructions of Myth

There are a great variety of perspectives on myth in modernity. In *The Modern Construction of Myth* Andrew Von Hendy characterises four streams of theorising; the romantic, the anthropological, the ideological, and the constitutive.[123] To these could have been added structural and psychological categories. The first part herein provided a brief introduction to anthropological sources. While modern romantic mythopoeia is elsewhere evident in contemporary discourses of environmental law and governance, it has only marginal relevance for *the Tragedy*.[124] The two final streams as categorised by Von Hendy, the ideological and the constitutive, are the focus of this brief review. An ideological perspective adopts a negative, suspicious stance towards myth. Literature is classed as constitutive if it regards mythopoeia to be a permanent possession of humanity; that shared illusions are somehow constitutive of culture.

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117 A recent restatement can be found at Laurence Cordonnery "Environmental Law Issues in the South Pacific and the Quest for Sustainable Development and Good Governance" in *Passage of Change: Law, Society and Governance in the Pacific* (Pandanus: Canberra, 2003) 237.

118 Prest summarises these developments in his second chapter: James Prest *The forgotten forests: the environmental regulation of forestry on private land in New South Wales between 1997 and 2002* PhD Thesis, University of Wollongong, 2003.

119 Neil Gunninham and Peter Grabosky *Smart Regulation: Designing Environmental Policy* (Oxford: Oxford University Press, 1998).

120 Carol Rose "Common Property, Regulatory Property and Environmental Protection: Comparing Community-Based Management to Tradable Environmental Allowances" Elinor Ostrom et al (eds) *The Drama of the Commons* (Washington DC: National Academies Press, 2002) 236.

121 See Ibid. Also Owen Lynch & Kirk Talbott Balancing Acts: Community-Based Forest Management and National Law in Asia and the Pacific (World Resources Institute: Washington DC, 1995) and James Lindsay Legal Frameworks and Access to Common Pool Resources FAO Legal Papers Online #39, 2004.

122 See Rose notes 78, 100.

123 Von Hendy note 26.

124 For example, the concept of "wilderness", understood as a nature without people – *terra nullius* – can be critiqued as a neo-romantic myth constructed by those to whom indigenous peoples were either invisible or non-human. Jules Pretty *Agri-Culture* (London: Earthscan, 2002) 14-16.

2.5 The Tragedy of the Commons as an Ideological Myth

> *They hang the man and flog the woman*
> *That steals the goose from off the common*
> *But let the greater villain loose*
> *That steals the common from the goose.*[125]

Literature is considered within this category if its aims include unmasking the bases of political ideology, of any hue, as fictitious or illusory and adherents to it of practising something akin to religious faith. These authors adopt negative stances towards "myth"; this being the mark excluding them from the final constitutive grouping whose members view myth either neutrally or favourably. Among the perspectives contributing include those of Marx, neo-Marxists, anarchists, feminists and economic reformers prioritising social and environmental factors. These authors apply differing conceptions of "myth", from the popular usage of "widely-dispersed lie" to highly nuanced illusion-constructing dynamics. Placing them together in a single category does not imply their combined contributions constitute a coherent or consistent line of thinking. Indeed, some view themselves in opposition to each other, accusing their co-iconoclasts of mythopoeia.

Of the cornerstones of the critique of capitalist myth Karl Marx's theory of commodity fetishism remains steadfast.[126] Marx outlined the dynamic thus:

> A commodity appears at first sight a very trivial thing, and easily understood. Its analysis shows that in reality it is a very queer thing, abounding in metaphysical subtleties and theological niceties . . . To find an analogy we must have recourse to the mist-enveloped regions of the religious world. In that world the productions of the human brain appear as independent beings endowed with life. . . . So it is in the world of commodities with the product of men's hands. This I call the Fetishism which attaches itself to the products of labour, so soon as they are produced as commodities.[127]

Commodities, whose value should reflect merely labour and use, are upon production endowed transcendent qualities that are reified in an exchange value; a fetish character that "has spread like a cataract across society in all its aspects".[128] Von Hendy characterises this as the demystification of "the oldest Western archetype . . . in the shrine of capitalism" where the commodity "is worshipped as the true god".[129] In this perspective capitalist ideology bounds reason such that no rational person can honestly say "I have enough commodities" any more than a believer could declare "I have enough divinity".[130] The corollary is that capitalism is founded upon a need to produce an ever-increasing volume of commodities to satisfy demands that are by definition insatiable. Sandler terms this imperative Grow or Die: GOD.[131]

Marx's analysis, both of the mystical origin of exchange values as well as of capitalist ideology and production modes more generally, provides direct and indirect source material for much that flows in the myth-as-ideology vein, with many implications for theory on environmental governance. Marxists and neo-Marxists have for some time debated interpretive versions of the theory of value in attempting to answer its environmentally-minded critics and to prove its

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125 English folk verse circa 1760.

126 This is in contrast to his theories on religion. This he predicted would fade in response to economic prosperity. History has not shown this to be the case shown by examples such as Ireland and the United States.

