

## **Reformatted Final Report**

# **FOREST LAW AND REGULATIONS: OBSTACLES TO IMPROVEMENT**

**NR International Contract Number: Z F0116  
DFID Project Reference Number: R 7339**

Re-organising the work of

**Richard G. Tarasofsky  
Lead Consultant**

**(dated 7 August 2000)**

**and the addendum of the IUCN Environmental Law Centre  
(requested by NR International on 20 December 2000 and submitted on 19 April 2001)**

**30 January 2003**

## Executive Summary

The overall objective of this project, entitled "Forest Law and Regulations: Obstacles to Improvement" was according to NR INTERNATIONAL "to identify the needs of developing countries for research to support improved forest laws and associated regulations." The methodology utilised was the development and analysis of three case studies (Malawi, Mexico and Nepal) of the impact and effectiveness of public participation in the development and amendment of national forest legislation.

Following scoping and organisational work by a lead consultant (in Germany), three national consultants were detailed to prepare comprehensive reports on forest law in their respective countries, and the process by which the most recent new forest legislation was developed, giving specific attention to the involvement of rural and local residents and of the civil society, more generally. Two of these reports were then the subject of national workshop, and in the third (Nepal), the national synthesis process was conducted through a series of interviews and smaller meetings (due to practical factors which prevented a more general gathering.) The lead consultant prepared final and synthesis reports bringing together the lessons, conclusions and recommendations of all three processes. As a final step, the lead consultant circulated his reports to a team of reviewers from the IUCN Commission on Environmental Law, whose comments and suggestions were incorporated into the final versions of those documents.

Ultimately, the project's contribution to the welfare of poor and marginalised people and their environment will include *inter alia*:

- concrete ideas and suggestions to improve forest legislation and its responsiveness to the needs and concerns of rural and forest-dwelling people and other forest (whose knowledge of the local forests and the manner in which they are used and affected on a daily basis is more extensive and intensive even than that of forestry officials and professionals);
- development of a baseline of forest information and process on which to continue to build and improve the forest legislative and institutional systems;
- improvement of the ability and incentive of rural and forest-dwelling people to participate in forest management;
- improvement of the role of government as a facilitator of sustainable forest activities, and of solutions to forest-related problems, at the local level.

The project outputs included three case studies, two workshops, a report of the Nepal interviews, a synthesis report and a final report. In addition, final technical and financial reports were separately submitted. The last of these documents, along with the final financial reports were submitted to and accepted by NR INTERNATIONAL on 21 August 2000.

The project outputs demonstrate a variety among approaches to public participation, and identify a number of areas in which national and subnational participatory processes regarding forest legislation may have added to the quality and potential success of its implementation. They have also noted ways in which such processes may have failed to achieve their full potential as instruments for improving sustainability of forest livelihoods.

On December 22, 2000, NR INTERNATIONAL submitted questions to the IUCN-ELC relating to the Final Report in the above-captioned Project., and seeks to satisfy the general objective of the Project. An Addendum addressing the concerns expressed in those questions was submitted on 19 April 2001.

On 14 May, 2002, NR INTERNATIONAL again contacted IUCN-ELC, requesting a rewrite of the Final report. None of the ELC persons with substantive responsibility for this project remains available to the ELC. Hence, owing to the press of extreme demands, this reformatted report has taken some time to prepare. This document is a response to that request.

## Background

The constraints and demands on forestry law and institutions have changed markedly over the past 15 years (a time period much shorter than the maturation time of many forest species). Increasingly, domestic and international needs with regard to forest, call for legislation and institutions to address a matrix of issues (including environmental and conservation issues, indigenous rights, genetic resource access, alien/invasive species, trade, transboundary impacts and many other matters.) Many countries' forest legislation, however, remains focused only on issues of "traditional" forest management – governing and regulating the commercial use of forest resources (especially timber.) When the time comes to strengthen, broaden, and otherwise adjust their forest legislation, that process may go forward in a manner reminiscent of former days – by internal legislative development, without public involvement or collaboration.

At the same time, apparent threats to the ecological wellbeing of forest ecosystems are also increasing. Sometimes incompletely understood, these threats are best documented, unfortunately, by cataloguing (after the fact) incidents of forest loss and other objective evidence of declining forest health – matters best known only at the most local levels. Taken together, such a catalogue may be useful only as a general indicator that a problem exists, but may not be useful in identifying root causes, which may vary widely. Often, however, general solutions are sought, including through policy, legislative and other regulatory measures.

Although governmental authorities have great knowledge of forestry matters generally, they lack a significant type of information that can only be obtained from the people who are closest to the forests. Rural and forest dwellers, and indigenous peoples possess a special awareness of forest matters. Each of them may know only a small part of the forest, but knows it extraordinarily well. Moreover, they possess an important perspective on forest regulatory and management practices, and their effectiveness. This perspective is often unreflected in the process of developing new forest legislation, or amending such legislation as exists.

There has been relatively little research into the effectiveness of public participation in legislative development, in general, and we know of none that directly addresses the effectiveness of public participation and other collaborative mechanisms in the specialized context of forest legislation and institutions. However, there are strong national and international incentives to decentralize forest management processes, and to involve local people, and to empower community action with regard to forests.

This project was directed at "identifying the needs of developing countries for research to support improved forest laws and associated regulations." (NR INTERNATIONAL Review, 2001.) In this endeavour, it sought to " present a survey and analysis of obstacles facing developing countries in improving forest legislation and regulations and develop a set of recommendations to overcome them which outlines (a) the involvement of stakeholders in the consultation process leading to new laws and regulations, and (b) the role of donor agencies."

No person now associated with IUCN-ELC was involved in the process of preparing the project document, nor in the process of determining how to proceed, nor in discussions of the underlying needs or objects. No record of the discussions and negotiations of this process exists in any place accessible to the current IUCN-ELC staff, and the Lead Consultant and others who have been involved in those processes have not responded to requests for the information. Hence it is impossible for the author of the reformatted final report to state, as requested in the form, "how the demand for the project was identified." All that is known at present, is that NR INTERNATIONAL and Mauricio Cysne (then project manager at IUCN-ELC) agreed together on the list of countries to be studied.

## Project Purpose

This project provided an initial study of the needs of developing countries for improved legislation for forests and forestry, particularly in the areas of conservation, sustainable development, and local and community involvement in forestry activities and in collaborative processes to develop or amend the regulatory and institutional framework on which they are based. This objective was met through the development and analysis of three case studies (Malawi, Mexico and Nepal), each of which began with an analysis of the applicable legislative regimes (forest legislation and legislation relating to the legislative development processes), followed by an examination of the impact and effectiveness of public participation in recent processes of developing and/or amending national forest legislation.

## Research Activities

Primary research was carried out by a team consisting of a lead consultant (Richard Tarasofsky, based in Germany) in conjunction with national consultants from each of the study countries. *Mr. Tarasofsky's summary of the activities of the project is found in the Final Report (Annex 1 to this Reformatted Final Report) at pages 3-4.*

The process began with a "scoping phase," undertaken by the IUCN and the lead consultant, working in conjunction with UNFAO's Development Law Service and Forestry Division. In this period, IUCN developed a set of general recommendations for the work of the project, including the selection of the three "study countries" (Mexico, Malawi and Nepal), and enunciation of the parameters of legal analysis and in-country consultative workshops. IUCN then selected national consultants (Gracian Banda- Malawi, Maria Fernanda Sanchez Pardo (Mexico), and Narayan Belbase (Nepal)), and prepared their terms of reference and an initial methodology for the analysis.

The second stage of the Project focused on the work of the national consultants. Each consultant conducted in-depth research and interviews throughout the forestry sector and affected individuals and organizations. This research first examined in detail relevant national law on or related to two subjects – forest regulation/forest management and legislative development (in the natural resources sectors.) On the basis of this information, the consultants went on to examine the particular legislative documents on forestry which had been most recently adopted in that country, and, through a combination of research and interviews, to obtain an understanding of the level of public participation in the legislative development process, the manner in which that participation was sought/encouraged, and the procedures and other logistical arrangements for carrying it out. *A synthesis summary of the findings of the three case studies is found in the Final Report (Annex 1 to this Reformatted Final Report) at 4-9.)*

Once the relevant report was complete, national workshops were scheduled in Malawi and Mexico, to which many representatives from various aspects of the forest sector and various stakeholder groups were asked for their views and other input on the report, and more generally on the issues of effective forest legislation and stakeholder involvement in the legislative development process. In Nepal, owing to certain difficulties, no workshop could be scheduled. Hence with NR INTERNATIONAL approval, a series of in-country interviews were held to address the matters that would otherwise have been covered by the workshop.

On the bases of these activities and with advice and commentary from IUCN, the national consultants each prepared and submitted a final report embodying their case study and the particular inputs of the workshop and/or interviews. These three reports are submitted as annexes to this Reformatted Report. They are

**Annex 6 (herein, Malawi Study):** Banda, Gracian, "Forestry Law and Regulation in Malawi: Obstacles for Improvement" (17 March, 2000)

**Annex 7 (herein, "Mexico Study"):** Sanchez Pardo, Maria Fernanda, "Estudio sobre los procesos de reforma de la legislación forestal mexicana: Obstaculos para su mejoramiento y efectividad" (28 Febrero 2000)

**Annex 8 (herein “Nepal Study”):** Belbase, Narayan, “Forest Law and Policy: Obstacles for Improvement” (19 April, 2000)

For Nepal, in addition to the final report, a separate report on the final round of interviews was prepared by the Lead Consultant. (The report of those interviews is submitted as **Annex 9** “Tarasofsky, Richard, “Report on Mission to Nepal on NR INTERNATIONAL Project” (1 March, 2000))

As the final stage of the Project, the lead consultant reviewed the three reports and attempted to distill therefrom

- factors common to all,
- issues uniquely experienced by any one of the study countries, and
- a series of lessons learned, recommendations and conclusions.

The lead consultant’s reports were circulated to a team of reviewers from the IUCN Commission on Environmental Law (CEL), selected for their particular expertise in forest legislation and law, and specific knowledge of these issues in the context of developing countries. The CEL team provided useful comments and suggestions, some of which were incorporated into the final versions of those documents.

The Lead Consultant’s work is reflected in two documents:

**Annex 1 (herein “Synthesis Report”):** Tarasofsky, Richard, “Synthesis report: Forest Law and Regulations: Obstacles to Improvement”

**Annex 2 (herein “Lead Consultant’s Final Report”):** Tarasofsky, Richard, “Final report: Forest Law and Regulations: Obstacles to Improvement” (note: We have not included the original Annexes to this report, as they duplicate Annexes 6, 7, and 8 to the current “Reformatted Final Report.”)

In addition to these documents the newly appointed project staff at ELC submitted a final report of the project (attached as **Annex 3 (herein “ELC Project Final Technical Report”)** Young, Tomme “Final Technical Report (15 June 2000).)

Several months after submission of the “Synthesis Report” and “Lead Consultant’s Final Report” of the Project, NR INTERNATIONAL submitted several questions (the “NR INTERNATIONAL Review”)<sup>1</sup> to the IUCN Environmental Law Centre (IUCN-ELC) relating to the Final Report in the above-captioned Project. This document began by stating that the overriding objective of this project was *“to identify the needs of developing countries for research to support improved forest laws and associated regulations.”* The NR INTERNATIONAL Review noted with concern that the report focused only on the (“subservient”) specific objective of the contract, and thus failed to specifically discuss the more general descriptive objective. It asked for a revision of the Report to address these matters. Accordingly, on 20 December 2000, IUCN-ELC<sup>2</sup> submitted an addendum to the report.

The NR INTERNATIONAL Questions and Addendum are annexed to this report as

**Annex 4 (herein “NR INTERNATIONAL Review”):** “e-mail entitled “R7339 ZF0116 REVIEW,” dated December 22, 2000, received from Mr. Duncan Macqueen, Deputy Programme Manager, DFID-FRP, NR INTERNATIONAL.

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<sup>1</sup> These comments were received by e-mail entitled “R7339 ZF0116 REVIEW,” dated December 22, 2000, received from Mr. Duncan Macqueen, Deputy Programme Manager, DFID-FRP, NR INTERNATIONAL.

<sup>2</sup> The Lead Consultant having been released from his contract by that time between completion of the project and receipt of the NR INTERNATIONAL Review, the Addendum was prepared by IUCN-ELC’s then-current professional staff, none of whom was involved in the substantive work of the project. As of the writing of this reformatted final report, no person who had even supervisory responsibility during the substantive work of the project remains at the ELC.

**Annex 5 (herein "Addendum"):** "Addendum to Final Report: FOREST LAWS AND REGULATIONS: OBSTACLES TO IMPROVEMENT" (the "Addendum" to address the concerns expressed by the NR INTERNATIONAL Review, and to satisfy its wish for a discussion of the general objective of the Project.<sup>3</sup>

## Outputs

The tangible outputs of this project consist of Annexes 1-9, as described above. Re-listed here, in order, they are:

Annex 1 (herein "Synthesis Report"): Tarasofsky, Richard, "Synthesis report: Forest Law and Regulations: Obstacles to Improvement"

Annex 2 (herein "Lead Consultant's Final Report"): Tarasofsky, Richard, "Final report: Forest Law and Regulations: Obstacles to Improvement" (note: We have not included the original Annexes to this report, as they duplicate Annexes 6, 7, and 8 to the current "Reformatted Final Report.")

Annex 3 (herein "ELC Project Final Technical Report") Young, Tomme "Final Technical Report (15 June 2000).)

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Annex 6 (herein, Malawi Study): Banda, Gracian, "Forestry Law and Regulation in Malawi: Obstacles for Improvement" (17 March, 2000)

Annex 7 (herein, "Mexico Study"): Sanchez Pardo, Maria Fernanda, "Estudio sobre los procesos de reforma de la legislación forestal mexicana: Obstaculos para su mejoramiento y efectividad" (28 Febrero 2000)

Annex 8 (herein "Nepal Study"): Belbase, Narayan, "Forest Law and Policy: Obstacles for Improvement" (19 April, 2000)

Annex 9 "Tarasofsky, Richard, "Report on Mission to Nepal on NR INTERNATIONAL Project" (1 March, 2000))

In addition, the workshops in Malawi and Mexico and the meetings in Nepal constitute substantive non-tangible outputs of the project.

A summary/collation of the particular information gleaned by the Lead Consultant from the three studies, and from his participation in the two workshops and from his interviews in Nepal, is found in the Synthesis Report, beginning on page 4, and in the Final Report, beginning on page 4. The full wealth of information from those processes, however, is most easily obtained through an examination of the three studies. One of the defects of project formation was that it was not conducive to the development of cross-cultural/cross-legal-system lessons, and in fact that the project did not include any process for discussing or distilling such lessons as might have become relevant through direct cross-regional exchange. A full discussion of the need for (and difficulties of making) pan-regional generalisations and cross-regional comparisons is found in the Addendum at pages 2-9.)

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<sup>3</sup> While IUCN-ELC was happy to accede to NR INTERNATIONAL's request, we noted that a reasonable reading of the contract would suggest that it was the objective of the project to undertake the survey and analysis (the "specific objective") as one step in helping *NR INTERNATIONAL* to achieve the General Objective.

## Contribution of Outputs

Contribution to DFID Development Goals: Forests and forest legislation are of critical importance to the welfare of developing countries, and to the daily lives of poor and marginalized people who live or obtain their livelihoods in forested and deforested areas. Growing international recognition of this fact, and of the importance of an integrated program of multi-level forest management and decentralization of these responsibilities has led to a recognition that many existing forest laws and institutions are outdated and provide insufficient authority for these activities. It is essential that new approaches to forest legislation and institutions be developed. Moreover, in order to ensure that they (especially the collaborative and decentralised aspects) function effectively and that local people “buy in” to the process, it is essential that legislative development must occur in the most transparent way possible, and that a systematic collaborative process must be used even at the legislative development stage. Where this happens, DFID’s various goals of improving the sustainability of livelihoods for rural and forest dwelling peoples are served in a variety of ways.

For example, one of the single greatest contributors to ineffective or unsupported forest legislation and institutions is the lack of knowledge of specific problems encountered at the local level, by government officials, by forest residents and other concerned citizens, and by the regulated individuals and groups. Although their knowledge of the forests and the manner in which they are used and affected relates only to a small fraction of the country’s forests, that knowledge is based on daily “interaction,” of one sort or another, with the forest ecosystem in that area. If the development of new forest legislation occurs through a truly collaborative process, the resulting legislation must, necessarily, be more responsive to the needs and concerns of rural and forest-dwelling people and other forest users.

Collaborative legislative development in the forest sector also is a step toward improving the ability and incentive of rural and forest-dwelling people to participate in forest management. Forests are an important national asset which must be managed in a very locally specific way. Participation by rural and forest-dwelling people provides the forest sector with many benefits based on their knowledge of the forest in their area. At the same time, it creates a framework for exchange of information, capacity-building, and the development of a long-term co-operative relationship by which local individuals and groups can take responsibility for management of this important resource.

One important component of community involvement is so-called “community forestry” programmes. Although a major international effort has been quite successful in many countries in creating programmes for community forest management systems of various types, relatively few such systems are operating effectively. Re-evaluation of these programmes, using a collaborative process that examines what specific factors deter effective use of the program in particular instances may be of value.

Finally, each activity in which government makes the effort of soliciting, listening to *and responding to* the concerns of affected members of local and rural communities operates as an indicator to all parties of the value that can be realized through improvement of the relationship between these two groups. As government becomes (and comes to be perceived as) a facilitator of sustainable forest activities, and of solutions to forest-related problems, at the local level, the process and objectives of sustainable forest management are enhanced.

This project has taken the first steps toward achieving some of these goals. It has created a baseline of information and a series of recommendations relating to specific additional progress in each of the three study countries. *(This information is excellently presented in the Mexico study, the Malawi study, and the Nepal study. A very brief overview of the results of these studies is found in the Synthesis Report.)*

Dissemination, Promotional Pathways and Specific Contribution in the Study Countries and Elsewhere: In each of the three study countries, interest was expressed in carrying the project forward into concrete activities in the implementation of legislation – through regulatory and protocol development, for example, and through the establishment of forums for collaborative forest decision-making. *(These issues are very briefly summarised in the*

*Synthesis Report at pages 18-22. The reader is encouraged to also consult the Mexico, Malawi and Nepal studies directly.)*

To date, dissemination of certain outputs of the project (the Mexico, Malawi and Nepal studies) have been as follows: The documents have been disseminated to the participants in the three national workshops and to the CEL review team, and have been provided on request to researchers and government officials in the three countries and elsewhere. They have lately been posted on the IUCN-ELC website, with permission from NR INTERNATIONAL.

Follow up: The project serves as a beginning, and can become a springboard begun to address the more global issues of the problems and constraints preventing collaborative development of forest legislation, policies and programs. In particular, the project has considered the possibilities for follow-up action and research to carry the work begun by this project into the creation of a more complete and useful "toolbox" of legislative mechanisms, examples and experience, that would be more widely relevant around the globe to aid in legislative-development/participation processes that will enhance forest management and sustainable development. While this issue is not expressly addressed in the Synthesis Report or in the Lead Consultant's Final Report, the Addendum provides direct input into the manner in which the initial information developed by this Project can be carried forward to provide value across the wider list of global priorities and regional issues. In response to specific requests, the Addendum identifies 9 particular additional studies that would contribute greatly to the effectiveness and positive impact of participatory processes in forest legislative and administrative work. (Addendum, pages 10-18) It includes recommendations for studies on –

1. Participation of Donors in Legislative Development
2. Cross-sectoral Factors
3. Mechanisms for Local Enforcement and Implementation
4. Community Forestry and Law – Developing Legislative and Administrative Programs "by doing"
5. Interests of Forest Holders
6. Controls and Mandates on Government: Evaluating the Role of Sectoral Agencies in Development of Legislation within their Sector
7. Costs of Governance
8. Methodologies of Conflict Resolution, and
9. Representative vs. Direct Participation

IUCN is not currently funded to undertake any of this work, nor any other promotional work to extend the outputs of this project, beyond the specific dissemination described above.

Respectfully re-submitted,

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**Synthesis report**

**FOREST LAW AND REGULATIONS:  
OBSTACLES TO IMPROVEMENT**

**Richard Tarasofsky  
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**7 August 2000**

## TABLE OF CONTENTS

TABLE OF ABBREVIATIONS.....	3
<b>I. INTRODUCTION.....</b>	<b>4</b>
<b>II. OVERVIEW OF THE LEGAL PROVISIONS ON FORESTS IN MALAWI, NEPAL AND MEXICO.....</b>	<b>4</b>
A. OWNERSHIP.....	4
B. MANAGEMENT APPROACH .....	5
C. CONSERVATION AND SUSTAINABLE MANAGEMENT.....	6
D. INSTITUTIONS.....	6
<b>III. REVIEW OF LAW-MAKING EXPERIENCES ON FORESTS IN MALAWI, NEPAL AND MEXICO.....</b>	<b>7</b>
A. LEGAL REQUIREMENTS RELATING TO THE LAW-MAKING PROCESS .....	7
B. WHICH GOVERNMENTAL ACTORS WERE INVOLVED? .....	9
C. AVAILABILITY OF FINANCIAL RESOURCES FOR THE LAW-MAKING PROCESS .....	10
D. INFLUENCE OF OTHER RELEVANT LAWS AND THE PROCESS BY WHICH ANY INCONSISTENCIES WITH OTHER PIECES OF LEGISLATION WERE IRONED OUT .....	10
E. EVALUATION OF FEASIBILITY OF SUBSTANTIVE OR INSTITUTIONAL ASPECTS OF THE PROPOSED LEGISLATION.....	11
F. ROLE OF FOREIGN DONORS AND EXPERTS .....	12
G. PROCESS FOR IDENTIFYING PROBLEMS AND DETERMINING LEGISLATIVE SOLUTIONS.....	13
H. CONSULTATION OF STAKEHOLDERS.....	14
I. PRIMARY AND SECONDARY LEGISLATION .....	15
<b>IV. ASSESSMENT OF HOW THE LAW-MAKING PROCESS INFLUENCED THE QUALITY OF FOREST LEGISLATION IN MALAWI, NEPAL AND MEXICO.....</b>	<b>16</b>
<b>V. RECOMMENDATIONS ON IMPROVING THE LAW-MAKING PROCESS ON FORESTS IN MALAWI, NEPAL AND MEXICO .....</b>	<b>18</b>
A. GOVERNMENT ACTIVITY .....	18
1. Malawi .....	18
2. Nepal.....	19
3. Mexico.....	19
B. PUBLIC CONSULTATION .....	20
1. Malawi .....	20
2. Nepal.....	20
3. Mexico.....	20
C. TECHNICAL DRAFTING PROCESS .....	21
1. Malawi .....	21
2. Nepal.....	22
3. Mexico.....	22
D. ROLE OF FOREIGN DONORS.....	22
1. Malawi .....	23
2. Nepal.....	23

## **Table of Abbreviations**

ACPD	Assistant Chief Parliamentary Draftsman
CBD	Convention on Biological Diversity
CEL	IUCN Commission on Environmental Law
DOF	Department of Forests
DOL	Department of Lands
DFO	District Forest Officer
FUG	Forest User Group
FAO	UN Food and Agriculture Organization
IUCN	The World Conservation Union
LGEEPA	Ley General del Equilibrio Ecológico y la Protección al Ambiente (General Environmental Law) – Mexico
NOMs	Normas Oficiales Mexicanas (Regulatory Standards) – Mexico
NGO	Non-governmental Organisation
SECOFI	Secretaría de Comercio y Fomento Industrial (Ministry of Commerce and Industrial Promotion) – Mexico
SEMARNAP	Secretaría de Medio Ambiente, Recursos Naturales y Pesca (Ministry of Environment, Natural Resources and Fisheries) – Mexico
VNRMC	Village Natural Resources Management Committee

## **I. Introduction**

This report will synthesise the findings and recommendations of the country reports done under this project on law making for forests in *Malawi*, *Nepal*, and *Mexico*.

The report on *Malawi*<sup>1</sup> examines the law-making process leading up to the 1997 Forest Act, and subsequent regulations; the report on *Nepal*<sup>2</sup> examines the law-making process leading up to the 1993 Forest Act and subsequent regulations; and the report on *Mexico*<sup>3</sup> examines the extensive amendments made to the Forest Act in 1997 and the regulations adopted in 1998.

## **II. Overview of the legal provisions on forests in *Malawi*, *Nepal* and *Mexico***

The following is a summary of the main findings of each report on the substance of the forest statutes. Each legislative regime proved highly complex, covering a number of areas including the following:

### **A. Ownership**

All three statutes contain rules regarding ownership of forests and resources.

Under the Forest Act in *Malawi*, ownership of resources in forests depends on who (persons or communities) plants or protects the trees (whether planted or naturally grown). If the tree is natural, then the owner can use it in a sustainable manner. Where the tree is planted, the owner, i.e. "the person/community that planted it", has the right to harvest and dispose of it freely. In the case of leasehold forests, use and transport of naturally occurring timber requires a permit, whereupon the revenues from such permit fees accrue to the Village Natural Resource Management Committee (VNRMC), even if the reversion is freehold or public land.

In *Nepal*, ownership rules are also specified in the Forest Act. Five categories of public land are provided for: community forests, leasehold forests, government-managed forests, protected forests and religious forests; specific management and use rules are provided for each classification. A further category of private forests also exists.

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<sup>1</sup> Background paper and workshop report prepared by Gracian Banda

<sup>2</sup> Background paper prepared by Narayan Belbase.

<sup>3</sup> Prepared by Maria Fernanda Sanchez Pardo, translated by Alejandro O. Iza

Article 3 of *Mexico's* Forest Act clearly vests ownership of forest resources in the hands of the commons, communities, natural persons and corporations who own the land where the resources are located. The Forest Act specifically states that its procedures will not alter the ownership regime of this land. Notwithstanding this, in order to use the timber resources, the owner must get governmental authorisation and submit a programme of forest management. As to use of forest resources generally, holders of ownership or use rights (or those with whom they have contracted), should respect the provisions of the Forest Law, the Regulation of the General Environmental Law (LGEEPA) and of the Land Act.

### ***B. Management approach***

The experiences in *Malawi* and *Nepal* reveal a strong movement towards decentralisation of forest management, particularly towards community management. In *Malawi*, the new legislation provides for the execution of forest management agreements between the government and communities, thereby providing an opportunity for an enhanced role for Village Natural Resource Management Committees (VNRMCs).

In *Nepal*, the 1993 Forest Act sets out extensive procedures for handing over state-owned forests to Forest User Groups (FUGs), representing communities, as well as for leasehold and religious forests. Depending on the applicable property regime, the Act places limitations on the use of the forests (e.g. in cases of community forests, the Act places some prohibitions on specified activities, while providing for conservation and management of the forests according to an approved workplan).

In *Mexico*, the legislation provides mechanisms for future decentralisation of forest management by, for example, authorising the Ministry of the Environment to conclude agreements with the Governments of the Mexican States, the Governments of the Federal District as well as with communities and the private sector. However, in reality this has not taken place perhaps owing to a lack of incentive to take such action, and the lack of training and economic resources to exercise these functions. For forest governance to be more assertively mandated, the Federal Public Administration Act (*Ley de la Administración Pública Federal*) will probably have to be amended (to reduce federal administrative powers (such as supervision, monitoring and drafting of regulations).) Such an amendment would have to be co-ordinated with further amendment of the Forest Act, as well as of the LGEEPA, to more explicitly define and authorise the powers of Mexican States and municipalities.

### **C. Conservation and sustainable management**

All three statutes include rules on conservation and sustainable management, in varying degrees of specificity.

The *Malawi* Forest Act includes, for the first time, provisions on deforestation, vegetation cover and loss of biodiversity. It also provides for the creation of protected areas by the Department of Forests and the Department of Physical Planning, although no coordination between the two bodies is specified.

In *Nepal*, specific provisions on conservation apply on public land, depending on the classification. For example, specific prohibitions are placed on community forests, mainly aimed at preventing serious degradation of the forests, and must be respected in the work plan to be prepared by each FUG. However, the precise extent of these prohibitions has been controversial in practice. With regard to leasehold forests, specific activities are permitted, upon application. In religious forests, even more stringent limitations apply. By contrast, lesser limitations apply in the case of private forests.

In *Mexico*, the Forest Act sets out rules concerning the use of forest resources, reforestation, agroforestry and non-timber forest products. Specific instruments, such as licences (including environmental impact assessments) and technical regulations (for non-timber resources, as well as for reforestation, agroforestry and activities aimed at domestic use). The Act addresses transportation and transformation of forest raw materials, as well as preventing and combating fire and pests. The Act also provides for use of planning instruments, including a forest development programme, a forest plantation development programme and a national reforestation programme.

### **D. Institutions**

Each of the new statutes contains provisions relating to governmental institutions.

The Forest Act in *Nepal* does not create new government institutions (relying mainly on the Ministry of Forests and Soil Conservation and the Department of Forests), but does establish the legal basis for the FUGs. It also grants considerable power to the Department of Forests to decide whether or not to hand over forests to FUGs, as well as the power to cancel the registration of an FUG. Because in practice these provisions are not subject to appeal, they clearly impact on the extent to which community forestry actually is practised.

In *Malawi*, the statute supplements the structure of the Department of Forests, by providing for a management board. The Forest Act also creates the VNMRCs for community based forest management. The Act sets forth functions for the Department of Parks and Wildlife, but does not address coordination with the Department of Forests.

The Forest Act in *Mexico* creates the National Technical and Consultative Forest Council – an entity whose specific purpose is to promote stakeholder/civil-society participation. The Council is a consultative body under the Environment Ministry. The Forest Act retained provisions (enacted in 1992) for regional forest councils. These Councils are consultative bodies to address all areas defined by the Act (and in those where the Ministry requires their opinion), including, *inter alia*, the following:

- technical criteria for the compilation of information and organisation of the national forest inventory
- participation in the drafting of regulatory measures (NOMs, or “Normas Oficiales Mexicanas”) for prevention, combat and control of fires, and of forest pests and diseases
- establishment of logging-bans, and
- elaboration of economic programmes.

### **III. Review of law-making experiences on forests in *Malawi, Nepal and Mexico***

#### ***A. Legal Requirements relating to the law-making process***

Although each country has a general procedure that is followed in the preparation of laws, only *Mexico*'s legislative structure specifically addresses the procedure to be followed in preparing amendments. This procedure includes inter-ministerial and public consultation, although there is no set process for incorporating public inputs into the actual drafting. (These procedures are Constitutionally required for every amendment of legislation in *Mexico*). In addition, a policy established by the Ministry of the Environment specifically discusses the integration of public consultation and consultation with the Congress with regard to the amendment of laws in this area.

The steps are as follows:

1. A diagnostic of the problem is prepared by any of the Parliament Houses or by the Executive (via any Government Ministry). In case of the 1997 Forest Act and Regulation, the diagnostic was prepared by the Ministry of the Environment, Sub-Ministry of Natural Resources, Directorate General for Forests.
2. A first draft is prepared containing the opinions of experts in relevant government departments.
3. A *ruling* on the regulatory impact (*dictamen de impacto regulatorio*), including a cost-benefit analysis, is submitted to the Ministry of Commerce and Industrial Promotion (SECOFI). All the Government Ministries are obliged to submit this kind of ruling to the SECOFI. This ruling is so important that if SECOFI does not approve it the whole amendment process will terminate.
4. At this point, a consultation process could be initiated via Regional Forums, and sectoral consultation processes (as was done in the case of the 1997 Forest Act. Other Government Ministries, however, do not provide for public participation.)
5. The Mixed Drafting Commission begins work, integrating the different sectors through the establishment of drafting commissions representing the different sectors and authorities
6. This draft is sent to the responsible commissions in the House of Representatives and the Senate.
7. From there, the draft is sent to the legal department of the Ministry of the Environment, Natural Resources and Fisheries, as well as to the Federal Procurator for the Protection of the Environment.
8. The revised draft is next sent to the Ministry of Commerce and Industrial Promotion for comments and proposals.
9. The draft is sent to the Legal Unit of the Presidency of the Republic, where its legal form, but not its content, is analysed.
10. Finally, the draft is sent either to Parliament as a Bill or Decree (for approval and its subsequent publication) or is published in the Official Journal of the Federation if it is a regulation.



### ***B. Which governmental actors were involved?***

In each country, a specific governmental entity initiated the law-making process and varying degrees of inter-ministerial consultation took place.

In *Nepal*, the process of drafting the statute was undertaken by the Ministry of Forests and Soil Conservation, led by the Department of Forests (within the Ministry), and assisted by a lawyer from the Ministry of Justice operating from within the Ministry. At times, the process involved the Minister directly. Different interviewees had differing views about the extent of inter-ministerial consultations during the law-making process, but all agreed that it was insufficient.

In *Malawi*, the work on the Forest Act proceeded under the auspices of the Ministry of Natural Resources. A key actor in the process was the Permanent Secretary for Natural Resources, who worked closely with the Assistant Chief Parliamentary Draftsman. It was reported that the Department of Forests was involved, but not intensely (even claiming ignorance of some amendments made before the draft was presented to cabinet). There was no formal consultation with any other departments. However, various officials had involvement through a series of workshops on the draft bill, and the Department of the Environment's Principal Environmental Officer (Legal) and the Policy Advisor were also consulted on specific aspects.

In *Mexico*, the initiative came from the Adviser of the Sub-Ministry of Natural Resources. The Ministry of Environment, Natural Resources and Fisheries set up a process that involved the Commission for Forests and Rainforests of the House of Representatives and the Commission on Sylviculture and Hydraulic Resources (also of the Senate.) Input was then obtained from the State Technical Consultative Forest Councils and the Legislative Committee of the National Consultative Council for Forests, although other relevant committees (e.g. on forest plantations and incentives) were not consulted.

### ***C. Availability of financial resources for the law-making process***

Law making can be both a lengthy and expensive process, particularly when it involves legislation as complex as for forests. Yet information on financial resources made available, or even budgeted, is difficult to discern. In neither *Nepal* nor *Malawi* has it been possible to precisely quantify the availability of financial resources. In both cases, the law-making process was done on a tight budget. However, there was no single funded project that carried the entire enterprise – rather, the funding was piecemeal and ad hoc. In *Mexico*, no specific budget was allocated.

### ***D. Influence of other relevant laws and the process by which any inconsistencies with other pieces of legislation were ironed out***

Given that forest issues are cross-sectoral, it is self-evident that legislation on forests will be related to other pieces of national legislation. A key challenge during the law-making process is to iron out potential inconsistencies.

In *Malawi*, the ACPD considered a variety of related statutes directly relevant to forest management, however not all, such as the Electricity Act 1998, Post and Telegraph Act 1995, Public Roads Act 1962, and National Roads Authority Act 1998 and the National Construction Industry Act 1996. These statutes all have an impact on the conservation and sustainable use of forests. In addition, no assessment was done of the relevance of traditional law, even though this law is very relevant to forests. Implementation of applicable rules of international law was captured by a general provision giving the Minister the power to specify implementation measures. However, it appears that the Act reflects some provisions in the Desertification Convention and the Convention on Biological Diversity (CBD), but not all those with relevance to forests. It also appears that that DOF did not view the CBD as being very significant as regards their mandate.

