

Intro – I will talk about issues concerning forest governance, participation and democracy as expressed in legal frameworks.

I am a realist about the relative importance of law.

- reasons participatory forest management works or doesn't work often has little to do with law.
- getting the law right is critical, for good governance approaches that are sustainable over time and that can be scaled up.
- but for today's purposes, using law as good prism for identifying patterns, weaknesses and strengths in policy and strategic thinking.

From a lawyers perspective, participatory natural resource management has been a major growth area over the last decade.

- Many new laws on the books, in forestry, land, water, fisheries, that enable to some degree greater local involvement in resource management.
- Same true in the related areas of land tenure and indigenous rights – with major implications for forests and management of common property generally.

On one level, this is impressive.

- Older forestry and land laws usually give little scope for local people to play a meaningful part in the ownership and management of forest resources on which they may have depended for generations.
- Recent laws create chinks in this prevailing paradigm.

But how profound is this shift?

- A wide variety of approaches, a “messy” spectrum.
- At one end, narrowly defined participatory processes, with a narrow, time-bound sectoral agenda, driven from outside.
- At other end – models that nest local management within a vision of local democracy, with more explicit links to overall governance issues.

This variety shaped by the fact that the impetus for greater local management may come from many different directions (viz. Mike Arnold):

- Conviction that local management leads to more effective conservation;
- Local livelihoods;
- Demands for local freedom and decision making.

Depending on what mix of motivations prevails, participatory strategies can have quite different goals, structure and group membership.

I will look at how emerging legal trends deal with 3 topics.

- nature and scope of rights – what are people are empowered to do?
- security of rights – to what extent can people count on their rights being respected, protected and exercisable?
- defining the rights holders – in whom are rights and responsibilities vested? who belongs to a “community”? how are relationships within a community and with outsiders mediated?

## 1. Nature and scope of rights. a number of common limitations:

- rights often expressed in terms of sharing benefits from participation in an agenda set by outsiders, as opposed to genuine involvement in deciding how the resource should be managed in the interests of the community.
- management planning requirements and processes which limit the scope of local input into decision-making. Governments jealously holds onto decision-making in important arenas.
- government dominates question of what areas are or are not suitable for participatory management. The more valuable the resource, less likely local rights are to be recognised.
- what is or is not on the table for negotiation may have long been frozen into place by sectoral agendas, and a tendency to lock land uses into predefined legal and bureaucratic categories. India example – land “frozen” within a forestry or revenue classification because in the past it was classified as such, not because a careful evaluation of current environmental, social and economic conditions and priorities.

## 2. Security/robustness of rights

Newly acquired rights in many instances are fragile. For example:

- co-management agreements may be cancellable by government partners unilaterally or for unclear reasons;
- governments often retain the power to change the rules in mid-stream (backtracking/logging bans make the effective realisation of rights impossible);
- recourse is often limited to forest departments. This is like saying that in the event of a contract dispute, one of the contracting parties is the arbitrator.
- rights are expressed vaguely

Sometimes this persisting legal vulnerability is equated with the absence of ownership by local people over the resource. Unless ownership is established, then rights will always be insecure, this argument goes. Some truth. But it underplays extent to which security can be achieved even where the form of tenure is less than ownership – and this is important because “ownership” as an option is often not on the table.

And conversely, ownership doesn't always = real management control. Stools “own” forest reserves in Ghana (they are the allodial owners), but they have usually still been effectively eliminated from management of those lands.

Still, whether called “ownership” or something else, the recognition some form of strong legal and registerable right over common property may be an important step in making rights more secure and meaningful. This is one reason that recent innovations in Tanzania bear watching, to see how they play out in practice.

### **3. Who are the rights holders, how do they govern themselves, and how do they fit into larger governance frameworks?**

In recent years, growing criticism of the way “community” has been used in development circles.

- A feel good term that oversimplifies, misinterprets and caricatures local realities.
- Obscures the co-existence of several local communities that people belong to at the same time for different reasons, the velocity of change within many communities, and the often vast inequalities and power differences.

Won't go into this familiar debate, but its interesting to look at this from a legal point of view.

For a lawyer, group definitions are important because –

- If you are going to vest or recognize rights and responsibilities in a group or entity, you obviously need to identify (or provide a process for identifying) who or what that group or entity is.
- At the same time, if done badly, legal definitions have the capacity to exacerbate misconceptions.

How words like “community” have been used in recent legislation. If you think social scientists struggle with the term, look at some of these:

- Philippines
- South Africa

Ed Barrows and colleagues in a recent IUCN publication: “any attempt to provide an overall definition of community [is] futile, except at a level so generalized as to be analytically sterile.”

In fairness, most laws don't try to define community, and even those that do don't make too big a deal of the actual definition – what really matters is how different laws identify who belongs to a group, and the range of institutional choices that are available to that group.