127 Karl Marx *Capital*, Volume 1.

128 Max Horkheimer & Theordor Adorno *Dialectic of Enlightenment, Philosophical Fragments*, (Stanford: Standford University Press, 2002) 21.

129 Von Hendy note 26 58.

130 This is theme illustrated throughout the contemporary social critique of Clive Hamilton *Growth Fetish* (Sydney: Allen and Unwin, 2003).

131 Blair Sandler "Grow or Die: Marxist theories of Capitalism and the Environment," 7 *Rethinking Marxism* (1994) 38-57.

compatibility with a "sustainable economic system".[132] There have been Marxist critiques of *the Tragedy* and these will not here be reiterated, except for the following observations regarding commodification.[133]

The insight from Marx considered most revealing in terms de-masking the mythic role of *the Tragedy* is its significance in justifying the commodification of land. This it does by implying that markets can efficiently allocate natural resources in the interests of long-term productivity only when land is regarded first and foremost as a commodity capable of individual ownership.[134] This can be considered *the Tragedy's* most vital ideological role; to reinforce the belief that land must be a commodity, individually owned, available for and valued by market exchanges. In the past land was very often reified in the sense that many elements of nature were considered to be imbued with spirituality. Upon becoming a commodity, land is reified in the creation of its exchange value, and its character as a commodity is accordingly prioritised above all other concerns.

Current examples of ideological arguments insisting upon the commodification of land, with a clear heritage to *the Tragedy*, are not difficult to locate. Examples are recent statements of the Australian Federal Minister for Immigration and Aboriginal Affairs suggesting an end to community land ownership among indigenous Australians.[135] Papua New Guinea's economic woes are frequently blamed in large part upon customary land ownership, with some academic commentators continuing to justify their reform suggestions upon comparisons with eighteenth century England. [136]

Roland Barthes' influential *Mythologies* opens alternate avenues for a myth-as-ideology critique of *the Tragedy*.[137] *Mythologies* combines twenty-eight short sociological essays on topics such as *The World of Wrestling*, *Soap-powders and Detergents*, *Steak and Chips* and *Plastic*, with a longer piece titled *Myth Today* which draws upon Saussure in positing myth as "a second-order semiological system", illustrated as follows:[138]

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132 E.g. James Foster *Marx's Ecology* (New York, Monthly Review Press, 2000); Paul Burkett *Marx and Nature* (New York, St. Martin's Press, 1999) and Jonathon Hughes *Ecology and Historical Materialism* (Cambridge: Cambridge University Press, 2000).

133 John Vandermeer "The Tragedy of the Commons: The Meaning of the Metaphor" 60 *Science & Society* (1996) 290-306.

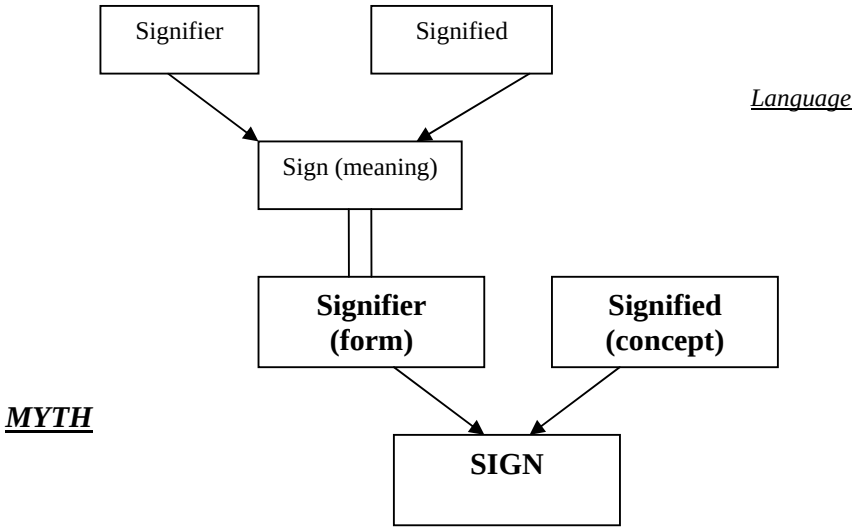
134 Tim Curtain, Hartmut Holznecht and Peter Larmour "Land Registration in Papua New Guinea: Competing Perspectives" *State Society and Governance in Melanesia Discussion Paper* 2003/1, 16.

