

# Is Law Important for the Local Level Management of Trees and Forests?<sup>1</sup>

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## Some years ago

I was with a consultancy team in Burkina Faso preparing our first interviews in the field with local foresters and villagers. We were having passionate debates. "Is law important for environmental management?" "Nonsense!", my colleagues' statement was categorical. "Look" he said, pointing at the dry Sahelian scenery around us, where women were tilling the fields with a hoe and some drooping trees kept up appearances of a forest, "the soil is poor, the forests are poor, the rains are poor, the people are poor and they have poor tools. What they need to better manage their land and trees is technical innovations and economic incentives, and not laws."

With my legal background I felt challenged and started to defend arguments that laws, rules and institutions actually are important for the local management of natural resources. I was not very successful in convincing my sceptical colleague and back home I started studying literature and case studies in order to be better prepared in discussions with more technical oriented colleagues. The question is whether the present literature provides evidence for the argument that law is important. With me you will see that, contrary to the rather provocative statement cited above, the answer is not categorically positive or negative, but much more variegated.

## Shortly thereafter

I found a supporter in the person of Michael Cernea, a consultant of the World Bank. Talking more specifically

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about national legal systems, he stated: "Such macro-societal tools as the state, its policies, the centrally instituted legal system, and fiscal levers are to guarantee, reinforce, and stiffen the backbone of even the lowest local resource management system" (Cernea, 1994: 189). But what is the actual impact of legislation on the management of trees and forests?

Over the last several years, case study literature has developed examining the different legal and institutional strategies to improve the management of natural resources in developing countries. In the literature available to me, general environmental case studies on Africa are obviously an overwhelming majority. This is without doubt due to my own geographical interest, but there may be another more objective explanation, as expressed by Platteau (1991:3): "Till the beginning of the seventies the attention of land reforms was almost exclusively focussed on Latin America and Asia, while Africa was commonly considered as 'a special case' thanks to her abundant land endowments and to the flexibility of her indigenous land tenure institutions."

Another striking feature in the case study literature is the attention given to problems of forestry management in developing countries. Generally speaking this attention may be explained by the high value attributed to trees and forests with regard to a sound environment, whereas the market value of wood is also high. In Africa the expansion in agriculture and an increase in demand for fuelwood and charcoal contribute to the focus on forestry.

Tenure security to land and security of tree tenure are closely related. In agroforestry, clear tenure rules, assuring the farmer that planted trees on the holding keeps possession over the trees, are important. Bruce and Fortmann (1989: 4) provide a good overview of the problems related to property and forestry: "People who have been exposed only to the more familiar forms of Western property law often assume that trees are part and

parcel of the land on which they grow (...) but many tenure systems confer property rights in standing trees quite different from the land on which they stand and may confer those rights on someone other than the landholder" (See also Fortmann and Riddle, 1988; Fortmann and Bruce, 1988).

State legislation and policies may often have a serious impact on the security of tree tenure for the individual man or woman or local communities depending partly on trees and forests for their living. "Often the state advances the claim that it owns all uncultivated land, frequently in concert with the principle that individuals can establish their claims to land by clearing it" (Bruce and Fortmann, 1989:4).

The transfer of property rights from traditional user groups to others eliminates the incentives for monitoring and restrained use (McKean and Ostrom, 1995:4.). Famous examples of such policies leading to deforestation are given by Binswanger (1987) for the Brazilian Amazon, and Rassam (1990) for Ivory Coast. In many former French colonies in Africa forest management policy is based principally on regulation of use through enforcement of restrictions, within the forest reserves but also with regard to trees on individual farms. Together with many misinterpretations by the mighty but at the same time poorly equipped forest service, the result is the absence of security for individuals and groups on trees and forests<sup>3</sup>.

### **I would like to illustrate**

this with an example from Senegal, the country in Africa I know best (Ribot, 1990, 1993 and 1995).