In *Nepal*, it does not appear that all related statutes were considered, since many inconsistencies exist. Examples of legislation that allow for the taking of land, including forests, include the Public Roads Act 1974, Water Resources Act 1992, Electricity Act 1992 and Land Acquisition Act. In addition, the Local Self-Governance Act 1998 includes provisions on the entitlements of Village Development Committees that are inconsistent with the community forest provisions of the Forest Act. There is, however, a provision in the Forests Act that provides that in case of inconsistency, unless otherwise specified, the Forest Act prevails. While this provision helps clarify the primacy of the Forest Act in some instances, there is some related legislation, such as the Nepal Mines Act 1966, that also includes similar provisions. Nonetheless, the Supreme Court has held that the Forest Act 1961 is a special Act that implies that it prevails in respect of forest management issues. It also does not appear that international law was considered very profoundly during the drafting process; in part this may be due to problematic inter-departmental coordination within the Ministry of Forest and Soil Conservation, in that different parts of the department are the focal points for different international instruments.

The various legislative documents affecting forests in *Mexico* lack internal consistency. While there are provisions intended to integrate Forest Act and the LGEEPA, with regard to those environmental principles and concepts most relevant to forests, there are two different interpretations: one that says that the amendments do not reflect an integrity with the provisions of LGEEPA, and another says that as a result of efforts to be fully compatible with the LGEEPA, the drafters of the Forest Law were unable to effectively integrate concepts of productive and commercial uses of forests.

### ***E. Evaluation of feasibility of substantive or institutional aspects of the proposed legislation***

As indicated above, all the pieces of legislation contained provisions which both substantially revised the existing rules and either created new institutions or amended the mandates of existing institutions. In other words, the new laws heralded significant changes, in some cases even sweeping changes. Yet, none of the countries performed feasibility studies in any formal sense or any kind of evaluation of likely practicability of these changes. In *Mexico*, however, the Ruling on Regulatory Impact (Dictamen de Impacto Regulatorio) is worth mentioning. Since 1998, this law has made it obligatory for every Government Ministry to submit a cost-benefit analysis to the Deregulation Unit of the Ministry of Commerce and Industrial Promotion (SECOFI), with regard to every new piece of legislation or legislative amendment.

## ***F. Role of foreign donors and experts***

In some developing countries, foreign donors and experts are significant actors in the development of law and policy on forests.

However, in *Mexico*, no foreign inputs took place directly on the current forest legislation, because it was judged that the domestic expertise was sufficient and that forest issues were considered to be internal matters. It must be noted, though, that foreign inputs did take place earlier in relation to other forest policy initiatives in *Mexico*. By contrast, in the other two countries, foreign donors did play significant roles in the law-making process on forests.

In *Malawi*, foreign input was somewhat limited and ad hoc. Two consultancy projects were funded in 1989/90 on forest legislation and forest policy. Although a draft Forestry bill 1993 was produced, the law-making process stalled until 1996. The resurgence of activity took place as a result of pressure from donors funding various projects in forestry, who were concerned about the impact of forest legislation on their projects. As a result, several donor projects at that time had a legislative component.

It should be noted, however, that there was little or no donor pressure for *Malawi* to adopt provisions in its policy and legislation that the country did not want. What was apparent, however, was that if a donor had specific interest in promoting a particular principle or strategy for forestry or environmental management (e.g. community management or decentralisation) more emphasis would be placed on this in its project document such that the departmental officials may have felt that this element was part of the conditionality.

In *Nepal*, foreign donors played key roles in the law-making process on forests, following a tradition of extensive donor support for the forestry sector. Rather than a single donor project financing the entire law-making effort, different aspects were funded out of different projects at various points in time.

Donors in *Nepal* also played another crucial function during the law-making process – in addition to providing funding. Through their field projects, they acted as intermediaries between the government and the grassroots, so as to allow the latter some input into law-making process. They solicited comments from FUGs, NGOs and individual experts on the draft Forest Regulations and provided their own inputs through participating in working groups. Although this more substantive role of donors was somewhat controversial (i.e. there were those who were concerned about the implications for Nepalese sovereignty), it was largely perceived as effective. Donor input was channelled by the government in a manner that allowed the government to keep control. Donor input may also have been instrumental in specific references in the regulations concerning foreign assistance (e.g. to FUGs).

### ***G. Process for identifying problems and determining legislative solutions***

In *Malawi*, this process was not as systematic as it might have been. General departmental experiences were gathered, but not in a structured manner. It is difficult to gauge the effect of this, since there was no official record of how these were used. Rather, the findings of the country-consultant were based on anecdote. However, a set of studies was done in the process of preparing the 1993-94 World Bank/FAO Forest Sector Review and the 1994 National Environmental Action Plan. In addition, several study visits were made to other countries, although not by the ACPD, who actually did most of the drafting. The National Forest Policy was a substantive input, but key parts were not reflected in the legislation. In addition, not all environmental policy initiatives were influential, even though they were relevant.

In *Nepal*, the Master Plan for the Forest Sector provided the basis for identifying legislative obstacles. The Master Plan reviewed various pieces of legislation and made several recommendations, some of them sweeping, on how to improve the legal landscape.

As mentioned above, Mexican law requires a formal process for identifying problems and determining solutions as part of the law-making process. This was done by the General Directorate for Forests, albeit in the face of political opposition from some quarters resistant to change.

## **H. Consultation of Stakeholders**

There were differing views about the level of consultation of stakeholders in *Nepal*, both as regards the statute and the regulations. Some interviewees indicated that a broad range of consultations was held with journalists, lawmakers, foresters associations and district Forest Officers. Others indicated that only three institutions received early drafts, only communities near Kathmandu were consulted, and only senior officers in the Ministry and Department of Forests were consulted. Differing views also were expressed about the level of consultation with NGOs. Whatever the case is, it certainly appears that no fixed consultation strategy was established or followed, at least in the case of the statute. The consultative process was more extensive for the regulations. However, there was no process for resolving conflicts among the stakeholders. And, uniquely, the donor forestry projects were actively involved in certain aspects of the law-making process, especially regarding the regulations.

In *Malawi*, no extensive public consultation took place either. Three regional workshops were held for traditional leaders, but only on the theme of community based forest management. No funds were available to conduct grassroots consultations, e.g. local meetings in all forest communities, although limited consultations were conducted as part of the World Bank/FAO sponsored forest sector review. A national workshop was held in 1996 on the draft Bill with some, but not all, stakeholder groups. But it appears that the impact of that workshop was limited, since proposals made at the workshop regarding enforcement were not taken up in the final draft Bill. In addition, no record of the workshop was directly supplied to the ACPD. No consultation has taken place in regard to developing the secondary legislation.

In *Mexico*, five regional forums were convened for approximately six Mexican states, all taking place in capital cities. The location limited the extent of actors that could participate. Most participants were from the government sector. Documents upon which the forums were based were not distributed in advance, and in general there was a lack of effective public access to relevant information. It is asserted in the report from *Mexico* that the conclusions and minutes of the forum did not match the actual discussions that took place. One debated issue was “to whom should the proposed changes be submitted?” The options were either (i) to the drafting committee of the National Technical Consultative Council for Forests or (ii) directly to the Parliament. As the latter option was more popular, this is what took place. The report from *Mexico* concludes from this that the organisers of the consultation process had pre-conceived notions on the specific amendments from the beginning.

A separate forum was convened to discuss the Forest Regulations (Reglamento Forestal) under the auspices of the Commission on Forests and Rainforests of the House of Representatives and under the Drafting Commission of the National Technical Consultative Forest Council. This commission was better organised and the process was more transparent. It produced a number of proposals, as well as consensus on their integration into the regulatory documents.

### ***I. Primary and secondary legislation***

Normally the decision about what should go into primary and secondary legislation is based on the principle that general and fundamental aspects of the regime should be codified in the statute, while the details subject to change should be in the regulations. Among the reasons for this are differences in the manner in which regulatory decisions and amendments are made; amending secondary legislation is often easier and quicker than amending a statute. This is because one does not want to have to go back to Parliament with every small change, when it can be more easily dealt with by Cabinet. There are certain grey areas, however, when smaller changes can in practice imply fundamental changes.

In *Nepal*, it appears that some key conflicts, especially relating to community forestry, could not be resolved during the process leading up to the adoption of the statute, and thus were left to be resolved through the regulations. The result was ambiguous wording in the text, which continues to be controversial. This is particularly relevant in respect of the precise entitlements of FUGs to use forest resources, which, to a significant extent, have been defined by secondary legislation. On the more positive side, the development of regulations on community forest management had a relatively high degree of public input.

In *Malawi*, the process of deciding what went into the Act was partly due to not having complete information, e.g. about pricing and marketing of forest produce, at the time of preparing the Act – therefore it was left to the regulations. It also appears that relatively more involvement by communities took place in developing the regulations that concerned them, because of the information that only they had.

In *Mexico*, the Act is very vague, offering no clear indication as to what regulations are permitted or required. As a result, much pressure was brought to bear in the drafting process, in some instances, leading to an amendment process that was sometimes haphazard. Here also, treatment of polemic issues contrary to the SEMARNAP policy were put off, under the justification that they would be considered in the Regulation, something that in most of the cases did not happen.

#### **IV. Assessment of how the law-making process influenced the quality of forest legislation in *Malawi*, *Nepal* and *Mexico***

Each of the pieces of legislation examined yielded problems potentially attributable to deficiencies in the law-making process.

In *Malawi*, these problems include:

- Problems relating to inappropriate institutional mandates being granted may have been due to insufficient interdepartmental consultations. Examples include not granting the DOF some power to deal with afforestation on leasehold land (which is now exclusively the responsibility of the DOL), and the powers of institutions under other statutes to take actions that affect forests.
- The rule that revenues from fees from freeholders or leaseholders for using natural trees should go to VNRMCs is problematic, in that it is why the revenues should accrue to VNRMCs and that no provision is made for the case where a VNRMC does not exist. This could have been avoided with more effective consultation with the private sector and NGOs during the drafting process.
- Confusion exists about the legal authority for creating VNRMCs, i.e. whether they are created by agreement under Section 31 between the Director and a management authority or elected by stakeholders of a village forest area under Section 2. In addition, it is unclear whether a village headman is such a management authority. This was likely exacerbated by lack of consultation with local communities.
- There is a lack of precision regarding the rules for community management on government-owned land or on customary land, as well as whether there can be co-management of forest reserves. This is possibly due to insufficient consultation with local communities, as well as bureaucratic intransigence in giving up control.



- The lack of harmony between the Forest Act and legislation on other sectors that affect forests is either because information from prior multi-sectoral reviews was not made available to the drafters or because the problems were ignored.
- There is incongruity between the Forest Act and legislation governing local authorities -- such as the Local Government (Urban Areas) Act and the Local Government (District Councils) Act and the Local Government Act 1998 -- regarding the role of local authorities in forest management. This is possibly due to lack of information by the draftsman and lack of consideration of overall government policy trends towards decentralisation
- The Forest Act 1997, like its predecessor, relies mainly on penal sanctions with low penalties for enforcement. This approach has, however, proven ineffective in *Malawi* and is in contrast to more innovative approaches in other pieces of legislation. This possibly reflects not taking account of multi-sectoral reviews carried out by related agencies.
- Even though the Constitution affirms that customary law is part of the law of the land, it appeared that these rules were not taken account of by the drafters.

In *Nepal*, these problems include:

- A lack of coherence between the Forest Act and other pieces of legislation affecting forests, both outside the sector (e.g. mines, public roads) and related laws (e.g. environment). This is most likely due to lack of coordination between government ministries.
- A provision of only usufruct rights to FUGs, not full ownership rights, with the perception by the author of the country study that proper financial incentives for sustainable management are not as strong as would have been the case with full ownership. This may be due to insufficient consultation with FUGs. It should be noted that not all reviews of this country study agreed with the author that the problem exists in reality.
- One CEL member reports that the problems arising from applying the community forestry provisions are the result of conflicting views on this as between donor agencies and the Forest Department.

In *Mexico*, these include:

- A lack of congruity exists between the General Law on Ecological Balance and the Protection of the Environment and the Forest Act, in that the latter does not really take into account the conservation and use of non-timber species and associated fauna . This demonstrates the lack of a cohesive process in the development of the legal orders, as the various proposals submitted by the different actors were not taken into account.
- There are no clear rules regarding the use of certain forest resources or undertaking of certain forest activities. This is partly because the law-making process did not take on board many specific proposals made from those consulted.
- *Mexico* also shares with *Nepal* and *Malawi* the problem of lack of coherence between the Forest Act and other statutes that affect forests.

## **V. Recommendations on improving the law-making process on forests in *Malawi*, *Nepal* and *Mexico***

Each report yielded several concrete recommendations, which are presented below in a clustered format.

### ***A. Government activity***

Several recommendations were made as to how government, as the initiator and leader of the law-making process, should act efficiently and effectively. These arise because of the perceived need in all case studies that those in government charged with the law making could have been more effective. The recommendations below are aimed partly at strengthening the relevant institutions and partly at improving the way law making is carried out.

#### 1. *Malawi*

- The Planning Unit in the Department of Forestry should be strengthened and the Forestry Research Institute of *Malawi* be properly utilised to ensure researched policy articulation.
- The Department of Forests (DOF) should consider employing its own lawyers rather than relying solely on consultants or the Ministry of Justice.

- Where new institutions are being created, such as for the promotion of community involvement, pilot projects should be established to inform the law reform process.
- The focal point for the drafting process of forestry legislation should be the DOF and not the mother Ministry of Natural Resources, so as to involve the actual professionals who face the problems on a day-to-day basis and ensure the inclusion of all relevant legal norms into the Act.
- A department that sponsors any new legislation should circulate drafts to other concerned institutions for their comments well before workshops are held to discuss those comments. Any such workshops should as much as possible build consensus with regard to principles, obligations, mandates among the various stakeholders through airing of comments.
- The department should assess and evaluate past legislation

## 2. Nepal

- An official record should be kept of the inter-ministerial consultation and review processes, as well as all drafts.
- It is necessary to involve DFOs and other district level line staff in the process – i.e. bring on board the views of those who deal with implementation issues on a day-to-day basis (although this is not meant to suggest that consultation with DFOs is a substitute for consultations with the local communities).
- Appropriate levels of financial resources should be allocated for the law-making process, especially to allow more effective consultation.

## 3. Mexico

- There should be inter-ministerial legal participation in drafting process, including representation on the drafting committee.
- A specific budget for information dissemination and consultation should be established.
- The Forestry Committee within the Federal Legislative Congress should play a key role during the consultation process, including during the compilation and systemisation stage, as well as in bringing together different parties.

## ***B. Public Consultation***

A second cluster of recommendations, in fact the majority, concentrated on how public consultation during the law-making process could be made most effective. This reflected a clear conviction by most of the interviewees and participants in the workshops that public consultation is a central component of effective law making.

### 1. *Malawi*

- Public participation in legislation should be properly designed and planned. Public inputs should be sifted and synthesised by the Planning Unit in the DOF and discussed by representatives of various stakeholders including traditional leaders, politicians, NGOs and others. Records of proposals and recommendations should be kept.
- Donors should provide support for civil society to engage in the lobbying process so as to help ensure that important change is not derailed in Parliament.

### 2. *Nepal*

- Public involvement needs to be assured through the creation of an iterative public forum that would systematically feed into the law-making process. This would involve a legally mandated committee with representation from different interest groups. A process of negotiation should be facilitated so that all stakeholders can participate effectively on an equal footing, and include a conflict resolution function. Documents should be circulated in advance and prepared for the target audience. Consultation should take place of grassroots (based on a sampling, staff members of district level government agencies, and central level experts).
- A public record should be kept of the consultations, hearings, seminars and workshops that take place as part of the consultation process.

### 3. *Mexico*

- To ensure effective consultation, develop a methodology containing: objectives, strategies, rules for participation, compiling and vetting of proposals and recommendations, and the procedure to be followed.

- Inform those consulted about relevant policy developments taking place under other ministries (e.g. deregulation under commerce ministry).
- Create a record of the drafting process, including results of the consultation process and an annotated draft that justifies and explains the content.
- The consultation process should encompass several stages:
  1. Preliminary consultation of strategic sectors prior to the elaboration of solutions of (legal) problems
  2. Elaboration of a first draft of reforms based on preliminary consultation
  3. Field visits to obtain views of the local population in relation to forest-related problems
  4. Specific questionnaires directed to social organisations and a sample of individual producers
  5. Regional forums established to discuss specific strategically selected issues
  6. A drafting committee established with balanced representation, including Ministries and government authorities
- Integrate relevant pieces of environmental information from all sources in a digestible manner for those being consulted.
- Consultations should follow two parallel tracks: one for the type of resource and another for the sector.

### ***C. Technical Drafting Process***

A further cluster of recommendations relates to how the drafting process itself could be improved. Some of these recommendations relate to actions to be taken during the process, whereas other recommendations express more substantive regulatory objectives.

#### 1. Malawi

- International comparisons should be conducted on how other countries have dealt with similar substantive issues.
- Compare traditional legal norms with new legislative proposals.

## 2. Nepal

- More efforts to incorporate international and other relevant national legal norms should take place.

## 3. Mexico

- Ensure that reforms reflect a long-term policy outlook and can be sustained over a long period.
- Establish a global strategy for medium and long-term regulatory needs.
- Create an integrated legal framework for the management of natural resources.
- Consider not only standards and rules, but also compliance mechanisms, e.g. audits.
- Establish forest protection committees to prevent and detect illegal acts and to undertake restoration.
- Establish certification mechanisms for rendering of technical forestry services.
- Regulatory strategy should be such as to maintain minimum control and monitor compliance, but to allow the sector to operate with minimum costs and maximum efficiency.

### ***D. Role of Foreign Donors***

A final cluster of recommendations relates to channelling international donor support. These recommendations are drawn from the two countries where donors played important roles. They reflect the reality that as major actors, international donors can facilitate or hinder effective law making.

## 1. Malawi

- Foreign consultants should be engaged to bring in expertise on innovative and technical aspects of forestry legislation, but they should work closely with local consultants who must carry on and finalise the process after the expiry of the mission of the foreign consultant.
- Donors should not force the pace of legislation development that involves a number of natural resources sectors as this risks creating gaps and duplication between the individual pieces of natural resources legislation. This arises out of the experience in *Malawi*, where some donors required that their projects relating to improving the Forest Act be completed before multisectoral reviews could be undertaken. The result was a piece of legislation that has greater problems than other statutes where a multisectoral review did take place.

## 2. Nepal

- Donors should help ensure that sufficient resources are available for the law-making process.
- Donors can help bring the views of local people to the attention of central government through supporting workshops and other exchanges of information and views.

**IUCN - The World Conservation Union  
Environmental Law Centre**

**Final Report**

**THE NEED FOR RESEARCH TO SUPPORT  
FORESTRY LAW AND REGULATIONS**

**NR International Contract Number: Z F0116  
DFID Project Reference Number: R 7339  
Forestry Research Programme**

**Richard G. Tarasofsky  
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**7 August 2000**



## TABLE OF CONTENTS

<b>I.</b>	<b>INTRODUCTION.....</b>	<b>3</b>
<b>II.</b>	<b>SUMMARY OF ACTIVITIES UNDERTAKEN .....</b>	<b>3</b>
<b>III.</b>	<b>SUMMARY OF THE FINDINGS OF THE CASE STUDIES .....</b>	<b>4</b>
	A. OVERVIEW OF THE LEGISLATION ON FORESTS IN MALAWI, NEPAL AND MEXICO.....	4
	B. REVIEW OF THE LAW-MAKING PROCESS IN MALAWI, NEPAL AND MEXICO.....	5
	C. ASSESSMENT OF HOW THE LAW-MAKING PROCESS INFLUENCED THE QUALITY OF FOREST LEGISLATION IN MALAWI, NEPAL AND MEXICO .....	6
<b>IV.</b>	<b>SUMMARY OF THE RECOMMENDATIONS MADE IN THE CASE STUDIES .....</b>	<b>7</b>
	A. GOVERNMENT ACTIONS.....	8
	B. PUBLIC CONSULTATION PROCESS .....	8
	C. TECHNICAL DRAFTING PROCESS .....	8
	D. FOREIGN DONOR SUPPORT .....	9
<b>V.</b>	<b>SUGGESTIONS FOR A FOLLOW-UP PHASE TO THIS PROJECT .....</b>	<b>9</b>

## **I. Introduction**

This is the final report<sup>1</sup> in the NRI-funded project entitled: Forest Law and Regulations: Obstacles to Improvement. *The objective of this project has been to develop insights into the obstacles that developing countries face in enacting effective forest legislation. As such, the method for achieving this objective was to conduct case studies on the law-making process in three developing countries.*

Two key points should be stressed at the outset. One is that the case studies did not evaluate implementation of the laws involved, except to the extent that connections could be drawn to the law-making process. Secondly, the main technique for fact finding was through interviews conducted by local consultants. On occasion, different persons consulted expressed different views on past events and, where significant, these differences are noted in the reports. However, since this project aims at making recommendations on overcoming obstacles to effective law making on forests, rather than setting out a definitive history of events in each country, IUCN should not be taken as endorsing the veracity of any such conflict of views.

After consultations with several IUCN officers around the world, NRI and other experts, it was decided to conduct the case studies in Malawi, Nepal and Mexico. Among the criteria for selecting these countries were that they each were recipients of DFID support in the forest sector and they each had relatively new forest legislation.

This report will summarise the activities undertaken, the main findings, the main recommendations, and will make proposals for future activities.

## **II. Summary of activities undertaken**

This project included the following activities:

From 15 to 18 May 1999, the lead consultant, Richard G. Tarasofsky, went on mission to FAO HQ in Rome, to consult on the methodology of the country-case studies. He met with the Head and Legal Officers from the Law Development Service, as well as the Director of the Forestry and Planning Department, and others.

Over the next six months, individual draft reports were prepared for each of the three study countries. The draft report on Malawi was prepared by Gracian Banda, an environmental lawyer based in Blantyre, Malawi. The report on Mexico was prepared by Maria Fernanda, of the Mexican Centre for Environmental Law. The Nepal report was prepared by Narayan Belbase, legal officer in IUCN's Country Office in Nepal.

On 15 December 1999, a workshop involving 24 participants from the government, NGO, and donor sectors was held in Lilongwe, Malawi. The workshop evaluated the draft report prepared by the local consultant. A lengthy set of recommendations on improving the law-making process was produced at the workshop on the following ten topics: community participation in policy and legislation making, departmental involvement, NGOs and the private sector, steps in the law-making process, cross

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<sup>1</sup> The electronic file name of this report is "Final Report for R7339-ZF0116".

sectoral coordination, traditional/customary norms, gender, policy and legislative reviews, donors, and decentralisation. The draft report was finalised, on the basis of comments received at the workshop, and includes a report of the workshop proceedings.<sup>2</sup>

On 25 February 2000, a workshop was held in Mexico City, Mexico. Twenty experts participated in the workshop, including from the governmental, judiciary, NGO and industry sectors. Twenty-three detailed recommendations were produced, on the consultation process, technical drafting process and the content of legislation.<sup>3</sup>

The country case study for Nepal did not involve a workshop, as the others did. In the judgement of the IUCN Nepal Country Office, it would not have been appropriate, for a variety of reasons, for such a workshop to be held. Therefore, with the agreement of NRI, it was decided that instead of a workshop, individual interviews with select actors would be conducted. From 19-24 February 2000, the lead consultant accompanied Narayan Belbase to consult with eleven experts on the issues in the report. They met with government officials, NGOs, academics, community group representatives, and foreign donors. On the basis of these consultations, the draft report was finalised and a summary of the consultations was prepared.<sup>4</sup>

A draft synthesis report on the three case studies was prepared and circulated to select experts from the IUCN Commission on Environmental Law, as well as members of the IUCN Forest Conservation Programme. A final version of the synthesis report, attached as Annex I (electronic file name: "Annex I: Synthesis Report") to this report, was elaborated on the basis of their reactions and comments.

### **III. Summary of the findings of the case studies**

The country case studies examined both the legislation on forests and the law-making process. They then sought to identify linkages between problems in the legislation and the law-making process.

#### ***A. Overview of the legislation on forests in Malawi, Nepal and Mexico***

All the legal acts examined proved to be complex pieces of legislation, which is typical of legislation on forests. They contain rules regarding ownership of forests and resources, often providing for various categories of public or private ownership, around which particular conservation and management rules, of varying degrees of specificity, apply. These arrangements include forest reserves, leasehold forests, community forests and private forests.

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<sup>2</sup> The paper and workshop report are Annex 2 to this report (electronic file name: "Annex II - Malawi Report).

<sup>3</sup> The paper and workshop report are Annex 3 to this report (electronic file name: "Annex III - Mexico Report).

<sup>4</sup> The paper is Annex 4 to this report (electronic file name: "Annex IV - Nepal Report).

The experiences in Malawi and Nepal reveal a strong movement towards decentralisation of forest management, particularly towards community management. This was the result of a policy decision to move away from top-down management and towards more participatory approaches. The new laws create new corporate bodies at the community level that enter into agreements with the government on managing the forests. The Mexican legislation also allows for decentralisation, in that it provides for agreements between the federal government and state or district government, as well as communities and the private sector, but these provisions are less specific and have not been applied in practice.

Reflecting increasing awareness of the multiple values of forests, the laws examined, with variations between them, contain provisions relating to biodiversity, soil and water catchment conservation, protection of important or fragile areas, and rehabilitation of degraded areas, non-timber forest products, agroforestry, and protection from fire and pests. These provisions are in addition to the more traditional rules in forest legislation relating to jurisdiction, licensing of harvest activities, and enforcement.

Finally, each statute examined contained provisions relating to governmental institutions responsible for administering the legislation. In some cases, this involved modifying existing mandates and in other instances, new institutions were created.

### ***B. Review of the law-making process in Malawi, Nepal and Mexico***

It was found that only Mexico has official rules on how the law-making process on forests should be conducted. In the other two countries, where there are no such rules, the process is more ad hoc.

In general, one specific governmental entity, i.e. the forest department, initiated and steered the law-making process, in which varying degrees of inter-ministerial consultation took place. In each of the countries, the process was conducted under a tight budget. Although there was donor support for two of the three countries examined, in no case was there a single funded project that supported the entire enterprise. This is relatively common, but the risk is that the process can be more ad hoc or fragmented than otherwise. In at least one country examined, it appeared that the priorities and timetables of individual donors hindered the development of truly holistic legislation.

Given the cross-sectoral nature of forest conservation and management, as well as the multiple values of forests, it is not surprising that various pieces of national legislation existed in each country that affected forests -- in addition to the legislation specifically on forests. In some instances, inconsistencies between these laws were ironed out, but in no case were all inconsistencies ironed out.

As mentioned above, all the pieces of legislation contained significant substantive and/or institutional changes. To varying degrees, these changes reflected outcomes of an ongoing policy process, which is positive. However, the translation of these changes into practice has not always been successful, and it is worth noting that none

of the law-making processes included a thorough evaluation of the feasibility, from the operational sense, of the proposed legislation.

The role of foreign donors varied between the countries. In Mexico, they played no role, as the government considered this process to be purely an internal matter. In Malawi, the input was somewhat haphazard, with several projects containing a legislative aspect. In Nepal, the donors were very important -- through experimentation with concepts and institutions in their projects -- in helping to develop the rules on community-based forest management.

The process for identifying problems and determining legislative solutions varied from country to country. In Malawi, this process was not as systematic as it might have been, in Nepal, this occurred through the development of the Forest Sector Master Plan, and in Mexico this was a formal act done by the General Directorate for Forests.

The experience with public consultation varied from country to country, except that all three authors of the country reports considered it insufficient. In Nepal and Malawi, the view was that the consultation process was not extensive enough and lacked strategy. In Mexico, although there was relatively more consultation, the process was criticised for not having much influence on the outcome.

Although the general rule that fundamental aspects of a legal regime are codified in a statute, while details subject to change should be in the regulations was followed in the three countries, the case of Nepal is noteworthy. There, certain fundamental matters which could not be agreed upon during the process leading up to the statute were left to be dealt with by regulations. Clearly, from the point of view of democracy, this solution is not ideal, in that statutes passed by parliaments tend to have more legitimacy than regulations passed by cabinet.

### ***C. Assessment of how the law-making process influenced the quality of forest legislation in Malawi, Nepal and Mexico***

*All three authors of the country case studies identified several problems with the forest legislation and its implementation that are likely attributable to deficiencies in the law-making process. Among the most significant of these problems were:*

- ***Ill-defined or problematic institutional mandates (e.g. relating to the powers of the forest departments or overlapping mandates with other institutions, or even conflicting mandates with other institutions).*** There can be many reasons relating to local circumstances for why this phenomenon occurs. *However, one common theme throughout the country case studies was that insufficient inter-departmental consultation took place during the law-making process, suggesting that more such consultation could have eliminated some of the institutional problems.*
- ***Ambiguity over the practical application of certain provisions relating to community forests management.*** In both Nepal and Malawi, the most recent pieces of forest legislation contained, for the first time, detailed rules on

community forest management. However, in each case, controversies have arisen regarding the application of the legislation in practice. These controversies range from confusion about the entitlements of the communities to use and profit from the resources to issues relating to who represents the communities for the purposes of managing the forests. *The country case studies suggest that some of these problems arise because of insufficient consultation with local communities during the law-making process.*

- ***Lack of harmony between forest legislation and other laws, including customary law.*** Given the cross-sectoral nature of forests and the multiple values of the resources, it is self-evident that many laws will have an impact on forests. Examples of these laws include legislation on biodiversity and other environmental law, roads, mining, and decentralisation. However, in all countries, it was found that relevant legislation did not fit together coherently, such that there was overlap, gaps, and even outright conflicts. *It was found that part of the problem was due to the drafters of the forest legislation lacking the necessary information concerning these other laws. Similarly, it was found that international law on forests was not always taken into account by the drafters.*
- ***Ambiguity about the entitlements to use certain forest resources.*** Provisions that set out the rules for using forest resources are at the heart of forest legislation. Yet, in at least two of the cases studied here, significant ambiguities in these provisions were found. *In the case of Nepal, this was partly due to lack of political consensus on all aspects of community forest management, whereby conflicts were papered over by vague language. In Mexico, it was found that the drafters failed to take on board proposals from members of the public that were involved in the consultation process.*

***The most important conclusion to be drawn from all three case studies is that there is a correlation between the quality of the law-making process and the resulting legislation.***

In addition to the individual findings and recommendations of the case studies, it also appears that, to varying degrees, the law-making process as a whole tended not to be conducted in a *strategic* manner aimed at achieving the most effective legislation. These, and other problems identified with the forest laws, provide a basis for the recommendations set out below.

#### **IV. Summary of the recommendations made in the case studies**

Numerous recommendations on improving the law-making process for forests arose from the country case studies. The most significant of these are presented below, in the clusters; those aimed at government, the public consultation process, the drafting process and donor agencies.

## **A. Government actions**

Governments play the key role in law making, by initiating, leading and then finalising the process. As such, a number of recommendations are aimed at achieving coherence at the government level, so as to maximise the effectiveness of the law making. A recurring theme was the need to enhance interdepartmental consultation to ensure institutional and substantive consistency. Another key recommendation was aimed at ensuring that the process is informed by as much reality testing as possible: forest officers from the field, who would be responsible in applying the legislation, should be consulted. A third recommendation was that new law making should be based on a thorough assessment and evaluation of past forest legislation, so as to identify what worked and what did not. A fourth recommendation was that pilot studies be undertaken before any new institutions are created, although it must be recognised that this risks considerably lengthening the time frame for the law making. Law making is a process which can always be improved, and yet, no official records of this process were kept in the countries examined. Thus, the final recommendation to emerge is that such records be kept and analysed with a view to improving it for the inevitable next time round.

## **B. Public consultation process**

Each of the country case studies stressed the crucial need for an effective public consultation process. This is not only to serve the function of enhancing the legitimacy of the law-making process, but it can be a vital source of relevant information for the government to consider. As such a key recommendation was that the public consultation process should be properly designed and planned. It should be based on a methodology containing objectives, strategies, rules of participation, compiling and vetting of proposals and recommendations, as well as the consultation procedure itself. It was further recommended that the public consultation process should begin at the problem diagnostic stage and continue through to the parliamentary phase. If the law is to resolve major social conflicts about forest use and management, it could involve the creation of an iterative public forum that would systematically feed the inputs of stakeholders into various stages of the law-making process. And for maximum effectiveness, the consultation process should be structured so as to, as far as possible, resolve policy conflicts between the stakeholders.

## **C. Technical drafting process**

Every country has its own legal tradition that informs how technical drafting is done. Nonetheless, the case studies elicited a number of recommendations that are universal in character. The first is that since the time and resources for undertaking a thorough drafting process should not be underestimated. Secondly, the process should include a thorough reconciliation with other relevant national and international laws and norms, including traditional law. Thirdly, international comparisons should be conducted on how other countries have dealt with similar issues through legislation. Fourthly, ambiguous text that reflects deep conflicts or is otherwise difficult to apply

should be minimised. And finally, a comprehensive record should be kept of the drafting process, including all drafts and commentaries.

#### ***D. Foreign donor support***

The final set of recommendations are aimed at foreign donors, whose role in law making on forests in some countries can be very significant. Although it is recognised that foreign donors can and should bring in expertise on innovative and technical aspects of forest legislation, their project should support work by local lawyers who should then be the ones to primarily carry the law-making project forward. Secondly, donors should not drive the law-making process in accordance to their own needs and timetables, but should be responsive to the recipient country's needs and realities. Finally, it was recommended that where donors support projects in the field, they should consider supporting inputs from those projects into the consultation process for law making.

#### **V. Suggestions for a follow-up phase to this project**

The case studies have confirmed what is well known intuitively: the quality of the law-making process affects the quality of the legislation. And yet, it appears that too little attention is placed on ensuring that this key process is as effective as it might be. The recommendations derived from the three country case studies reveal that the law-making process on forests could be improved significantly in virtually every aspect, from the points of detail to the overall strategy. While these recommendations present a starting point for generally identifying possible solutions, it would be useful to build on them to derive more robust guidance to developing countries.

In order to overcome obstacles to effective law making on forests in developing countries, it is proposed that a follow-up phase to this project could concentrate on producing a sourcebook of good practice, based on actual experiences in developing countries. The main objective of this document would be to allow those leading the law-making process to be more strategic. By offering concrete examples and ideas relating to the process, it would provide a useful tool for empowering communities and increasing the value and effectiveness of forest legislation.



-----Original Message-----

From: Duncan Macqueen [[mailto:duncan\\_macqueen@hotmail.com](mailto:duncan_macqueen@hotmail.com)]

Sent: Friday, December 22, 2000 3:10 PM

To: TYoung@elc.iucn.org

Cc: j.r.palmer@gre.ac.uk; s.halfmann@gre.ac.uk

Subject: R7339 ZF0116 REVIEW

Dear Tomme,

R7339 ZF0116 REVIEW OF PROJECT REPORTS ON "NEEDS FOR RESEARCH TO SUPPORT FORESTRY LAW AND REGULATIONS"

1. Thank you for sending FRP three copies of your final report, the synthesis report and the three case studies. The reports make a useful contribution to the study of the policy/law development process in these three countries. The reports (and all the other project documentation) have been sent out for external review. I have included this (anonymous) review -

preceded by comments from FRP management's own perspective. You will note that, notwithstanding the positive comments of the external reviewer, there is a perception by FRP management that the project failed to deliver on its primary objective. We invite you to take the opportunity to revise the final

report, as there is already demand from several quarters for the information

contained within.