135 Australia: "Give Me Land Lots of Land" *The Economist* Nov 17 2005.

136 Papua New Guinea: Curtain, Holznecht and Larmour note 134. Note Curtain's contribution in particular.

137 Roland Barthes *Mythologies* (New York: Hill and Wang, 1972; orig. pub.1957)

138 Ibid.



Barthes suggests myth is less a concept than a system of communication. For Barthes "myth is a type of speech defined by its intention [concept] much more than by its literal sense [form]; and that in spite of this, its intention is somehow frozen, purified, *made absent* by this literal sense."[139] Barthes illustrated this by reference to a photograph on a magazine cover of an African colonial soldier giving the French military salute. He claims "[m]yth does not deny things, on the contrary its function is to talk about them; simply, it purifies them, it makes them innocent, it gives them a natural, eternal justification, it gives them a clarity which is not that of an explanation but that of a statement of fact."[140] In his example of the soldier on the magazine cover, the mythical concept is French imperiality; this is in no way hidden, it is rather on display. Yet the form of the communication is such that there is continual oscillation between the meaning of the original sign (an African soldier saluting) and the signified concept (French imperiality) such that *the concept is naturalised and thus made to appear unmotivated*.[141] "The French Empire? It's just a fact: look at this good Negro who salutes like one of our own boys".[142] Hiley digests Barthes ideas of "the great distortion of myth" thus;

> it disguises itself as an inductive system, when it is in fact a semiological one; the reader, instead of recognising the arbitrary connection between signifier and signified, believes there to be a natural relationship between them. This appearance of naturalness justifies myths claim to timelessness and universality. It transforms historical reality into a natural, self-justifying image of this reality. Myth thus poses an absolute, an essence, denying any relativity; it is valid everywhere and at all times, denying the existence of anything beyond itself.[143]

The figure below applies Barthes semiology to *The Tragedy*, posited as a modern myth in an ideological sense.

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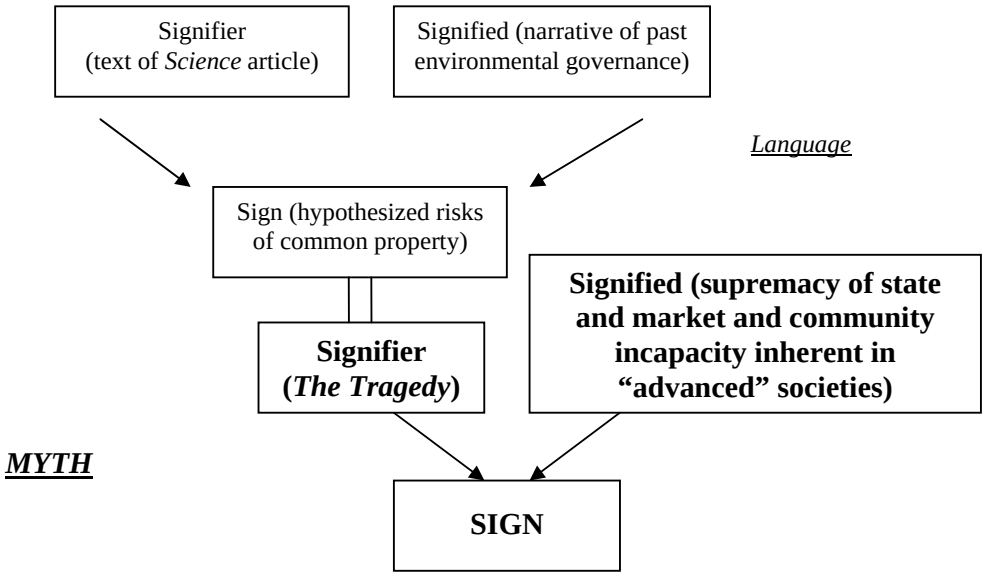
139 Ibid, 124

140 Ibid.

141 Margaret Hiley "Stolen Language, Cosmic Models: Myth and Mythology in Tolkien" 50 *Modern Fiction Studies* (2004) 838-860, 840.

142 Barthes note 137, 124

143 Hiley note 141, 841.



The figure above presents *the Tragedy*, in its role as a founding myth of environmental law and governance, as both embodying and obfuscating core elements of capitalist ideology. *The Tragedy* naturalises, precisely by *not* justifying, a situation in which "unconstrained aggregate satisfaction of uninstructed private tastes" is assumed to be the primary objective of governance.[144] Moreover, by directing its conclusions towards the number of people on the planet rather than production and consumption choices, *the Tragedy* naturalises a vision of unfettered individual consumption, somehow reconciling this with rational and sustainable ecological outcomes.

One is here reminded of Levi-Strauss: "The purpose of myth is to provide a logical model capable of overcoming a contradiction".[145] He also noted that this is of course impossible if the contradiction is "real". In this perspective myth plays the vital role of enabling the apparent resolution of intractable conflicts; *a denial of choice* repressing fundamental contradictions into a shared cultural subconscious. The herders in *the Tragedy* cannot choose to engage in dialogue with a view to devising sustainable pasture management; they are instead bound to myopically obey their short-term economic self-interest.