Since the long dry periods in the seventies and eighties, the Senegalese government has been well aware of the process of deforestation. It was realized that the charcoal production was an important, and moreover a very visible cause of deforestation. Therefore laws, regulations and additional measures were adopted to keep the charcoal production under control. The most important measures

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<sup>3</sup> For example on Land, Trees and Tenure from Africa, Asia and Latin America, see Raintree, 1987. See also Kessler & Wiersum, 1995, with regard to the Sahel.

were the introduction of a national production quota, divided among officially recognized production zones; the limitation of the production period to the dry season and a whole set of licences (labour licences, licences to transport and to stock, etc.). When the necessary licenses to produce are obtained, the agents of the Forestry Service allot certain forest areas to the entrepreneurs or cooperatives. The criteria used for allotting a plot are proneness of the soil to erosion and the presence of sufficient dead trees. When a plot has been exploited a regeneration period of 20 years must be observed before it may be allotted again for the production of charcoal.

When judged on its own merits, these regulations seem quite coherent and appear reasonable. In reality, however, the ends, namely the reduction of deforestation and the prevention of over-exploitation of forests, are not realized at all. What has been achieved are financial revenues for the state and the Forestry Service and the creation of a small group of rich employers who have a quasi-monopoly in the charcoal sector. In fact, the production season is not observed and the production quotas are not respected. Even worse: the deforestation is aggravated instead of stopped.

### **What are**

the reasons of failure of such a nice and coherent set of measures and rules? Firstly, there is a manifest contradiction between the duty of the Forest Service to protect the forests and their obligation to provide urban households with charcoal. The last task brings financial revenues to the Forest Service which is in constant lack of means, while the protection of the forests only costs money.

Secondly, the adopted rules do not take into account that the villagers in the charcoal production zones need to use products from the forest on a daily basis to earn their living. The criteria for the selection of forest areas are physical in nature and no social criterion is involved. The result is that the plots chosen for charcoal production are nearly always in the vicinity of a village. This is profitable for employers, for they can lodge their labourers there, and it brings short term profits to the villagers who receive

some money for housing and food. The labourers, however, do not only fell dead trees, they also cut trees with only some dead branches, or they treat the bark of living trees in such a way that they soon die. After some time the vegetation around the village is largely decimated, so the villagers have to look for wood, leaves, roots and fruits at a greater distance from the village. Their sheep, goats and cattle roam around freely, eating up any natural regeneration. Thus villages that ever received a large group of charcoal labourers will always be surrounded by plains with scant vegetation. By disregarding the needs of the local community, the Forestry Service neglects a real partner in sustainable exploitation.

Thirdly, clientelism (favouritism, nepotism, ed.) is the backbone of political culture in Senegal, permeating all sectors of political and economic life. Such a system of pervasive clientelism may imply several obstacles to whatever environmental laws, regulations or policy are employed. Let me just name some of those obstacles (Van den Bremmer and Hesselning, forthcoming).

As soon as nature and natural resources represent a certain financial value on the international or domestic market, they also belong to those state resources which may serve to establish favoured relationships. The quotas of charcoal production is an example. The patrons see to it that their clients acquire additional quotas, that forestry agents do not apply any sanctions for infringement and that the transgressors are immediately liberated from prison and may go free. Clientelism disrupts the organization of less powerful groups in order to prevent their empowerment and their potential development to an opposition group. Finally, clientelism displaces any notion of common good or the general interest, and stimulates the unbridled search for private advantage. Thus, it creates a moral context for the tragedy of commons.

All these problems relate to government policies and national lawmaking in a system based on favouritism. Therefore, nowadays solutions are sought in a decentralized, participatory management of nature and natural resources. In Africa, governments are experimenting a whole range of more participatory ways to

come to more sustainable systems of resources management at a local level. Let me just try to explore one of them: the development of local conventions with regard to the management of village forests.

