Prologue: Law and the Fumba Mangroves

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

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

Villagers and foresters agreed that the crux of the problem was the wanton fashion in which the mangroves were being exploited. People from other parts of Zanzibar and mainland Tanzania were coming to the area and destroying large areas of the mangrove forest. The villagers conceded that their own use of the mangroves was increasingly out of control and showed little respect for past local management practices. No one, in short, was taking responsibility for the management of Kisakasaka's mangroves.

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

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

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

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

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

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

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

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

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

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

State Law and Community Management

The example of Kisakasaka is far from unique. It represents a modest example of a growing emphasis worldwide on the management of forests and other natural resources by local communities, groups, families and individuals.

But Kisakasaka is representative in another way as well - in the weaknesses of its legal underpinnings (though as noted above, recent legal reforms may improve the situation). This is a characteristic it shares with many, if not most, community-based management efforts around the world. For the most part, legal regimes do not provide a way for local people to establish enforceable legal rights to the resources on which they depend, or to play a meaningful part in planning and managing those resources. Many national laws continue to reflect a state-centric approach to resource management and a restricted philosophy of property rights that has tended to undermine existing community-based systems. This has seriously constrained local people and progressive government officials in the search for new community-based solutions.

As in any area of human endeavor, community management can take place in blissful ignorance of its legal environment, provided that (by design or indifference) the policy, social and economic conditions are favorable. Some community management systems have existed for centuries, and may continue to operate with no legal underpinning as far as state law is concerned, and perhaps even in direct contradiction to what is written on the law books or administered in the courts. There are of course many political, social, economic and ecological variables that play a part in the success or failure of any given effort, many of which state laws and legal institutions may affect only marginally.

Yet community-based management systems almost never exist in a state of pristine isolation. Natural resources are the focus of increasing conflicts around the world. Where community-based management efforts are subject to growing threats from out-side or within, and to the tugs and pulls of national and international economies, the formal legal environment, for better or worse, becomes increasingly relevant. Consequently, it appears inevitable that the presence of state law (or in many cases, the problems caused by its absence) will loom ever larger as community-based efforts receive more attention - both supportive and damaging - from outside.

Looked at from a different angle, local management initiatives need state law, sometimes more than their
advocates like to recognize, though usually less than governments are willing to admit. They need state law because, however robust local management systems may be, there are things that local institutions or community-based rules often cannot accomplish alone. This includes:

- **Community-based institutions, acting alone, cannot define the rules by which they interact with outsiders.** Of course, interaction with outsiders is invariably shaped by community-based rules, and frequently governed by long-standing norms and understandings between local groups and outsiders that stand outside of state law. Highly localized management systems (for example, those that operate at the level of a particular village or user group), are often nested within a wider community governed by elaborated "customary" or non-state legal regimes that provide rules for how the smaller groupings within the larger community interact as well as mechanisms for resolving conflicts. Thus, "outsider" may be defined differently depending on which concentric, or sometimes overlapping concept of community, one is alluding to. The point remains, however, that because local groups and community-based systems are also nested within a state legal regime, local groups often need a legal status that outsiders can recognize and interact with. They need legal protection from trespass and the criminal behavior of outsiders. They need state law to provide legal recognition to community-based rules and to tell outsiders that they have to abide by those rules.

- **Local rules also cannot define the limits of state power,** that is the extent to which the state will respect local autonomy, and where, and under what conditions it will retain the power to intervene. In the best scenario, community groups, other components of civil society, and government will work together to define these limits. Nevertheless, unless these limits are spelled out in state law, or somehow recognized by the state legal system, there is little that community-based rules alone can do to enforce them.

- **State law may play an important role in providing basic protection for individuals against the abuse of local power.** The extent to which state law should intervene on behalf of locally oppressed people, or can be effective in doing so, is of course problematic. Nevertheless, especially in constitutional settings, where the state has pledged to uphold some basic human rights, it is hard to see how state law can escape this responsibility. In many parts of the world, people oppressed by their own communities turn for support (though sometimes more symbolic than instrumental support) to concepts of equity or social justice that are articulated in state law.