Max Horkheimer and Theodor Adorno provide an intriguing critical appraisal of myth in an ideological sense. It is acknowledged that the complex, literary and fragmentary nature of their work resists such interpretive summary as is here attempted. Drawing inspiration from many directions including Nietzsche and Marx, they place "myth" and "enlightenment" in dialectical relationship as do some Marxists with "myth" and "ideology".[146] The dual theses of their classic treatise *Dialectic of Enlightenment* are "myth is already Enlightenment; and Enlightenment reverts to mythology".[147] We freed ourselves from the superstition and fatalism of myth through our understanding of nature in its components, a process whose germination relied upon the reporting, recording and explanatory powers of myth itself.[148] But our spectacular successes in achieving such understanding turned to domination; of ourselves, of other people and of nature.[149] Moreover, we are alienated from that which we seek to dominate.[150] We express unquestioned

144 Herman Daly *Five Policy Recommendations for a Sustainable Economy* Speech Given in Oslo upon receipt of the Sophie Award, June 15 1999.
145 Levi-Strauss note 31.
146 George Sorel, for example.
147 Max Horkheimer & Theordor Adorno *Dialectic of Enlightenment, Philosophical Fragments* (Stanford: Stanford University Press 2002) (first published 1947) xviii, 7-8, 20.
148 Ibid 3, 5, 20.
149 Ibid 2, 21.
150 Ibid 6, 21, 32.

faith in the methods of reductive scientific positivism, an irrational belief given the weighty remainder of the uncomprehended whole.[151] Enlightened thought, which began as the freeing of conception, became a process of developing and reinforcing closed intellectual systems.[152] Our terror of the unknown future is quelled, as it has always been, by irrational belief in certitude. That we can now comprehend our fatalism does not remove its fatalistic character.[153]

Dialectic of Enlightenment, in presenting a narrative of mythic enlightenment turned, through domination, to mythic delusion, has perhaps more to contribute to an appraisal of "the myth of sustainable development" than *the Tragedy*. Nevertheless, elements of *the Tragedy* are also illuminated by it. Fundamentally, in gaining an understanding of the mythical herder's plight one is led irresistibly to a conclusion that human interactions with nature should be mediated by the state or the market. In many ideological perspectives such mediations necessarily imply dominance via coercion or profit-taking, and the very act of mediation is also one of alienation. Finally, that the logic of *the Tragedy* represents an irrational and fatalistic belief in the flawed conclusions of a closed intellectual system is a theme often emphasised within common property governance literature.[154]

Horkheimer and Adorno's skilfully crafted narrative of humanity's struggle against mythopoeia has in turn been drawn upon by other theorists of myth in modernity. The Frankfurter's thesis of a permanent dialectic of myth and antimyth might have placed them in the last category of thinkers, but ultimately they are opposed to myth, maintaining the Enlightenment "will only fulfil itself if it forswears its last complicity with [its Romantic enemies] and dares to abolish the false absolute, the principle of blind power".[155] Nevertheless, many who derive ideas from them belong in the constitutive category; of those content to resist the temptation to resist fictivity.

2.6 The Tragedy of the Commons as a Culturally Constitutive Myth

Literature is classed within this category if it regards mythopoeia to be a permanent possession of humanity; that shared illusions are somehow constitutive of culture. Hegel's *The Struggle of Enlightenment with Superstition* may be regarded as a succinct framing of the re-entry of myth in modernity: "It will yet be seen whether enlightenment can continue in its state of satisfaction; that longing of the troubled beshadowed spirit, mourning over the loss of its spiritual world, lies in the background. Enlightenment has on it this stain of unsatisfied longing."[156] Ideological contributors invest their energies in a cleansing iconoclasm that imagines a world purged of myth; the constitutive theorists have viewed Hegel's stain and announced it a birthmark.

The first contributor considered is legal theorist Desmond Manderson who argues that even though law is "produced in the dialogue and discourse all about us. . . . there *are* nevertheless texts that provide an important discourse through which we develop assumptions as to the meaning, function, and interpretation of law".[157] These texts are myths, and while Manderson's focus is children's literature exemplified by Sendak's *Where The Wild Things Are*, the current suggestion is that *the Tragedy* is a similarly mythical text.

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151 Ibid 8, 11.
152 Ibid 15, 22-23.
153 Ibid 22, 30-31.
154 An obvious example is Ostrom's critique of determinist attitudes, "the only way": Ostrom note 107, 13-15.
155 Horkheimer & Theordor Adorno note 147, 33.
156 Georg Hegel *The Phenomenology of the Spirit* (New York: Harper and Bow, 1967) 589.
157 Desmond Manderson "From Hunger to Love: Myths of the Source, Interpretation, and Constitution of Law in Children's Literature" 15 *Cardozo Studies in Law and Literature* (2003) 87.

For Manderson a law-constituting myth takes three concurrent forms. It is firstly "a psychological cummerbund" which "dramatizes and ornaments the cleavage that lies at the origin of any normative system, the moment of its foundation, making a virtue of necessity".[158] The point Manderson is making here is that at the historical foundation of a legal object is the act of violence and illegality that was its birth; this often distressing and bloody event requires narratives (of social contracts, for example) that soften and legitimise it within the collective memory.