FRP MANAGEMENT COMMENTS

2. Your contract, dated 18 February 1999 committed you to one specific objective - a survey and analysis of the obstacles facing developing countries in improving forest legislation and regulations and the development of a set of recommendations to overcome them. This was subservient to the overarching general objective: to "identify the needs of developing countries for research to support improved forestry laws and associated regulations" (as indicated in the title of the research project).

3. Having read the Final Report, the Synthesis Report, and the three country

case studies (from Malawi, Mexico and Nepal), the Final Technical Report (FTR) and the Project Completion Summary Sheet (PCSS) it is apparent that the project has substantially failed to achieve its primary general

objective. Nowhere in any of these reports is there any mention of needs for

further research to support forestry law and regulations. (The brief paragraph V on p9 of the final report is not adequate). There is the erroneous repetition throughout the reports that the sole objective of the project was to achieve the secondary specific objective.

4. The reports concentrate on an analysis of key problems in existing legislation, clustered into major headings: government activity, public consultation, the technical drafting process and the role of foreign donors.

In your FTR, IUCN-ELC identified one of the single greatest contributors to ineffective legislation and institutions as "the lack of knowledge of specific problems encountered at the local level". To solve this central communication / information problem you recommended "collaborative legislation development". In Tarasofsky's Final Report, IUCN draws the most important conclusion that there is a correlation between the quality of the law-making process and the resulting legislation. It is certainly difficult to question this logic, but the conclusion does not take us very far.

5. In effect, the reports diagnose the "disease" (an inadequate law-making process) and describe the "symptoms" (problematic institutional mandates in the law-making process, ambiguities over the practical application of poorly-worded legislation and lack of harmony between forest and other laws). They even suggest a "cure" (greater collaboration / technical competence in the law making process). The reports, however, do not go far enough to identify the underlying causes of the "disease" and this undermines confidence in the recommendations. Some of these underlying causes are hinted at, but not specifically addressed. What is needed is a more thorough analysis of WHY governments law-making bodies do not engage in

greater collaboration and WHY legal drafting is so poor and harmonisation so

rare. There are several potential underlying causes (and there may well be many more), each hinted in the reports:

6. COST: In the Malawi case study (p4) there is a throw-away line "there is also the question of resources to undertaking such participation exercises".

This is amplified in the synthesis report p9. What are the comparative costs

of different levels of collaborative law-making? Where do law-making budgets

come from? What percentage of the ideal law-making process do they cover?

Where should governments find the shortfall? What political pressures restrict access to such funds?

7. EXTENT: In the synthesis report (p19) it is recommended that public participation in legislation should be properly designed and planned.

But

what is the ideal extent of public participation? Should every single member

of the population be invited to participate (a la Grenada), or should it be

restricted to technical professions? Are there different ideals for different stages of the law-making process?

8. SUBSIDIARITY: It is noted in all three case study reports that decentralisation is a key element in the application of forest law, and mention of the differences between centralised law and traditional law systems (e.g. for Malawi). What parts of forest law are best inscribed in

central statutes and regulations, and what aspects might be best left to

what type of local government authority? Is there room for flexibility in

the development of certain parts of the law (e.g. specific infringements of

usufruct rights etc) which might be better left under local control, with

permissible variation from region to region, without compromising equality

under the law?

9. TIME: In the Malawi case study (p32) and elsewhere, it is noted that the

structure of funding for law-making often precludes adequate consultation.

What are the trade-offs between funding timeframes and the quality of resultant laws? What structure of formulation and iteration best suits the

development of flexible and adaptive legislation? Is there a process to allow non-departmental and non-parliamentary inputs?

10. For each of these underlying causes of why governments do not engage in

collaboration, it will be possible to identify certain elements which are

fixed (e.g. limited available financial resources), basic laws (e.g. the law

of diminishing returns in terms of participation), matters of ideology (e.g.

limited possible land management options), researchable constraints outside the forest sector (e.g. methodologies for conflict resolution) and researchable constraints within the forest sector. It is these latter constraints which should have been clearly identified by the project.

11. FRP is not a development agency. It is a competitive research grants body. FRP funds research which tests hypotheses, leading to new knowledge which can then be applied to solve problems. The suggested follow-up phase to this project (producing a sourcebook of good practice) is not research and is already contemplated by existing DFID projects - FRP does not accept case studies as a substitute for research hypotheses.

12. Since the primary objective of the project has not been achieved, FRP would ask you to re-analyse the project findings and submit a short addendum

to the final report which lays out the key researchable constraints (in order of priority) each with a testable research hypothesis.

#### COMMENTS FROM THE EXTERNAL REVIEWER

Institution: IUCN Environmental Law Centre  
Project Title: Needs for Research to Support Forestry Law and Regulation  
Author: Ms. T. Young  
Codes: R7339/ZF0116  
Start and Finish Dates: 8/2/99 to 15/6/00  
Total Cost: 25,955

#### Part 1: Validation of the Project Completion Summary Sheet

1. The documents mentioned in the PCSS are available. The final report consists of a concise and informative summary report and as annexes a well structured and substantive synthesis report on the three case studies followed by the three fairly detailed country reports on Malawi, Mexico and Nepal.

#### Part 2: Assessment of the technical quality of the Project

##### 2. Significant and Original Contribution

To my knowledge there has been no serious investigation on the policy and law development process in the area of forest law and regulations. The contribution is significant since it brings new knowledge relevant to

understand better the present scope and content of relevant legislation as well as to assist decision makers to organise and steer future law making more efficiently.

### 3. Contracted Activities and Outputs

Country studies and seminars were carried out as scheduled in the case of Malawi and Mexico. In the case of Nepal a slightly different approach has been taken. The reasons for this change are explained and are justified. The

outputs as indicated under 1. are useful and interesting and, after a final editing merit publication.

### 4. Significant Modifications in the Course of the Research

There were reasoned and justified changes in the case of the Nepal country study as appropriate to prevailing local conditions.

### 5. Presentation and Analysis of Results and Conclusions

Presentation and analysis of results are comprehensive and adequate within the scope of researched outputs from case studies. Conclusions are valid and

a good basis for policy makers and future researchers.

### Attention to Social Science, Environment and Biometric Issues

This is a social science study on the environment. Biometry is not relevant.

### 6. Efficient Use of Time, Finance, Personnel and Other Resources

Yes, as far as I can see.

### Part 3: Assessment of Contribution to Development

### 7. Contribution of Project Outputs to Programme Purpose

The project findings are highly relevant to improved public policy frameworks in forestry and in particular to more consistent integration of social groups in the law making process and to stronger integration of environmental objectives in forest legislation.

### 8. Means of Promotion and Implementation of Outputs

I agree with the major proposal: the usefulness of producing a source book

of good practices in law making. However, I feel that the present results allow more. The findings of the study merit already to be published in journals and other publications, as well as summarised on the internet.

I also think that one of the concrete conclusions is that more advice should

be provided in this field as part of development co-operation. Since the legal service of FAO is in my view the major technical expertise in assisting countries in preparing new or revised forest legislation it would be effective to provide support to them.

This would of course not prevent the encouragement of other donors (in particular bilateral ones) to make similar efforts. I have also experienced,

and this is also said in the report, that in many countries revision of legislation is to considerable extent donor driven (e.g. world bank but also

increasingly bilateral) and this means that their decision makers and field staff need urgently to learn about the findings of this study. There is plenty to do to, and there are plenty of misunderstandings and often illusions;

I could elaborate!!

Another important issue is the following: which are the relevant communities

to be addressed, both in the developing countries as well as among the "experts". The whole focus of the investigation as well as the perspective of the addresses goes, largely in my opinion to the environmental community.

This is reasonable and I understand the context. However, it is probably as important, and sometimes more important, to reach, inform and advice the "forestry community". There is not much point to preach to those that are already convinced or say at least that they are. Again if necessary I can elaborate.

With this in mind, it would be interesting, to publish and spread the information within the IUFRO 613 research group on forest and environmental legislation (co-ordinated by Franz Schmithusen - schmithuesen@fowi.ethz.ch).

A contribution for the next research proceedings in 2001 would be welcome  
(the proceedings are actually in preparation).

#### 9. Uptake by Target Institutions and Beneficiaries

Much is already said under point 8. It would be worthwhile to identify clearly pertinent "customer" groups and to work out in which way to reach them.

#### 10. Other Ways

The essence of this research is institution building and the results have good potential for training and transfer of knowledge and understanding.

#### Part 4: Additional Recommendations to Enhance Impact of the Project

#### 11. Additional Distribution of FTR

I think that there are two documents to be made available. A short version with the summary and the synthesis report on the three case studies i.e. Annex I; and the full final report including the country case studies i.e. Annex II to IV. And there is considerable potential to write short papers and decision maker documents. An important channel, in addition to the environmental community, is certainly the forestry department of FAO as well

as the Legal Service from FAO in order to reach forest services in developing countries. The donor community can be reached via several channels; and there is IUFRO.

#### 12. Additional Actions to Support Implementation of the Findings

The very nature of the project output is that it needs a follow up with more

research and more knowledge transfer. For research see section 15, for dissemination section 11 and 8.

#### 13. Scope for Production of Additional Dissemination Outputs

See section 11.

#### 14. Additional Comments

Recommendations for additional research - Here comes the really interesting question. I flag the following points and could elaborate if necessary: The present study addresses mainly the social and environmental aspects and

the communities concerned and affected by them. Little is said on forest owners interests as well as on the forest industry sector and its relevance.

However, good forest management depends primarily on their actions and initiatives.

The importance of cross sector linkages and a systematic analysis of public policies others than forest policy is rightly stressed in the report. I feel

that this is and will be even more in the future one of the new and important subjects. There is currently a joint undertaking with FAO to start

with some more serious work on this subject.

There is plenty of work on how to make better forest legislation ongoing or launched at the moment. With some irony one could say that some people, sometimes in the donor community, request revisions before the new texts are

printed, not to say read, by those that are supposed to apply them. The real

issue is in my mind to find out what comes out of all these dynamic changes.

In other words, implementation in the form of results, impact and outcome -

an analysis based on empirical material looks to me as one of the logical

follow ups to the present project.

I have just reviewed with considerably pleasure a diploma thesis of one of

our students who gave some solid empirical evidence on what local people and

responsible land managers knew about the brand new texts, in this case in a

communal forest development in Mali. At least from my knowledge that has

been the first case that someone has tried to research such an evident issue. Of course, the results are refreshing and give stimulation to thinking.

Land tenure and customary law are highlighted by the report and I agree.

However the point is not only traditional land law but also modern communal

and common property management practices and legal systems.

The present project has its focus clearly on law formulation as a process

within the administration and between the concerned actors or at least those



that are able to articulate themselves. This is good!! However, there is very little on what happens at parliamentary level and on the interplay between cabinet and parliament during the law making process. After all, in existing democracies, laws are really made not by experts and government people - I think that it is here where we have almost no empirical information relating based on documented analysis. Coming back once more to the issue of implementation. Further analysis is needed of clearly defined competencies, instruments and addressees.

#### 15. Additional Review of FTR

In my view this is not necessary.

#### 16. Other Remarks

Excellent outputs which gives food for thought, empirical evidence for three

countries and a good basis for further work.

Best wishes,

Duncan

Mr Duncan Macqueen  
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## Review Natural Resources International UK Forest Law 00-10-30

Reviewer's name: Franz Schmithüsen

Institution: IUCN Environmental Law Centre

Project Title: Needs for Research to Support Forestry Law and Regulation

Author: Ms. T. Young

Codes: R7339/ZFO116

Start and Finish Dates: 8/2/99 to 15/6/00

Total Cost: 25,955

### Part 1: Validation of the Project Completion Summary Sheet

- 1 Yes The documents mentioned in the PCSS are available. The final report consists of a concise and informative summary report and as annexes a well structured and substantive synthesis report on the three case studies followed by the three fairly detailed country reports on Malawi, Mexico and Nepal.

### Part 2: Assessment of the technical quality of the Project

#### 2 Significant and Original Contribution

Yes To my knowledge there has been no serious investigation on the policy and law development process in the area of forest law and regulations. The contribution is significant since it brings new knowledge relevant to understand better the present scope and content of relevant legislation as well as to assist decision makers to organise and steer future law making more efficiently.

#### 3 Contracted Activities and Outputs

Yes Country studies and seminars were carried out as scheduled in the case of Malawi and Mexico. In the case of Nepal a slightly different approach has been taken. The reasons for this change are explained and are justified. The outputs as indicated under 1. are useful and interesting and, after a final editing merit publication.

#### 4. Significant Modifications in the Course of the Research

Reasoned and justified changes in the case of the Nepal country study as appropriate to prevailing local conditions.

#### 5 Presentation and Analysis of Results, Conclusions

Yes Presentation and analysis of results are comprehensive and adequate within the scope of researched outputs from case studies. Conclusions are valid and a good basis for policy makers and future researchers.

#### 6 Attention to Social Science, Environment and Biometric Issues

This is a social science study on Environment. Biometry is not relevant.

#### 7..Efficient Use of Time, Finance, Personnel and Other Resources

Yes, as far as I can see.

### Part 3: Assessment of Contribution to Development

#### 8 Contribution of Project Outputs to Programme Purpose

Yes Highly relevant to improved public policy frameworks in forestry and in particular to more consistent integration of social groups in the law making process and to stronger integration of environmental objectives in forest legislation.

#### 9 Means of Promotion and Implementation of Outputs

Yes I agree with the major proposal and its usefulness to produce a source book of good practices in law making. However, I feel that the present results would allow to do more. The findings of the study merit already now to be published in journals and other documentation, as well as summary on the Internet.

I also think that one of the concrete conclusions is that more advice should be provided in this field as part of development co-operation. Since the legal service of FAO is in my view the major technical expertise in assisting countries in preparing new or revised forest legislation it would be effective to provide support and means. This would of course not prevent the encouragement of other donors (in particular bilateral ones) to make similar efforts.

I have also experienced, and this is also said in the report, that in many countries revision of legislation is to considerable extent donor driven (e.g. world bank but also increasingly bilateral) and this means that their decision makers and field staff need urgently to learn about the findings of this study. There is plenty do to, and there are plenty of misunderstandings and often illusions; I could elaborate!!

Another important issue is the following: which are the relevant communities to be addressed, both in the developing countries as well as among the "experts". The whole focus of the investigation as well as the perspective of the addresses goes, largely in my opinion to the environmental community. This is reasonable and I understand the context. However, it is probably as important, and sometimes more important, to reach, inform and advice the "forestry community". There is not much point to preach to those that are already convinced or say at least that they are. Again if necessary I can elaborate.

With this in mind I offer the opportunity, in fact I would be interested, to publish and spread the information within the IUFRO 613 research group on forest and environmental legislation which I co-ordinate. I would welcome a contribution for the next research proceedings 2001 actually in preparation. This is only a small drop, but .....!

#### 10 Uptake by Target Institutions and Beneficiaries

Most is already said under point 9. It would be worthwhile to identify clearly pertinent "customer" groups and to work out in which way to reach them.

#### 11 Other Ways

The essence of this research is institution building and the results have good potential for training and transfer of knowledge and understanding.

## Part 4: Additional Recommendations to Enhance Impact of the Project

### 12 Additional Distribution of FTR

I think that there are two documents to be made available. A short version with the summary and the synthesis report on the three case studies i.e. Annex I; and the full final report including the country case studies i.e. Annex II to IV. And there is considerable potential to write short papers and decision maker documents. An important channel, in addition to the environmental community, is certainly the forestry department of FAO as well as the Legal Service from FAO in order to reach forest services in developing countries. The donor community can be reached via several channels; and there is IUFRO.

### 13 Additional Actions to Support Implementation of the Findings

The very nature of the project output is that it needs a follow up with more research and more knowledge transfer. For research see section 15, for dissemination section 12 and 9.

### 14 Scope for Production of Additional Dissemination Outputs

See section 12.

## Additional Comments

### 15 Recommendation for Additional Research

Here comes the really interesting question. I flag the following points and could elaborate if necessary:

- The present study addresses mainly the social and environmental aspects and the communities concerned and affected by them. Little is said on forest owners' interests as well as on the forest industry sector and its relevance. However, good forest management depends primarily on their actions and initiatives.
- The importance of cross sector linkages and a systematic analysis of public policies others than forest policy is rightly stressed in the report. I feel that this is and will be even more in the future one of the new and important subjects. In fact I am presently embarking on a joint undertaking with FAO to start with some more serious work on this subject.
- There is plenty of work on how to make better forest legislation ongoing or launched at the moment. With some irony one could say that some persons, sometime in the donor community, request already a revision before the new texts are printed not to say read by those that are supposed to apply them. The real issue is in my mind to find out what comes really out of all this dynamic changes. With other words implementation in form of output, impact and outcome analysis based on empirical material looks to me as one of the logical follow ups to the present project.
- I have just reviewed with considerably pleasure a diploma thesis of one of our students who gave some solid empirical evidence on what local people and responsible land managers knew about the brand new texts in the case of communal forest development in Mali. At least from my knowledge that has been the first case that someone has tried to research such an evident issue. And of course the results are refreshing and give stimulation to thinking.

- Land tenure and customary law are highlighted by the report and I agree. However the point is not only traditional land law but as well modern communal and common property management practices and legal systems.
- The present project has its focus clearly on law formulation as a process within the administration and between the concerned actors or at least those that are able to articulate themselves. This is good!! However, there is very little on what happens at parliamentary level and in the interplay between cabinet and parliament during the law making process. After all in democracies that is where the laws are really made and not by experts and government people I think that it is there where we have almost know empirical information respectively documentary analysis.
- Coming back once more to the issue of implementation. Further analysis of clearly defined competencies, instruments and addressees is another relevant point.

#### 16 Additional Review of FTR

In my view this is not necessary.

#### Other Remarks

An excellent output which gives food for thought, empirical evidence for three countries and a good basis for further work.

I would like to have contacts with the authors. Perhaps you could provide me with their direction or tell them to contact me if they would like to do this.

Prof. Dr. Franz Schmithüsen

Zurich, 31 October 2000

IUCN Environmental Law Centre

**Addendum to Final Report:  
FOREST LAWS AND REGULATIONS: OBSTACLES TO IMPROVEMENT**

NRI-funded Project R7339 ZF0116  
(May 1999 – August 2000)

**INTRODUCTION**

On December 22, 2000, NRI submitted several questions (the “NRI Review”)<sup>1</sup> to the IUCN Environmental Law Centre (IUCN-ELC) relating to the Final Report in the above-captioned Project. Those questions began by stating that the overriding objective of this project was

*to identify the needs of developing countries for research to support improved forest laws and associated regulations.*

The Review noted with concern that the report focused only on the (“subservient”) specific objective of the contract –

*[to p]resent a survey and analysis of obstacles facing developing countries in improving forest legislation and regulations and develop a set of recommendations to overcome them which outlines:*

- a) the involvement of stakeholders in the consultation process leading to new laws and regulations, and*
- b) the role of donor agencies*

This Addendum addresses the concerns expressed in those questions, and seeks to satisfy the general objective of the Project.<sup>2</sup> The Lead Consultant having been released from his contract by ELC in the time between completion of the project<sup>3</sup> and receipt of the NRI Review, it falls to IUCN-ELC’s current professional staff<sup>4</sup> to call upon their collective experience in these matters to address these issues.

**ORGANIZATION OF THIS ADDENDUM:**

This addendum is intended to address the issues raised in the NRI Review, and particularly to provide recommendations relating to the above-described “overriding objectives” of this project. It will do so in three parts, beginning with a discussion the role and scope of legislative analysis,

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<sup>1</sup> These comments were received by e-mail entitled “R7339 ZF0116 REVIEW,” dated December 22, 2000, received from Mr. Duncan Macqueen, Deputy Programme Manager, DFID-FRP, NRI. Throughout this Addendum they will be referred to as the “NRI Review.”

<sup>2</sup> While IUCN-ELC is happy to accede to NRI’s request in seeking additional recommendations, we would note that a reasonable reading of the contract would suggest that it was the objective of the project to undertake the survey and analysis (the “specific objective”) as one step in helping *NRI* to achieve the General Objective. Hence we do not believe that our lead consultant should be faulted for assuming that his mandate was to undertake the specific project described by the specific objective, recognizing that it would ultimately be a part of the larger work of NRI toward achievement of the General Objective.

<sup>3</sup> August, 2000.

<sup>4</sup> Brief biographical statements of the IUCN-ELC officers directly involved in authorship of this addendum are attached.

following with discussion of specific points raised in the NRI Review, and concluding with a series of recommendations and suggestions regarding further legal/legislative research and analysis, which can integrate with the work of other disciplines to achieve the general objective of the project.

## **I. ROLE OF LEGAL/LEGISLATIVE ANALYSIS IN TECHNICAL ASSISTANCE PROJECTS**

The anonymous reviewer who provided the “external review” of the Final Report of this Project, refers to this report as a “social science study of the environment.” This statement suggests that some exposition is necessary as a prelude to the Final Report, to clarify the difference between “social scientific research”, and legal research.<sup>5</sup> This explanation will identify the parameters of the current report and, in addition, set the context for the legal component of future research (recommended in part III.)

Calling on the collaboration of a great many disciplines, international assistance programs are designed to achieve a number of purposes. Their overarching objective, however, is the development and implementation of policies and programmes to conserve and sustainably use natural resources, improve lives and lifestyles (especially through the alleviation of poverty, improvement of health care, etc.), and generally to contribute to sustainable development of economic and social systems, all within developing countries. Legal/legislative research and analysis is only one specifically focused component (albeit an important one) in achieving these objectives. In considering the contribution of a legislative expert<sup>6</sup> to this overall work, it is essential to be aware of the nature of the services and experience that the legal expert brings to the table.

### **A. NATURE OF LEGISLATIVE SUMMARY AND ANALYSIS**

One of the primary tools of legal/legislative consulting is the “legislative summary and analysis” (hereafter shortened to “legislative analysis.”) While the particular components of such an analysis are generally agreed, its depth and scope can vary dramatically depending on the mandate given to the legal expert, and on the time and resources available to him or her for its completion.

In general, a legislative analysis consists of two general components: (i) Technical evaluation of legislative documents (laws, regulations, rules, and other documents of law or administration), and (ii) experiential evaluation of the operation and effectiveness of administration within their regulatory scope.

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<sup>5</sup> While law might be considered a “social science” under the broadest use of that term, it appears that the reviewers, both internal and external, were expecting the report to approach its subject from sociological, political, and economic perspectives, rather than as a legal analysis.

<sup>6</sup> This paper will describe these persons using the term “legal expert” or “legislative expert” to describe the range of legislative analysts, legal researchers and other legal consultants. In this regard it is important to realize that, although nearly all lawyers deal with legislation and legislative documents in every aspect of their practice, only a very small minority of these individuals are particularly capable or experienced in legislative draftsmanship and analysis, and an even smaller group is sufficiently versed in the comparative operations of legislation in a sufficient variety of countries to provide competent services as an “international expert” in legislative or regulatory development.

## **1. TECHNICAL EVALUATION**

Within particular projects, the technical evaluation of legislative documents is bounded by several restrictions/decisions. The following is a brief discussion of the three most important of these.

### **a. Substantive Scope**

Typically, the project requires a legal expert to evaluate legislation in a particular substantive area. The breadth or narrowness of this area is a major factor in determining how complete and detailed the technical evaluation will be. In the present project, the scope of analysis was tightly focused – legal obstacles to improvement of national forest regulatory schema, with particular attention to the roles of mechanisms for public participation and of donor agencies.

### **b. Limitations**

In some cases, there may be limitations on the substantive categories of law that may be included in the analysis. For example, research on forest-related legislation may be limited to legislation developed by the Forest Ministry. This may happen directly by provision in the Terms of Reference. More often, it happens indirectly, where the agency providing documentation does not have access to or knowledge of relevant legislation in other sectors. This is one of several reasons that it is usually necessary for the legislative analyst to visit the country and collect legislation in person.

In the absence of this type of restriction, it is well accepted that legislative analysis must examine relevant legislation from all substantive areas.<sup>7</sup> Only in this way can the legal/legislative researcher and those who rely on his work have any reliable baseline analysis concerning many elements of national legislative, administrative and judicial orientation which have a direct bearing on how legislation is created, how it is perceived, how it is applied, how it is enforced, how it is interpreted, and how it is changed or repealed.

In the present project, the minimum appropriate scope of review was broadened by the juxtaposition of three distinct substantive groupings – forest-related law; law of public participation; and legislative/regulatory process.

### **c. Levels of Government**

Governments typically operate at a number of levels, in both federal and non-federal systems. With formal legislation, or informal rules and procedures found at all levels. In general, the vertical scope of a legislative analysis is a function of the amount of money and time that can be devoted to the analysis. The impact of this scoping decision varies widely and unpredictably.<sup>8</sup> While in some countries an analysis limited to the national level gives a clear picture of the problems and issues of concern, in others it may bear no relevance to them at all.

In the present project, although time and financial constraints required that the work be focused on central levels, the nature of the subject matter (public participation) appears to have motivated each of the national consultants to conduct research and to call upon relevant experience with regard to provincial, district and local issues, as well.

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<sup>7</sup> “Desktop” consultancies are sometimes undertaken to provide legal analyses or legislative drafting, however their value is often questionable, owing to the need for a more complete contextual understanding.

<sup>8</sup> Factors such as legal system, literacy, communication infrastructure, etc., do not appear to bear a reliable relationship to whether a national-level-only analysis will yield a useful and sufficient picture of the nature of the legal/legislative situation under study.



## 2. EXPERIENTIAL (OPERATIONAL) EVALUATION

Having amassed and reviewed the relevant body of legislation, the legal analyst is still lacking a significant informational input necessary to properly “analyze” its content. An evaluation of the words on paper can only tell the reader how the analyst, if he were called to sit on the national judiciary, would interpret these documents for purposes of juridical decisions (guilt/innocence; liability/exculpation; authorization/non-authorization; etc.)

The law, however, has a broader role in society, which is much more important than its narrow construction in a courtroom. It is intended to be a guide for actions and implementation throughout the range of socially or politically mandated government or interpersonal relations in a given sector. It is impossible, by technical examination alone, to determine how a legislative regime or any part of it fulfills this mandate, or how it can be used altered or strengthened to improve its performance. To fill this gap, the legislative analysis should properly also examine “operations” and “effectiveness” (or “coverage”) of the existing legislative system.

### a. Operations

The legislative analysis must be based on specific facts about the country, including its political divisions, legal system, cultural history, and other matters that can help to analyze the kinds of laws used, and the options available for addressing problems and creating legislative programs. Beyond this, more specific operational information must be gathered administrative experiences in applying the current legislative/regulatory scheme, and judicial and quasi-judicial interpretations of it. This analysis is based on a compilation of relevant input from a broad range of sources – government officers and members of the various affected communities (the regulated public, impacted communities, and other “stakeholders”), as well as judicial documents (if available) or interviews with participants in trials, hearings, permit decision-making processes, and other direct procedures applying existing legislation.

In the present project, this factor appears to have been brought out primarily through the national workshops (Malawi and Mexico) and formal interviews (Nepal).

### b. Effectiveness/Coverage

The most difficult component of the legislative analysis is the examination of the effectiveness of existing laws and/or of the appropriateness of their current level of coverage. Although lawyers sometimes find this difficult to admit, the fact is that *no one can ever actually know whether or to what extent a particular law or legal system affects the activities, conditions, or relationships it addresses*. A community that embodies a particular social or cultural ethic may not need any law to encourage them to relate to one another and to their environment in a public-spirited manner that allows that society to thrive and to operate cooperatively. By contrast, a community that lacks such an ethic may find itself sinking into political decay and see a general rise in unacceptable or illegal activity, even though it is regulated by state-of-the-art legal provisions implemented by the most dedicated and selfless enforcement officials.

In evaluating the effectiveness and/or coverage of a legal regime, the legal expert is called upon to address factual questions, and to put them into the context of legislative recommendations. The primary questions posed in this portion of the research are

- ◆ What are the most significant problems encountered in this area?<sup>9</sup>
- ◆ How and to what extent are these matters addressed by legislation? (the “effectiveness” question)

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<sup>9</sup> This inquiry is often, but not always, limited to enforcement/governance problems.

- ◆ Why and to what extent are these matters outside the scope of existing legislation? (The “coverage” question.)

Typically, the legislative expert’s mandate is to offer suggestions and recommendations for addressing problems based on his/her experience, to identify other countries or fora whose legal experiences may be relevant, and to explain these recommendations in terms of contextual and other factors.

Here also, “effectiveness” and “coverage” information appears to have come into the current project through the national workshops and formal interviews, as well as through the process of review and comment by the IUCN Commission on Environmental Law.

## **B. NATURE OF LEGAL/LEGISLATIVE EXPERTISE**

In evaluating the role of the legal analysis, it is important to keep in mind the nature of legal expertise. In all of the capacities in which he might act, the legal professional’s work is directed at six general types of activity:

- ◆ Analyzing factual (“real life”) problems and determining how (or whether) the law or legal process are or may be used or revised to address them;
- ◆ Creating legal relationships and seeking to maximize the possibility that they will operate without obstruction, misunderstanding, or abuse;
- ◆ Representing individuals, entities and/or institutions, in the role of fiduciary, negotiator, or impartial referee;
- ◆ Participating in the adjudicatory and mediation systems by which obstructions, misunderstandings and abuses are interpreted, adjudicated, and enforced, terminated, punished, vindicated, compensated or remedied;
- ◆ Advising concerning the possible existence and/or probable outcomes of problems, relationships, and claims as described above;
- ◆ Advocating particular choices or objectives (selected by client or employer) in negotiations or before parliamentary or other governmental or pseudo-governmental bodies, and advising these bodies on how those choices or objectives can best be documented/implemented within the relevant legal system;
- ◆ Conducting reviews, comparisons, and analyses of any of the above.

Contrary to its perception as an opinion-based profession, the law is relatively rigorous in focusing on analytical/factual matters. In the context of law, an “opinion” refers to a reasoned analysis of facts and law, ending with a prediction of the outcome or legality of a particular event, situation, or activity, and/or a recommendation of a future course.

It is a profession focused on finding a way to an objective, rather than on choosing or evaluating those objectives themselves. Only when the lawyer steps beyond the bounds of his/her role and training may he do so. For this reason,

- selection of policies and objectives (politics, policy analysis, philosophy);
- inquiry into root causes of behavior (sociology, psychology); or
- evaluation of financial or political causation and/or outcomes (economics, anthropology, political science)

must be considered outside the scope of the lawyer’s professional expertise, in most instances.

IUCN-ELC is not generally mandated to work in other disciplines besides law, and legal issues in policy. It frequently does identify areas in which such work is needed, however, and/or work in tandem with professionals specializing in other disciplines.

## II. SPECIFIC ISSUES RAISED IN THE REVIEW

Before providing our recommendations and suggestions concerning further research to support improved forest laws and associated regulations, we must give some attention to three of the questions raised in NRI's internal and external reviews. We hope that these answers will not disappoint, even where they appear to explain the lack of direct answers rather than to provide them.

### A. CONCLUSIONS IN THE REPORTS

The most telling comment in NRI's review is its first specific comment – that the Final Report of the project is rather thin on conclusions.<sup>10</sup> Certainly, the Lead Consultant's general conclusion that “there is a correlation between the quality of the law making process and the resulting legislation”<sup>11</sup> states not so much the endpoint, but the beginning of the analysis. This appears to have been the starting point for each of the national reports, which document the extent of participation, identify gaps in participation, and suggests ways for maximizing participation, all with the clear objective of thereby improving not only the quality of the resulting legislation, but also its acceptance by the regulated public (often cited as the most important factor in the success of such legislation.)

NRI's comment underscores two weaknesses in the initial structure of this project:

- ◆ *Lack of integration of the work of the three countries:* To support the goal of synthesis of the three national reports, it would appear that the three national consultants should not have worked completely independently of one another. At a minimum, all three (and the Lead Consultant) should have participated in all three of the national workshops.<sup>12</sup> As a consequence of this weakness, the national reports were internally directed, and their conclusions focused only on particular recommendations for alteration in their own countries' national legislative and administrative processes and provisions.
- ◆ *Selection of countries:* The complete disparity among the three subject countries – geographical, juridical, social, political, bio-ecological, etc. – and among the forest issues addressed by their legislation made it virtually impossible that useful comparisons could be drawn between them, other than at random.

The Lead Consultant's response to the problems posed by these design flaws was consistent with his perception of his mandate – to complete a specifically described legal analysis. As a result, he opted to base his overall conclusions on the specific recommendations contained in the national reports. He therefore notes the similarities and differences among these three sets of national recommendations, rather than attempting to draw from their full contents a series of more-overarching conclusions concerning forestry legislation and legislative processes. This addendum (at part III) attempts to fill this gap.

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<sup>10</sup> NRI Review, ¶ 4.

<sup>11</sup> Id.

<sup>12</sup> The Lead Consultant participated in one workshop (Malawi), and conducted some of the informal interviews that were substituted in Nepal when no workshop was found to be possible.

## **B. UNDERLYING CAUSES**

The NRI review further expresses the concern that the report does not “identify the underlying causes of the disease”<sup>13</sup> *i.e.*, that it does not identify the root causes underlying the legislative problems identified in the national reports. This comment demonstrates the truism that legal analytical processes need to be coupled with socio-economic-political analyses. In the typical legislative analysis – directed at preparing the ground for the development of new or revised legislation – a socio-economic-political evaluation is usually present in the form of a pre-existing policy-analysis and/or policy development – typically the product of the work of several professionals from a combination of disciplines.

In the current project, however, the policy under scrutiny is a component of the political-legal system itself – the manner in which legislation is adopted or revised. In addressing this topic, an initial legal analysis was necessarily the first step. This initial legal analysis cannot, however, give final or satisfactory answers to questions, posed in the Review, such as

- ◆ Why is legal drafting so poor?
- ◆ Why don't governmental law-making bodies engage in greater collaboration?

The lawyer's answer to the first question may be either (i) because there are few well-trained legal draftsmen; or (ii) because the forestry legislation has been changed only rarely, if at all, in many years prior to the current revision, so that the legal specialists within forest ministries have not had occasion to develop this special expertise. (*See* footnote 6, *supra.*) Each of these answers would lead the sociologist to another “why?”

To the second question, the answer may be (as is frequently the case) that, under existing administrative mechanisms, the ministries are required to operate as separate units. Legal alternatives to the “independent ministry” system have always existed, and in recent years many legal/legislative mechanisms for improving inter-ministerial cooperation have been developed. It is not within the lawyer's mission, however, to ask why a particular mechanism for dividing governmental responsibilities was adopted, only to suggest mechanisms for addressing the particular problems arising from the ministerial system that is in place.

If NRI feels that these questions of underlying causation need to be addressed, it would be possible for IUCN-ELC to develop, on the basis of the national reports under the current project, a program for further inquiry, however, the actual performance of such an inquiry would require a political scientist or the sociologist. We would note, however, that such inquiry would be an examination of the structure underlying the whole of each studied country's national government and its relationship to the country's social and cultural underpinnings. Although intellectually interesting, we suspect that such a study would not result in outputs of practical value.

## **C. THE PROBLEM OF “TESTABLE RESEARCH HYPOTHESES” IN THE CONTEXT OF LEGAL ANALYSIS (¶¶ 11-12)**

The NRI Review requests that IUCN-ELC identify “key researchable constraints (in order of priority) each with a testable research hypothesis.” He further notes NRI's organizational goal of “fund[ing] research which tests hypotheses, leading to new knowledge which can then be applied to solve problems.”