### Indeed,

in the current discussion about improved management of land and natural resources, local management contracts are increasingly considered as a valuable option. To date, few experiments with local management contracts have been fully documented; consequently there is little evidence to evaluate the long-term role, impact or sustainability of those contracts.

In Mali, contracting local management conventions forms an integral part of the decentralization policy with regard to natural resources. As in the beginning of the 90s, the Land Law and the Forestry Code were in a process of reform, the drawing up of local rules for forest management was allowed by the authorities by way of exception. To my knowledge, just one experiment with this kind of conventions has been documented (Hilhorst and Coulibaly, 1995, 1996).

It concerns a convention involving six villages in the management of the "brousse" (common property resources -forest and pasture- in the "bush"). The negotiations to arrive at a draft convention took years, mainly because of the following factors:

- difficulties in convincing the villagers to limit their activities with regard to their resources;
- some villages had to give up part of their resources in favour of less gifted villages;
- the elaboration of a system of control and sanctions, the low prices of wood as a disincentive for investments in the maintenance of the forests and pastures, and
- the resistance of local forest agents and civil servants to really transfer part of their powers to the villages.

The draft convention still needs the support of a professional lawyer in order to be designed in proper juridical terms. And the sometimes vehement discussions with the official parties in order to overcome their resistance seriously slow down the process of operationalization. But the process of negotiation in itself (involving not only the six villages, but also civil servants and external donors) constitutes a promising result of the contractual approach.

In China also, the government experiments with local contracts to improve the management of forests. According to Bruce *et al* (1995), the "lack of law" in China's legal culture does not prevent but rather facilitates such experimentations. "Contracts have played a major role in filling gaps in both the law of property and the law of associations, with charters and agreements used to define institutions, and leases used to customize tenure arrangements." (p. 48).

Contractual arrangements with regard to local forests are not always considered as a valuable option. However, in certain situations, especially in situations of rapid changes and transition, the contractual approach may have advantages and provide positive legal and institutional incentives for local management. Indeed, the contractual approach offers flexibility in:

- the number of parties involved. For example, it could make it easier to involve the appropriate groups, e.g. seasonal users of a forest, plus local NGOs and private producers groups;
- protecting "bundles of rights" of various users groups. While property rights (which in the long term make land registration) establish the rights of one person or one group, a contract can handle situations involving "bundles of rights" and a variety of user groups;
- duration of the contract. In situations of rapid developments, a contract can yet guarantee users the benefits of their investments, as long as they fulfil their obligations;
- tailoring contract stipulations to specific local situations.

Additional advantages are:

- certain stipulations could be used to lay down the rights and obligations of all parties;
- a contract can be better adapted to local conditions; in particular, it can contain a clause creating the possibility of, under specific conditions, breaking open the contract and reopening negotiations;
- agreement of local contracts with regional and national policy can be assured by standard incorporation of the obligation that these must fit within the local policy plans, since this must be in accord with the framework of regional and national policy plans (Hesseling, 1994 and Picciotto, 1992).

In conclusion, contracts may contribute to creating a socially broad basis for new policies, because parties have more influence on, and are with respect to content also more interested in the outcome as in the case of government regulations. That does not alter the fact that important juridical and institutional conditions are yet to be fulfilled in present day Africa to really make the contractual approach a workable option for local environmental management.

### To conclude,

let me now try to draw some lessons from the practice. The example from Senegal demonstrated that, in spite of a set of legal rules which on the face of it appeared to be appropriate to push back the process of deforestation, the intended goals were not achieved. It would be easy now to jump to the conclusion that law is not important for the management of forests. Indeed, I will show that the prospects of changing the behaviour of people (villagers, forestry agents and other government officials) through national legislation tend to be grossly overestimated. I will do that with the help of a figure, worked out by the Dutch sociology of law professor John Griffiths.