> [E]very legal judgment, *every* act of interpretation, in as much as it is not conclusively referable to some previous text, statute, or case, suffers from the momentary aberration to which Kelsen gave the name *Grundnorm*: each and every such decision is an exercise of choice whose legality can only be determined by its confirmation *thereafter*.[159]

This element is recognisable in *the Tragedy* in both its textural, mythic formulation, and in many of the historical events surrounding the processes of individualisation or state appropriation of previously common property. Hardin's herders are locked into their pattern of resource degradation and can escape only upon the imposition of the coercive power of the state, by definition an act of threatened or actual violence. Forcible expulsions of indigenous peoples from their commonly-held traditional lands are real examples of these moments of violence and illegality. The sometimes violent, and always deeply-felt, nature of the contemporary debate on land registration and privatisation in Papua New Guinea further exemplifies this.[160] More broadly, reflecting upon Australian environmental law and governance, indeed Australian law generally, indicates that it is founded in a continuing and unreconciled acceptance of the act of violence and illegality that was the usurpation of the lands of indigenous Australians, thereinafter justified by the doctrinal myth of *terra nullius*.[161] This mirage of law was eventually laid bare in the *Mabo* decision, but the subsequent response to this juridical demythologisation has done little to mitigate the legacy of *terra nullius* as a foundational concept in Australian law.[162] *The Tragedy*, similarly to *terra nullius*, provides a narrative legitimating and justifying the conversion of common property, not as something marked by conflict, but as a natural component of "progress" and "civilisation".

Manderson suggests the second form of myth is to constitute "legal subjects in accordance with the values it narrates".[163] Here he draws upon the metaphor of stellar constellations; different cultures have viewed the same randomly positioned stars and in them discovered patterns that give rise to different stories. The "patterns are not "in" the stars but in the stories under the influence of which they are approached and indeed rendered comprehensible".[164] By playing an analogous role in relation to social facts, myths lay down paths of understanding and evaluation upon which individuals can make sense out of a world of jumbled meaning. "Myths constitute our relationships, to ourselves, to others, and to institutions. They are neither true nor false, but a way of becoming true, and of making us true to their premises and promises".[165]

In reflecting these ideas upon *the Tragedy* one clearly recognises the ideal-typical modern individual, *homo economicus*, in Hardin's herders. Bounded economic rationality and individual self-interest are the prime characteristics. This is a curse and a blessing; a curse because it means that if their resource use is not mediated by the state or the market that they are doomed to perish. Yet therein also is the blessing, the salvation of the market and the state lie close at hand. Thus, to

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158 Ibid, 89.
159 Ibid.
160 Curtain, Holznecht and Larmour note 134.
161 Stuart Banner "Why Terra Nullius? Anthropology and Property Law in Early Australia" 23 *Law & History Review* (2005) 95-131.
162 *Mabo v Queensland* (No 2) (1992) 175 CLR 1.
163 Manderson note 157, 89.
164 Ibid, 90.
165 Ibid.

the extent that contemporary environmental law and governance is a discourse on the mediation by the state and the market of natural resource-using activities, *the Tragedy* can be recognised as being among its founding, constituting, myths.

Manderson's third and final form taken by myth is its existence as narrative. Unlike other theorists, Manderson considers narrative to be an essential element "since it is what gives to myth its transformative power".[166] These narratives are formative rather than prescriptive; "they do not lay down laws for us. Instead, they inscribe behaviour: they lay down ways of being in us."[167] In support he cites Robert Cover's influential 1983 article:

> For every constitution there is an epic, for each Decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live. In this normative world, law and narrative are inseparably related.[168]

Adapting Manderson's approach as described above *the Tragedy* can be read as a reiteration of the narrative of the primal scene from whence social and legal order first emerged:

> [T]ime and again, our legal culture retells the story of how we sacrificed the state of nature and submitted instead to a legal order marked by objectivity and obedience. Indeed, the objectivity of the law and the obedience of its subjects seem precisely to be the terms of this new settlement. The story is always told as a tragedy and as a loss of innocence, but nonetheless necessary for that.[169]

The significant loss of innocence embodied in *the Tragedy* is not captured by Hardin's neo-Malthusian attack upon "freedom to breed", but is located instead in the acceptance and reinforcement of Hobbes' bleak vision of human nature as irrevocably greedy, violent and atomistic.[170] *The Tragedy* not only justifies these elements, but lays the groundwork for redemption via governance in which the scientific choices of the state, combined with the efficient functioning of the market, prevents the anticipated catastrophe.

Taking a sociological turn, in their classic 1966 treatise *The Social Construction of Reality* Peter Berger and Thomas Luckmann set out a theory of human institutionalisation.[171] While myth was peripheral for Berger and Luckmann, their ideas on the role of myth, and myth-like phenomena, in social life nevertheless place them in the class of constitutive mythic theorists. For reasons of brevity this discussion is focused narrowly upon their statements regarding myth and symbolic universes and the possible relevance of these concepts to *the Tragedy*.

Berger and Luckmann apply a broad conception of institution and institutionalisation: "Institutionalisation occurs wherever there is *a reciprocal typification of habitualised actions* by types of actors. Put differently, any such typification is an institution".[172] Institutions are always related to historicity and control.