- **Finally, state law is needed to provide basic guidelines for protection of important wider societal interests,** such as environmental protection. Here, again, the problem is one of balance. The call for vesting stronger and more secure property rights in local communities is sometimes portrayed as dangerous because government will lose its power to protect wider interests. Yet such an argument is clearly spurious. No private property right is absolute, and government always retains a regulatory function by which it can act to protect legitimate interests of outsiders, including future generations (Lynch 1998). The problem lies in trying to define those interests. Government frequently has an excessively expansive and detailed vision of the "national interest", with the result that local autonomy and decision making can be drastically undermined. National interest has often been defined as if the needs and aspirations of local people were not part of the equation, and that national interest can only effectively be defended by the state defining all rules of resource access and use.

To point out in a generic way why state law has an important role to play in effective community-based management is not to say that it actually plays this role in all or even most cases. Law, in fact, does many of these things quite miserably, or not at all. Despite the rapid proliferation of rhetoric in support of community management and participatory processes, many if not most community-management efforts continue to exist in a state of legal uncertainty and insecurity (Bruce 1999).

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

- **Laws that recognize local ownership (or other substantial property rights) over land and/or natural resources based on historical claims.** These would include laws that provide for the recognition of long-standing land claims of indigenous communities as in ancestral domains legislation in the Philippines, native title laws in Australia, and indigenous land rights laws in a number of Latin American countries.

- **Laws that provide mechanisms for a site-specific delegation to local people of some measure of management responsibility over state land and/or resources, either on an indefinite basis or for a particular term.** Such delegation is usually spelled out in some sort of plan or agreement. Under this category would fall most joint management or co-management arrangements, such as Joint Forest Management (JFM) in India and similar programs in a growing number of other countries.

- **Laws that promote decentralization (decentralization being used here in the sense of delegation or devolution of authority to local government units).** Depending on the nature of the decentralization program in a particular country, it may result in a greater involvement of local community-based
institutions in resource management. This is less likely to be the case, however, where decentralization is in essence simply a delegation of authority to local units of central governments, or where local government institutions are more accountable to higher levels of government than to the local population (Ribot 1997).

These are not hard and fast categories. Indeed, the first two broad approaches might be said to represent a spectrum, consisting of a variety of situations characterized by more or fewer "sticks" in the bundle of rights held by community-based managers. In between these two ends of the spectrum we find many types of intermediate approaches, such as laws that allow for village titles over common property resources in Tanzania (Wily 1997).

**Designing Enabling Laws: Principles and Dilemmas**

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

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

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

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

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

Laws designed to promote community-based management can usefully be evaluated by reference to criteria that fall into two broad categories - security and flexibility. Community-based managers, whatever the setting, need secure and certain rights. At the same time, they also need the flexibility and the power (the legal space) to exercise choice in a way that reflects their unique needs, conditions and aspirations. For both security and flexibility, laws in most countries of the world leave much to be desired.

**Security**

As already stressed, community-based management can take many forms, and the nature of the rights local people have with respect to the resource can vary considerably from model to model. Nevertheless, one principle should apply in any context. For any individual community effort to be successful, it must not only provide a realistic hope of significant benefits, but also must instill confidence that the rights to those benefits are secure and will not be taken away arbitrarily. This principle applies however limited or extensive the rights granted under a particular program may be.
Security is, of course, in part a state of mind. Where relations have traditionally been good between community and the government, local people might feel secure enough to undertake management simply on the basis of a promise from local officials. Sometime a sense of security is derived from the fact that a particular management arrangement is part of a donor-funded project, thus unlikely to be derailed as long as the flow of funds is assured - a type of security that may prove illusory in the long run. In other situations, communities may not feel secure no matter how carefully and strongly their rights are set forth in legal documents.

Nevertheless, while perceptions of what constitutes security may vary, some key attributes can be identified that provide guidance to the designers of substantive legal provisions. It should be noted that this list is not exhaustive; at the same time, not all of the listed criteria may be relevant to any given situation. They are offered here simply as an indicative sample of the types of considerations that should be taken into account when attempting to design secure legal rights.

1. **Security requires that there be clarity as to what the rights are:** Confusion as to one's rights can significantly undermine the effectiveness and enthusiasm with which those rights are exercised. There are many examples in laws from around the world of rights so vaguely described as to be virtually meaningless. Striking examples include laws that state that "customary rights of forest-dwellers will be respected as much as possible" or "customary law shall be respected unless the national interest requires otherwise". Perhaps more significant is the uncertainty that pervades many co-management arrangements, where rights and responsibilities have supposedly been negotiated and tailored to local conditions. Part of this is a failure of communication and understanding, part of it is a matter of politics - it may suit some People in power for rights to be vaguely defined, and finally part of it is a matter of drafting, both in legislation and regulations and in local level agreements that govern specific community-based initiatives. Examples from India and elsewhere testify to frequent confusion about the way in which benefits are to be shared, leading to false expectations and possible disillusionment.