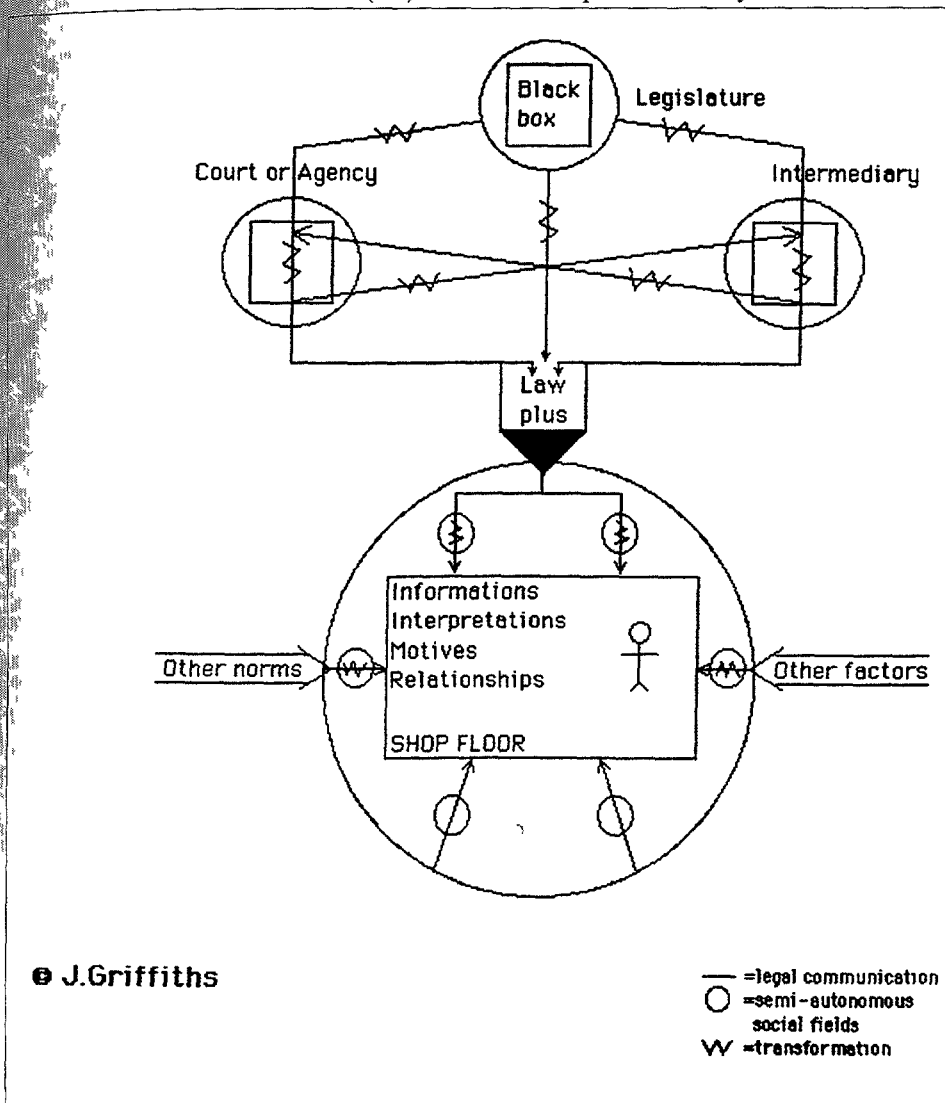
The figure shows that the behaviour of peasant men and women, government officials and foresters, and local and international development workers is governed not only by national legal rules, but also by rules generated by all kinds of social networks of individuals, and the interdependent articulation of many of them. With regard to

these processes, the American anthropologist Sally Falk Moore (1978: 57-58) developed the concept of the semi-autonomous social field. I will not bother you now with the complex definition of this concept.

Figure 1, which summarizes the theory of the "social working of law", may serve as a kind of help desk to better understand why a particular legislation intended to improve the management of local forests not always has the expected results and sometimes even produces undesired and undesirable side-effects. It focuses on the shop floor of social life, the place where the activities which the legislator would regulate are taking place. The central question then, is not the intention of the lawmaker, but what the man or woman on the shop floor actually will do. The answer to this question is not an easy one. Several factors have to be taken in account (Griffiths, 1992).