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<sup>13</sup> NRI Review, ¶ 5.

IUCN-ELC is strongly of the opinion that further legal research relating to the questions studied in Project R7339 ZF0116 could be of inestimable value, providing information on legislative mechanisms and experiential evaluations of their use in a variety of situations.

Our concern in offering the recommendations in Part III, however, relates to the requirement of “testable research hypotheses.”<sup>14</sup> In order for a “research hypothesis” to be “testable,” it must, among other things, be replicable. Moreover, the phrase “testable research hypothesis” implies the use of an empirical methodology which is frankly inconsistent with the methods and subject matter of legislative research and analysis.

Legal research is, by nature, focused on governmental systems, of which there are in total, at the national level, some 200 in existence. Under close scrutiny, few if any of these systems will be found to be similar enough in all relevant parameters to be considered comparable for purposes of experimental replication. Moreover, it is not possible to make the standard empirical leap from the specific to the general, by utilizing provincial or local governmental systems as test subjects for theories of national governance.

A greater difficulty relates to the nature of legal conclusions. While it is certainly possible to analyze and opine concerning the quality of legal draftsmanship and the legal sufficiency of particular enactments or sectoral regimes, it is virtually impossible to determine whether and to what extent such documents are, in fact, effective,<sup>15</sup> owing to two basic obstacles:

- legislation is a single component within an overall system, which includes cultural, social, political, economic and historical factors too numerous to list. Identification of the effect of a specific legislative enactment is, at best, a supported “guess” – hardly an acceptable outcome for research into a “testable hypothesis.”
- once a change has been made in the law, it will be several years before its actual effectiveness and results can be measured, even in the best of circumstances (where legal changes have been effectively communicated to a literate population, and are fully explained to local authorities who have capacity to enforce them.) At best, it is difficult to say whether or to what extent legislative changes have been a contributing cause of an identified positive effect. In a field such as forestry law, this problem is further compounded by long growing cycles, and other variables, which increase the difficulty of assessing changes to the resource itself.

While an increase or decrease in the number of enforcement actions (a measurable factor) may sometimes be attributable to legislative changes, that is not always the case. In addition, more (or fewer) enforcement actions may not necessarily be indicative of the success of a law. To demonstrate effectiveness, one would instead have to (i) demonstrate a higher rate of *compliance* with the law (difficult to measure) and (ii) prove that enhanced compliance was a result of the change in law, rather than other factors such as improvement in local economy, increased environmental education, depopulation of forest areas (urbanization of younger generations), etc.

For the above reasons, we have given somewhat less of our attention to the development of “testable research hypotheses,” instead focusing on identification of research objectives and

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<sup>14</sup> The discussion of empiricism and methodology which follows is generated from our recollection of our personal experience as physical-scientific and social-scientific researchers, while we were undergraduates and graduate students. It is said that “old men forget,” and in compiling this brief statement we have found that middle-aged men and women forget as well. We apologize for any inaccuracies in this discussion, and hope that its main message is not obscured by them.

<sup>15</sup> A corollary issue – whether better drafting or more inclusive provisions, etc. would result in greater effectiveness is similarly difficult or impossible to determine.

enumeration of the particular values that the research results might have in addressing problems of forest-related legislative development.

### **III. RECOMMENDATIONS RE: THE “NEEDS OF DEVELOPING COUNTRIES FOR RESEARCH TO SUPPORT IMPROVED FORESTRY LAWS AND ASSOCIATED REGULATIONS”**

IUCN-ELC<sup>16</sup> offers the following recommendations for areas in which we believe that there is a need for research, and that such research will result in outputs that will be of inestimable substantive value for developing countries seeking to address problems of forestry governance and management through legislation.<sup>17</sup>

These recommendations focus primarily on the issue of participatory legislative and administrative processes as used or needed within the forest sector, given that this was the focus of the current project. In a few instances, related projects outside of this narrow focus are identified, where they are suggested by the project reports, or by the NRI Review.<sup>18</sup>

We have not limited our suggestions to the three countries, nor have we focused only on multi-country projects. Except where specifically mentioned, we have not attempted to specify particular countries, in light of our understanding that donor criteria will be specified with regard to the selection of countries, as they were for the current project.

The IUCN-ELC’s recommendations fall generally into three categories

- issues relating to donor participation;
- issues relating to matters commonly thought to be within the mandate of the forest sector, and
- issues more commonly thought of as “governance.”

While the specific distinction between these categories are largely blurred – more so because these suggestions are all focused on “forest aspects” even with regard to donor and governance issues – these recommendations are divided based on where the bulk of the research (and local counterparts) would be located in conducting the suggested research.

Although rarely mentioned below, the possibility of work in tandem with projects involving foresters, economists, political and social scientists, is inherent in many of these proposals.

**Note on Priority:** We suggest that proposals A, C.1, B.1, B.2, B.3, and C.2, should be given the highest priority, in that order. We would emphasize however that any of the projects described are potentially achievable, valuable and timely. Moreover, in several cases, it appears that two or more of the suggestions below might easily be combined into a multi-activity project or series of

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<sup>16</sup> Given that the authors of this Addendum were not directly involved in the substantive work of this project, our evaluation of priority may be based on factors outside of the Project’s scope.

<sup>17</sup> We have been informed that, for NRI’s purposes, additional case studies are “not a substitute for research hypotheses.” However, for purposes of legal research, we must note the difference between “case studies” and basic legislative analysis. The latter is a necessary prerequisite to any research regarding existing laws and legal issues. We must underscore, the need to begin any of the following research projects with an appropriate legislative analysis, or a painstaking review of existing analyses to ensure that they are correct, current, complete, and directed at the issues under study. If any follow-up project is to be undertaken in Mexico, Malawi or Nepal, IUCN-ELC recommends that the country studies be further elaborated into complete and sufficient legislative analyses, under the supervision of international legislative experts.

<sup>18</sup> IUCN-ELC will be happy to provide a broader list of areas in which legislative research could be undertaken that would “support improved forest laws and associated regulations.”

projects. Such a combination approach may be advisable if NRI proposes to go forward with more than one of the following concepts utilizing some or all of the same countries as “subjects,” given that the cost of replicating or supplementing existing legal analyses can be reduced if the initial work identifies legislation relevant to all proposed project areas.

## **A. PARTICIPATION OF DONORS IN LEGISLATIVE DEVELOPMENT**

One of the specific objectives of this Project was to evaluate “the role of donor agencies” with regard to the improvement of forest legislation and its influence of sustainable forest management. Given the increasing focus on intended and unintended incentives that impact natural resource management and conservation, in-depth inquiry into the manner in which donor financing of legislative processes affects the outcomes of those processes appears a timely and critical subject for in-depth examination.

**Brief Background:** Each of the country reports in this Project noted particular concerns relating to donor participation in forest legislative processes. Not surprisingly, these comments included both strongly worded criticisms of the nature and level of involvement of donors in a process that is expected to be national, democratic and independent, as well as statements of the need for additional (outside) funding for participation and for legislative development more generally.

It is indisputable that bi- and multi-lateral assistance programs as well as international financial organizations have played a significant role in advancing the process of national legislative development. Less information is currently available on

- whether and how the objectives of the donors aligned with or differed from those of the regulatory bodies proposing such legislation, the parliamentary bodies enacting it, and the regulated community;
- the extent to which that involvement has influenced or altered the legislative development process and/or the output (legislative content),
- whether such alterations were warranted and effective in achieving national and sectoral objectives of such legislation.

Forest legislation offers an excellent opportunity for examination of this question, given that its objectives offer a blend of two or more components (often conservation and commercial development are primary concerns) about which international concerns and domestic concerns will not align perfectly.

**Research Proposal:** Identify two or more countries whose particular experience in legislative development or revision was largely financed or requested by external donors (IFOs or aid agencies) within the last 5-10 years.<sup>19</sup> The project would examine all available records concerning the legislative development and donor financing processes, with particular attention to how the donor-funded legislative process (including participation by various interested parties, communities, governmental sectors, etc.) compared to more conventional legislative development processes. It would also examine the substantive issues were addressed, and how those issues were raised, affected or dealt with. This basic examination of the former process would then be supplemented with a review of the particular problems of concern to the various components of the national forest sector, and affected communities and groups at the time of the legislative process. The third component of the project would be an examination of the current state of those

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<sup>19</sup> Both Malawi and Nepal would qualify for such a project. Although little in the initial country studies directly addresses donor involvement, those studies could provide a basis for further work on this issue.

problems and objectives and how they have been altered or affected in the time since the legislation has passed.

**Objective:** To analyze and compare experiences of donor-financed or –mandated legislative processes or administrative reorganization in the forest sector, regarding the extent to which donor involvement affects the substantive content of the legislation or other revision, and to provide a basis for recommending changes in the mechanisms of donor involvement, where appropriate to ensure that national legislative processes increasingly meet national needs and concerns, and are enhanced (rather than subsumed) by international participation.

## **B. FOREST-SECTOR ISSUES**

### **1. CROSS-SECTORAL FACTORS**

An important and frequently overlooked component of the participatory process is the participation of other governmental units, agencies and ministries. Concerns regarding the lack of inter-ministerial cooperation and in some cases, direct competition were expressed throughout the country reports.

**Brief Background:** As participatory management principles become more expansive in the forestry sector, they increasingly come into contact (or conflict) with the plans, legislation, and administration of other sectors. Standard legal mechanisms for addressing, avoiding or resolving inter-sectoral conflict or confusion are frequently ineffective. In a few legal systems, specific participatory processes have been developed, which are intended to provide both a mandate and an incentive for cross-sectoral cooperation.

**Research Proposal:** Examine two or more legal systems which utilize participatory process mechanisms for (1) involving other sectors in forestry decision-making; and (2) preempting future complaints from such bodies when the legislation involved conflicts with other sectoral proposals or objectives. The countries or regions studied should have had such mechanisms in place and operation for at least 5 years. In this work, special attention should focus on the systemic and cultural underpinnings that support or undermine the effectiveness of such a system, and the extent of consequent or counteracting legislative processes by other sectors.

**Objective:** To provide a basic understanding of the role of mandatory inter-agency participation mechanisms (including SIA) in fostering the development and improvement of forestry legislation, and minimizing inter-sectoral conflicts and overlaps.

### **2. MECHANISMS FOR LOCAL ENFORCEMENT AND IMPLEMENTATION**

Concerns were expressed in all three country studies concerning the ability of local and district officials to implement and enforce forest legislation.

**Brief Background:** Regardless of the level of governance at which forest legislative and administrative programs are created, the primary instrument of their implementation and enforcement is nearly always the most decentralized level of government official.<sup>20</sup> The most significant decisions relating to forests are frequently those within such officials' discretion, such as whether and when to cite or prosecute violators, evaluation of compliance with permit conditions, etc. Funding issues for specific forest-related activities at the local level often raise

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<sup>20</sup> This statement is true whether the individual official is directly employed by the federal or central government, given that he or she is usually stationed in an outpost office in the region for which he is responsible. Only in very small (usually island) countries can one find a single central forest office which directly implements and enforces relevant law.



additional concerns. Participatory legislative and administrative processes are often undertaken on a problem-by-problem basis, and often solutions do not (or cannot) make any allowance for the ability or inability of local officials to bring them to fruition. Modern forest legislation evidences an unquestionable trend toward greater flexibility in implementation, which by implication requires a higher level of participation at this “ground” level of enforcement. While the logic behind this approach is presently unquestioned, its level of effectiveness is dubious in many situations – often blamed on lack of appropriate local implementation.

**Research Proposal:** Examination of one or several instances in which lack of empowerment, legislative conflict or other legal/legislative/administrative obstacles are cited as the reason that recently adopted or revised (*i.e.*, less than 10-year-old) forest legislation has not been successful. Identification (from legislative database and other research materials<sup>21</sup>) of various legal, legislative, institutional and financial mechanisms for surmounting this type of obstacle, and evaluation of the probable applicability and effectiveness of each in the context of particular situations examined.

**Objective:** To provide an initial researched basis for the development of legislative and institutional solutions to problems of inadequate local enforcement of modern forest legislation.

### 3. COMMUNITY FORESTRY AND LAW – DEVELOPING LEGISLATIVE AND ADMINISTRATIVE PROGRAMS “BY DOING”

All three of the country studies noted some increasing emphasis on community involvement in forestry, including community forest management programs.

**Brief Background:** Even more than general forest legislation, legislation relating to community<sup>22</sup> forest management must necessarily be both (a) carefully tailored to address a range of factors (social, political, cultural, economic, historical, definitional etc.) and (b) responsive to new issues and problems that arise both in the regulation of CFM activities and in development of commercial and management capacity within community groups to enable them to participate effectively in the full range of forest management. Legislation and administrative/institutional development form an important component of this process. In a few recent instances, an iterative legislative development process has been undertaken focusing primarily on participation by forest communities in developing and implementing rules and plans, which are put into operation in advance of being memorialized as legislation.

**Research Proposal:** Examine at least one instance of the use of iterative participatory processes in the development of community forest programs and legislation. Focus of the examination should include (i) the legal bases on which the process was created and implemented; (ii) the extent and procedures for public participation; (iii) substantive processes and issues; (iv) (if possible based on the existence of or conduct of sociological research) level of acceptance and implementation of the resulting regulatory program. Compile a document of “lessons learned” in those processes. Identify (from legislative database and other research materials) particular difficulties encountered in the development of legislative and institutional frameworks for CFM in other countries, and evaluate the potential for application of iterative participatory processes as a mechanism for developing solutions in those countries.

**Objective:** To provide an analytical basis for utilizing recent experiences in iterative participatory legislative development processes, in the context of CFM development.

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<sup>21</sup> In this Addendum, “legislative database” and “other research materials” refer to IUCN-ELC’s extensive Legislation Library and Literature Library, respectively. More information on the contents of these valuable research resources will be provided on request.

<sup>22</sup> Even the most basic definition of community has come to be problematic in addressing these issues.

#### 4. INTERESTS OF FOREST HOLDERS

One forest legal issue which has been the subject of a substantial body of research is the issue of forest ownership<sup>23</sup> and its relationship to forest management and sustainable use. Within the studies undertaken to date, however, there has been little direct examination concerning the relationship between forest ownership and participation in forest governance. In two of the country studies, issues of forest tenure were specifically mentioned.

**Brief Background:** Arguably, some of the stakeholders most impacted by legislative and institutional changes in forest management and administration are the holders of legal interests in forests or forest lands, as well as those who have been occupying or cultivating forest lands over significant time periods. Various approaches to participatory legislative development may give these individuals a greater or a lesser voice in the eventual development of legislation.

**Research Proposal:** Beginning with a literature search, examine the various issues of forest management that are thought to be most directly affected by land tenure arrangements (“tenure-related issues.”) Identify one or more subject countries in which participatory processes have been used in the development or revision of legislation in the last 5-10 years. For each subject country, determine the method used to foster/encourage/conduct the participatory process, and the extent to which forest owners were represented therein, in comparison to other groups. Identify particular issues raised by the participatory process and how they were addressed in the resulting legislation. Compare results looking for correlation between the level of participation by forest owners, and the methods used to address the tenure-related issues.

**Objective:** To provide analytical guidance concerning the representation of forest owner groups in participatory processes.

#### C. BROADER GOVERNANCE ISSUES

While the following issues are primarily issues of “governance,” with implications that extend well beyond forests, these proposals and suggestions focus entirely on the relevance of these governance and administration issues within the forest sector.

##### 1. CONTROLS AND MANDATES ON GOVERNMENT: EVALUATING THE ROLE OF SECTORAL AGENCIES IN DEVELOPMENT OF LEGISLATION WITHIN THEIR SECTOR

As a reviewer correctly noted during the “IUCN and CEL Review” component of this Project, “Because the law-making process [creating the Nepal Forest Act], was lead by the Forest Department, [the resulting forest legislation] contains are very few checks and balances on the behavior of the Forest Department. The law has allowed the Department to use delaying tactics and to manipulate the system so that the opportunities for using forest to alleviate poverty have been missed.”<sup>24</sup> As forest management and governance become increasingly technical, however, many countries’ legislative bodies are guided almost exclusively by sectoral forest agencies in legislative development.

**Brief Background:** Participatory process offers one mechanism by which the “forest department monopoly” on the process of developing forest legislation can be controlled or influenced. However, in many cases, that process, too, is controlled and managed by the forest department.

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<sup>23</sup> For these purposes, the term “forest ownership” can refer to any right-based possession or use of forest lands.

<sup>24</sup> Bill Jackson, Director, IUCN Global Forest Program, Gland, Switzerland. Letter dated 27 June, 2000.

**Research Proposal:** Identify (from legislative database and other research materials) the components of forest legislation most commonly directed at controlling of forest officials, and mandating governmental actions (“sectoral-governance controls”). Select two or more study countries, whose legislation was developed in a process primarily conducted and controlled by the forest department, and two or more study countries whose process was primarily conducted and/or controlled by another arm of government (the Ministry of Justice, or other body.) For each study country, (i) evaluate the legislative development process, in terms of the number, relevance and sufficiency of checks on and inputs into this process, and the degree to which its requirements were met, and (ii) evaluate the resulting legislation in terms of the sufficiency of its provisions in the areas of sectoral-governance controls. Compare and draw conclusions about the results of this research.

**Objective:** To provide an analytical basis for creating procedures for the development of forest legislation which ensure that appropriate attention is given to controlling and mandating the activities of forest departments and officers.

## 2. COSTS OF GOVERNANCE

**Brief background:** The financing of participatory governance is a matter of critical importance to the improvement of public participatory process, and the consequent improvement of forest legislation. A number of important limiting issues typically arise relating to the cost of the participatory process. While some of these are legal issues (such as the mechanisms used, and the legal basis and mandate underpinning this use of funds), questions concerning the “comparative costs of different levels of collaborative decision-making,” the sources of law-making budgets, and the political choices regarding this use of government funds<sup>25</sup> and/or the creation of national or sub-national “forest funds,” appear to be matters for the economist, economic strategist, or political scientist to determine.

**Research Proposal:** Examination of the legal bases for three or more legislative models regarding the financing of forest governance, focusing on the need to pay the costs of forest management planning, strategic and environmental impact assessment, legislative development (at all levels, particularly in cases of strong mandate for decentralization of forest governance), monitoring and evaluation, and procedures for public participation in each of these processes.

This analysis could focus on a countries with similar governance system and mandates (*e.g.*, countries in transition to market economies; countries whose historical form of governance is tribal- or family-based (where that system continues to exert influence on an informal level); pre-colonial countries whose legal system is based on common law (or civil law); etc.)

**Objective:** To analyze and compare different systematic legal/legislative approaches to financing participatory processes in the forest sector, including analysis of their administrative implementation and functioning, with a goal of identifying common problems and evaluating the advantages and disadvantages of particular solutions, in various contexts.

**[NOTE:** This proposal could be undertaken in concert with, as a prelude to, or as a follow-up to economic/policy research relating to the following policy and practical issues – comparative costs of different mechanisms for participatory forest governance, sources of funding for forest legislative development (and other governance), political support for this allocation of funding, etc.<sup>26</sup>]

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<sup>25</sup> NRI Review, ¶ 6

<sup>26</sup> These issues were identified in the NRI Review at ¶ 6, and are presumably issues in which NRI is interested.

### 3. METHODOLOGIES OF CONFLICT RESOLUTION

**Brief Background:** As forest governance has transformed from its former focus on resource extraction and commercial development into a mechanism for addressing a complex of interrelated concerns, it has become more complex to administer. Still, however, the basic determining factor regarding the success of forest legislation remains the same – public acceptance. In the absence of this factor, governmental forest enforcement can never be sufficient to protect forest from illegal and harmful activities of all types. In this regard, the use of more complex legislation and institutions increases the possibility that members of the public will be dissatisfied with regulatory decisions. Similarly, increased government regulation of land uses and use restrictions multiplies the bases for concern. For this reason, the need to develop conflict resolution mechanisms relative to forest governance and management is increasingly recognized.

**Research Proposal:** Identify (from legislative database and other research materials) countries whose forest governance system includes specific mechanisms for conflict resolution. Select two or more such countries for in-depth study, both of the system as created legislatively, and of its operation in fact. Prepare a comparative analysis of the legislation and practices studied in-depth, supplemented by discussion of other types of mechanisms included in or applicable to forests, based on the initial research.

**Objective:** To develop a basic understanding of the options for forest-related conflict resolution mechanisms. In this connection, it should be noted that the need for conflict resolution mechanisms is also recognized with regard to the environment, more generally. Forests, which present a classic combination of objectives (biodiversity conservation, recognition and protection of ecological functions, resource development, poverty alleviation, etc.) may be an appropriate crucible in which to examine the value of such mechanisms.

### 4. REPRESENTATIVE VS. DIRECT PARTICIPATION

**Brief background:** Another critical issue relevant to the participatory process is the scope of participation. A critical underlying question here is whether such processes should attempt to involve all concerned individuals, or merely to ensure the representation of all relevant classes of stakeholders in the process. The increasingly “representative” (or as some would say “token”) approach to public participation is highly controversial. Although it is being discussed in many fora, this issue has not been sufficiently addressed in the forest context. From a legal perspective, each option offers unusual challenges. This issue is one of combined interest for the political scientist/strategist as well as the lawyer.

**Research Proposal:** Identify one or more countries which have utilized one of the various options for participation in development of legislation which has been adopted and in place for a period of not less than 4 years. Undertake a systematic study of (i) the extent of participation involved in the prior process, (ii) examine the mechanisms by which participation was solicited or encouraged; (iii) examine the functioning of the legal/administrative system through extensive contacts with all components (governmental and private) of the forest sector, addressing to the particular matters addressed by the revised legislation, including special attention to issues that were raised and addressed by the participatory process as well as other issues; (iv) (optional, if sociological researcher can be added to the project team) assess the extent of acceptance/buy-in of various stakeholder groups to the resulting legislative/administrative framework; and (v) develop an analysis or comparative analysis concerning how and to what extent various types and scopes of participatory processes affect the outcome of that process – *i.e.*, result in legislation that addresses known problems and concerns.

**Objective:** To provide an analytical basis of support for use in adopting, implementing or revising participatory governance programs, which provides functional analysis of existing programs in terms of the relationship between the scope and nature of participation and the acceptance and coverage of resulting legislative or other outputs derived through such participation.

**[NOTE:** To some extent, the question of scope and nature of participation is more a policy than a legal issue. Often a decision regarding the level of participation that will be mandated under participation laws is one of the trade-offs involved in securing support for the enactment of those laws.]

## TOMME ROZANNE YOUNG

Tomme R. Young is Legal Officer at the IUCN Environmental Law Centre in Bonn, Germany. Throughout her 19 years as a lawyer, she has developed a specialised expertise in many areas of environmental law and policy. She has worked in many diverse locations around the globe. Internationally, Ms. Young has served as a special advisor on environmental and sustainable development issues to foreign governments, under the auspices of several UN agencies. She has advised the governments of 16 countries in Europe, Africa, Asia, Oceania and the Americas, on legislative drafting and negotiations and regulatory development. She has participated in negotiation of international and regional agreements, and prepared advisory white papers on the Biodiversity Convention, forest legislation and administration, sustainable development, environmental protection, resource development and conservation, and coastal zone management, for the United Nations. In addition to this, she has represented numerous international corporate clients.

In the field of forest law and administration, Ms. Young has focused particularly on the legal issues relating to the sustainable management of forests, and related resources. She has undertaken in-depth national analyses of legal, legislative, administrative and policy issues relating to forest management and sustainable use in 10 countries in Africa, Asia, Europe, Oceania and the Caribbean. She has written comparative analyses of legal and administrative issues relating to forests including

*Trends and Innovations in Forestry Legislation in Asia and the Pacific (FAO 1998)*

*Trends and Innovations in Forestry Legislation in Anglophone Africa (FAO, 1999)*

*China, Mongolia, Myanmar, Vietnam: the Transition of Forestry Activities to Market Oriented Operation (FAO 1998)*

Other recent forest-related legal publications include: *Evaluation of Commercial Forest Plantation Resources of Trinidad and Tobago (1994)*; *Evaluation and Analysis of Tongan Forests Conservation and Environmental Legislation, with Proposals for its Revision (1996)*; *Legal Issues Relating to Strengthening National Forest Fire Management Capacity in Indonesia (1996)*; *Legislation and Legal Assistance for Conservation and the Establishment and Management of Regulations and Programs for Sustainable Forest Management and Conservation in Bhutan (1997)*; *Harmonisation of Legislation and Strategy for Forestry Sector Formation in Slovakia, in the Wake of Transition to Market-oriented Operations (1999)*

Ms. Young's other international publications include legislative reports and analyses addressing national and regional legislative status and particular issues of conservation, environmental protection, pollution prevention, coastal and marine management, access and IPR issues and environmental compliance and enforcement.

Ms. Young was in private practice in San Francisco (USA) for nine years, specialising in environmental and transactional law, as well as energy, land-use planning and financial instruments. She has served as an adjunct professor in several institutions, including at the University of San Francisco School of Law. She was co-author of the treatise Managing Environmental Risk in Transactions (West Group, looseleaf), which she updates annually. She has written numerous articles in periodicals as diverse as the AGC Construction Manual, World Conservation, Distressed Real Estate Law Alert, Environmental Law for Lenders, and The Flood Report. She is a member the ABA Sections Section on International Law and Policy, where she has chaired the International Environmental Law Committee, served as liaison to the ABA Standing Committee on Environmental Law, and the Subcommittee on Transboundary Movement of Hazardous Waste, and developed the ABA policy for the Earth Summit. She is a frequent speaker on environmental and business issues.

Ms. Young is a graduate of Hastings College of the Law (1981), and the University of Southern California (1978). She was as an editor of the Hastings International & Comparative Law Review.

## **CHARLES E. DI LEVA**

### **Biographical Details**

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Mr. Di Leva's work at the Bank included advising on forestry- and forestry-law-related projects in Africa, Asia and Latin America, including assisting with drafting such legislation. He also worked extensively on Forest Issues related to indigenous and community forestry, resettlement and environmental assessment. Most recently, he has worked in Cambodia on that countries new draft Forestry Law.

Prior to joining the World Bank, Mr. Di Leva served as Trial Attorney with the U.S. Department of Justice, Environment and Natural Resources Division (1984-86, 1990-92), and as both the Environmental Advocate for the State of Rhode Island Department of Attorney General and Legal Counsel with the Rhode Island Department of Environmental Management (1979-1984). From 1986 until 1989 he worked in private practice with a large national environmental law firm. He has also served as Senior Program Officer stationed in Nairobi, Kenya in the Environmental Law Unit of the United Nations Environment Programme (1989-90).

Since 1993, Mr. Di Leva has also taught as an Adjunct Professor, offering courses in Comparative Environmental Law at American University's Washington College of Law, and International Environmental Law at the George Washington University School of Law.

Mr. Di Leva is a graduate of Vermont Law School (1978) and the University of Rhode Island (1975).

## TABLE OF CONTENTS

	<i>Executive Summary</i> .....	1
1.	<i>Introduction</i> .....	4
	1.1 <i>Background</i> .....	4
	1.2 <i>Methodology</i> .....	5
2.	<i>Forestry Framework Legislation</i> .....	5
	2.1 <i>Participatory Forestry</i> .....	6
	2.2 <i>Forest Management Agreements</i> .....	7
	2.3 <i>Powers of Village Natural Resources Management Committees</i> .....	10
	2.4 <i>Forest Tree Ownership and Forest Produce Utilisation</i> .....	10
	2.5 <i>Soil and Water Catchment Conservation</i> .....	11
	2.6 <i>Institutional Capacity</i> .....	12
	2.7 <i>International Cooperation</i> .....	13
3.	<i>Development of Recent Legislation Initiatives</i> .....	13
	3.1 <i>Historical Development</i> .....	13
	3.2 <i>International Assistance</i> .....	14
	3.3 <i>Parallel Policy Legislative Reviews</i> .....	14
	3.4 <i>Local Legal Expert Review</i> .....	15
	3.5 <i>Development of Legislative Objectives</i> .....	15
	3.5.1 <i>Guiding Principles</i> .....	15
	3.5.2 <i>Department Initiatives</i> .....	16
	3.5.3 <i>National Study Initiatives</i> .....	16
	3.5.4 <i>International Developments</i> ... ..	17
	3.5.5 <i>Comparative Models</i> .....	18
	3.6 <i>Feasibility Assessment of Proposals</i> .....	18
4.	<i>The Role of national Forestry Policy</i> .....	18
5.	<i>The Legislative Drafting Process</i> .....	20
	5.1 <i>Who Was Involved?</i> .....	20
	5.2 <i>Interdepartmental Consultations</i> .....	21
	5.3 <i>The Policy Planning Unit</i> .....	22
	5.4 <i>Role of Foreign Consultants</i> .....	22
	5.5 <i>Cross-sectoral Legislative Considerations</i> .....	22



5.6	<i>The common law, customary law and local community participation</i>	23
5.7	<i>Decision making</i>	27
6.	<i>Public Participation</i>	28
7.	<i>External Donor Assistance</i>	30
8.	<i>Incorporation of International Forestry Related Conventions and Policy</i>	31
9.	<i>Primary and secondary legislation</i>	32
10.	<i>Assessment of the law making process and quality of the legislation</i>	34
10.1	<i>Scope of the Act</i>	34
10.2	<i>Utilisation of Forestry Produce</i>	35
10.3	<i>Village Natural Resources Management Committee</i>	35
10.4	<i>Participation of Local Communities in Management of Government Forests</i>	36
10.5	<i>Institutional Mandate</i>	37
10.6	<i>Local Authorities</i>	38
10.7	<i>Enforcement</i>	39
10.8	<i>Traditional/Informal Rules</i>	39
11.	<i>Observations and Regulations</i>	41
11.1	<i>Policy and Legislative Planning</i>	41
11.2	<i>Creation of New Institutions</i>	41
11.3	<i>Involvement in the Drafting Process</i>	42
11.4	<i>Role of Foreign Consultants</i>	43
11.5	<i>Role of Donors</i>	43
11.6	<i>Public Participation</i>	44
11.7	<i>Incorporation of Public Comments</i>	44
	<i>References</i>	46
	<i>List of Acronyms</i>	47
	<i>List of Interviewees</i>	48
	<i>Report of the Workshop on Effective Forestry Law Making in Malawi</i>	49-60

## **EXECUTIVE SUMMARY**

The law making process in Malawi has traditionally been the province of the Government since the country attained independence in 1964. Bills are prepared by draftsmen at the Attorney General's chambers in the Ministry of Justice in liaison with the sponsoring (client) government department. It is then sent to cabinet for approval. Thereafter it is sent to Parliament for publication as a bill for Members of Parliament to deliberate on and pass as law. The first real change to this tradition first occurred in 1994 when the transitional Republic of Malawi Constitution was adopted through public consultation involving national workshops and public hearings. In relation to environment and natural resources legislation, the Environment Management Act 1996 also underwent some multisectoral reviews through workshops.

The Forestry Act 1997 also underwent some multisectoral review through workshops that dealt with policy and legislative review. In particular, two workshops may be mentioned. The first took place in Mangochi in 1995 and the second took place at Malawi Institute of Management in Lilongwe in 1996. These workshops considered a draft Forestry Bill 1993 which had been prepared by a FAO consultant. Despite these reviews, the Forestry Act 1997 still has problems in terms of quality of language used and the consistency of the rules which seem to suggest that somewhere the law making process was very far from gaining from proper interdepartmental consultations and public participation.

The issue in this study is to consider if and to what extent the quality of legal language and rules and provisions of the Forestry Act 1997 were influenced by the law making process. The study has thus reviewed the process starting from the commencement of the initiatives through intra-departmental and inter-departmental consultations as well as involvement of members of the general public including NGOs, the private sector and the local communities. A few interviews were conducted with stakeholders to determine their involvement in the process and how that involvement was reflected in the results of the process.

It has been observed that although some attempt was made to involve various stakeholders in the law making process, the consultations were narrow and not properly co-ordinated. The internal consultations within the Department of Forestry left much to be desired. The absence of properly recorded proceedings including proposals and recommendations on various positions taken at the workshops means that the draftsman at the Ministry of Justice had had no material to inform him on the various legislative provisions he was requested to incorporate. The draftsman relied heavily on the instructions of the Principal Secretary for Natural Resources and his perception of proposals and recommendations and had no consultations with professionals at the Department of Forestry. Finally, it seems that there was no mechanism for ensuring that stakeholder proposals were actually incorporated in the Forestry Act 1997.

The foregoing concerns did influence, in some measure, the result of the law making process. In the first place, the concept of local community participation in forest management was merely glossed over during consultative meetings and did not precisely articulate institutional forms and mandates resulting in muddled provisions that open up the Forestry Act 1997 to various possible interpretations. The process also did not adequately identify and examine traditional or customary law norms of natural resources management and the extent to which any such norms can be used by local communities.

Secondly, the law making process did not adequately take into account the role of other statutory agencies in forestry management. The most glaring omission concerns the role of local authorities which have lost the role they had under the repealed Forest Act 1942. The disturbing fact is that the Local Government Act 1998 had continued to mandate local authorities to be involved in forestry issues without any co-ordination with or mention of the provisions of the Forestry Act 1997. This reflects lack of proper consultation to capture such an important stakeholder in forestry issues as the local authorities. The same can be said with regard to the Land Act 1965 and the National Parks and Wildlife Act 1992.

Thirdly, it seems the legislative process for forestry had no mechanism for ensuring that the proposals from stakeholders or multisectoral reviews were incorporated. We therefore notice that some stakeholder concerns such as the exclusion of NGOs from the policing and monitoring of the Forestry Act 1997 and the failure to include enforcement officers from other departments such as agriculture, community services, fisheries and among others to be part of the enforcement machinery, has not improved the enforcement machinery as it should have.

Fourthly, donor assistance was somehow narrow and fragmented as some donors applied pressure on the Department of Forestry to finalise the Forestry Bill as a conditionality for releasing project funds. This may have prompted some officials to take drafting into their own hands and exclude equally important stakeholders.

The foregoing and other problems have prompted recommendations that forestry legislation should be sponsored by and exhaustively discussed within the Department of Forestry, that the Department of Forestry must strengthen its Planning Unit and utilise its Research Institute so that these should feed into policy and legislative enactments. It has also been recommended that proceedings of consultative workshops on policy and legislation should be properly recorded including proposals and recommendations to inform the draftsman in his work. Civil society needs to be empowered to follow up proposed provisions by lobbying concerned Government departments and Parliament to ensure their views are incorporated rather than having to watch helplessly as their efforts are swept aside. Finally, it has been recommended that donor assistance needs to be co-ordinated and that includes in relation to the pace of any changes being sponsored.

## **1. Introduction**

### **1.1 Background**

It is increasingly being realised that effective implementation and enforcement of any legislation depends to a large extent on the extent of involvement of various stakeholders in the process of adopting the legislation. Such stakeholders include government officials, local communities, non-governmental organisations (NGOs), the private sector and donor agencies. While most government departments and legislators accept and welcome this participatory approach, the form in which the participation must take place is still far from clear. This is partly due to the fact that the participatory approach concept is still new to most developing countries including Malawi. There is also the question of resources to undertaking such public participation exercise. In Malawi, in particular, much of the legislative making process has been the domain of central government departments, that is, the Attorney General's chambers working in liaison with the client department originating the proposed legislation. After a draft has been produced it is then sent to cabinet for approval. It would thereafter be sent to Parliament for enactment. Informed debate in Parliament may not be forthcoming to express public sentiments and quality proposals for several reasons, including lack of knowledge in technical subject matters, lack of consultation with constituents and funding constraints to carry out the consultations.