> Institutions always have a history, of which they are the products. It is impossible to understand an institution adequately without an understanding of the historical process in which it was produced. Institutions also, by the very fact of their existence, control human conduct by setting

166 Ibid.
167 Ibid.
168 Robert Cover, "*Nomos* and Narrative," 97 *Harvard Law Review* 4 (1983) 4-5.
169 Manderson note 157, 88.
170 Thomas Hobbes *Leviathan* (New York: Collier, 1962) (first published 1651) Chapters 1-16.
171 Peter Berger and Thomas Luckmann *The Social Construction of Reality: A Treatise on the Sociology of Knowledge* (New York: Anchor, 1966).
172 Ibid, 54.

> up predefined patterns of conduct, which channel it in one direction as against the many other directions that would theoretically be possible.[173]

They emphasise that while control is inherent in the initial construction of the institution, actual mechanisms of control are only required insofar as the processes of institutionalisation are less than fully successful.[174]

Considering the success of institutionalisation processes brings the discussion to legitimation and symbolic universes. Berger and Luckmann describe legitimation as a "second order" objectivation of meaning which produces new meanings serving to integrate the meanings already attached to disparate institutional processes.[175]

> Legitimation is not necessary in the first stage of institutionalisation, when the institution is simply a fact that requires no further support either intersubjectively or biographically; it is self-evident to all concerned. The problem of legitimation inevitably arises when the objectivations of the (now historic) institutional order are to be transmitted to a new generation. At that point, as we have seen, the self-evident character of the institutions can no longer be maintained by means of the individual's own recollection and habitualization.[176]

Legitimation justifies the institutional order by providing normativity to what would otherwise be considered merely practical imperatives.[177] Berger and Luckmann distinguish analytically between four different levels of legitimation; incipient knowledge, theoretical propositions in a rudimentary form, explicit theories legitimating specific institutional sectors and symbolic universes.[178]

Symbolic universes are "bodies of theoretical tradition that integrate different provinces of meaning and encompass the institutional order in a symbolic totality".[179]

> The symbolic universe is conceived of as the matrix of all socially objectivated and subjectively real meanings; the entire historic society and the entire biography of the individual are seen as events taking place within this universe. . . The symbolic universe is, of course, constructed by means of social objectivations. Yet its meaning bestowing capacity far exceeds the domain of social life, so the individual may "locate" himself within it even in his most solitary experiences.[180]

Berger and Luckmann suggest that the experience of death, both that of others and the anticipation of one's own death, posit an extreme marginal situation for every individual, and that integrating these experiences are among the most pivotal roles of symbolic universes.[181]

> A strategic legitimating function of symbolic universes for individual biography is the 'location' of death.... Whether it is done with or without recourse to mythological, religious or metaphysical interpretations of reality is not the essential question here. The modern atheist, for instance, who bestows meaning upon death in terms of a *Weltanschauung* of progressive evolution or of revolutionary history also does so by integrating death with a reality-spanning symbolic universe.[182]

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173 Ibid, 54-55.
174 Ibid, 55.
175 Ibid, 92.
176 Ibid, 93.
177 Ibid.
178 Ibid, 94.
179 Ibid.
180 Ibid, 96.
181 Ibid, 101.
182 Ibid, 101.

In this perspective each individual has a mythic consciousness, a symbolic universe, functioning in a way that legitimates death and thereby life; enabling everyday routines of social reproduction to continue after the death of loved ones, and notwithstanding the undeniable immanence of their own death to face each day with "terror sufficiently mitigated".

> The symbolic universe also orders history. It locates all collective events in a cohesive unity that includes past, present and future.... Thus the symbolic universe links men with their predecessors and their successors in a meaningful totality, serving to transcend the finitude of individual existence and bestowing meaning upon the individual's death. All the members of a society can now conceive of themselves as belonging to a meaningful universe, which was there before they were born and will be there after they die.[183]

Berger and Luckmann's concept of symbolic universes are of present import for various reasons. Firstly, they provide an explanation from a sociological perspective for an ongoing resort to myth. The present suggestion is that to the extent that *the Tragedy* represents, within the realm of environmental law and governance, a widespread explanatory narrative integrating claims of progressive evolution coupled with aspirations of sustainable natural resource management, it is a constituting element within the symbolic universes of many environmental governance actors and decision-makers.

Berger and Luckmann's symbolic universes have other implications for the interpretation of *the Tragedy* if combined with secondary theories. One line of thinking combines the implications commodity fetishism with those of symbolic universes. In the words of Baland and Platteau:

> A central feature of recent evolution in capitalist societies may be seen as the rise of individualism, a phenomenon directly associated with the development of a materialist society based upon mass consumption. This development has been accompanied and promoted by active marketing policies that have largely succeeded in conveying the deceptive message that happiness or removal of pain can be achieved through individual consumption of things (goods and services). In the process, the problem of death and human suffering has been essentially obliterated by creating the illusion of man's immortality or eternal youth.[184]

What promises did the Moai make to the people of Rapanui to entice them to indulge in the megalomanic forest cutting that caused their demise?[185] Today's Commodity Gods, as authors such as Bauman and Murray point out, are now promising their devotees a life free of suffering and death.