Different models in recent legal and policy frameworks (lots of overlap and variations on these models):

- The user group model – epitomised by Nepal but common elsewhere too. In theory, these are self-identifying groups of households, united by a common interest in a particular

resource. Again, in theory, there need be no convergence between such groups and other local community identities and institutions or administrative arrangements – in Nepal the law states that user groups may straddle panchayat boundaries.

- The adjacent community model – very similar to the user group model, except an attempt to define ahead of time the pool of eligible potential participants by reference to some geographical limitations. Some early JFM resolutions in India talk in terms of villages adjacent to a forest – this is the pre-defined unit from which forest protection committees may emerge.
- Indigenous or community land-holding model. Impetus is quite different from the first two. Here local resource management stems from struggle by local people for self-determination based on historically verifiable notions of community-self identity and territorial control. Mozambique land law and the Philippines Indigenous Peoples Rights Act are two recent examples. Both have elaborate procedures by which groups identify themselves and negotiate their territorial limits with adjoining people. To varying degrees, land tenure and management within identified areas are recognised as being governed by customary law of the identified community.
- Finally, may be part of a wider agenda of decentralization (next week's topic). Jesse Ribot has shown how in West Africa, much of the decentralisation of forest management has not been accompanied by downward accountability to the people themselves. But there are at least potentially happier examples. Liz Wily would argue, I believe, that the Tanzanian land, forestry and local government laws, taken together, represent a potential merging of robust local democracy with the assertion of community property rights over local resources.

Recurring problem areas that cut across this typology (again, this is just a sample):

1. The “Participation as a New Vehicle for Exclusion” phenomenon. Defining who belongs means defining who does *not* belong. Evidence that narrow or uni-dimensional definitions can unfairly exclude. Classic examples – secondary or transient users of a resource suddenly finding their access cut off – a problem with JFM in India for example from the beginning. This type of exclusion may be driven by politics and power grabs, but it is exacerbated by a tendency to resort to simplistic one-to-one legal relationships between communities and resources. Baviskar on Great Himalayan National Park.

2. The “Alien Legal Forms” syndrome. Good group dynamics can be undermined by imposing complex formal legal requirements on local groups that people don’t understand. More sophisticated people can grab control through the manipulation of legal forms that are unfamiliar to most local people.

3. The “Over-Standardization” trap. Law drafters and governments often want communities to look more or less the same in terms of their make up, structure, size and jurisdictional areas. This can come at the cost of the diversity...and a problem when one of the ostensible goals has been to build upon existing institutions and management arrangements that have in fact been working. (Madhu Sarin on Uttaranchal on how insisting on a certain size model resulted in the breaking up of pre-existing functioning units.)

4. The “Whose Vision of Community Do We Use” conundrum. The dangers of an approach that tries to give expression to local vision of community is that it can play into the hands of

one of several competing visions of what the community is, what its legitimate rules and structure are. Exacerbated where outsiders automatically assume an identity between a “community” and certain conspicuous symbols of the community – for example, the chiefs-equal-community equation. Ghana – tendency of outsiders and government is still to think that vesting of more rights in stools is the same thing as vesting more rights in local communities.

5. The “Local Democracy will Swallow up our Forest Committee” anxiety. The fight raging during the early days of JFM – should forest protection committees be independent of, or subsumed, by panchayats. How can the special needs of vulnerable sections of society – women, tribals, scheduled castes, ie, those most dependent on forests – possibly be protected if we turn the whole thing over to faction-ridden, corrupt, local democracies? Goes one side. How can we take seriously the idea of local democracy if we don’t, goes the other side. And anyway, why should local resource management – even by vulnerable people – be accountable to outside bureaucrats rather than to the wider local community itself. [This controversy is alive and well today, though considerably more nuanced].

I don’t intend to weigh in on the controversy, but it allows me to come full circle to the topic of today’s session. I confess that I have treated today’s question – is participation a poor excuse for democracy – somewhat obliquely. It’s begging for expertise in political theory that I don’t have. The question is, however, a lovely, leading one. It presumes that there is a sort of ideal standard – democracy – to which we are obviously striving and against which we can measure participatory strategies, and likely find them wanting. Where I grew up, it was precisely local democracy run amok that threatened the meaningful participation of women and minorities in education, health, and so many other aspects of life. It was various

“participatory” schemes designed and driven in large part from outside – perhaps expressing the norms of the wider democratic polity, if you will – that gave them a voice. This is a penetrating glimpse into the obvious – a syndrome that is common to all constitutional democracies which consist of various levels of governance, each one nested within the other. What I wonder is if, in thinking about participatory forest management, we have tended to fixate too much on the local, and to err by either over-extolling the virtues of local dynamics and indigenous institutions, or of insisting that those be remade in a image that we, as outsiders, are comfortable with.