This project considers the legislative making process during the drafting of the Forestry Act 1997 in Malawi. It evaluates the procedure that was followed in producing the draft Forestry Bill including the role that relevant government and donor agencies, NGOs, the general public and the private sector played in the process. The aim is to provide guidance on overcoming obstacles to effective law making in the forest sector.

## **1.2 Methodology**

The first part of this report will survey current forestry legislative framework with particular emphasis on the Forestry Act 1997 which repealed and replaced the Forest Act 1942. This survey will also consider other related legislation such as the National Parks and Wildlife Act 1992, the Local Government Act 1998, the Land Act 1965 and the Environment Management Act 1996 (EMA 1996) as well as their impact on the Forestry Act 1997.

The second part will describe the process in the drafting and enactment of the Forestry Act 1997 that is, from the origin of initiatives up to passage in parliament. Any obstacles in the process to achieve the most effective result will be identified. Recommendations will then be made on how best to overcome those obstacles.

Interviews and or consultations were conducted with various stakeholders who were involved in the process of preparing the draft Forestry Bill. These included officials from the Department of Forestry (DOF), Department of Environmental Affairs (DEA), Ministry of Justice (MOJ), Wildlife Society of Malawi and the Co-ordination Unit for the Rehabilitation of the Environment (CURE). Names of officials interviewed are appended to this report. Due to constraints of time the exercise was limited in scope and some equally important stakeholders were not interviewed.

## **2. Forestry Framework Legislation**

The principal statute that regulates forestry matters is the Forestry Act 1997. This Act which came into force in 1998 repealed the Forest Act 1942. That repeal however saved any subsidiary legislation made under the old Act as long as that subsidiary legislation was not in conflict with the new Act and is not amended revoked or replaced by subsidiary legislation made under the new Act (section 87).

## 2.1 **Participatory Forestry**

One of the major reasons for the enactment of the Forestry Act 1997 was to introduce the concept of participatory approaches to forestry management. The foreword to the National Forestry Policy of Malawi put this point succinctly as follows:

*The use of a coercive heavy handed approach in the enforcement of the provisions of the Forest Act led to the alienation of local people who came to regard trees or forests as being conserved not for their benefit but for the benefit of the Government. This belief led to the people's disrespect for trees or forests that were being conserved, and the manifestation of the disrespect was the inception of the inordinate rate of deforestation.*

Thus there was a clear departure from command and control, top down administration of forest resources under the Forest Act 1942 to a participatory approach that took into account the needs, attitudes and aspirations of local communities. In this respect, the new Forestry Act 1997 specifically spells out its intent in section 3 as including, inter alia:

*to augment, protect and manage trees and forests on customary land in order to meet basic fuelwood and forest produce needs of local communities and for the conservation of soil and water;*

*to promote community involvement in the conservation of trees and forests in forest reserves and protected forest areas; and*

*to empower village natural resources management committees to source finance and technical assistance*

*from the private sector, Non-Governmental Organisations and other organisations.*

These objectives are further reflected within the responsibilities of the Director of Forestry (the Director) in section 5. Among the many broad mandates, duties and responsibilities, the Director is required to promote participatory forestry; facilitate the formation of Village Natural Resources Management Committees (VNRMCs); facilitate the establishment of rules of village forest areas; and promote the empowerment of local communities in the augmentation, control and management of customary land trees and forests.

## **2.2 Forest Management Agreements**

The repealed Forest Act 1942 brought about the concept of a village forest areas under its part IV. This concept was continued under the Forestry Act 1997 which empowers any village headman with the advice of the Director, to demarcate a part of unallocated customary land a village forest area to be managed for the benefit of that village community (section 30). Village forest areas are therefore established on customary land which is communal land and controlled by traditional leaders.

In order to facilitate the proper management of these village forest areas, the Director may enter into a forest management agreement with a management authority (section 31). According to section 2 of the Act, a management authority is defined in the following terms:

*“in relation to a village forest area, means a person designated as the management authority pursuant to the agreement establishing the village forest area”.*

It is clear from this definition that a management authority is a person, that is, natural or artificial. A village headman may qualify as a management authority, though it is not clear why the Act did not specify that a management authority is or includes a village headman since this is a statutory office under the Chiefs



Act 1967. It follows therefore that the Director may enter into a forest management agreement with a village headman, or a company which can provide for, inter alia, the formation of VNRMCs for the purposes of managing and utilising village forest areas.

A VNRMC is defined by section 2 of the Act as a “committee elected by stakeholders of the village forest areas”. A VNRMC therefore cannot be a “person” since it is an unincorporated body. It is established through election by stakeholders who, it may be assumed, even though the Act does not define means members of the village in which the village forest area is located. However, it seems, though this is not clear from the language of the Act, the VNRMC can be designated a management authority by a forest management agreement under section 31.

The question that arises then is who manages village forest areas? Is it a management authority or a VNRMC. There are a number of possible interpretations:

- (a) where there is a forest management agreement, a village forest area will be managed by either the Director and a village headman (if he qualifies as a management authority) or the Director and a VNRMC (if the VNRMC is designated as a management authority). What is disturbing, however, is that there can be no management authority without a forest management agreement between the Director and a management authority. And a VNRMC cannot be a management authority without a forest management agreement ! (section 31).
- (b) Where there is no forest management agreement, a village forest area will be managed in accordance with section 30 of the Forestry Act, 1997. That provision states that such village forest areas shall be managed in the prescribed manner for the benefit of that community. It is not clear as to who shall prescribe and in what manner as to the management of such village forest area.

The foregoing are serious drafting errors and need to be remedied as a matter of urgency. The following proposals may be offered.

A management authority should be defined as either the village headman responsible for the village in which village forest area is located or a VNRMC. So that where there is no VNRMC the village headman will enter into a forest management agreement with the Director. And if there is a VNRMC such agreement will be between the Director and the VNRMC or its representatives. The VNRMC would be a more democratic and participatory institution than the traditional office of the village headman which, though it commands traditional respect, it has its own limitations in ensuring that each member of the community feels they have a stake in the efforts and decisions of the community. The village headman's role should be for purposes of land allocation and his participation within the management of the village forest area should be by election or as an honorary member who can provide wisdom and traditional guidance in the deliberations of the VNRMC.

A better approach would be amend the Act so that neither the VNRMC nor the village forest area is a product of a forest management agreement. The parties to the agreement and the subject matter thereof should precede the agreement. This approach would make the process truly participatory and make the institution legally constituted. A reading of sections 3,5,32 and 33 of the Act suggests that the VNRMC are to play a prominent role in the conservation and sustainable utilisation of forestry. The Forestry Act 1997, as it is now, subordinates their role to an agreement whose parties are not clear until it is entered into!

### **2.3 Powers of Village natural resources management committees**

Although a reading of sections 3,5,32 and 33 of the Forestry Act 1997 suggests VNRMCs have a big role to play, the Act does not clearly bring out their powers and functions. For example, section 9(3) which gives the VNRMCs power to seize and detain forest produce obtained in violation of the rules of the VNRMC, restricts their enforcement powers to village forest areas. The purport of part V of the Act as stated in section 29 also appears to confine the role of these committees to village forest areas. On the other hand section 3(d) which states that one of the purposes of the Act is, inter alia, to empower community involvement in the conservation of trees and forests in forest reserves and protected forest areas in accordance with the provisions of this Act, suggests that these VNRMCs should be involved not only in village forest areas but also protected forests and forest reserves which had prior to the Forestry Act 1997, been in the exclusive protection of the DOF. This is also in accordance with the National Forestry Policy which is aimed at identifying forestry resource management and utilisation with the needs and attitudes of the community. That must include resources within forest reserves.

The VNRMCs are also given power to make their own rules (section 33) for the protection and management of village forest areas within their jurisdictions. These rules will have to be approved by the Minister. It is clear that the role of the Minister is merely facilitative and to provide governmental authority to the rules.

### **2.4 Forest Tree Ownership and Forest Produce Utilisation**

The second new concept brought about by the new Forestry Act 1997 is the ownership of trees and forests by persons or communities which either protect or plant a tree or a forest. According to section 34, a person who or community which protects a tree or forest whether planted or naturally growing which that person is entitled to use, is the owner of that tree or forest “with the right to sustainable harvest and disposal of the harvest”. Section 37 on the other hand

states that a person who plants any tree on any land is the owner of such tree and has the “right to harvest the resulting produce and to dispose of it freely”.

The implication of sections 34 and 37 is that planted and naturally growing trees may be privately owned save that whereas a person who plants a tree may “freely dispose” of such tree, naturally growing trees must be sustainably utilised. On the other hand, all forests must be sustainably utilised whether they are planted or naturally growing. The implication clearly is that private trees plantations that do not qualify as forests can be harvested at will. In our view unsustainable harvest of private plantations can be detrimental to land use practices within the plantation owner’s holding or neighbouring land users. The state under the common law principle of eminent domain should have the power to superintend the harvest of private plantations.

Finally, section 83 restricts the utilisation of indigenous timber on leasehold land and requires a permit if a person wishes to transport such timber from such land. The revenue from the permit fees accrues to the VNRMCs. It is interesting to note that these VNRMCs will enjoy the fees even though the reversion of the lease in question is freehold or public land. There is no justification for this provision and it may dissuade private landowners from investing in forestry. It is also not clear from the Act as to who will receive the permit fees if there is no VNRMCs.

## **2.5 Soil and Water Catchment Conservation**

The control and prevention of soil and water degradation is also the responsibility of the DOF. The Forestry Act 1997 has for the first time made specific provisions to deal with the effects of deforestation, destruction of vegetation cover and loss of biodiversity. It gives power to the Minister to make rules to provide for the protection of water catchment and fragile areas, rehabilitation of degraded areas and any other activity that would promote good land husbandry (section 32 (2)(a)). This is a mandate for departments of agriculture and lands as well as physical planning and therefore requires consultation before rules can be promulgated as the same rules may be made

under the Land Act 1965 and the EMA 1996 (section 35 (2) and the Town and Country Planning Act 1988 (See Banda, 1999).

The Act has also provided for the concept of protected forests under which the Minister responsible for Forestry is given power to declare by order in the *Gazettee* an area of land as a protected forestry if he finds that the protection of soil and water resources, outstanding flora and fauna requires that the area be so declared. The Minister is required to consult the Ministers of Lands, Agriculture and Irrigation and Water development including owners or occupiers of such land or traditional authorities if the land is customary land. This provision caters for protection and management of any category of land that is degraded or is threatened with degradation and provides for measures that may be employed as well as the assistance the DOF may provide to the owner or occupier. It should be noted that these powers are also given to the Department of Physical Planning and lands and there is therefore need for co-ordination. The Act is silent in this regard.

## **2.6 Institutional Capacity**

The Implementing and enforcement agency for the Forestry Act 1997 is the DOF. There is, however, an advisory body such as the Forestry management Board which is a multisectoral body that, among other things, promotes inter-sectoral co-ordination in forestry management. The Act also recognises the role of traditional authorities as did the repealed Forest Act 1942 but the new Act goes a step further to mobilise local community involvement in forestry management through establishment of VNRMCs which are elected by stakeholders of a village forest area. There is, however, no attempt in the Act to involve enforcement personnel from other agencies such as agriculture, fisheries, water as is done under the Fisheries Conservation and Management Act 1997. Finally, although both the Forestry Act 1997 and the National Parks and Wildlife Act 1992 deal with the protection of endangered plant species, the latter Act has more detailed provisions which could be mutually enforced by the

two relevant institutions. Co-ordination is, however, lacking between the DOF and the Department of Parks and Wildlife.

## **2.7 International Cooperation**

For the first time again the Forestry Act 1997 has provided for international co-operation in cross border forests and gives power to the Director to enter into cross border forest management plans, the implementation and review of common plans at bilateral and regional fora and implementation of international conventions (part XI).

## **3. Development Of Recent Legislative Initiatives**

### **3.1 Historical Development**

The repealed Forest Act 1942 was based on the command and control strategy of protecting forests for conservation and industrial use backed by penal sanctions. It was also a reflection of the colonial style of administration which was intended to exploit resources in the colonies for the benefit of the colonial master. This style of management did not change after independence as the new state continued to ape capitalist accumulation strategies. During interviews with DOF officials it was stated that under the repealed Forest Act 1942, forests were utilised and managed primarily as assets of the state so that although some kind of decentralisation was established through involvement of traditional authorities in managing village forest areas and the local authorities in the control and management of forests on customary land, the DOF continued to be the ultimate owner and controller of forest produce. Village forest areas had to be exploited with the consent of the DOF save where their utilisation was for domestic purposes.

The National Tree Planting Day declared in 1976 was the first national forestry programme to involve the general public in forestry matters. On the other hand, developments in international forestry policy such as the 11th World Forestry Congress in 1979 and much later the Earth Summit of 1992 emphasised the

need to involve local communities in the conservation and management of forestry and signalled the change in policy direction within the DOF that culminated in the need to review the repealed Forest Act 1942.

### **3.2 International Assistance**

According to the DOF the Malawi Government requested the Food and Agriculture Organisation of the United Nations (FAO) to assist it in forestry policy and legislation review in the late. It seems, according to files in the MOJ, the FAO consultant who was responsible for legislative review, did his work sometime in 1990. And although information in both the DOF and MOJ is scanty, it appears it was this consultant who produced the first draft Forestry Bill 1993 that became the basis for various reviews within the DOF and between the MOJ and the Ministry of Natural Resources.

### **3.3 Parallel Policy and legislative Reviews**

The review of the Forest Act 1942 was carried out together with that of the forestry policy and both were initiated by FAO although it seems the development of the National Forestry Policy was much better co-ordinated and focused than that of the legislation. This may be due in part to the fact that the DOF has an established Planning Unit which is responsible for the development of forestry policy plans and programmes. Of course this is a reflection of the DOF having no legal expertise and relies on the MOJ to service its needs. Thus apart from the internal reviews of the draft forestry policy, there were also inter-departmental multisectoral reviews and two workshops organised in 1995 at which representatives from different departments, NGOs such as the Wildlife Society of Malawi, and the donor community were represented. Among the donors, there were representatives from FAO, the World Bank, the United Nations Development Programme (UNDP) and the then Overseas Development Administration (now called DFID).

### **3.4 Local Legal Expert Review**

It is interesting to note that, according to the foreword to the National Forestry Policy, at the second workshop that reviewed the draft forestry policy held in Mangochi in 1995 the then Principal Parliamentary Draftsman (now the Solicitor General) and a lawyer from the Department of Lands (DOL) provided their legal expert guidance “particularly on the policy’s section entitled Legal Framework which seeks to overcome major institutional obstacles and to increase interagency co-operation while avoiding overlapping jurisdictions, and to prevent vested interests from paralysing new initiatives” (page 2). While it may not be safe to conclude that this was the first local input in legislative review, it would appear it is the first properly recorded consultative process that included local lawyers. It is clear, however, that the MOJ already had a draft Forestry Bill which had been given to it by the Secretary for Natural Resources. It can only be surmised that this was the version prepared by Larry Christie but probably reviewed by the Secretary for Natural Resources. It is interesting again to note that it was also the Secretary for Natural Resources who prepared the draft forestry policy that was reviewed internally and at the two workshops already referred to.

### **3.5 Development of Legislative Objectives**

#### **3.5.1 Guiding Principles**

The formulation of principles, strategies, institutional structures and mandates that inform legislative development is a multifaceted process. It involves deliberate development of policy matrices, synthesis of experiences and results of studies and comparative models from comparable jurisdictions as well as developments in international forestry policy identified from international conventions, regional and bilateral agreements. This process can be diffuse and it may be difficult to determine in some cases how particular principles, strategies and institutional structural reforms were developed. This is the case



with the legislative process on forests in Malawi. The interviews conducted at the DOF confirmed this position. It was, however, frustrating that it was difficult or impossible to obtain recorded information on the process of the reviews.

### **3.5.2 Departmental Initiatives**

Thus when asked as to how the DOF identified the various problems and solutions in forestry regulation for purposes of legislative enactment, various factors were mentioned. Firstly, it was noted that, through a number of years of implementation and enforcement of the repealed Forest Act 1942, a number of problems were identified and sometimes solutions offered through intra-departmental initiatives. Thus forestry personnel working in the fields as guards or extension workers related their experiences to policy makers through field reports and other channels of communication including departmental consultations, training and workshops. These are processed within the Planning Unit and discussed by the DOF. It was not clear however whether and to what extent this process is properly organised and structured. These are very important initiatives which must be encouraged. The DOF confirmed they are continuing even after the enactment of the Act.

### **3.5.3 National Study Initiatives**

Secondly, studies such as that pertaining to the formulation of the National Environmental Action Plan 1994 (NEAP 1994) in which the DOF actively participated confirmed such problems and identified many more. It also offered a number of approaches to dealing with those problems. The NEAP 1994 noted two major problems. It identified the related problems of deforestation and destruction of vegetation cover on the one hand, and soil erosion and loss of biological diversity on the other hand. It noted that, although there was legislation such as the Forest Act 1942 and the Land Act 1965, there were still gaps and lack of enforcement of the existing provisions. Enforcement efforts were hampered mainly due to the heavy reliance on penal sanctions and lack of resources to carry out policing, monitoring and prosecution of offenders. The

absence of co-ordination in related and complementing pieces of legislation such as the Land Act 1965, the repealed Local Government (Urban Areas) Act and Local Government (District Councils) Act on the one hand and the Forest Act 1942 on the other, also contributed to ineffective enforcement. These Acts gave responsibility for forestry management to the DOL, local authorities and the DOF respectively yet failed to provide mechanisms for co-ordination and policy formulation. This particular problem was also articulated in the foreword to the National Forestry Policy 1996 and the National Environmental Policy 1996 which recommended that all legislation relating to conservation of natural resources be harmonised.

#### **3.5.4 International Developments**

As already noted the DOF has for a long time been involved in international forestry policy making through participation in international fora where international conventions, agreements and strategies are formulated. Among many that were mentioned during the interviews with DOF officials were the 11th World Forestry Congress in 1979 and the Earth Summit of 1992 that brought out emerging participatory concepts. It was also mentioned that Malawi is a party to the Convention to Combat Desertification (CCD) and the Convention on Biological Diversity (CBD) which have forestry related provisions and that the DOF in fact is national focal point for the CCD in Malawi. These international initiatives therefore informed policy and legislative making as officials who attended consultative sessions would be expected to articulate their provisions in departmental and national consultative debates.

Further, Malawi is a member of the Southern Africa Development Community (SADC) which has a sector co-ordinating Land and Environment and Malawi has the regional mandate for co-ordinating forestry and fisheries and the DOF is responsible for this forestry sector co-ordination. Again this particular involvement and the regional initiatives being thereby developed inform national policy and legislative development and promote collaborative arrangements in crossborder forestry issues.

### **3.5.5 Comparative Models**

The interviews revealed that some officials from the DOF and the DEA who participated in the policy and legislative reviews had had study visits to developing and developed countries. Although these visits were not necessarily part of the forestry policy and legislative making process, they informed departmental debate and initiatives. Examples given were study visits to Japan, the Philippines, India and Niger by Mr. Luhanga, a social economist of the DOF. Although other officers also undertook such study visits, it is noteworthy that the Assistant Chief Parliamentary Draftsmen (ACPD) who did the actual work of preparing the final copy of the draft Forestry Bill did not have such study visits. Finally we should not lose sight of the involvement of FAO Consultant, who had experience of legislative drafting from missions in various jurisdictions.

### **3.6 Feasibility Assessment of Proposals**

All the interviewees agreed that there were no assessment studies to test the feasibility of the proposals that were being suggested in the draft National Forestry Policy and the draft Forestry Bill. This is in spite of the fact that the policy and legislative review process commenced in 1990 and took six and seven years respectively to finalise. There were, however, proposals to carry out studies on the pricing and marketing policy for forest produce so as to come up with clear policy guidelines on pricing and marketing to be included in the legislation. It seems this study did not take place. However, it may still be necessary for subsidiary legislative making since the provisions on pricing and marketing will be incorporated in the subsidiary legislation.

## **4. The Role of National Forestry Policy**

As already noted, there was parallel development of the National Forestry Policy and the Forestry Act 1997. The National Forestry Policy was approved and adopted by the Cabinet in January 1996 while the Forestry Act 1997 was passed by Parliament in April 1997. It is noteworthy that a first draft of the Forest Bill was made available to the MOJ in 1993. No real progress was however made on this draft until February 1996 when the ACPD sent draft copies for consideration by the Cabinet Committee on Legal Affairs (interview

with ACPD). By this time the National Forestry Policy had already been developed, discussed and approved. The ACPD in fact confirmed that he used the National Forestry Policy in redrafting the draft Forest Bill 1995. In particular the 1993 draft Forest Bill did not clearly articulate the principles of participatory forestry as did the National Forestry Policy.

The delay in finalising the draft Forestry Bill 1993 prepared by the FAO consultant appears to have been as a result of lack of local initiatives to complete the task. The FAO initiative was purely donor driven and left little or no incentive for finalising the draft bill until 1995/1996 when it seems, as will be noted later, other donors got interested in forestry legislation.

It should also be noted that during this particular time (1995/1996) a number of initiatives on the protection and management of the environment and conservation and sustainable utilisation of natural resources were underway and these tended to feed into each other in terms of policy and legislative formulation including that of the forestry initiative. Examples include the National Environment Policy approved by Cabinet in February 1996, and the EMA 1996. These particular policy and legislative instruments dealt with cross-sectoral management and co-ordination of environmental and natural resources issues. Although it is not possible to conclude that the draftsman who prepared the draft Forestry Bill used all these initiatives in preparing the Forestry Act 1997, it will be seen later that some attempt was made to incorporate the new trends in environmental and natural resources law. In addition to these policy and legislative co-ordinating instruments donor agencies such as the United States Agency for International Development (USAID) and the United Nations Environment Programme (UNEP) through the UNDP initiated environmental and natural resources programmes whose aims were, inter alia, to harmonise policy and legislative initiatives so as to make the protection and management of the environment and the conservation and sustainable utilisation of natural resources effective (see for example, Banda 1997). These were cross-sectoral reviews intended to ensure that no department carried out policy and legislative reviews in isolation. This initiative also informed legislative review in forestry.

## **5. The Legislative Drafting Process**

### **5.1 Who was Involved?**

The first draft Forest Bill 1993 was prepared under the auspices of the Ministry of Natural Resources which was and is the mother Ministry for the DOF. It would appear in fact that the Principal Secretary for Natural Resources had a much more active role in modifying, redrafting and consulting with the MOJ as compared to the DOF. It was clear from interviews at the MOJ and the DOF that the prime mover of the draft Forest Bill was the personal initiative of the then Principal Secretary for Natural Resources who personally redrafted the draft bill, liaised with MOJ and pushed the process to ensure that it was finalised in good time. This particular observation is in fact confirmed in that it seems Dr. Maida was also responsible for drafting the National Forestry Policy. This is very clear from the foreword to the National Forestry Policy (page 1).

According to the ACPD, the draft he worked on was only exchanged between him and the Principal Secretary for Natural Resources aforesaid. The ACPD assumed that the Principal Secretary for Natural Resources was consulting with the DOF which was the client department. As it turned out, however, when the draft bill was approved by Cabinet in 1996, the Director of DOF expressed ignorance of the various amendments that had been made to the draft Forestry Bill 1993. While it may be that some officers in the DOF may have been involved in the redrafting of the draft bill, it is clear there was very little consultation between and within the Ministry of Natural Resources and the DOF on the draft bill. The ACPD who drafted the Forestry Act 1997 is a trained and seasoned draftsman having been in the drafting section of the MOJ since 1987 and, as is normal in the MOJ, the draft bill is circulated among other draftsmen for comment.

## 5.2 **Interdepartmental Consultations**

Consultations with other concerned agencies such as departments of lands, water, physical planning, local authorities were even scantier. The ACPD is emphatic that, to his knowledge, the draft Forestry Bill was not circulated to any other department apart from the Principal Secretary for Natural Resources. The DOF officers also confirmed this position. The first workshop to discuss the draft bill is that which was funded by the World Bank in 1995 in Mangochi which discussed both the draft national Forestry and Forestry Bill. The Author was unable to obtain a record of proceedings of this workshop from the DOF. The ACPD did not attend this workshop and there is no record of its proceedings in MOJ files. Any recommendations or proposals at this workshop were not directly considered by the ACPD, though it is possible that the Principal Secretary for Natural Resources may have incorporated recommendations and proposals from that workshop into the draft he and the ACPD were working on. The second workshop to discuss the draft bill was conducted at Malawi Institute of Management in Lilongwe in 1995. The author was also unable to get a record of that workshop and the ACPD did not have a copy. According to the DOF both workshops were attended by officials from other government departments and NGOs.

Interviews at the DEA showed that its Principal Environmental Officer (Legal) had discussions with MOJ particularly on issues such as community participation and ownership and utilisation of trees, forests and forest produce that helped to refine these issues within the draft bill. The Principal Environmental Officer (Legal) programmes is a lawyer who has undergone various training in environmental and natural resources law. He also mentioned that the DEA's Policy Advisor, a socio-economist, who was responsible for NATURE project funded by the USAID was also involved in promoting amendments to the draft forestry bill to incorporate broad principles that would ensure harmonisation of legislation and promotion of participatory forestry.

## 5.3 **The Planning Unit**

It has also been noted that the National Forestry Policy also substantially fed into the draft Forestry Bill. The DOF has a Planning Unit which is headed by a Senior Forestry Officer qualified in forestry matters and also has technicians in data processing. This unit works hand in hand with other sections of the DOF such as the forestry extension services, the forestry development division and forestry support services to come up with a policy.

From the foregoing it can be seen that the actual draft Forestry Bill, was not widely circulated. The major players were the Principal Secretary for Natural Resources and MOJ. The cost of the whole drafting process was estimated by the DOF at K1 million. This was just an estimated figure as the DOF had no record of the cost of the exercise.

#### **5.4 Role of Foreign Consultants**

The only foreign consultants that participated in the development of the forestry legislation are those from FAO who initiated the policy and legislative making process. In particular, the FAO Consultant came up with the first draft Forestry Bill 1993 which was amended later in the process.

#### **5.5 Cross-sectoral legislative considerations**

Forestry matters touch on a number of other related issues. In particular, issues of land use, wildlife protection and management, water resources conservation and management are relevant. On the other hand, institutional issues and obligations of other agencies impact on forestry management. In particular the cutting of trees for agricultural use, laying of electricity and telephone lines, road construction and brick making impact on forestry conservation and management. The draftsman needs to be sensitive to all these influences in coming up with a draft forestry bill. According to the ACPD consideration of other legislation is a normal drafting technique to avoid duplication, conflicts and gaps in related legislation. In the case of forestry legislation, he considered legislation such as the Land Act 1965, the National Parks and Wildlife Act 1992, and the Environment Management Act 1996.

These were the legislation that were mentioned as being relevant by the DOF and the DEA officials during the interviews.

While these statutes are some of the most important as far as forestry management issues are concerned, they are in no way exhaustive. The Electricity Act 1998, the Posts and Telegraphs Act 1955, the Public Roads Act 1962, the Natural Roads Authority Act 1998 and the National Construction Industry Act 1996 may be mentioned. Although these statutes have no apparent relevance to forestry issues, their operation can and do affect the conservation and sustainable utilisation of natural resources including forests. Some of these statutes give some institutions powers to cut trees without considering any conservation measures. Examples include the Electricity Act 1998, the Post and Telegraph Act 1955 and the Public Roads Act 1962. It was necessary for the Forestry Act 1997 to deal with such lacunae. There is, however, no reference in the either in the National Forestry Policy or in the Forestry Act 1997 requiring sustainable forestry management on the part of institutions such as Electricity Supply Commission of Malawi (ESCOM) and the Malawi Posts and Telecommunications Corporation (MPTC) when they clear trees or forests as they lay their power and telephone lines. Further, there is no evidence that any of these institutions were consulted during the policy or legislative making process.

## **5.6 The Common Law, Customary Law and Local Community Participation**

In addition to legislation, as mentioned in the foregoing paragraphs, common law principles have equally important ramifications on forestry law. In particular, the ownership and utilisation of trees and forest produce have an intimate relationship with the manner in which land is held (land tenure). In Malawi there are various ways in which land can be held: customary land tenure, freehold tenure, leasehold tenure and public land tenure. At customary law land is held owned or used by the community under the trusteeship of traditional authorities. Freehold tenure is almost absolute title while leasehold title is held of some other superior title holder for a definite term of years. Public



land is owned and held by the Government and is vested in the President as, head of Government (see definitions under section 2 of the Land Act 1965). These various aspects of tenure have very significant consequences on utilisation and management aspects of forestry matters. For example, where there is a forest on customary land the primary consideration is the local community which owns the forest. However, as the community may not be properly organised and may not consider sustainable forestry management in the exploitation of the forest resources, the state has powers under the common law principles of *eminent domain* to protect and conserve such property. The state may do this either by providing for its intervention in the Forestry Act 1997 or by acquiring the land under the Lands Acquisition Act 1969. The Forestry Act 1997 has specific provisions for dealing with forests on customary land and provides for reservation of pieces of land including land under customary tenure, freehold or leasehold tenure for forest reserves or protected forests (see part IV of the Act).

The concept of local community participation is another aspect that requires consideration of common law principles, traditional organisational structures as well as emerging concepts of government decentralisation. While there is no doubt at customary law that customary land and therefore customary forests are owned by the community, there has been misinterpretation of such ownership to mean that such land and such forests are ownerless and therefore available for unbridled exploitation (Banda, 1999). The State therefore needs to inculcate not only community responsibility but also individual responsibility. Only then can local community participation in management of forests ensure sustainable management.

On the other hand, forest reserves are government property. The Forestry Act 1997 suggests that there should be no local community participation in the management of such forests. The reasoning is clearly that such forests do not belong to the local communities. This particular reasoning is flawed. Firstly, one of the reasons for involving local communities in forestry management is to increase policing and monitoring personnel as it is recognised that DOF

personnel are not adequate. Secondly, though forest reserves are government property, they belong to the people of Malawi. This is clearly recognised by section 4 of the EMA 1996 which states that all “natural and genetic resources of Malawi shall constitute an intergral part of the natural wealth of the people of Malawi” and (a) shall be protected, conserved and managed for the benefit of the people of Malawi; and (b) save for domestic purposes, shall not be exploited or utilised without the prior written authority of the Government. Further, according to section 3 of the EMA 1996, it is the responsibility of every Malawian to conserve and protect natural resources.

It should follow therefore that the people of Malawi are the true owners of all natural resources. The role of the Government is to supervise the utilisation, protection and management of these natural resources for the benefit of all the people of Malawi and ensure that individuals do not exploit these resources for selfish profit motives without due regard to sustainable management. Local communities have therefore as much right and responsibility to protect and manage trees and forests as Government.

Further, while traditionally chiefs and village headmen control natural resources such as land, trees and forests their role has been that of allocating land and settling disputes, there has been no effort on their part to encourage conservation and sustainable management of natural resources. A recent survey showed that customary law which grows from practice did not develop a legal regime of soil, water or forest protection and conservation. This is because at the time this legal regime was developing (before English law became the major legal system) natural resources including soil, water, forests and trees were in plentiful supply and there was little or no need for developing principles of conservation and sustainable utilisation (Banda, 1999). It follows therefore that traditional authorities cannot be solely relied on to provide the guidance necessary to mobilise community responsibility in natural resources management.

Further, current conditions suggest that the authority of traditional authorities has been greatly eroded partly due to the colonial legal system which was sustained by the independence government that stripped away their powers and partly due to the new democratic dispensation that emphasises individual freedoms and people power. These conditions suggest that it is necessary to create and nurture community institutions that have participatory methods of approach.

The Malawi Government has adopted a decentralisation plan which seeks to devolve government administration to the grassroots level through local authorities. This plan will affect government institutional structures substantially and the manner in which local communities are to participate in development activities including environmental and natural resources management. While the EMA 1996 attempts to take into account this devolution process the Forestry Act 1997 is silent on this matter.

Finally, the Forest Act 1942 (repealed) gave certain powers of control of forests on customary land to local authorities such as district councils (part III). However, from the interviews at the DOF these local authorities considered forests as a revenue generating activities only and did not provide the necessary technical competence for sustainable utilisation and management of the forests. The Forestry Act 1997 seems to have removed the local authorities altogether from being responsible for forests. Whether this is because local authorities may have failed to properly perform their statutory functions is not clear. On the other hand the Second Schedule to the Local Government Act 1998 gives power to local authorities to establish, maintain and manage, inter alia, botanical gardens, forests, woodlands and nature reserves [clause 8(1)(a)]. There is, however, no any mention of how local authorities and the DOF will work together, consult or co-ordinate their efforts in forestry management. In fact interviews with the Director of Blantyre City Assembly's Leisure, Culture and Environment department revealed that the Blantyre City Assembly had not been consulted on the enactment of the new forestry legislation. It is possible

however that consultation may have been carried out with the Ministry of Local Government. This study was unable to establish if this was the case.

There also seems to have been little or no attempt to assess the relevance of traditional systems of regulation of forests during the time the Forestry Act 1997 was being drafted. While, as shall be seen below, traditional authorities were consulted on the new legislation the same was not about relevance or applicability of traditional or customary norms of forestry management. This is in spite of the recognition by the DOF of the fact that most of the forest reserves were connected to graveyards which have strict and effective customary regulations which could be utilised in forestry regulation. The ACPD was emphatic that no customary norms of forestry management were brought to his attention at the time of preparing the draft Forest Bill.

## **5.7 Decision Making**

The drafting of the Forestry Bill was an exercise that was mainly carried out through consultation between the Principal Secretary for Natural Resources and the MOJ. This is in contrast to the National Forestry Policy which, though was initially drafted by the Principal Secretary for Natural Resources, underwent two national workshops apart from intradepartmental consultations and the expert input of the Planning Unit of the DOF. Most of the issues relating to institutional mandates, obligations and resources were settled within the policy matrix.

It must also be remembered that there was at the time of drafting the Forestry Bill an ongoing general review of the environmental and natural resources legal regime. There was therefore interdepartmental concerted efforts to harmonise those issues within policy documents such as the National Forestry Policy and the National Environmental Policy and legislation such as the Forestry Act 1997 and the EMA 1996. The many harmonisation consultations that took place between departments during this process assisted in the making of decisions as

to institutional mandates, obligations and resources. It should also be noted that most of the decisions on financial resources were made in consultation with the Ministry of Finance and donor agencies and incorporated into policy.

Finally, it should be noted that while the Principal Secretary for Natural Resources and DOF officials made submissions on their requirements, the decision as to whether and how to incorporate such proposals into the legislation, is made by the draftsman in the MOJ.

## **6. Public Participation**

The Forestry Act 1997 did not go through much public consultation. According to the DOF, they conducted workshops in the country's three regions in 1996 at which traditional authorities from each region were gathered in Mzuzu (northern Region), Lilongwe (Central Region) and Blantyre (Southern Region). The only theme of the workshops was local community participation in forestry management. The DOF was seeking the views of traditional authorities on the most effective ways of involving them and their subjects in forestry management. Officials from the DOF explained the forestry legislative and policy exercise that the DOF was undertaking and received views of the traditional authorities on the subject. The author tried to get a record of the proceedings of the workshop from the DOF but has been unsuccessful. It is therefore difficult to determine as to the type of information the persons consulted were supplied with, how the various views expressed were processed and if any consensus, and in what form, was captured during the workshop.