> [I]n modernity the fact of our mortality has become a series of afflictions that can be overcome by 'rational' cures and preventions – don't smoke, eat or drink to excess, and be sure to practice safe sex. Death then becomes a series of unpleasant but tameable diseases. . . . through the deconstruction of mortality in post–late–modern society, immortality has become our birthright.[186]

In this view increasingly fragmented and episodic experiences of time add to the illusion that no aspect of life or death remains outside the realm of circulating commodities and recycling relationships; the modern utopia wherein, for the chosen ones, no loss is beyond costing or

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183 Ibid, 103.

184 Jean-Marie Baland & Jean-Philippe Platteau *Halting Degradation of Natural Resources: Is There a Role for Local Communities?* (FAO, Rome, 1996) chapter 6, section 3.

185 The Moai were the gods of the people of Easter Island, the Rapanui. The narrative of the downfall of the Easter Islanders has received much attention of late, see Jared Diamond *Collapse: How Societies Choose to Fail or Survive* (London: Penguin 2005) 79-119.

186 Mary Murray "Myth, Mortality and Modernity" presented at *Narrative, Ideology and Myth Conference* 2003, 3. Zigmunt Bauman *Mortality, Immortality and other life strategies* (Oxford, Polity Press 1992).

retrieval. "With the circulation between life and death in all areas, death ceases to be a one-off single unique event."[187]

> This is an especially significant evolution for the following reason: when the inescapability of death and suffering is erased from people's consciousness through their constant immersion in a ceaseless stream of consumption (market's ingenuity has actually succeeded in supplying powerful means of calming or suppressing pain and even grief), the need for a symbolic universe that legitimizes these painful experiences by explicit reference to an ever-living community of beings tends to disappear.[188]

Baland and Platteau are adapting an argument dating at least to Schumpeter in suggesting capitalism gradually erodes the moral norms that the market economy relies upon to function effectively. The outcome is that to the extent beliefs of belonging to a permanent social entity are foregone, also cast aside are sympathetic feelings that might otherwise empower individuals to take the situation of others into account. Reading Berger and Luckmann in this (ideological) way, *the Tragedy* is characterised as a component of the symbolic universe of the archetypical contemporary environmental governance decision-maker. therein reinforcing the ideological traits of capitalism identified in the previous section.

Peter Berger would almost certainly oppose the application of his work described above.[189] Less determinist interpretive implications of symbolic universes for *the Tragedy* are also possible. Berger and Luckmann themselves identified a significant roles for individual human agents in the construction and deconstruction of symbolic universes.[190] Symbolic universes are never static nor completely stable, a situation reinforced by heightening levels of intercultural exchange. The very identification of *the Tragedy* as a flawed legitimating feature of environmental law and governance is an act of demythologisation.

2.7 Conclusion

Conclusions to part one were provided in section 1.8 above and will not here be reiterated.

The second part was not oriented to the drawing of firm conclusions, its primary aim being to overview a range of arguments inverting the notional traditional / modern hierarchy of assumptions regarding the "advanced, logical, rational" nature of contemporary and customary environmental law and governance. The provocative hypothesis, which remains to be fully tested, is that environmental law and governance, today as always, is characterised by bounded rationality and is responsive to embedded cultural narratives. These narratives, of which *the Tragedy* is one, assist in the apparent resolution of intractable contradictions, the obfuscation of difficult choices, and the legitimation of existing institutional authority.

If there is a "conclusion" to be drawn it is perhaps most succinctly expressed in Berger and Luckmann's warning:

> Great care is required in any statements one makes about the "logic" of institutions. The logic does not reside in the institutions and their external functionalities, but in the way these are treated in reflection about them. Put differently, reflective consciousness superimposes the quality of logic on the institutional order.[191]