First, the attitudes of farmers, cattle breeders or woodcutters with respect to land, pastures or forests are also determined by social relationships: gender, power relations, status and so on. Second, before the legal message included in the law reaches the (wo)man in the field, it is subjected to various transformations by interpretation or misinterpretation. And third, management and exploitation of forests are not subject to just one single, coherent body of legal concepts and rules, but to plural normative systems (state law, indigenous law, religious law and sometimes also project law): societies are characterized by legal pluralism (Von Benda Beckmann, 1991: 78). To make it even more complex, Von Benda Beckmann continues: "Over time, both state laws and traditional laws have changed considerably, and hybrid forms of local regulation, made up

**Figure 1:** Analytic diagram of the social working of law.  
 "What will the (wo)man on the shop floor actually do?".



of elements of various systems, have developed in many Third World regions."

In other words, the theory of the social working of law warns us that lawmaking as such cannot always play the role of "catalyst" for the desired change of environmental behaviour in local communities. The introduction of new legislation therefore requires thorough knowledge of the situation at local level. In this respect, the maxim put forward by Oakerson (1988: 151) seems appropriate: "Don't destroy the base. Decide what part of the existing structure of society constitutes a useful base, and seek to preserve and build upon it".

The development of local conventions for the management of forests may be an interesting approach, but only under the condition that they are embedded within the national legislation. As Cernea (1994:189) puts it: "The local level derives strength not just from its 'localness' and self containment, but from the extent to which the supra-local levels stand behind it, and legitimize and empower it." Thus, national legislation remains a key instrument for developing a new policy on the management of trees and forests.

## I now return to

my initial question: "Is law important for the local level management for trees and forest?"

My interest in this question started after a rather trivial but familiar dispute between technical experts and social experts. The empirical studies focussing on the different legal strategies adopted to improve the management of forests at the local level have indeed revealed that rule making (state laws or customary laws, at a national or at a decentralised level) will not automatically generate incentives for certain kinds of activities or discourage actors from other kinds of behaviour. Let me give three reasons.

Firstly, modern law systems are often too centralistic denying the relatively efficient, dynamic and legitimate nature of local management practices. They therefore

provide few safeguards for local people which undermine their incentive for a better management of trees and forests. Thus, a prerequisite for legal measures in local forest management is that they are flexible and adapted to fit various local practices.

Secondly, an analysis in terms of legislation has to be situated in a perspective of the social working of law, including the strategies developed by the (wo)men at the shop floor in response to the imposed rules on the basis of their culture (norms, rules, social relations etc.), the specific characteristics of the resource involved, the social and political context and so on. The degree of success in applying external norms varies greatly, depending on the context in which they must work. Thus, instead of laws prescribing such or such behaviour, it will be desirable to formulate laws allowing the quest for and application of a whole spectrum of possible solutions.

Thirdly, local organizations have to be nested within a network of larger organizations and authorities, including the state, for dealing with problems beyond the boundaries of the local community.

The conclusion of this intellectual exercise may be somewhat disappointing: the point of departure as well as the conclusion being general.

Indeed, my reaction to my colleague's statement would now be that laws and institutions appear to be at the same time incentives and disincentives for local environmental management and therefore interventions in the sphere of lawmaking at all levels will remain indispensable. The potential to create legal and institutional incentives for local management of trees and forests is undoubtedly present in national legislation, in decentralised management structures and in local contracts and agreements. There is no need to make a choice between these three approaches which may coexist within the same legal system. Methods and strategies of the approaches have to be continually improved and adapted to new challenges by taking into account social, technical and political factors. And finally, legal and institutional instruments alone will never generate enough incentives to change the environmental behaviour of local communities.

They have to be accompanied by technical innovations, economic and social incentives.

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