According to the DOF the decision to involve traditional authorities only in relation to local community participation rather than include other members of the community was partly based on the fact that these leaders represent communities and are therefore in the best position to contribute to the aspirations and interests of these communities. The problem of inadequate resources to enable the DOF to conduct the consultations at grassroots level was another factor. The DOF also restricted the subject of consultation to community participation only possibly on the ground that the rest did not

concern the communities. This attitude is retrogressive and confirms the usual official attitude of treating rural people as ignorant subjects who must be dictated to.

The second workshop to discuss the draft Forestry Bill was the one at the Malawi Institute of Management in Lilongwe held in 1996. This workshop was attended by various stakeholders including NGOs. According to Director of the Wildlife Society of Malawi, the workshop was attended by government and NGOs. He remembers specifically that one of the issues raised by NGOs was their role in enforcement of the legislation since, according to the definition of forest officers under the draft Forestry Bill, only officers from the DOF were given powers of enforcement of the new legislation. NGOs who are involved in forestry felt that the new legislation was not improving the enforcement machinery at all. According to him, it was resolved that the amendments should be effected. The Forestry Act 1997, however, did not incorporate these concerns. Other NGOs such as CURE that co-ordinate the work of environmental NGOs were not involved in this process. A record of this workshop was however not made available to the author just as all the other workshops. It is therefore difficult to determine as to what happened at the workshop. It is clear, however, that the draftsman at the MOJ was not supplied with either the workshop proceedings of the Mangochi workshop or the Lilongwe workshop or any recommendations or proposals thereof. The ACPD was emphatic that not only did not attend these particular workshops, he was also not given any report of these workshops. It is possible however that the recommendations from the workshop may have been incorporated into the National Forestry Policy which the ACPD used in preparing the draft Forestry Bill. The Principal Secretary for Natural Resources may also have incorporated the recommendations and proposals from the workshops as he provided instructions to the ACPD.

Finally it should be noted that subsidiary legislation under the Forestry Act 1997 is being drafted by two consultants: a draftsman and a forestry consultant. There was a requirement for consultation to inform the drafting process but this has not been done. According to one of the consultants, there

was delay in providing the resources to undertake the exercise. The rules have therefore been drafted without this vital component.

## **7. External Donor Assistance**

The first donor to get involved in the review and reform of forestry legislation and policy is FAO who funded two consultancies: one on legislation and another on policy. This seems to have been about 1989/1990. Although a draft Forestry bill 1993 was produced, the process stalled until 1996 when there was a lot of activity again. From information in the MOJ and DEA, there was pressure from donors who were funding various projects in forestry who required that release of projects money would only be effected upon new forestry legislation being passed. These were the Social Forestry Project funded by the European Union and the Lilongwe Forestry Project by the African Development Bank. These conditionalities seem to have spurred most concerned departments into action so as not to lose the money.

As already noted there were a number of donors with an interest in forestry in addition to the above. These were the UNDP, the World Bank and some Scandinavian countries. According to FAO and UNDP whom the author interviewed, their assistance was either sector specific or project oriented (FAO) or general environmental and natural resources legislation and policy assistance (UNDP and USAID). The author remembers while researching for a project on Reform of Environmental legislation and Policy: Determining the Need and Scope for Review in 1996/1997, that there were co-ordinated efforts to harmonise donor assistance. The UNDP were carrying out a project entitled Environmental Law and Institutions in Africa on behalf of United Nations Environment Programme (UNEP) while USAID were carrying out the NATURE Project. Both these projects had legislative and policy reform efforts and their terms of reference not only required interdepartmental consultations to determine what, and how far, each department was doing in its environment and natural resources law reform but also consultations with other donors to harmonise efforts and ensure that the reforms were not fragmented and piecemeal.

It is noteworthy however that pressure from some donors to finalise legislative and policy review could make some departments want to quickly finalise their legislation before interdepartmental consultations had been finalised. The author remembers quite well that the Forestry Act 1997 was a victim of this unfortunate scenario. It should be noted however that there was little or no donor pressure for Malawi to adopt provisions in its policy and legislation that the country did not want. What was apparent however was that if a donor had specific interest in promoting a particular principle or strategy of forestry or environmental management it would put more emphasis on it in its project document such that the departmental officials may have felt it was part of the conditionality. While the interviewees did not bring out this point, observation during the environmental and natural resources reform programme suggested that some provisions were essential to donor assistance or continuation of ongoing programmes. These included local community participation and decentralisation of governmental powers to the grassroots.

The assistance given by the donors varied quite substantially. Thus while FAO sent their consultants who provided the first draft Forest Bill, the World Bank funded one workshop that discussed the draft National Forestry Policy and Forestry Bill. The UNDP and USAID projects made available some funds for drafting subsidiary legislation under the Forestry Act 1997. They also provided funds for producing guides to the Act after it passed as law. These guides will be in two or more vernacular languages to help people to understand the Forestry Act 1997 and the Fisheries Conservation and Management Act 1997. There was no donor assistance to get the legislation pass through Parliament.

## **8. Incorporation of International Forestry Related Conventions and Policy**

Interviews at the DOF showed that there are a number of conventions which are relevant to forestry management. These include the CBD and CCD as already mentioned. It was pointed out that a general provision was included in the new Forestry Act 1997 to the effect that the Minister may specify measures for the



proper implementation of forestry related conventions to which Malawi is a party (section 80). The reason for such a broad provision was to ensure that the DOF can adapt the provisions of any such convention to the local conditions, and ensure that implementation will not burden the Government.

A reading of the Forestry Act 1997 would tend to suggest that provisions of some of the conventions were duly incorporated within the Act. The CCD, for example, requires appropriate strategies to ensure proper soil and water conservation techniques are used and to promote afforestation programmes. The Forestry Act 1997 gives power to the Minister to make regulations to promote soil and water conservation (section 32) and provides for promotion of afforestation programmes that includes the private sector, NGOs and members of the general community (part IV). On the other hand it would seem that the CBD was not seriously taken into account. Apart from the shortcomings of the local community participation provisions already mentioned, there are very few and inadequate provisions which would cater for protection of biodiversity or endangered tree species and their management. While section 32 (2) (4) provides power to the Minister to declare endangered or essential tree species, this only applies in relation to customary land. It also does not provide for harnessing indigenous knowledge or exploitation of intellectual property rights accruing from use of forest produce. The DOF was of the view that in most of the international conventions the department is not a major player and that some of these issues, such as protection and management of biological diversity are cross-sectoral and better dealt with under the EMA 1996.

## **9. Primary and Secondary Legislation**

According to the ACPD the decision whether particular provisions should be incorporated in the Forestry Act 1997 or in subsidiary legislation under the Act is in the first place one of the normal rules of drafting. An Act should normally contain general provisions while details that may be subject to change as, for example, those relating to figures or technological processes that may change with time will go to subsidiary legislation. The reasoning is to avoid having to

continuously take the Act back to Parliament for amendment where there is little time. Subsidiary legislation can be amended or revoked by the Minister by a proper notice in the Gazette without having to take it back to Parliament (see section 17 of the General Interpretation Act 1966).

On the other hand the DOF stated that the decision may be based on the fact that studies have to be conducted in order to have precise information for inclusion in the Act. In that case it is not necessary to have to wait until the studies have been conducted in order to finalise the Act. This actually happened in relation to the pricing and marketing of forest produce.

What seems to be emerging, however, is clear willingness and readiness on the part of officials to fully involve members of local communities in relation to finer details of legislation whose information can only be found in the communities. This is very clear from the experience of the drafting of the regulations under the Fisheries Conservation and Management Act 1997 where there was a lot more involvement of communities in developing subsidiary community based management legislation than on the primary legislation itself. Even in relation to the Forestry Act 1997 officials only consulted local communities in matters they considered directly affected the community, namely, community based management of forestry. Government seems to think it knows better about the larger picture of natural resources policy than the communities and has the necessary mandate to promulgate legislation accordingly.

On the other hand, it would seem that Government would indeed decide to enact an issue in subsidiary legislation if it can only get the necessary information from the communities. In order to speed up primary legislation, a decision would be reached to deal with such an issue in subsidiary legislation.

## **10. Assessment of the Law-Making Process and Quality of the Legislation**

The question we would like to answer at this point is whether the nature of the process of drafting the Forestry Act 1997 affected the quality of the legislation. We are concerned with the extent to which the law making process affected the clarity of the rules and words used, the consistency between the various rules and if the rules are drafted in such a way that they are intended to achieve stated objectives.

The Forestry Act 1997 clearly stipulates its purposes in section 3 and in section 5 outlines the general duties and responsibilities of the Director who is responsible for the execution of the Act. A reading of these two provisions provides very good guidelines for determining what the Act intends to accomplish, that is by resolving the various shortcomings that had been identified in relation to the repealed Forest Act 1942.

### **10.1 Scope of the Act**

The repealed Forestry Act 1942 was criticised for having failed to deal with management of forests on categories of land other than public and customary land. The present Act clearly stipulates in section 3 as read with parts V, VI and VIII of the Act that it covers all categories of land including private land. However, the Act fails to capture one observation that was made in the NEAP 1994 that the Land Act Regulation that requires afforestation on leasehold land granted by the Minister responsible for Land matters suffers from lack of institutional capacity. It could better be implemented either solely by the DOF or in conjunction with the DOL. The present provisions which give power to the Minister responsible for lands to enforce the regulation misplaces institutional mandate in that it is the DOF that has the necessary technical expertise and personnel to enforce. The omission to deal with this aspect in the Forestry Act may be due to the lack of adequate consultation between the departments as noted elsewhere in the report. It is also possible that since the DOL was itself involved in the Presidential Commission on Land Reform, no decision had as yet been reached in the department as to the form its institutional mandate should

take. Meanwhile the DOF needed to have its legislation passed and could therefore not wait for the DOL to finalise its studies.

## **10.2 Utilisation of forestry produce**

It has been noted that although there seems to have been some attempt at involving members of the general public in considering the draft Forestry Bill through the workshops for traditional chiefs in the three regions and the workshop at Malawi Institute of Management in Lilongwe in 1995, other equally concerned stakeholders were not consulted. The workshop in Mangochi in 1995 seem to have mainly attracted government departments and some NGOs such as the Wildlife Society of Malawi. But even if both workshops did involve most of the stakeholders in forestry, there is no way of knowing whether and to what extent their views were incorporated in the recommendations and if and how any consensus was reached on the various issues. The author submits that if the private sector and NGOs had been properly consulted and their concerns properly considered, the confusion regarding utilisation of forest resources on freehold or leasehold land whose reversion belongs to private persons would have been settled in a manner that would have promoted investment in forestry by these stakeholders. As it is now, it seems under section 83 of the Forestry Act 1997 if a freeholder or leaseholder takes care of natural trees on his land, any fees for their exploitation would go to a VNRMC. The basis of such allocation of resources is not clear. The Act also fails to stipulate who should get the fees in the event that there is no VNRMC.

## **10.3 Village Natural Resources Management Committees**

There is considerable confusion in the Forestry Act 1997 as to whether VNRMCs are created by agreement under section 31 between the Director and a management authority or is elected by stakeholders of a village forest area as defined under section 2. This confusion is clearly due to lack of a clearly thought out concept of local community participation born out of a study in which the DOF and local communities should have participated or proper consultation that should have produced clear recommendations. What seems to have happened was that the draftsman confused local community participation

and traditional participation. Thus the village headman in whose village a village forest area is located was given a not so clear a role of a “management authority” to enter into agreement with the Director and therein provide for the establishment and role of VNRMCs. The new wine cannot be comfortable in old wine skins. The result is that we do not know for sure whether a village headman is indeed a management authority, whether the VNRMCs are a creature of the local community or of an agreement between the Director and a management authority.

The Forestry Act 1997 also fails to properly state the manner in which local communities are to participate in management of a village forest area if there is no VNRMCs. While section 30 mentions that in that event the village forest area shall be managed in a prescribed manner, it is not clear who shall prescribe, and whether by regulations or not.

#### 10.4 **Participation of Local Communities in Management of Government Forests**

According to section 3(c) of the Forestry Act 1997 one of the purposes of the Act is to promote community involvement in protected forests and forest reserves which are owned and controlled by the Government. This provision suggests that the participation of local communities in forestry management extends to forests not owned by local communities. However, the Act does not provide detailed provisions for management of these forests as is done in relation to forests on customary land. Section 25 merely states that the Director may enter into agreement with local communities for implementation of the management plan that is mutually acceptable to both parties. Whether that agreement will be entered into with the VNRMCs or village headmen is not clear. It does not also state whether there will be rules for co-management of forest reserves. It seems, on the one hand, that the agreement with local communities will be on implementation of management plans prepared by the Director (sections 5 and 24) and on the other hand, the agreement will be to implement management plans jointly produced by the Director and local communities: section 25. The language used is not clear as to which one is correct. It seems again a half-

hearted official attempt to involve local communities without obtaining the views of the concerned stakeholders. The people involved in the actual drafting seem to have given with one hand local communities power to participate in forestry management and with the other hand taken that power away.

It is generally an open secret that bureaucrats rarely wish to relinquish or share power in which they have vested interests. A donor driven programme such as the drafting of the Forestry Act 1997 can easily endorse the concept of participatory forestry so as to finalise the project and get the necessary funding. To internalise the prescriptions of the conditionalities and operationalise them through consultations with the relevant stakeholders is another matter. In a process such as the drafting of the Forestry Act 1997 where there was little or no circulation of drafts containing alternative options of principles, mandates and obligations, the likelihood that the process can incorporate the aspirations of the stakeholders is very slim. Interviews with the Director of Wildlife Society of Malawi showed that when he attended a workshop at Malawi Institute of Management in Lilongwe to discuss the draft Forestry Bill in 1996 most NGOs expressed concern with the fact that the draft had left out NGOs in policing and monitoring or enforcement of the legislation. These concerns were, however, not incorporated in the Forest Act 1997. His view is that it is a reflection of reluctance of Government to relinquish and share what has traditionally been their exclusive mandate, that is policy and law making.

### **10.5 Institutional mandates**

Forestry issues are cross-sectoral in nature. Various institutions are involved. It would appear that although the Forestry Act 1997 was being drafted at a time when a multisectoral legal review of environmental and natural resources law was in progress, it failed to capture some of the lessons from that process. It was recognised during the multisectoral review process funded by USAID and UNDP, that many of the mandates of the DOF were being undermined by Government and parastatal institutions with statutory mandates that clearly militated against sustainable forestry management. ESCOM and MPTC have already been mentioned as having mandates that allow them to clear forests for

laying power and telephone lines respectively. The draftsman did not take these into account either because the recommendations of the multisectoral reviews were not made available to him or because the DOF did not pay special attention to this institutional problem. The issue of forestry matters being handled by the DOL has already been mentioned in the same vein.

### **10.6 Local Authorities**

It would appear that the Forestry Act 1997 has completely discarded the involvement of local authorities in forestry management in contrast to the repealed Forest Act 1942 that gave powers of control and management of customary land forests to local authorities. This may be due to the problems of management that local authorities had as indicated at interviews with DOF. However, the Forestry Act 1997 failed to deal with mandates of local authorities either as they appeared in the repealed Local Government (Urban Areas) Act and the Local Government (District Councils) Act or in the new Local Government Act 1998. The fact that the new Local Government Act 1998 has no reference to the Forestry Act 1998 again shows that there was no consultation in the making of related legislation. It seems again that the draftsman was not given the basis for removing the role of local authorities from the forestry legislation. Further, in view of the ongoing decentralisation process the draftsman needed to have been provided with some indication of changing Government policy which was already in vogue even in 1997. Finally in this regard it is not possible due to lack of workshop records to assess if at all and to what extent local authorities were involved in the drafting of the Forestry Act 1997. Interview with the Blantyre City Assembly Director for Leisure, Culture and Environment, revealed that to his knowledge the Blantyre City Assembly was not consulted on the draft Forestry Bill. It is clear also that the draftsman was not provided with any proposals or comments from local authorities. The drafting of the Forestry Act 1997 was, after all, an affair between the Secretary for Natural Resources and the ACPD and no drafts were ever circulated to persons in other departments including the DOF.

### **10.7 Enforcement**

Although the repealed Forest 1942 had some gaps, it still had some workable provisions if they were being efficiently enforced. The repealed Act, however, relied on penal sanctions with low penalties and the enforcement machinery required heavy presence of forest enforcement personnel to police, monitor and prosecute offenders in addition to equipment and facilities for their use. These were and cannot be forthcoming in a poor country such as Malawi. There was therefore need to change the enforcement machinery and strategies. The Forestry Act 1997 seems to have done very little about this issue apart from enhancement of penal sanctions to deter offenders.

It fails to recognise, as does the Fisheries Conservation and Management Act 1997, that extending enforcement personnel to include enforcement officers from other department can increase capacity quite substantially. It still relies on forestry officers appointed under section 4 and police officers. These can never be enough. This is a clear manifestation of the fact that the drafting of the Forestry Act 1997 failed to take into account the multisectoral review that was in progress at the time and developments in other related agencies. The Forestry Act 1997 also fails to take advantage of involvement of VNRMCs or traditional authorities or NGOs as stated above to increase capacity in enforcement. The Act confines the role of local communities to forests owned by the communities. This a reflection of the half hearted incorporation of participatory forestry due either to the lack of internalisation of the concept within controlling officers or a feeling that communities know little or nothing born out of either out of ignorance or the need to protect vested interests.

#### 10.8 **Traditional/Informal Rules**

According to section 200 of the Republic of Malawi Constitution, customary law is part of the law of Malawi so long it is not inconsistent with the Constitution 1995. It follows therefore that it is necessary to have regard to customary norms of regulation especially with regard to local community participation in the regulation of forestry. It appears that there was no attempt to consider customary or traditional norms when the Forestry Act 1997 was being drafted. The ACPD in fact confirmed this fact during interviews. Such customary rules



may be incorporated in the rules of the VNRMCs under section 33 of the Forestry Act.

It is interesting to note however that interviews with staff in the Planning Unit of the DOF indicated that in some DOF pilot projects where there are VNRMCs which were given power to make their own rules to regulate their village forest areas, the rules contained substantial customary rules that are not available in the received English common law. For example, the punishment for violation of the rules can be in form of paying a goat or a chicken as a fine depending on the magnitude of the offence. Their assessment was that these penalties are more readily enforceable and acceptable than those in the ordinary received courts. The adjudication process is also swift as compared to the delay experienced in the ordinary courts. These types of penalties are only applicable to rules made under section 33 of the Forestry Act 1997 and in relation to village forest areas. It is noteworthy however that there are limits as to what punishment can be imposed under criminal law. Section 25 of the Penal Code, does not recognise punishment in kind such as paying a goat or a chicken. Further according to section 21 of the General Interpretation Act 1966, the maximum penalty that subsidiary legislation can impose is K500 or 3 months imprisonment or such penalty as the authority approving the subsidiary legislation may allow. It is not clear whether fines in form of a goat or a chicken are within the purview of this provision. These gaps suggest that inclusion of customary rules of forestry regulation was not properly considered. If for example, the regional workshops had produced recommendations to include customary law rules in management of village forest areas, there would have been opportunity to explore the applicability of the rules including their interface with the received English common law.

## **11. Observations and Recommendations**

### **11.1 Policy and Legislative Planning**

It would appear that the Forestry Act 1997 was enacted to cater for new situations that had taken place after the repealed Forest Act 1942. The identification of problems and solutions was done either internally within the Department of Forestry or through multisectoral reviews. Studies such as the NEAP fed into National Forestry Policy. The drafting of the Forestry Act 1997 failed to undergo a similar process.

It is recommended that the Planning Unit in the Department of Forestry be strengthened and the Forestry Research Institute of Malawi be properly utilised to ensure researched policy articulation. They should have more competent policy personnel who can sift information coming from the field and synthesise such information for full departmental review. It may be worthwhile for the DOF to consider employing its own lawyers rather than relying on consultants only or the MOJ.

It is also recommended that the focal point for the drafting process of forestry legislation should be the DOF and not the mother Ministry of Natural Resources as that leads to detachment of the process from the actual professionals who perceive and deal with the problems on a day to day basis and may result in lack of internalisation of legal norms in the Act.

### **11.2 Creation of New Institutions**

The Forestry Act 1997 had as one of its main objectives the promotion of local community participation in forestry management. This is a new concept that required some feasibility studies such as pilot projects in village forest areas. While it seems the Forestry Extension Services Division had some pilot projects, the results of such projects do not seem to have undergone assessment and evaluation for purposes of informing the legislative process. In fact it seems, from the quality of the provisions on this aspect, that the draftsman was

groping in the dark. He only relied on information provided by the Secretary for Natural Resources to come up with the draft Forestry Bill.

It is recommended that where new institutions are being created such as for the promotion of community involvement, it is necessary to set up pilot projects intended to inform the reform process. There should be proper project guidelines that seek to chart the course of the project. The results and recommendations from the project should be properly recorded, reviewed at stakeholders consultative workshops or meetings and proposals and recommendations for policy and legislative formulations properly set out. While such projects may delay the drafting process it is possible to incorporate the concept as a general principle in the Act and detailed rules left to subsidiary legislation. The Fisheries Conservation and Management Act 1997 seems to have avoided confusions experienced under the Forestry Act 1997 as to what form local community participation should take by leaving the details of the institutional structures to the rules to be made by the Minister. On the other hand, the Forestry Act 1997 in attempting to define the institutional form has brought about a number of mistakes that require amendments which are not easy to make as they must await available parliamentary time and the draftsman's convenience.

### **11.3 Involvement in the Drafting Process**

Although the draft National Forestry Policy was prepared drafted by one person, the Secretary for Natural Resources, it had a lot more involvement of forestry personnel in the Forestry Planning Unit and the DOF as a whole including other Government departments and stakeholders through workshops as compared to the draft Forestry Bill. The DOF has competent and qualified foresters and while their input in the policy must have been reflected in the draft bill, it is clear that the final product would have been different from the way it is had the internal consultations been emphasised. The draft would have further been enriched if it had been widely circulated outside the DOF for comments. This was not adequately done.

It is recommended that a department that sponsors any legislation must circulate drafts to other concerned institutions for their comments well before discussions are held to discuss the comments. It is further recommended that such workshops should as much as possible build consensus with regard to principles, obligations, mandates among the various stakeholders through fairing of comments.

#### **11.4 Role of Foreign Consultants**

Foreign consultants have an important role to play in providing comparative international experience in forestry management. These consultants should, however, only provide short term backstopping missions that help to build local capacity while providing much needed international experience. It seems that the drafting of the Forestry Bill stalled between 1993 and 1996 due to lack of or inadequate local participation as well as lack of funding to finalise the process.

It is recommended that while it is necessary to engage foreign consultants especially with regard to new innovative and technical aspects of forestry legislation, these should be supported by local consultants who must carry on and finalise the process after the expiry of the mission of the foreign consultant.

#### **11.5 Role of Donors**

It is commendable how donor agencies were able to co-ordinate in the multisectoral reviews on environment and natural resources that also dealt with forestry policy and legislation. However, the fact that some donors needed their projects to be underway sooner than the multisectoral reviews could allow, contributed to the derailing of the multisectoral approach to the review of the forestry legislation. That is why forestry legislation seems somehow to differ from other legislation that underwent multisectoral review process. It is disjointed in content and the language is not focussed to reflect detailed consultation and analysis.

It is recommended that donors should as much as possible avoid having to force the pace of legislation that involves a number of sectors as this will continue to create gaps and duplication in natural resources legislation. Where the lack of new legislation is crippling efforts to protect natural resources, multisectoral reviews can prioritise legislative reviews and deal with the most urgent.

### **11.6 Public Participation**

This may be hampered by inadequate funding or failure to design appropriate methodology for promoting the participation of the public especially the section of the public that is in the rural areas. Bringing chiefs together or workshops involving mainly Government departments are not enough.

It is recommended that public participation in legislation should be properly designed and planned. It may be done through the media, by phone in radio or television programmes or panel discussions as well as consultations through other community fora such as farmers clubs. The DOF could mobilise community participation through its extension services and request the assistance of other extension workers from agriculture, community services, fisheries or water to help in soliciting views. These then can be sifted and synthesised by the Planning Unit in the DOF and discussed by representatives of various stakeholders including traditional leaders, politicians, NGOs and others. Records of proposals and recommendations can greatly assist the draftsman in his work. On the other hand, the local communities would feel they 'own' the law and therefore easily identify and comply with it if there are deliberate attempts to involve them at the earliest possible time.

### **11.7 Incorporation of Public Comments**

It will usually happen that even where a credible participatory methodology is used the comments may be 'hijacked' by some officials who may not be happy with certain changes. As Malawi learns the democratic and participatory methods of decision making there will be resistance from persons who 'love the past' way of doing things. Examples may be cited from experiences during the adoption of the Republic of Malawi Constitutions 1995 and the enactment of the

Environment Management Act 1996 when proposals and recommendations made from consultations with the general public were turned down either at cabinet level or by Parliament. In the present study the Director of Wildlife Society of Malawi remembers that the concerns of NGOs to involve them in policing monitoring and enforcing forestry legislation were agreed upon at a workshop at Malawi Institute of Management in 1996. The Forestry Act 1997 did not however incorporate those concerns.

It is recommended that in addition to providing the draftsman with properly recorded proposals and recommendations from relevant workshops or consultation it is necessary for civil society to get involved in lobbying Parliament and the Government to incorporate concerns from local communities, the private sector and NGOs. Donors must provide facilities for this important exercise to ensure that change is not derailed by a few influential people in Government or Parliament.

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Local Government Act 1995

Electricity Act 1998

Public Roads Act 1962

Posts and Telegraphs Act

## **LIST OF ACRONYMS**

<b>EMA</b>	: Environment Management Act
<b>VNRMC</b>	: Village Natural Resources Management Committees
<b>DOF</b>	: Department of Forestry
<b>SADC</b>	: Southern Africa Development Community
<b>NEAP</b>	: National Environmental Action Plan
<b>CCD</b>	: Convention to Combat Desertification
<b>NGOs</b>	: Non-Governmental Organisations
<b>CBD</b>	: Convention on Biological Diversity
<b>DEA</b>	: Department of Environmental Affairs
<b>DOF</b>	: Department of Forestry
<b>MOJ</b>	: Ministry of Justice
<b>ACPD</b>	: Assistant Chief Parliamentary Draftsman
<b>FAO</b>	: Food and Agriculture Organisation of the United Nations
<b>UNDP</b>	: United Nations Development Programme
<b>UNEP</b>	: United Nations Environment Programme



## **LIST OF INTERVIEWEES**

Mr. K. Nyasulu, Director of Forestry

Mr. J. Luhanga, Department of Forestry

Mr. J. Ngalande, Department of Forestry

Mr. E. Makawa, Department of Environmental Affairs

Mr. A. Chinula, Ministry of Justice

Ms C. Munthali, Co-ordination Unit for Rehabilitation of the Environment

Mr. D.D.C. Mauambeta, Executive Director, Wildlife Society of Malawi

R.I. Kawiya, Director for Leisure Culture and Environment, Blantyre, City Assembly.

**REPORT OF THE WORKSHOP**

**ON**

**EFFECTIVE FORESTRY LAW MAKING  
IN MALAWI**

**Held at Malawi Institute of Management, Lilongwe  
on 15<sup>th</sup> December 1999**

Prepared by  
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## **I. INTRODUCTION**

- The workshop was organised by IUCN together with the Consultant who prepared the draft preliminary report on *Study on Forestry Law and Regulations: Obstacles for Improvement*. The initial date for the workshop was 6<sup>th</sup> October 1999 but it was postponed to 15<sup>th</sup> December 1999 due to prior engagements on the part of some key sectors. The opening address was delivered by the Director of Forestry. Mr. Skottke Martin, Project Manager for GTZ, SADC-FSCTU facilitated the workshop.
- In all there were 15 participants representing donor agencies, Malawi Government representatives especially from the Department of Forestry as well as from local authorities and Non-Governmental Organisations. A list of participants is appended hereto.

## **II METHODOLOGY**

- The methodology adopted was to ask the Consultant to present the report for a period of close to 45 minutes and thereafter participants were given a chance to ask questions, seek clarifications or make comments or observations on the presentation and the draft report. There was then a group session in which participants were grouped into two groups to discuss the various issues that had arisen during the presentation of the report as well as the ones identified by the consultant together with the facilitator of the workshop. Each group then finally presented its findings and recommendations to a plenary which made observations and final recommendations.

### **III PRESENTATION OF THE REPORT**

- In the presentation of the report the consultant first introduced the background to the study mentioning that the thrust of the report is on the forestry law making process and not a critique of forestry legislation. It was pointed out that while a short survey of the critical provisions of the relevant provisions has been made that is intended to inform the critique on the law making process.
- The consultant then went through the first part of the report that deals with the major provisions of the Forestry Act 1997 as read with other relevant legislation concentrating on emerging concepts touching on institutional co-ordination and capacity, and the various management techniques introduced by the Forestry Act 1997.
- Next was the development of the legislative initiatives that led to the enactment of the Forestry Act 1997 noting the involvement of international donors and experts, the participation of local legal expert reviews, the role of the Department of Forestry and Ministry of Natural Resources. A number of possible aids were assessed such as comparative approaches, use of feasibility studies and the influence that international developments in forestry law and policy have had on the new legislation and the National Forestry Policy.
- The legislative drafting process was then assessed with regard to the participation of the Department of Forestry, Ministry of Natural Resources, the Attorney Generals Chambers, foreign consultants and the impact of customary and common law norms. Finally the consultant assessed the decision making process and the extent to which views from consultations or workshops were incorporated in the draft Forestry Bill.
- The involvement of members of the public and external donors was then assessed noting the constraints that the Department of Forestry was

working within to reach members of the general public and the pressure to produce tangible results to meet donor targets for assistance.

- Finally the consultant made a general assessment of the law making process. An attempt was made to juxtapose the procedural aspects of the process against the quality of the substantive provisions of the Forestry Act 1997, particular attention being given to new concepts introduced by the Forestry Act 1997. A summary of the observations and recommendations were read out.

## **II COMMENTS FROM THE PLENARY**

Some of the major observations from participants were:

- The list of interviewees seems to have been restricted to senior staff of the various departments. Interviews with field staff could have provided more information. It was suggested that the interviews should have been held in all districts so as to capture the views of people close to the grassroots.
- Participants acknowledged that it is not enough to rely on legal expertise from Ministry of Justice since it is already understaffed. It was recommended that the Department of Forestry should strengthen its Planning Unit including employing legal staff who will be involved in the planning as well as enforcement of the legislation.
- It was noted that the present forestry legislation has not dealt with the impact of the decentralisation process currently being implemented.
- Participants acknowledged that even though the law making process has been protracted (1990-1997) it did not adequately assess the lessons learnt from pilot projects underway during that period. These could have gainfully informed the drafting process.

- It was noted that it would be worthwhile for the consultant to clearly and separately identify the process through which legislative drafting goes for purposes of future references.

### **III RECOMMENDATIONS FROM PLENARY PRESENTATIONS**

The two groups were given particular topics to discuss on how to improve the legislative making process. The role of various stakeholders and how their inputs can be harnessed was assessed. The following were the recommendations of the plenary after presentations from each group.

#### **1. Community participation in Policy and Legislative making.**

- Participatory Rural Appraisals to be conducted.
- Conduct meetings with the communities.
- Conduct awareness campaigns to inform communities of the process.
- Lobbying with parliament by Non-governmental organisations.
- Conduct workshops with representatives of stakeholders.

#### **2. Departmental involvement in Policy and Legislative making**

- Conduct consultative meetings with stakeholders;
- Enhance awareness campaigns;
- Conduct workshops involving concerned departments and NGOs;
- Conduct assessment and evaluation of past legislation;
- Draft legislation to be circulated to all stakeholders for comments;
- Cross checking of related Acts i.e. cross sectoral coordination;
- Conduct international comparisons on how other countries have dealt with the issues under review.

#### **3. The role of NGOs and the Private Sector in Policy and legislative making**

- DOF to consult NGOs and the private sector
- DOF to enhance awareness campaigns to attract participation of NGOs and the private sector.
- DOF to conduct workshops involving concerned NGOs and private sector;
- DOF to circulate draft legislation to NGOs and private sector
- Private sector and NGOs must lobby Parliament to ensure their concerns are addressed.

#### 4. **Steps in Policy and Legislative making successes and failures**

- Review of past Policy and Legislation - to include lessons learnt from past projects and activities;
- Phased development of Policy and legislation;
- Wide participation of Stakeholders in order to improve information collection;
- Identification of key elements and principles for the new legislation;
- International comparisons;
- Drafting of the legislation;
- Wide circulation of the draft legislation;
- Conduct meetings and workshops involving key stakeholders;
- Incorporation of comments from workshops;
- Submission to the Ministry of Justice;
- Submission to cabinet and Parliament;
- Lobbying Parliament by NGOs and the private sector;
- Translation into layman's language.

5. **Cross sectoral coordination in Policy and legislative making**

- Conduct meetings and workshops with all concerned lead agencies, NGOs and the private sector;
- Incorporation of comments;
- Provide comments to the Draftsman;
- Submission to cabinet/Parliament
- Lobbying Parliament

6. **Role of traditional/informal/customary norms in Policy and Legislative making**

- a. Understand and resolve sources of conflict in order to:
  - build local trust and support
  - take the communities on board in formulation of the policy and legislation.
- b. Collect baseline information for planning and policy formulations;
- c. Compare traditional legal norms and their variance with received law;
- d. Appreciate leadership roles in traditional norms and its impact on the concept of community participation.

7. **Role of gender in Policy and Legislative making**

- a. Consult men, women, boys and girls on their views in the formulation of the Policy. A good representation by gender in Policy and Legislative committees necessary;
- b. Identify gender needs;
- c. Appreciation of roles in gender sensitive matters and take advantage of the strengths in the process;
- d. To increase the participation of the marginalised;



- e. To gain support from communities.

**8. Regular Policy and Legislative reviews**

- a. Include/capture emerging issues;
- b. Policy review to be conducted every 5 years and legislative review after 3 years or review as need arises;
- c. Regular monitoring and utilisation of data - Create a Policy Planning Unit/Policy Analysis Unit in the DOF.

**9. Role of Donors and Consultants**

- a. Donors are responsible for funding, capacity strengthening, facilitating the process through funding and expertise and not directing;
- b. Consultants are responsible for capacity strengthening, and to facilitate the process through providing international expertise and their international experiences and to provide objective guidance.

**10. Decentralisation Impacts**

- a. advantages/benefits of decentralisation
  - Cuts down on bureaucracy, financial resources reach targets easily and promote efficiency;
  - Stakeholders roles are identified i.e. spell out the roles of Central Government and Assembly;
  - Delegation of powers at District Level
  - To include provisions of decentralisation in the Forestry Act.
  - Sharing of resources between the Assemblies and Central Government.

- Redefine powers of Director of Forestry in view of the decentralisation process.
- a. Disadvantages of decentralisation
  - Teething problems to include Resistance to change and loss of revenue for new projects.

#### **IV CLOSURE OF WORKSHOP**

The Workshop was closed by Mr. Ligomeka Professional Officer for IUCN Malawi who thanked all participants for their contributions and promised that the comments from the workshop would be taken into account by the Consultant. The final report will be circulated to all participants.