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

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

4. **Security means that rights need to be enforceable against the state (including local government institutions):** The legal system has to recognize an obligation on the part of the state to respect these rights. It is uncertain in many contexts - and, largely untested - whether co-management agreements are in fact viewed under law as containing enforceable contractual obligations on the part of the state (Eggertz 1996).

5. **Security requires that the rights be exclusive:** The holders of rights need to be able to exclude or control the access of outsiders to the resource over which they have rights. Use of the word "outsider" is potentially problematic. Exclusivity does not mean that there are no people outside the principal group responsible for management that might have certain rights that need to be respected. Distant or sporadic users of a resource may have legitimate historical claims that need to be accommodated. To the extent those rights are respected by the rules that are adopted, it would be wrong to refer to those users as outsiders in the sense that word is used here. What exclusivity does mean is that once the holders of rights have been defined, other users cannot be imposed on the group against its will. This means that government, for example, cannot assign rights to others over the same resource (such as assigning mining concessions in a community forest). It also means that government needs to recognize
the power of the community group to apply its rules to outsiders, and where necessary, to assist in the enforcement and protection of the group’s rights from outside interference.

6. Exclusivity also means that **there must be certainty both about the boundaries of the resources to which the rights apply and about who is entitled to claim membership in the group.** The issues of delineating the resource and identifying the holders of the rights are discussed below.

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

8. **Security requires that the law recognizes the holder of the rights:** The law should provide a way for the holder of the rights to acquire a legal personality, with the capacity to take a wide range of steps, such as applying for credits, subsidies, entering into contracts with outsiders, collecting fees, and enforcing rules.

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

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

**Flexibility and Meaningful Choice**

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

It must also be acknowledged that protecting flexibility in law is not an easy task, and some very serious dilemmas need to be faced. Even if it is both just and efficacious for state law to "pull back", and allow community-based rules (including in some cases deeply entrenched and long-standing systems of "customary" law) to flourish according to their own dynamics, flexibility can never be unlimited. Both wider society outside local groups, as well as individuals inside the group, have interests that need to be taken into account. Protecting these interests, while still leaving the necessary space for real local decision making and choice, requires very delicate balancing.

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

**Flexibility in planning and management**

Legal regimes should allow flexibility in deciding what the objectives of management should be and the rules that will be used to achieve those objectives. Successful natural resource management obviously needs to be sensitive to local ecological, social and economic variations. Participants in management must also perceive that the benefits of participation outweigh the costs. These axioms are likely to be violated where outsiders presume to know what local people want, need or deserve. And yet in practice, this frequently happens. We hear tales from many places about management decisions made within "participatory" management contexts that do not reflect basic realities about what local people want or need.
What is striking when one looks at even some of the most progressive new laws supporting community-based management is how jealously government holds on to the decision-making function. This expresses itself in a number of ways. Often the legal requirements for drafting a management plan are quite complex, and likely to be alien to what communities are used to and perhaps what the situation requires. Frequently, regulations regarding co-management continue to vest almost all management decisions in government. There may be requirements for consultation with villagers, but at the end of the day, the decision rests with forestry officers, and they are ultimately responsible for producing the plan. This kind of close control may be necessary in some delicate environmental situations, but in many instances it is driven more by a long-standing belief that “government experts know better”. Law alone cannot eliminate the tendency of officials to impose planning and management decisions, but the way that laws are drafted can help tip the balance away from perfunctory consultation to greater local ownership of the planning process.

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

**Flexibility in recognizing and forming community-based organizations**

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

It is instructive to look at this issue in the context of native land rights in Australia. Australian law is interesting because it illustrates two quite different approaches to the problem of group recognition. One approach is epitomized by the Aboriginal Councils and Associations Act. The law, which was drafted to provide for the establishment of legal forms for indigenous groups to hold native titles, was intended to allow Indigenous groups “to develop legally recognizable bodies which reflect [Aboriginal people’s] own culture and do not require them to subjugate this culture to overriding Western European legal concepts”. As one study has shown, however, this goal fell down in the hands of lawyers and officials who were unable to break free from the concepts, processes and general approach with which they felt comfortable. The result was a law that gave almost no room for local cultural variation in corporate structures and decision-making processes, and in fact caused groups to lose control over their affairs. By contrast, some state laws adopted in the 1990s, including the Native Land Titles Act are much more geared to the recognition of existing institutional forms, providing very basic requirements and guidelines, but leaving the details of internal group functioning up to the group itself. These latter laws are notable for their recognition that state law should not try to codify the community-based laws of indigenous groups, recognizing that to do so would threaten their inherent adaptability and the inevitable processes of change over time (Fingleton 1998).