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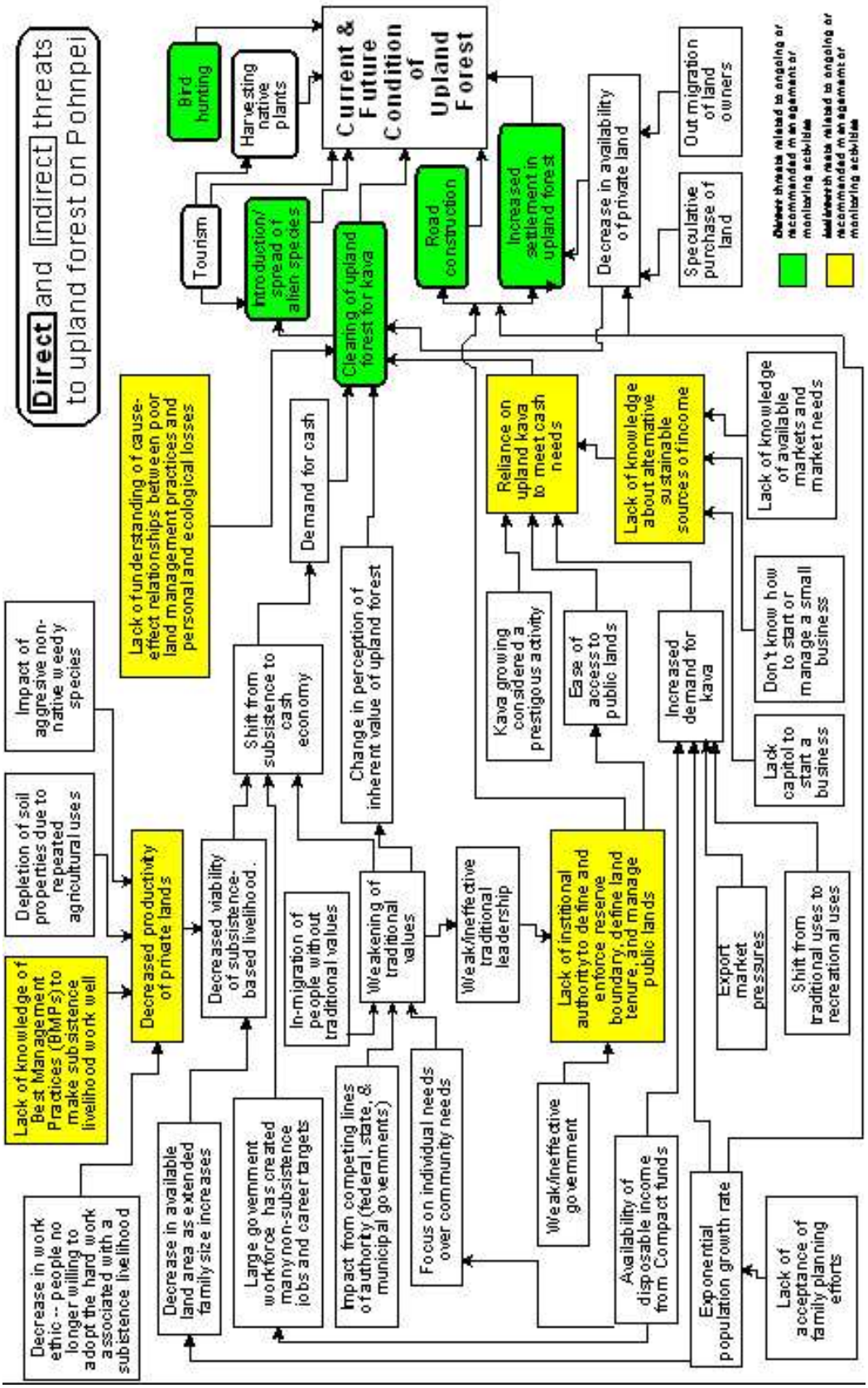
187 Murray note 186.
188 Baland and Platteau note 184.
189 "Interview with Peter L Berger" 3 *Reason: Journal for Politics and Culture* (2004).
190 Berger and Luckmann note 171, 65.
191 Ibid, 64.

Appendix 1


Direct and indirect threats to upland forest on Pohnpei
Current & Future Condition of Upland Forest
Bird hunting
Harvesting native plants
Tourism
Introduction/ spread of alien species
Clearing of upland forest for kava
Road construction
Increased settlement in upland forest
Decrease in availability of private land
Out migration of land owners
Speculative purchase of land
Lack of understanding of cause-effect relationships between poor land management practices and personal and ecological losses
Demand for cash
Reliance on upland kava to meet cash needs
Lack of knowledge about alternative sustainable sources of income
Lack of knowledge of available markets and market needs
Impact of aggressive non-native weedy species
Depletion of soil properties due to repeated agricultural uses
Shift from subsistence to cash economy
Change in perception of inherent value of upland forest
Kava growing considered a prestigious activity
Ease of access to public lands
Increased demand for kava
Don't know how to start or manage a small business
Lack capitol to start a business
Lack of knowledge of Best Management Practices (BMPs) to make subsistence livelihood work well
Decreased productivity of private lands
Decreased viability of subsistence-based livelihood.
In-migration of people without traditional values
Weakening of traditional values
Weak/ineffective traditional leadership
Lack of institional authority to define and enforce reserve boundary, define land tenure, and manage public lands
Export market pressures
Shift from traditional uses to recreational uses
Decrease in work ethic -- people no longer willing to adopt the hard work associated with a subsistence livelihood
Decrease in available land area as extended family size increases
Large government workforce has created many non-subsistence jobs and career targets
Impact from competing lines of authority (federal, state, & municipal governments)
Focus on individual needs over community needs
Weak/ineffective government
Availability of disposable income from Compact funds
Exponential population growth rate
Lack of acceptance of family planning efforts
Observe threats related to ongoing or recommended management or monitoring activities
Address threats related to ongoing or recommended management or monitoring activities