**ANNEX**

**WORKSHOP ON EFFECTIVE  
FORESTRY LAW MAKING IN MALAWI  
MALAWI INSTITUTE OF MANAGEMENT  
15<sup>TH</sup> DECEMBER 1999**

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## **ESTUDIO SOBRE LOS PROCESOS DE REFORMA DE LA LEGISLACIÓN FORESTAL MEXICANA: OBSTÁCULOS PARA SU MEJORAMIENTO Y EFECTIVIDAD (Proyecto No. 75686)**

### **Tema I. Descripción general del proceso de creación y reforma de ordenamientos jurídicos.**

#### **A. Facultades del Poder Legislativo en el proceso de elaboración de leyes.**

En el sistema legal mexicano, existen dos tipos de procesos de elaboración de leyes. El primer tipo está contemplado para efectuar reformas a la Constitución Política de los Estados Unidos Mexicanos; y el segundo para elaborar o reformar leyes. El proceso que se sigue para reformar la Constitución está regulado por el Art. 135 de la misma Constitución Política. El reformar la Constitución requiere de las dos terceras partes de los votos del Congreso de la Unión y la aceptación de la mayoría de las legislaturas estatales. A su vez, el proceso para la elaboración o reforma de una ley se describe en los Artículos 71 y 72 de la misma Constitución Política y de la Ley Orgánica del Congreso Federal. El proceso a seguir es el mismo tanto para la Cámara de Diputados como para la Cámara de Senadores, y puede describirse en las siguientes etapas.

(a) *Iniciativa*. Es la presentación de un proyecto de ley ante el Congreso de la Unión, por parte de actores autorizados para ello. Como actores autorizados, tenemos al Presidente de la República, los Diputados y Senadores del Congreso de la Unión, y los poderes legislativos de los Estados de la República. Personas físicas o morales privadas pueden presentar proyectos o propuestas dirigiéndose a su representante electo correspondiente. La iniciativa se puede presentar ante el Presidente de cualquiera de las dos Cámaras, de Diputados y de Senadores, el cual se lo hará llegar a las Comisiones correspondientes, dependiendo la materia de que se trate. La Cámara donde es presentada la iniciativa se llama Cámara de origen, y la otra se llama Cámara revisora.

(b) *Discusión* del proyecto de ley. La discusión se lleva a cabo en concordancia con los procedimientos legislativos y no hay limitantes en cuanto al periodo de discusión.

(c) *Aprobación Legislativa* del proyecto de ley. Requiere el voto de la mayoría en cada una de las Cámaras. Si el proyecto de ley es aprobado en la Cámara de origen, es enviada a discusión en la Cámara revisora. Si el proyecto de ley es desechado por la Cámara de origen, no podrá presentarse nuevamente a discusión en ese periodo de sesiones. Si la Cámara revisora aprueba el proyecto de ley, se envía directo al Ejecutivo. Si el proyecto de ley es aprobado por la Cámara de origen pero desechado por la Cámara revisora, volverá a la de Origen con las observaciones que se hubieren hecho. El proyecto entonces tendrá que

ser aprobado por las tres cuartas partes de los votos de cada una de las Cámaras para enviarse al Ejecutivo.

(d) *Sanción y Promulgación.* Se refieren a la acción del Ejecutivo de aprobar la ley o decreto que presenta el Congreso de la Unión. El Presidente de la República puede negar su aprobación de la ley o decreto mediante su “veto”. Sin embargo, si no se envían comentarios a la Cámara de origen en el transcurso de 10 días, se considerará aprobada por el Ejecutivo. Si el Ejecutivo veta la ley o decreto, se envía nuevamente a las Cámaras a discusión y si es aprobada por el voto de dos terceras partes, el Ejecutivo deberá promulgarla. La promulgación es el reconocimiento formal de una ley o decreto por parte del Ejecutivo, de que se ha cumplido con el proceso constitucional de elaboración de leyes.

(e) *Publicación* de la ley o decreto promulgados. Es necesario antes de que se consideren obligatorios. La publicación de leyes federales se hace en el Diario Oficial de la Federación. Las leyes estatales y locales deberán ser publicadas en las Gazetas oficiales de cada Estado o municipios.

## B. Facultades del Poder Ejecutivo en el proceso de elaboración de leyes.

El Poder Ejecutivo participa en la elaboración de leyes de tres maneras. Primero, el Presidente de la República puede presentar iniciativas de ley ante el Congreso de la Unión. Segundo, el Presidente debe aprobar y promulgar la ley o decreto que haya sido aprobada a su vez por el Congreso. Por último, el Presidente y las autoridades administrativas a su cargo, participan en darle cumplimiento a la ley, mediante la expedición de reglamentos y normas oficiales mexicanas (NOMs)<sup>1</sup>. Los reglamentos y NOMs deben de ser elaborados en cumplimiento con lo establecido en las leyes de su materia. Los reglamentos son expedidos por el Presidente y firmados por el Secretario en turno en la Secretaría de Gobernación (SG).

Las NOMs son expedidas por la Secretaría del ramo correspondiente, es decir, si se trata de una norma ambiental, corresponderá a la Secretaría de Medio Ambiente, Recursos Naturales y Pesca (SEMARNAP) su expedición. El proceso de elaboración de NOMs está regulado en la Ley Federal sobre Metrología y Normalización. Cada una de las Secretarías administrativas tiene un Comité de Normalización que trabaja de manera conjunta con la Comisión Nacional de Normalización, de la Secretaría de Comercio y Fomento Industrial, y con grupos de expertos en cada materia. Los proyectos de normas son publicados en el Diario Oficial de la Federación por un periodo de 90 días para que cualquier interesado presente comentarios. Transcurrido el plazo, la autoridad competente publica las respuestas a dichos comentarios y procede a publicar la NOM definitiva.

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<sup>1</sup> Las normas oficiales mexicanas de las cuales se hablará un poco más en los párrafos siguientes, tienen en la jerarquía jurídica el mismo nivel que los decretos presidenciales y están por debajo de los reglamentos. Tienen como finalidad el regular las especificaciones técnicas y procedimientos de actividades determinadas y de aprovechamientos de recursos naturales específicos.

## **Tema II. Breve análisis de la política forestal y su legislación vigente.**

### **A. Autoridades Competentes**

Es en la Ley Orgánica de la Administración Pública Federal (LOAPF)<sup>2</sup> y en el Reglamento Interior de la propia SEMARNAP donde se establece su competencia en materia forestal, en conjunto con sus órganos administrativos desconcentrados, el Instituto Nacional de Ecología (INE) y la Procuraduría Federal de Protección al Ambiente (PROFEPA)<sup>3</sup>. Dentro de esta Secretaría, la determinación de políticas, creación de programas y elaboración de reglamentación y normatividad en materia forestal se definen dentro de una Subsecretaría de Recursos Naturales, en una Dirección General Forestal.

Es importante resaltar la injerencia que las políticas y acciones de otras Secretarías de Estado tienen de una manera directa o indirecta sobre el manejo y conservación del recurso forestal. Como ejemplos, la Secretaría de Hacienda y Crédito Público (SHCP), en materia de planeación nacional del desarrollo y en materia de incentivos fiscales e instrumentos de financiamiento; la Secretaría de Desarrollo Social (SEDESOL), en cuanto a la política general de desarrollo social para el combate efectivo a la pobreza, incluyendo la de los asentamientos humanos, desarrollo urbano y vivienda; la Secretaría de Comercio y Fomento Industrial (SECOFI), en cuanto al establecimiento de la política de industrialización, distribución y consumo de los productos agrícolas, ganaderos, forestales, minerales y pesqueros, y para fomentar y estimular el desarrollo de la pequeña y mediana industria; la Secretaría de Agricultura, Ganadería y Desarrollo Rural (SAGADER), en la promoción e impulso del desarrollo rural, fomentando la productividad y rentabilidad de las actividades económicas rurales, así como la investigación y difusión de información; la Secretaría de la Reforma Agraria (SRA), en la creación, ampliación y titulación de tierras y aguas comunales de los pueblos, como son los ejidos y comunidades rurales; entre las más importantes.

### **B. Legislación Forestal**

Cuando analizamos la legislación aplicable al recurso forestal, no es suficiente con remitirnos a la Ley Forestal y su Reglamento. Se tiene una ley marco que regula en materia ambiental todos los recursos naturales: la Ley General del Equilibrio Ecológico y la Protección al Ambiente (LGEEPA). A este marco legal general, le rodean un sin fin de otros ordenamientos jurídicos, tanto

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<sup>2</sup> La presente Ley regula la estructura administrativa del Poder Ejecutivo, contemplando dos tipos de administración pública federal: la centralizada, representada principalmente por las Secretarías de Estado, como es la Semarnap; y la paraestatal, entre las cuales tenemos como ejemplo las empresas de participación estatal como es PEMEX, instituciones nacionales de crédito y los fideicomisos públicos.

<sup>3</sup> El INE regula el ordenamiento ecológico territorial, las evaluaciones de impacto ambiental, las áreas naturales protegidas, la contaminación del aire, entre otras. La PROFEPA es la autoridad coercitiva, cuyas funciones son de monitoreo, vigilancia e imposición de sanciones administrativas y canalización de los delitos ambientales a las instancias judiciales.



leyes y reglamentos de otras dependencias de Gobierno, como normas oficiales mexicanas, decretos y acuerdos.

De hace cinco años a la fecha, el marco legal en materia ambiental ha sido reformado o sustituido. La Ley Ambiental vigente desde 1988, fue reformada casi en su totalidad en diciembre de 1996. La Ley Forestal fue reformada, también casi en su totalidad, en mayo de 1997. En septiembre de 1998, se elaboró y aprobó un nuevo Reglamento de la Ley Forestal. No fue sino hasta junio del presente año que los artículos 4º y 25 Constitucional fueron reformados para integrar a las garantías individuales el elemento ambiental (el derecho a un medio ambiente sano) y de sustentabilidad.

Actualmente, se han hecho esfuerzos de diferente naturaleza para propiciar y proponer reformas y nuevos ordenamientos. Entre ellos, tenemos el proyecto de reformas al Reglamento de la LGEEPA en materia de Impacto Ambiental; el primer borrador de proyecto de Reglamento de la LGEEPA en materia de Areas Naturales Protegidas; esfuerzos de discusión y consolidación de una propuesta de Ley en materia de recursos genéticos; y de una propuesta de Ley de Vida Silvestre; todas ellas relacionadas con el recurso forestal.

### Constitución Política de los Estados Unidos Mexicanos

En México, la obligación de cuidar los recursos forestales y regular su aprovechamiento esta determinado en la Constitución Mexicana en su Artículo 27. Parte del marco Constitucional en esta materia son también los artículos 4º y 25.

*Art. 27: "...La Nación tendrá en todo tiempo el derecho de ... regular, en beneficio social, el aprovechamiento de los elementos naturales susceptibles de apropiación, con objeto de hacer una distribución equitativa de la riqueza pública, cuidar de su conservación, lograr el desarrollo equilibrado del país y el mejoramiento de las condiciones de vida de la población rural y urbana. En consecuencia, se dictarán las medidas necesarias para ... establecer adecuadas provisiones, usos, reservas y destinos de tierras, aguas y bosques ... para preservar y restaurar el quilibrio ecológico; para el fraccionamiento de los latifundios; ... para el fomento de la agricultura, de la ganadería, de la silvicultura y de las demás actividades económicas en el medio rural, y para evitar la destrucción de los elementos naturales y los daños que la propiedad pueda sufrir en perjuicio de la sociedad. ...*

*Fracción XX. El Estado promoverá las condiciones para el desarrollo rural integral, con el propósito de generar empleo y garantizar a la población campesina el bienestar y su participación e incorporación en el desarrollo nacional, y fomentará la actividad agropecuaria y forestal para el óptimo uso de la tierra, con obras de infraestructura, insumos, créditos, servicios de capacitación y asistencia técnica. ..."*

*Art. 4. "... Toda persona tiene derecho a un medio ambiente sano y adecuado para su desarrollo y bienestar. ..."*

*Art. 25. "Corresponde al Estado la rectoría del desarrollo nacional para garantizar que éste sea integral y sustentable, ..."*

### Ley General del Equilibrio Ecológico y la Protección al Ambiente (LGEEPA)

(Publicada en el Diario Oficial de la federación el 28/ene/88; las reformas a esta Ley se publicaron en el Diario Oficial de la Federación el 13/dic/96).

La LGEEPA es la ley marco en materia ambiental; por ello, establece los principios de una política ambiental, los instrumentos ambientales para llevar a cabo dicha política, y regula la protección, conservación, restauración y aprovechamiento de la biodiversidad, incluyendo las áreas naturales protegidas (ANPs), la flora y fauna silvestre, el recurso forestal, el suelo, agua y los recursos no renovables. Como parte del objeto de la LGEEPA, se encuentra primordialmente el establecer las bases para garantizar el derecho de toda persona a vivir en un medio ambiente adecuado para su desarrollo, salud y bienestar. Adicionalmente, se establecerán las bases para la preservación y protección de la biodiversidad, así como el establecimiento y administración de las ANPs, y el aprovechamiento sustentable, la preservación y en su caso la restauración del suelo, agua y demás recursos naturales, de manera que sean compatibles la obtención de beneficios económicos y las actividades de preservación de los ecosistemas.

Las facultades federales correspondientes a los bosques están contempladas en el Art. 5 de la LGEEPA, y se refiere a la regulación del aprovechamiento sustentable, la protección y la preservación de los recursos forestales, el suelo, las aguas nacionales, la biodiversidad, la flora, la fauna, y los demás recursos naturales de su competencia.

Las modificaciones de 1996 a la LGEEPA permiten que el gobierno federal establezca convenios con los Estados para delegar autoridad para administrar las ANPs, los recursos naturales, o la flora y la fauna forestales. Los Estados, a su vez, podrán establecer convenios con los municipios para llevar a cabo estas funciones delegadas. Se van a poder delegar el manejo y vigilancia de las ANP federales; la protección, preservación y restauración de los recursos naturales y de flora y fauna silvestre, así como el control de su aprovechamiento sustentable; y las acciones operativas y de vigilancia.

Dentro de la política ambiental, la LGEEPA integra como principios a seguir el uso renovable de los recursos forestales, el mantenimiento de la cubierta forestal, la protección de la biodiversidad y el garantizar los derechos de las comunidades y pueblos indígenas.

Los instrumentos de la política ambiental aplicables en materia forestal son: primero, la Planeación Ambiental<sup>4</sup>, la cual se plasma en el Plan Nacional de

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<sup>4</sup> La Planeación Ambiental se fundamenta en el Artículo 26 Constitucional: "El Estado organizará un sistema de planeación democrática del desarrollo nacional... Habrá un plan nacional de desarrollo al cual se sujetarán obligatoriamente los programas de la administración pública federal".

Desarrollo 1995-2000; de este, se remite al Programa sectorial de Medio Ambiente 1995-2000, que a su vez, en materia forestal, se remite al Programa Forestal y de Suelo 1995-2000. Le sigue el Ordenamiento Ecológico Territorial<sup>5</sup>, el cual está estrechamente vinculado con el inventario forestal y la zonificación forestal mencionados en la Ley Forestal. Los Instrumentos Económicos que el gobierno federal y estatal instrumenten, como son los incentivos fiscales, financieros o de mercado, deben alentar el uso sustentable, benéfico y equitativo de los recursos.

Tenemos también la Evaluación del Impacto Ambiental<sup>6</sup>, la cual, conforme al art. 28 de la LGEEPA, debe ser realizada para la tala de bosques o selvas tropicales o las especies difíciles de regenerar, las plantaciones forestales, las conversiones de tierras forestales o de selva a otros usos, y las obras en ANPs. El último instrumento de política ambiental aplicable en materia forestal, es la publicación de NOMs. Las enmiendas de 1996 aclaran que la SEMARNAP puede redactar estas normas para que rijan la extracción de recursos naturales y puede redactar las normas específicas para regiones, zonas, cuencas o ecosistemas particulares. Esta autoridad parece suficientemente amplia para apoyar las normas que rigen la extracción de madera y la protección de los recursos forestales, aunque como se analiza más adelante, la SEMARNAP tiene autoridad adicional en estas áreas según la Ley Forestal.

La LGEEPA no contempla un capítulo o sección específica para el recurso forestal, sino que lo va regulando a lo largo de su contenido, en las materias que tengan relación. Después de mencionar los instrumentos anteriores, la LGEEPA procede a regular las ANP<sup>7</sup>. Todos los que posean tierras, aguas o bosques en un área natural protegida, deben cumplir con cualquier limitación impuesta en el decreto que crea el área o en el plan de manejo de la misma. Las enmiendas de 1996 agregaron un nuevo capítulo a la ley que se encarga de las zonas de restauración. Esta designación es para áreas que muestran degradación, desertificación o severo desequilibrio ecológico. Como las áreas naturales protegidas, el gobierno puede establecer estas áreas a través de una declaración presidencial. La Ley Forestal a su vez contiene un capítulo sobre programas de restauración forestales.

La LGEEPA estipula la protección de la flora y la fauna silvestres, especialmente las endémicas, amenazadas o en vías de extinción. Estos tipos de protección pueden ser importantes para los bosques de dos formas. Las especies protegidas pueden ser árboles y la ley puede prohibir directamente su destrucción. De manera alternativa, las especies protegidas pueden depender de los bosques y

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<sup>5</sup> Este instrumento tiene como objetos el determinar la regionalización ecológica del territorio nacional y zonas de jurisdicción nacional y determinar los lineamientos y estrategias ecológicas para la preservación, protección, restauración y aprovechamiento sustentable de los recursos naturales. (art. 20 LGEEPA)

<sup>6</sup> “La Evaluación de Impacto Ambiental es el procedimiento a través del cual la Secretaría establece las condiciones a que se sujetará la realización de obras y actividades que puedan causar desequilibrio ecológico o rebasar los límites y condiciones establecidos en las disposiciones aplicables... a fin de evitar o reducir al mínimo sus efectos negativos sobre el ambiente.” (art. 28 LGEEPA)

<sup>7</sup> Las ANPs son áreas declaradas por el Presidente de la República que contengan “ambientes originales que no han sido significativamente alterados por la actividad del ser humano, o que requieran ser preservadas y restauradas”. (art. 44 LGEEPA)

la ley debe proteger el hábitat para proteger con eficacia las especies. Visto desde otro ángulo, la deforestación puede causar la pérdida de especies que dependen del bosque y el incremento en el número de especies amenazadas o en vías de extinción.

Varios artículos en el tercer título de la LGEEPA pueden aplicar al proceso de autorización de las solicitudes de aprovechamiento forestal. El título tercero aborda el uso sustentable de la naturaleza. Tiene capítulos acerca del agua y los ecosistemas acuáticos, el suelo y los recursos no renovables.

Las estipulaciones de la LGEEPA acerca del agua y los sistemas acuáticos reconocen que la cubierta forestal desempeña una función esencial en la calidad y cantidad de agua superficial y subterránea. Así, por ejemplo, el otorgamiento de concesiones madereras debe reflejar la consideración de los impactos potenciales en los recursos hidráulicos. El INE puede establecer las normas técnicas para la protección de los ecosistemas acuáticos, que lógicamente podría incluir restricciones a la deforestación cerca de los cuerpos de agua.

Las disposiciones de la LGEEPA acerca del suelo y sus recursos enfatizan la necesidad de usar el suelo en forma sustentable, de acuerdo con los criterios ecológicos. La Ley instruye al gobierno a aplicar estos criterios en la determinación de usos en predios forestales, el establecimiento de reservas, la reglamentación de zonas boscosas de protección pluvial y en el otorgamiento de autorizaciones de aprovechamiento forestal. La SEMARNAP revocará, modificará o suspenderá las autorizaciones de aprovechamiento forestal que degraden severamente el equilibrio ecológico, la biodiversidad o la regeneración y la capacidad productiva del suelo. La ley también requiere que el gobierno aplique estos criterios para apoyar la agricultura, la fundación de asentamientos y la minería que son actividades que pudieran resultar en la conversión de tierras forestales a usos no forestales. La ley detalla las disposiciones especiales aplicables a las autorizaciones que afectan el uso de la tierra en zonas selváticas. Se supone que el gobierno debe considerar los criterios ecológicos al otorgar cualquier incentivo financiero para las actividades silvícolas.

### Ley Forestal y su Reglamento

(Reformas a la Ley publicadas en el Diario Oficial de la Federación el 20/05/97, y en el caso del Reglamento el 25/09/98).

La Ley Forestal es reglamentaria del Art. 27 Constitucional, como lo es la LGEEPA. A pesar de que la LGEEPA es una ley marco, la Ley Forestal tiene el mismo nivel jerárquico que ésta y se considera una ley específica. Tiene como uno de sus objetivos: Conservar, proteger y restaurar los recursos forestales y la biodiversidad de sus ecosistemas. Dentro del contenido de esta Ley y su Reglamento, tenemos que regula: la coordinación y concertación con los gobiernos de los Estados y el Distrito Federal y con el sector social y privado; el inventario y registro forestal nacional; el aprovechamiento del recurso forestal y de

las forestaciones; la reforestación, agroforestería y recursos no maderables; la participación social y el derecho a la información; el cambio de utilización de los terrenos forestales y de aptitud preferentemente forestal; el transporte, almacenamiento y transformación de la materia prima forestal; los servicios técnicos forestales; la prevención, combate y control de incendios forestales y de plagas y enfermedades; los programas de restauración y las vedas forestales; la infraestructura vial (caminos); los instrumentos económicos; la educación, capacitación e investigación forestales; y todo lo que concierne a visitas de inspección, auditorías técnicas, medidas de seguridad, e infracciones.

Con las reformas a la Ley Forestal, el esquema de autorización y control de los aprovechamientos forestales cambió sustancialmente. Actualmente, se señalan procedimientos distintos para aprovechamientos en terrenos forestales y aprovechamientos en forestaciones, que serían las llamadas “plantaciones forestales”. Asimismo, se señalan procedimientos distintos para recursos forestales maderables y para recursos no maderables. Se manejan tres tipos de instrumentos que amparan los aprovechamientos: Autorización, Informe y Aviso.

El instrumento para el caso de aprovechamientos de recursos forestales maderables en terrenos forestales o de aptitud preferentemente forestal es una autorización. Otro instrumento muy valioso, contenido dentro de la autorización, es el Programa de Manejo Forestal, el cual debe de integrar medidas ambientales y en su caso la autorización del Estudio de Impacto Ambiental.

Para los recursos no maderables en terrenos forestales que pretendan aprovecharse con fines comerciales, se manejan meramente avisos y se regulan vía NOMs. Dada la importancia que este tipo de recursos naturales desempeñan, no sólo con fines de conservación sino como posible fuente de ingreso de los dueños del bosque, el controlar su extracción mediante un aviso, resulta incoherente con los esfuerzos nacionales e internacionales para conocer el acervo con el que cuenta México y el controlar el acceso a los recursos que tienen una importancia genética específica.

En el caso de las actividades silvopastoriles, de reforestación, prácticas de agroforestería y las de uso doméstico se van a regir por las normas oficiales mexicanas.

Resulta importante resaltar el Programa de Restauración (art. 32), el cual es compatible con las zonas de restauración que prevé la LGEEPA. En cuanto a las vedas forestales (art. 32 bis), con las reformas a la Ley, son acotadas al cumplimiento de determinadas condicionantes, limitando la discrecionalidad y abuso de las autoridades competentes. Interesante resulta la disposición de excepción para los que realicen aprovechamiento forestal mediante programas de manejo autorizados, “en tanto no se ponga en riesgo grave e inminente la biodiversidad”. En la práctica va a resultar difícil interpretar con exactitud lo que significa “grave e inminente”.

Como en la LGEEPA, la Ley Forestal contempla los instrumentos económicos (art. 33) en la materia. Son tres los instrumentos económicos que se han creado para la actividad forestal: Programa para el Desarrollo Forestal

(PRODEFOR), Programa para el Desarrollo de Plantaciones Forestales Comerciales (PRODEPLAN) y Programa Nacional de Reforestación (PRONARE). Los dos primeros se crearon en 1997, y desde entonces se vive una lucha año con año para aumentar el monto disponible, y para subsanar los defectos en aplicación de los fondos. El PRONARE fue recientemente transferido de la Secretaría de Agricultura, Ganadería y Desarrollo Rural (SAGADER) a la Secretaría de Medio Ambiente. Dicha transferencia se dio en la competencia, más no en el recurso presupuestal, teniendo la Secretaría de Medio Ambiente que asignarle una partida del presupuesto que ya se tenía distribuido.

Uno de los espacios más importantes de participación social con los que cuentan actualmente los diferentes sectores involucrados en la actividad forestal es el Consejo Técnico Consultivo Nacional Forestal (Consejo), cuya creación la dispone la Ley Forestal. El Consejo, como su nombre lo indica, funge como órgano de consulta de la Secretaría de Medio Ambiente, cuando esta solicita su opinión o en las materias que señala la propia Ley. La misma Ley Forestal prevé la creación de Consejos Regionales, que generalmente son por Estado.

Otro mecanismo de participación social por ley, son los acuerdos de concertación de la Secretaría con personas físicas o morales del sector social y privado. Este tipo de mecanismo es poco utilizado, tanto por la centralización tan fuerte que sigue existiendo, como por la falta de difusión principalmente al sector social.

En su capítulo sobre participación social y derecho a la información, la Ley Forestal se remite directamente a lo estipulado por la LGEEPA. Esta Ley le da a toda persona el derecho de petición de información ambiental, siguiendo con un procedimiento sencillo y estableciendo la información que no puede entregar. La materia que regula la Ley Forestal y la información que se llega a generar derivada de los procedimientos establecidos en esta Ley y su Reglamento superan la información de tipo ambiental. No se prevé ningún procedimiento parecido para solicitar información que no tenga una conotación ambiental.

Otra fuente de acceso a la información en la Ley Forestal, es el Inventario Forestal Nacional. Se establece explícitamente el vínculo con el Sistema Nacional de Información Ambiental y de Recursos Naturales previsto en la LGEEPA. Sin embargo, existen varios sistemas y centros documentales de recursos naturales, los cuales no tienen una vinculación clara, ni tampoco un método ni estrategia de cómo hacer accesible dicha información en la práctica, y que ésta sea integral.

El Inventario Forestal Nacional parece a simple lectura muy completo. Sin embargo, tiende a contener únicamente el recurso maderable, dejando a un lado los recursos no maderables, los impactos ambientales positivos y negativos, y los bienes y servicios ambientales. Como sistema de información, el Inventario debiera tener una vinculación con el Sistema de Contabilidad Ambiental, y para ello se requiere identificar los bienes y servicios ambientales.

El Registro Forestal Nacional<sup>8</sup>, es también otra fuente de acceso a la información dentro de la Ley Forestal, ya que se declara pública. En principio, este Registro debe vincularse con el Registro Agrario Nacional, por la importancia que la problemática agraria tiene para la deforestación del país. Sin embargo, debido a que se trata de la competencia de otra Secretaría, en la práctica no se da tal vinculación que resulta fundamental.

Cabe señalar que existe un problema de congruencia entre las disposiciones de la LGEEPA y las contenidas en las disposiciones cuyo objeto es el aprovechamiento del recurso forestal. La Ley Forestal se enfoca principalmente en regular el aprovechamiento forestal maderable, sin considerar claramente el uso y conservación de especies no maderables y de fauna silvestre asociada, lo cual provoca algunas lagunas que dificultan la adecuada regulación para la conservación y el aprovechamiento de flora y fauna silvestre. Es importante la implantación de auditorías forestales que contemplen las medidas adecuadas para la conservación de los hábitats de flora y fauna. Las auditorías forestales funcionarían también como supervisores del cumplimiento de los programas de manejo autorizados y del desempeño de los prestadores de servicios técnicos en la elaboración y aplicación de dichos programas.

Por último, hoy por hoy tenemos un grave problema de aplicación de la Ley Forestal y su Reglamento, debido al vacío que ha provocado la falta de publicación de las NOMs que regulan las materias que la misma Ley y Reglamento le remiten. Existen ventajas y desventajas en la utilización de NOMs, además de que su capacidad y ámbitos de regulación están perfectamente determinados en la Ley Federal de Metrología y Normalización. Como desventaja podemos entender lo que está sucediendo actualmente: las leyes y reglamentos han ido obviando marcos de regulación mínimos necesarios de determinadas actividades, remitiéndolas directamente a las NOMs. La Ley debería establecer el marco regulatorio mínimo de la actividad en concreto, de esa manera fijándole a la NOM límites y controles claros, con una visión integral del marco legal forestal.

Otra desventaja es el término en que la actividad queda sin regulación alguna, en tanto se dan los tiempos establecidos dentro del procedimiento de elaboración y publicación de una NOM. Esto es lo que está sucediendo en el marco legal forestal. Este se encuentra incompleto en tanto no se publiquen las NOMs pertinentes. Esto ahonda más la problemática de aplicabilidad que sufre el marco legal forestal y no permite iniciar un análisis de la eficacia de las nuevas disposiciones legales.

Como ventaja de las NOMs, está la posibilidad de regular una actividad de manera regional: cuando se trata de actividades o recursos de una región

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<sup>8</sup> Dentro del Registro Forestal Nacional se deben de inscribir los programas de manejo forestal, sus autorizaciones, modificaciones y cancelaciones; las autorizaciones de cambio de utilización de los terrenos forestales; los avisos de funcionamiento de los centros de transformación y almacenamiento; los datos de identificación de los prestadores de servicios técnicos; el inventario forestal nacional y la zonificación forestal; los acuerdos y convenios que celebre la Semarnap en materia forestal; entre otros. (art. 10 Bis LF)

específica, cuando su impacto o comportamiento difiere de zona en zona, o cuando se trata de resolver una problemática en concreto.

### Ley Agraria

(Publicada en el Diario Oficial de la Federación el 26/feb/92).

Sin ahondar mucho en el asunto pero dejando algunos puntos en claro, es necesario comprender el antecedente histórico de la tenencia de la tierra y su relación con los bosques. En la época de la Revolución Mexicana, el reclamo fundamental fue la injusta distribución de las tierras. La Constitución Mexicana de 1917 trató de remediar el problema al prohibir los latifundios y promover los ejidos y propiedades comunales. Se generó con ello un tipo de propiedad distinto: la propiedad social. Aunque los ejidos y comunidades rurales prevalecen en todo México, la demanda de tierras siempre ha superado a la oferta. En nombre de la reforma de la tierra, el gobierno ha establecido comunidades agrícolas en muchas áreas marginales, incluyendo las tierras forestales.

La Ley Agraria regula el sistema ejidal y comunal de tenencia de la tierra. Así como lo determina la Constitución, la Ley Agraria busca promover el desarrollo integral y equitativo del sector rural mediante el fomento de las actividades productivas, estableciendo como limitante el que se realice un aprovechamiento racional y sostenido de los recursos naturales para su cuidado y conservación (art's 4 y 5). La Ley Agraria establece ciertos límites al regular la delimitación y destino de las tierras ejidales, considerando nulo de pleno derecho la asignación de parcelas en bosques o selvas tropicales (art. 59). Con esto se entiende que los bosques y selvas tropicales dentro de territorio ejidal no podrán ser designadas a individuos, sino que se considerarán tierras de uso común. Sin embargo, esta medida ha resultado ser ineficiente en la práctica; ya que ha generado una explotación desmedida de los bosques y selvas tropicales, debido al acceso libre y sin regulación dentro de estas áreas.

Para finalizar, la Ley Agraria regula el proceso de expropiación de bienes ejidales y comunales. Su art. 93 enumera las causas de utilidad pública por las que se pueden expropiar este tipo de bienes; entre ellos tenemos la realización de acciones para el ordenamiento ecológico y para promover y ordenar el desarrollo y conservación de los recursos agropecuarios, forestales y pesqueros.

### **Tema III. Evaluación del proceso de reforma de la legislación forestal.**

Habiendo señalado los procedimientos legales para expedir y reformar leyes, decretos, reglamentos y NOMs, y conociendo a grandes rasgos el contenido de cuatro de los ordenamientos jurídicos más importantes dentro del marco legal



forestal reformado, procederemos a analizar las características particulares de lo que fue el proceso de reformas de la Ley Forestal y la elaboración del nuevo Reglamento Forestal, evaluando el grado de participación social que se tuvo, y su impacto en el resultado final del proceso y en el contenido de la Ley y Reglamento.

Dentro de lo que la Constitución Mexicana establece como el proceso legal para expedir y reformar leyes y decretos, no se expresa la obligación de integrar en el proceso la participación de los sectores privado y social. Todavía son muchas las leyes y decretos expedidos sin ningún tipo de consulta pública. Algunos llegan a manejar invitaciones directas para emitir comentarios, pero generalmente se basan en el grupo de asesores y de personal que tienen a su cargo. La SEMARNAP a iniciado, desde hace cinco años con las reformas a la LGEEPA, un nuevo proceso de reformas de ley y reglamentos que integra un proceso paralelo de consulta pública. En base a las experiencias recientes de reformas a la Ley Forestal y la expedición de un nuevo Reglamento, se han detectado aciertos, y a su vez anomalías y lagunas que hacen de este proceso de consulta, un proceso perfectible. No existe alguna metodología que plasme el proceso de consulta y su integración al proceso de reforma de ley, y como veremos, los procesos de la Ley y del Reglamento han sido distintos, debido a presiones de tiempo y de los actores involucrados, entre otros factores.

El proceso interno gubernamental que se sigue para justificar modificaciones a algún ordenamiento jurídico, para consensar y para lograr un proyecto de iniciativa de ley o un reglamento, es a grandes rasgos el siguiente:

1. Se elabora un tipo diagnóstico de la problemática en la materia.
2. Se elabora un borrador de reformas con las opiniones de los expertos dentro de cada área con responsabilidad sobre el tema (Ejemplo: Dirección Forestal, Dirección de Suelos, Dirección de Plantaciones Forestales).
3. Se elabora un Dictamen de Impacto Regulatorio y se presenta ante SECOFI. A partir de 1998, se vuelve obligatorio para cualquier Secretaría de Gobierno presentar, ante la Unidad de Desregulación de la SECOFI, un análisis costo-beneficio sobre cualquier reforma o nuevo ordenamiento que sea publicado en el Diario Oficial de la Federación; esto con la finalidad de disminuir la sobrerregulación de manera homogénea en todo instrumento y procedimiento legal.
4. Aquí puede entrar ya el inicio del proceso de consulta pública y el accionar de la Comisión Redactora Mixta que integre los diferentes sectores. Así mismo, en este momento se le envía el proyecto de ley a las Comisiones responsables dentro de la Cámara de Senadores y de la Cámara de Diputados, para que la autoridad administrativa y la autoridad legislativa vayan trabajando el documento de manera conjunta.
5. Aprobado el Dictamen, se envía el proyecto al Jurídico de la SEMARNAP, enviándose también el proyecto a la PROFEPA.
6. Se envía nuevamente el proyecto a la SECOFI para sus comentarios y modificaciones.

7. Se envía a la Unidad Jurídica de la Presidencia de la República, en donde analizan la forma jurídica, más que el contenido del proyecto.
8. Aprobado, se presenta como Iniciativa de ley o decreto ante el Congreso de la Unión o se publica el reglamento en el Diario Oficial de la Federación.