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

**Flexibility in defining jurisdiction and boundaries**

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

There are advantages and disadvantages to both approaches. The case of devolving authority to local government units is easier to define in legislation because there are uniform local structures in place. However, vesting power in a local government body is no guarantee that local people will have more of a say in local resource management, unless those bodies are designed to be democratic, representative and accountable (Ribot 1997). Moreover, natural resources and the way that people use them often have little respect for administrative boundaries (Emsail 1997). A fluid method of defining the responsible group creates a possibility of finding those institutions or people who, according to their own perceptions and needs, should have management responsibility and control over local resources. These are often based on longstanding traditional relationships. So the emphasis here is on self-definition. Still, the law may be legitimately concerned about whether some person or group is being unfairly denied an opportunity to participate.

It should also be noted that the empowering of local groups of users without efforts to coordinate with local units of government can in some cases result in the emergence of debilitating institutional conflict. Indeed, there is often a poor articulation between the seemingly complementary agendas of decentralization and community-based management (often driven by sectoral line ministries) that will need more careful attention as both agendas gain momentum.

A growing body of literature draws our attention to the immense conceptual and practical difficulties of “locating the community” in the formulation of legal regimes devolving powers and responsibilities to local communities (Kloeck-jenson 1998; Leach et al. 1997; Enters and Anderson both in this volume). It is essential to examine critically the various shorthand terms used when discussing community-based natural resource management, and in designing legal strategies that support it. These can often obscure a messy reality and can have the effect of making decisions for people that they do not want to make. This paper, for example, may well be accused of focusing on a supposed tripartite relationship between state, communities and resources. Obviously, the positing of such a relationship, while perhaps useful as an organizational device, ludicrously oversimplifies reality. What communities are we talking about? In almost every situation, even within single villages, there are overlapping and often conflicting ideas of community, often bearing little resemblance to what outsiders see or want to see. Different groups or individuals within a community may have very different relationships with local resources, and very different visions of what the ideal future for their area should be. Even state law is not a homogenous thing, but a composite of many different, often competing elements. And left out of this tripartite scheme are numerous additional relationships with other people and institutions at local, national and international levels, who all may have legitimate claims to be stakeholders for the resource in question. In view of these complexities, we should think of the potential of law reform not as a search for a correct answer, but as a search for processes by which multiple and varied stakeholders can fairly and transparently negotiate and renegotiate with one another.²

**Making Law Reform Meaningful**

Most of these remarks have focused on the substance - the principles and conceptual framework - of law. It is also useful to took briefly at the process of reforming and implementing laws, and examine several broad principles that could help guide the effort to make law a meaningful presence rather than a well-intentioned but
ultimately empty gesture.

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

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

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

**Fourth**, we need to be realistic in our expectations. Law is often an inefficient and unpredictable way to accomplish change. Any attempt through law to make massive changes from what is on the ground will simply be ignored. Laws should not be enacted that rely upon resources that government does not have or that require a massive redesign of institutions that is simply unlikely to take place. It is counterproductive to legislate away all the messy and unpalatable aspects of life - this has never worked and never will. Passing laws that don't have some realistic chance of being implemented and of meeting at least some of their main objectives is a sure way to undermine further any residual faith in the rule of law.

**Finally**, a closing question about priorities. It may be asked whether the emphasis on the substantive detail of law is justified. Community managers and their allies must make strategic choices about priorities. They must consider in any given context whether for the time being it is better to work with imperfect legal instruments and concentrate on persuasion and building alliances rather than pushing immediately for legal changes that may, in some circumstance, upset delicate coalitions. Nevertheless, the search for legal regimes that provide meaningful, secure and flexible rights to community-based management is not a second-generation task. It is fundamental if community-based management is to become a sustainable and widespread strategy, rather than the ad hoc approach it has been in many countries so far.

**References**


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Notes

1 An earlier version of this paper was presented at the International Workshop on Community-Based Natural Resource Management, held 10-14 May 1998 at The World Bank, Washington, DC.

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

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