En el caso del proceso de reforma de la Ley Forestal, debido a fuertes presiones reiteradas por parte de diferentes sectores forestales, como el industrial y el social, la Dirección General Forestal elaboró un Diagnóstico de la problemática forestal que se vivía en ese momento de acuerdo con las disposiciones establecidas en la Ley Forestal vigente desde 1992. Hubo una fuerte oposición por parte de un grupo de coordinadores dentro de la Presidencia de la República, que buscaban defender el contenido de la Ley como se encontraba – no había habido proceso de consulta y se habían impuesto las disposiciones legales desde un escritorio.

Debido a que el proceso de reforma de la Ley se dio con anterioridad a que entrara en vigor la disposición obligatoria de presentar un Dictamen de impacto regulatorio ante la Unidad de Desregulación de SECOFI, los análisis costo-beneficio se hicieron de manera interna dentro de la SEMARNAP. Además, la SECOFI tiene políticas de desregulación anteriores a 1998, que presionan a cualquier Secretaría a adecuar sus procedimientos administrativos, con o sin reformas de ley.

Una vez que se logra iniciar el análisis de la necesidad de reformar la Ley, en septiembre de 1996, surge un primer proyecto de reformas por parte de la Coordinación de Asesores de la Subsecretaría de Recursos Naturales, la cual se designa como responsable del proceso de reformas y del proceso de consulta. La SEMARNAP establece una relación estrecha con la Comisión de Bosques y Selvas de la Cámara de Diputados y con la Comisión de Silvicultura y Recursos Hidráulicos para trabajar de manera conjunta dentro del proceso de consulta pública y presentada la Iniciativa de reformas de ley, ya haya un consenso previo sobre el contenido.

Se recaban los primeros comentarios de los Consejos Técnico Consultivos Estatales Forestales y del Comité de Legislación del CONAF. Cabe señalar que existen otros comités que al parecer no fueron convocados, como son el de Plantaciones Forestales y Estímulos Forestales. Asimismo, se convocó a cinco “Foros Regionales de Discusión y Análisis para la Revisión de la Ley Forestal”, a efectuarse en el mes de noviembre; y cuya convocatoria se publicó en los periódicos el día jueves 31 de octubre de 1996. Estos Foros Regionales fueron convocados por el CONAF, la Subsecretaría de Recursos Naturales de la SEMARNAP, y las respectivas Comisiones dentro del Congreso de la Unión. Cada uno de estos Foros cubría en territorio un promedio de seis Estados de la República, teniendo su cede en la capital de uno de ellos.

Al participar en dichos foros, se pudo concluir que la selección de los lugares donde se llevaron a cabo dichos foros limitó las posibilidades reales de participación de actores sociales de algunas de las regiones forestales más

importantes del país, como son los casos de Chihuahua, Quintana Roo y Oaxaca. Aparentemente se tuvo una cifra importante en número de participantes; sin embargo, la mayoría de dichos participantes pertenecían al sector gobierno, provocando esto una limitante en la obtención de consensos reales, enriquecidos por una pluralidad de opiniones. Adicionalmente, no se distribuyeron de manera oportuna los documentos a discutir, restringiéndose la distribución de los mismos; y se presentaron documentos para discusión en el mismo momento de los Foros; documentos que, sin un análisis previo, fueron el tema central de discusión en las mesas (ej. capítulo sobre plantaciones). Finalmente, la lectura que se hizo sobre las conclusiones y el escrito que se les entregó a los representantes que asistieron, no correspondía a la discusión que se llevó a cabo en las mesas. El resultado de estos Foros fue recogido por las partes convocantes (el cual ha sido plasmado en un documento) conformando así la tercera versión de proyecto oficial de reformas.

Este proyecto de reformas se presentó ante el Comité de Legislación del CONAF como proyecto de Iniciativa de Reformas, lo cual generó oposición generalizada de que se fuera a presentar como Iniciativa de Reformas dentro del periodo de sesiones del Congreso que finalizaba el 15 de diciembre de ese mismo año (1996). Se definió entonces que las reformas y adiciones a la Ley Forestal se presentarían ante las Cámaras del Congreso de la Unión en su periodo de sesiones del 15 de marzo al 30 de abril de 1997. Asimismo, se consensó en la necesidad de continuar la discusión y análisis de las propuestas oficiales de reforma, debido a los nuevos cambios que se habían generado de los Foros Regionales. Por ello se fijó la realización de cuatro sesiones temáticas del Comité con la finalidad de discutir de una manera ordenada y específica los temas centrales de las reformas a la Ley Forestal.

Dichas sesiones se llevaron a cabo en el mes de enero de 1997. Las impresiones que se tuvieron en torno a estas sesiones fue la falta de sistematización del grupo en el análisis de los temas a tratar. Las reuniones principalmente consistieron en la presentación de ponencias sobre el tema a tratar y posteriormente participaciones, la mayoría de ellas, en relación a propuestas (más críticas que propositivas). Los de la mesa organizadora tomaron nota de las propuestas y comentarios, para posteriormente poder analizarlos y, en su caso, considerarlos dentro del proyecto de reformas. Sin embargo, no surgió un debate respecto de las propuestas y no se llegó a un consenso general de las mismas.

A mediados del mes de febrero, un grupo de seis organizaciones del sector social forestal (UNOFOC, PROFOAGREMEX, Red Mocaí, CNC, UNAPROFF y UNORCA) presentó, ante la SEMARNAP, una propuesta de nueva Ley Forestal, con los antecedentes y las razones de cada una de las propuestas de articulado de Ley Forestal. Ese mismo mes, el grupo de trabajo de SEMARNAP y el CONAF decidieron convocar a los integrantes miembros e invitados del Subcomité de Normatividad a formar un Comité Redactor de la Iniciativa de Reformas a la Ley Forestal. Dicho Comité se formó por dos representantes de cada sector, los cuales podían llevar un equipo asesor que no tendría ni voz, ni voto. La distribución del número de representantes por sector no consideramos que fué el adecuado ya

que no se consideró a los sectores por su grado de representatividad total en la materia. Como ejemplo, tenemos que el sector social forestal es dueño de aproximadamente el 85% de los bosques en el país, por lo que su participación debe ser proporcional al peso que tiene dentro del sector forestal en general.

El Comité Redactor estuvo trabajando arduamente en la discusión e inclusión de las propuestas que se vertían en la mesa por parte de los distintos sectores forestales. Se trabajó esa primera ronda del 25 al 28 de febrero. El grupo de trabajo de SEMARNAP le presentó al Comité una versión donde se incluían la mayoría de las propuestas vertidas. A principios de marzo, se reunió el Comité por segunda vez para verificar ese hecho, y se hicieron comentarios y propuestas adicionales.

Se volvió a elaborar otra nueva versión, la cual ya no fue discutida por el Comité en su conjunto, sino que se realizaron reuniones por sector directamente con la Secretaría de Medio Ambiente.

A partir de ese momento, la fracción parlamentaria del Partido de la Revolución Democrática (PRD) de la Cámara de Diputados, bajo la dirección de su representante en la Comisión de Bosques y Selvas, iniciaron un proceso de consulta con diversos actores, como son el sector social forestal y la academia. De ello, la fracción parlamentaria del PRD presentó, a finales de marzo, una propuesta para una nueva Ley Forestal.

A lo largo de todo el proceso se fueron elaborando diversas versiones de propuestas de reforma a la Ley Forestal. Tan sólo en el mes de marzo, habiendo ya el Comité Redactor discutido el contenido de las reformas, se tuvieron cuatro versiones distintas, y en el mes de abril, tres versiones. Fue muy desgastante para todos los grupos involucrados en el proceso, el estar revisando versión por versión, y fue frustrante ver en cada versión nueva la desaparición o modificación de propuestas o consensos derivados de las reuniones del Comité Redactor. Mucho tuvo que ver la presión del sector industrial, principalmente los interesados en plantaciones comerciales, y a nivel gobierno, la SECOFI, la SHCP y la Presidencia de la República, ninguna de las cuales estuvo presente en las reuniones del Comité Redactor.

Debido a la falta de inclusión de las propuestas presentadas o manifestadas por los distintos participantes dentro del proceso de consulta que abrió la SEMARNAP y las Cámaras del Congreso de la Unión, en abril un grupo de ONGs (Maderas del Pueblo del Sureste, UGAM, CEMDA, Naturalia, Pacto de Grupos Ecologistas y el Comité para la Defensa de los Chimalapas) envió a la Secretaría de Medio Ambiente una carta solicitando el aplazamiento de la iniciativa de reformas a la Ley Forestal.

Derivado de esa carta, el equipo de trabajo de la SEMARNAP y las Comisiones dentro de las respectivas Cámaras, convocaron a las ONGs firmantes a diversas reuniones. Se concluyó en una junta con la Secretaría y su equipo de trabajo, en la cual se expusieron los distintos puntos de vista de cada actor. Derivado de esta reunión, se fijaron dos reuniones para trabajar en propuestas

concretas dentro del articulado de la que fuera la última versión. Muy pocas propuestas fueron las que se integraron finalmente a la Iniciativa de Reformas.

Al mismo tiempo, otro grupo de ONGs, con respaldo de organizaciones sociales de diversos puntos de la República, presentó varios documentos a la SEMARNAP, a las Cámaras y a la prensa, reafirmando la necesidad del aplazamiento de las reformas.

Fue a finales de abril, en las dos últimas semanas del periodo de sesiones del Congreso de la Unión, que la Iniciativa se presentó, primero en la Cámara de Diputados, luego en la Cámara de Senadores, aprobándose por mayoría. El 20 de mayo se publicó en el Diario Oficial de la Federación, entrando en vigor dichas reformas al día siguiente.

Todo este extenso recuento del proceso de reforma y de consulta que se vivió en las reformas a la Ley Forestal, nos permiten detectar los siguientes problemas y defectos, algunos que atañen directamente al proceso y otros que forman parte del contexto exterior que circunscribe al proceso:

1. Fue evidente el hecho de que la Coordinación de Asesores de SEMARNAP, responsable del proceso de consulta, tenía bien definidas ciertas reformas dentro del contenido de la Ley, indiscutibles e inalterables. Además, se tenía que cumplir con las metas fijadas en el Programa Forestal y de Suelo 1995-2000 en torno a ciertos temas contemplados en la Ley. Esto creó un ambiente agresivo, frustrante e inconsistente con la política de participación pública que se estaba promoviendo.
2. Había intereses económicos muy fuertes, ya que ese mismo año arrancaban los dos programas de financiamiento forestal, el PRODEPLAN y el PRODEFOR, este último con un monto inicial bastante significativo. Fue evidente el peso que tenían en la tendencia de las reformas, por un lado el sector privado de inversionistas en plantaciones forestales, y por el otro, la SECOFI con sus políticas de desregulación.
3. Además, no debemos de dejar de mencionar que las reformas a la Ley Forestal también atendían una tendencia internacional de intercambio económico llamado globalización, al cual México se ha ido integrando, iniciando con el Tratado de Libre Comercio de América del Norte.
4. Hubo una total discrecionalidad en cuanto a determinar qué tanto y qué tipo de contenido se dejaba en la Ley y qué otro se remitía al Reglamento y a las NOMs. En general una ley debe plasmar los principios, criterios, instrumentos de política y lineamientos generales. Al reglamento le corresponde desarrollar la implementación de los instrumentos y establecer los procedimientos administrativos correspondientes. En este caso, no se establecieron criterios en la Ley y hubo recursos forestales y actividades forestales que quedaron sin un marco mínimo de regulación que marcara la pauta a seguir por el Reglamento y, en su caso, las NOMs.
5. Fue por lo anterior que no se tomaron en cuenta, ni se reflejaron en el contenido de la Ley, la mayor parte de las propuestas y comentarios recibidos

por los diferentes actores participantes. Un proceso de consulta real es aquel que no solo abre los espacios de participación para los individuos interesados, sino que el producto final derivado del proceso integra las propuestas hechas por aquellos.

6. Los tiempos legislativos fueron un tope para el proceso consultivo. No solo se tenía que coincidir con un periodo ordinario de sesiones, sino que se entraba a un periodo de elecciones, habiendo cambio de senadores y diputados, lo cual retrasaría el proceso de reforma de la Ley.
7. Si analizamos el proceso de manera superficial, encontramos que el proceso de consulta fue amplio en cuanto a espacios de participación. Sin embargo, encontramos que en los Foros hubo una falta de representatividad de todos los sectores, debido a una mala difusión de las fechas, una regionalización tan amplia que abarcaba promedio de seis estados por cede y fallas en la distribución oportuna de información adecuada.
8. En ningún momento del proceso de consulta hubo representantes de las Secretarías de Gobierno cuyas decisiones y acciones influyen tanto en el proceso de reforma, como en la efectividad de aplicación de la Ley. Como ejemplo, la SECOFI nunca escucho los argumentos y comentarios que se vertieron en la Comisión Redactora, en donde estaban representados todos los sectores forestales.

Adicional a lo anterior, habría que puntualizar sobre la importancia de espacios de participación social, como es el CONAF, y sobre el derecho a la información y su realidad mexicana. Se reconoce la importancia que es tener espacios de participación social como el CONAF, sin embargo, su impacto en la toma de decisiones de la Secretaría no ha sido importante. Son varias razones las que provocan estos resultados, entre ellas las diferencias intrínsecas que algunos grupos tienen entre ellos derivados de experiencias históricas; y la dependencia presupuestal del Consejo con la Secretaría para su convocatoria y sesión. Asimismo, no todos los Estados han creado su Consejo Regional y de los que existen, son pocos los que llevan algún tipo de actividad. Estos Consejos Regionales deberían tener un mayor peso en la toma de decisiones, no solo estatal, sino federal, ya que la política forestal debe de contemplar las diferencias regionales que tiene el recurso y la actividad forestal.

El Derecho a la Información en México es una garantía individual contemplada en nuestra Constitución Política, en su Artículo 6º. En México, el acceso a la información es muy deficiente. La información equivale a poder, y el poder no se comparte. Esta es la visión que prevalece en la mayoría de las esferas de actividad: gubernamental, privada, académica, etc. A nivel Secretaría, por ser ésta tan grande, se crean rivalidades internas entre grupos y entre los organos desconcentrados que son el Instituto Nacional de Ecología y la Procuraduría Federal de Protección al Ambiente. A nivel intersecretarial, no existe vinculación alguna entre la toma de decisión y elaboración de políticas de una Secretaría con la otra, no obstante que sus decisiones y acciones tengan injerencia e impacten la

actividad que la otra Secretaría esta protegiendo y regulando. Además, los diferentes sistemas de información que se tienen previstos en las leyes no se han creado o carecen de una vinculación real entre ellos, esto provoca una desarticulación de la información. Todo esto es perjudicial para lograr el cumplimiento y la aplicación de la ley, entre otras cosas.

En el caso del proceso de elaboración del Reglamento de la Ley Forestal, las circunstancias eran distintas. La Dirección General Forestal era la responsable directa de ambos procesos. Lo que imponía limitantes a la duración del proceso era la necesidad de tener un Reglamento acorde con las reformas a la Ley Forestal y no el cumplir con los tiempos legislativos. Además, los criterios, principios, lineamientos generales y los instrumentos de política forestal ya estaban dados en la Ley, y el Reglamento no podía ir más allá de lo estipulado por ella. Algunos errores de la Ley podían corregirse o encausarse, pero las lagunas no podían subsanarse.

A pesar de que el proceso de elaboración de un reglamento le compete únicamente al Ejecutivo, la SEMARNAP continuó con su política de consenso con el Legislativo. La Comisión de Bosques y Selvas de la Cámara de Diputados fue un actor presente en todo el proceso e influyó de manera especial en extender, a un término mayor, el plazo que había fijado la SEMARNAP para expedir el Reglamento. Hay que recordar que tanto los funcionarios de la SEMARNAP responsables del proceso, y los Diputados dentro de la Comisión eran otros y tenían una mayor disposición al cambio. El Congreso de la Unión en su conjunto había sufrido un cambio positivo para la democratización de los procesos legislativos, habiendo el Legislativo dejado de ser empleado del Poder Ejecutivo. El Congreso de la Unión había alcanzado en esta Legislatura una mayoría de oposición con respecto al partido oficial, PRI.

En cuanto a la participación del CONAF en este proceso, no se procedió a convocar al Comité de Legislación, sino que se decidió trabajar directamente dentro del Comité de Redacción, dándole seguimiento desde el pleno del CONAF en sus reuniones ordinarias.

Los espacios de participación que se tuvieron en el proceso de consulta del Reglamento fueron: Foros Regionales, con la misma dinámica y las mismas características que se presentaron en los foros de la Ley; un Foro convocado por la Comisión de Bosques y Selvas; y la Comisión de Redacción del CONAF. Asimismo, se abrieron periodos de recepción de comentarios para cualquier interesado en presentar posturas o recomendaciones.

La Comisión de Redacción en este proceso fue más ordenado, en cuanto al número de participantes y a la asistencia. Es decir, se acotó la participación a dos representantes, titular y suplente, por cada sector miembro del CONAF, invitando también a dos representantes del INE, PROFEPA y, en este caso, asistiendo también representantes de SECOFI. En el caso de este último, su representatividad tuvo poco efecto. Los representantes no pertenecían a la Unidad de Desregulación, que es la que evalúa los proyectos de ley y reglamentos, y

establece las políticas de desregulación a los procedimientos administrativos. Los argumentos planteados en el interior de la Comisión, argumentos que le dieron forma a una propuesta de Reglamento aceptada por los diferentes sectores forestales, no fueron escuchados ni retomados por la SECOFI, la cual al final del proceso impuso sus políticas homogeneizantes.

En cuanto al trabajo interno de la Comisión, ésta fue rica en propuestas, discusión sana y resultados aceptados en su mayoría por todos los presentes; sin con ello asumir una conformidad del contenido global del Reglamento. Debido a que en el Reglamento las propuestas emitidas y las resoluciones a las que llegaba la Comisión de Redacción fueron mayormente respetadas, el proceso fue menos tormentoso y ríspido, y hubo mayor consistencia en cumplir con el propósito de integrar al documento las propuestas de los sectores. Asimismo, se garantizó en gran medida el cumplimiento de los procesos administrativos señalados en el Reglamento, por parte de los sectores que estuvieron involucrados en la redacción.

En el proceso de la Ley no hubo transparencia, las reglas no eran claras y se violaron, además de no haber en ningún momento consistencia en el decir y en el actuar de la autoridad frente a los participantes del proceso de consulta. Un avance dentro del proceso del Reglamento, fue el contar con un grado importante de transparencia y consistencia, y un mayor número de reglas claras.

Algunos temas de relevancia para este estudio no han sido mencionados anteriormente para no desviar la información vertida sobre la secuencia de los procesos y su problemática. Dichos temas son complementarios a la información analizada hasta el momento, para poder emitir recomendaciones pertinentes al proceso de reforma y de consulta del marco legal forestal. A continuación se mencionan.

En lo que respecta al presupuesto asignado para llevar a cabo el proceso de consulta, tanto en el proceso seguido en la Ley, como en el Reglamento, no hubo asignación de un monto en específico, sino que se fueron utilizando recursos humanos, materiales y económicos de las diferentes áreas de trabajo dentro de la Subsecretaría de Recursos Naturales de la SEMARNAP, de conformidad con las actividades, reuniones, eventos y duración del proceso. Con respecto a este mismo tema, no hubo utilización, ni solicitud de recursos internacionales o extranjeros.

En la redacción de los primeros proyectos de reformas de la Ley y del nuevo Reglamento, se tomaron en consideración primero, las necesidades y demandas del sector forestal nacional; segundo, los compromisos y principios forestales internacionales; y tercero, las experiencias que han tenido otros países en materia forestal, principalmente en lo que respecta a plantaciones comerciales (Brasil y Chile). Posiblemente sobre el recurso forestal no maderable, habiéndosele dado en su momento la importancia debida, se hubiera necesitado ahondar en las experiencias extranjeras sobre el acceso a este tipo de recursos y a los recursos genéticos. Asimismo, no se establecieron disposiciones más



concretas sobre los servicios ambientales que generan los bosques y la necesidad de contabilizarlos.

En relación a la posibilidad de recurrir a asesores extranjeros dentro del proceso, se considera esto innecesario, debido al nivel de preparación y de experiencia técnica que se tiene en el ramo por parte de los diferentes actores involucrados. Además, la historia que ha vivido el sector forestal en México, y las fuerzas que lo circunscriben, le dan características únicas, que tienen que ser tratadas y solucionadas de manera nacional.

Por último, no podemos dejar de mencionar ciertos problemas de efectividad de la Ley y el Reglamento, que se vinculan estrechamente con los defectos y anomalías que se presentaron a lo largo del proceso de reformas y de consulta pública:

No obstante que la SEMARNAP tenga acuerdos y/o vínculos con otras dependencias gubernamentales federales y estatales, es evidente que las políticas que generan y las leyes que las facultan, en la mayoría de los casos, llegan a ser divergentes y contrarias. En esta misma línea, hay disposiciones en la Ley que facultan a la Semarnap a fomentar, promover o desarrollar determinada actividad, pero para que las pueda llevar a cabo efectivamente, requiere necesariamente de que otra secretaría realice acciones concretas en torno a dicha actividad, que pueden no estar contempladas dentro de las líneas de acción y las políticas de dicha Secretaría, como es el caso de la SAGDER y de la SEP. Lo anterior podría aminorarse si en el proceso de reformas y de consulta pública hubiera presencia y participación de estas dependencias.

Es determinante la falta de difusión de los ordenamientos jurídicos en la mayor parte de las zonas que tienen recursos forestales. Esto genera dos tipos de ignorancia: Ignorancia de la existencia de procesos de reforma del marco legal que les atañe y afecta, que provoca falta de participación en el proceso de reformas; e ignorancia del marco legal que les otorga derechos e impone obligaciones, lo cual provoca incumplimiento de la ley. Cabe la posibilidad de que estos actores participen o se informen del proceso de reforma y de consulta y sus resultados, si pertenecen a alguna de las organizaciones sociales forestales que participan en los foros de discusión, y siempre y cuando estas permeen las decisiones y la información hacia abajo. Por parte del gobierno, no hay presencia institucional suficiente que le dé seguimiento al proceso de reforma, difundiendo los instrumentos legales, sean estas leyes, reglamentos o normas oficiales mexicanas. Se han llegado a dar convenios con determinadas organizaciones sociales para que difundan la información, pero no se tiene un seguimiento que permita evaluar el impacto real de la difusión.

Adicionalmente, se ha evidenciado una clara incongruencia en la interpretación de los procesos administrativos que establece la Ley y el Reglamento, por parte de las Delegaciones de la SEMARNAP; lo que provoca: fallas en el cumplimiento de la Ley y Reglamento, y desinformación.

#### **Tema IV. Recomendaciones para mejorar el proceso de reforma de la legislación forestal.**

Existen elementos negativos dentro del proceso legal de reformas de ley que pueden entorpecer el proceso de consulta que se realice de forma paralela. Existen también factores externos que influyen en el éxito o fracaso de la consulta pública. Estos elementos y factores son difíciles de alterar o evitar. Por ello, tomando en consideración lo anterior, proponemos recomendaciones factibles de llevarse a cabo, que permitirán aminorar los defectos y anomalías que se detectaron a lo largo de este estudio. Todas ellas conllevan a tener un proceso transparente, con reglas claras y con consistencia.

1. Para poder ir perfeccionando el proceso de consulta, resulta necesario elaborar una Metodología, la cual contenga entre otros: los objetivos, las estrategias, las reglas de participación y de depuración de propuestas y el procedimiento a seguir. Esta metodología puede ser general, pero con la posibilidad de adecuarse a las circunstancias específicas del proceso en cuestión; es decir, pudiéndose modificar o adicionar objetivos, reglas o estrategias.
2. Integrar a las discusiones y dentro de los Comités de Redacción a representantes de la SECOFI, SHCP, SAGDR, y demás Secretarías que tengan injerencia en el tema que se este tratando.
3. Informar a los participantes de las políticas específicas de desregulación que es lo que la SECOFI le está imponiendo al sector forestal, para poder acotar nuestras propuestas o justificarlas ante SECOFI. Es común que se rechazen propuestas contrarias a estas políticas, a las cuales no se les dá explicación del porqué no se consideraron, creando tensión y crítica innecesaria.
4. Dentro de la Comisión de Redacción, procurar elaborar un documento de respaldo que presente los resultados de la discusión y justifique el contenido consensado del proyecto de ley o reglamento. Esto promueve dos cosas: primero, el dar a conocer el porqué de las propuestas integradas al proyecto de ley o reglamento, para aquellos que no estuvieron dentro de la Comisión, y principalmente a la SECOFI y al Jurídico de la Presidencia, que al final de cuentas son los que “tiran por la borda” gran parte de las propuestas vertidas en el proceso de consulta. Segundo, obligar a la SEMARNAP, a la SECOFI y al Jurídico de la Presidencia a dar una contestación argumentada sobre las propuestas no incorporadas al documento final.
5. Con respecto a los Foros Regionales, se necesita tener una estrategia más amplia de difusión y abarcar menos territorio por Foro. De esta manera, se puede lograr mayor representatividad de los distintos sectores, primordialmente de los dueños del recurso forestal. Asimismo, es necesario tener una metodología para recabar las propuestas vertidas, integrarlas y darles seguimiento.
6. Con respecto a los Foros Regionales, también se sugiere que, asignándoles una partida del presupuesto fijado para la consulta, sean las mismas

organizaciones sociales quienes realicen la difusión de la información y la recabación de propuestas con los ejidos y comunidades miembros de su organización.

7. La Comisión de Bosques y Selvas dentro de la Cámara de Diputados a jugado y puede seguir jugando un papel integrador y sistematizador dentro de un proceso de consulta y de recabación de propuestas y acercamiento con los diferentes sectores. Asimismo, una estrategia de monitoreo de las reformas de leyes que a innovado dicha Comisión a sido el establecimiento de un Buzón Público de recepción de opiniones sobre las leyes aprobadas por el Congreso en la materia. Este Buzón se utilizó después de las reformas a la Ley Forestal.
8. Se proponen nuevas estrategias y pasos a seguir dentro de un proceso general de consulta pública para reformas de ordenamientos legales en materia forestal:
  - 1) Consulta de los sectores, previo a la elaboración de un diagnóstico sobre la problemática forestal determinada.
  - 2) Borrador de reformas, de conformidad con las inquietudes detectadas.
  - 3) Visitas de campo a las regiones forestales, para detectar el sentir de los actores locales.
  - 4) Aplicación de dos tipos de cuestionarios, directamente en las localidades forestales. El primero, dirigido a las organizaciones de productores que se encuentren constituidas. El segundo, de manera individual con los productores, en base a una selección al azar. Con esto se detectan sus inquietudes sobre la problemática concreta y el grado de conocimiento que tienen del marco legal forestal que les aplica.
  - 5) Organización de Foros Regionales con temas concretos, para dirigir las propuestas a los temas de mayor relevancia y polémica.
  - 6) Constituir el Comité de Redacción con una participación balanceada y con una representación intersecretarial que permita sacar el documento final, y no una versión más que será alterada por otras instancias antes de ser presentada al Congreso de la Unión o publicada por el Ejecutivo en el Diario Oficial de la Federación.
9. Dentro de la consulta, el análisis debe de tener dos enfoques: por tipo de recurso natural, que sería bosque, selva, zonas áridas, áreas naturales protegidas; y por cadena productiva, considerando a los sectores socio-económicos, como la industria, los productores, la academia, etc.
10. Resulta necesario revitalizar los Consejos Regionales que no esten sesionando, y crearlos en las regiones o Estados que tengan una importancia relevante en materia forestal. Los Consejos Regionales son un instrumento necesario para poder extender el proceso de consulta y difundir la información.
11. Abordando el tema de la información, se requiere coordinar de una manera integral los diferentes sistemas de información, y que estos esten al alcance de la sociedad.

12. Debe de haber una mayor y mejor comunicación entre las oficinas centrales de la SEMARNAP y sus delegaciones. Ello va a propiciar la posibilidad de difundir información localmente, y va a permitir que los procesos administrativos establecidos en la ley se apliquen efectivamente y expeditamente.
13. Que la SEMARNAP elabore una campaña de información sobre los principales contenidos de la Ley y del marco legal forestal. Teniendo esta campaña y los puntos 7, 8 y 9 anteriores, se eliminará un porcentaje alto de ignorancia de la Ley y promoverá un mayor cumplimiento de ésta. Además, propiciará que en procesos de consulta sobre reformas de ley o reglamento, se tenga una mayor participación y que esta sea informada.
14. Establecer los mecanismos necesarios para dar seguimiento y monitorear la efectividad de los ordenamientos.
15. No sustentar las reformas de una ley o reglamento en programas sexenales, sino en una política forestal a mediano y largo plazo.
16. Establecer una política o estrategia global a mediano y largo plazo que contenga las necesidades de regulación, el marco legal necesario, y los lineamientos generales e instrumentos que debe contener cada ordenamiento jurídico que integre ese marco legal. De esta manera se puede tener un objetivo que justifique las modificaciones que se propongan y le dé sustento al proceso. Esto permite que se acote la improvisación y la discrecionalidad de la autoridad, y establece los parámetros necesarios para limitar y encausar la participación; permitiendo cumplir con objetivos de mediano y largo plazo, y no caer en procesos sexenales. Además, se lograría darle a la Ley el contenido necesario para que sea el marco base de la regulación del recurso forestal.
17. Sobre este último punto, derivado del Taller de Discusión, se recomienda tener en claro qué se pretende tener como marco legal integral de los recursos naturales. Lo anterior se logra visualizando un proyecto integral de ordenamientos jurídicos en torno a todos los recursos naturales a regularse y no caer en realizar esfuerzos aislados parchando ley por ley.
18. Priorizar la estructura organizacional de los productores.
19. Integrar como instrumento legal de política forestal las auditorías forestales, para el seguimiento y monitoreo del cumplimiento de las autorizaciones de aprovechamiento y sus programas de manejo.
20. Fomento y creación de comités de protección forestal dentro de los ejidos, que se aboquen a las actividades de prevención, detección de ilícitos y trabajos de limpieza y brechas.
21. Establecer un mecanismo de certificación de los prestadores de servicios técnicos para corroborar la calidad profesional y de prestación del servicio que se requiere.
22. Cambiar la política de desregulación por la de facilitación. Resulta necesario que la autoridad tenga por ley los controles y procedimientos administrativos necesarios para supervisar y monitorear la actividad forestal, pero a su vez

facilitando a los solicitantes evitando procesos engorrosos y costosos, que se vuelven una carga para el interesado y lo obligan a evadir la ley.

23. De manera conjunta con el Congreso de la Unión, realizar un análisis jurídico de las facultades Federales y Estatales en materia forestal. Lo anterior con la finalidad de promover las reformas necesarias al marco legal y evitar interpretaciones legales aisladas por parte tanto de la Federación como de las Entidades Estatales, cayendo en invasión de competencias y duplicidad de procedimientos administrativos, que lo único que logran es perjudicar al recurso forestal y no protegerlo. Además resulta necesario determinar nuevamente la distribución de competencias en materia forestal que debieran tener la Federación y los Estados para lograr una eficiencia en la regulación y protección del recurso.

## ACRONIMOS

ANP	Area Natural Protegida
CEMDA	Centro Mexicano de Derecho Ambiental, A.C.
CNC	Confederación Nacional Campesina
CONAF o Consejo Forestal	Consejo Técnico Consultivo Nacional Forestal
DOF	Diario Oficial de la Federación
INE	Instituto Nacional de Ecología
LGEEPA	Ley General del Equilibrio Ecológico y la Protección al Ambiente
LOAPF	Ley Orgánica de la Administración Pública
NOM	Norma Oficial Mexicana
ONG	Organización No Gubernamental
PRD	Partido de la Revolución Democrática
PRODEFOR	Programa Nacional de Desarrollo Forestal
PRODEPLAN	Programa Nacional de Plantaciones Forestales
PROFEPA	Procuraduría Federal de Protección al Ambiente
PROFOAGREMEX	Productores Forestales y Agropecuarios de la República Mexicana, A.C.
PRONARE	Programa Nacional de Reforestación
Red Mocaf	Red Mexicana de Organizaciones Campesinas Forestales, A.C.
SAGADR	Secretaría de Agricultura, Ganadería y Desarrollo Rural
SECOFI	Secretaría de Comercio y Fomento Industrial
SEDESOL	Secretaría de Desarrollo Social
SEMARNAP	Secretaría de Medio Ambiente, Recursos Naturales y Pesca
SEP	Secretaría de Educación Pública
SG	Secretaría de Gobernación
SHCP	Secretaría de Hacienda y Crédito Público
SRA	Secretaría de la Reforma Agraria
UGAM	Unión de Grupos Ambientalistas de México, A.C.
UNAPROFF	Unión Nacional de Productores Forestales y Frutícolas
UNOFOC	Unión Nacional de Organizaciones de Forestería Comunal, A.C.
UNORCA	Unión Nacional de Organizaciones Regionales Campesinas Autónomas, A.C.

## **FUENTES LEGALES**

Constitución Política de los Estado Unidos Mexicanos  
DOF 5 de febrero de 1917, última modificación publicada el 23 de junio de 1999.

Ley Orgánica de la Administración Pública  
DOF 29 de diciembre de 1976.

Ley Orgánica del Congreso General de los Estados Unidos Mexicanos  
DOF 3 de septiembre de 1999.

Ley del Equilibrio Ecológico y la Protección al Ambiente  
DOF 28 de enero de 1988, últimas modificaciones publicadas el 13 de diciembre de 1996.

Ley Forestal  
DOF 22 de diciembre de 1992, últimas modificaciones publicadas el 20 de mayo de 1997.

Reglamento de la Ley Forestal  
DOF 25 de septiembre de 1998.

Ley Agraria  
DOF 26 de febrero de 1992.

Ley General de Metrología y Normalización  
DOF 1º de julio de 1992.

## **ENTREVISTAS**

1. Ing. Sergio Madrid  
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Dirección General Forestal  
Subsecretaría de Recursos Naturales  
SEMARNAP
7. Lic. José de Jesús Solís  
Dirección General Forestal  
Subsecretaría de Recursos Naturales  
SEMARNAP



## **Report on Mission to Nepal on NRI Project**

Richard G. Tarasofsky  
Lead Consultant

I was in Kathmandu from 19-24 February 2000, to support the IUCN lawyer, Narayan Belbase, in preparing the national report required by this project. During my visit, we interviewed a selection of persons from government, donor project, and communities, in order to:

- identify obstacles to effective law-making on forests in Nepal (based on the history)
- derive recommendations for improving the law-making process

In the preparation of the draft report in November 1999, Narayan Belbase had already interviewed 3 persons. It was planned that several further interviews would be conducted after my departure, including of some persons identified during my visit.

On the whole, the interviews proved useful, and are summarised below. I also had good discussions with Mr. Belbase about improving his draft so that it focused more sharply on the law-making process, with a view of coming up with concrete recommendations. I also emphasised that it was not our role to come up with a definitive version of the history (since some of the interviewees disagreed with one another) and that the important part was to focus on forward-looking recommendations for improvement.

As the deadline for submitting the final report on this project is rather soon, it was agreed that Mr. Belbase would complete the next draft by 6 March 2000. This draft would be sent to me (for circulation to select individuals within IUCN), as well as to the interviewees for reaction. We would all be given one week to comment. The final version of the paper will then be completed by 15 March 2000.

### **Key points made during the interviews**

#### **I. Dr. Keshab Kandel, Ministry of Forests and Soil Conservation**

- first draft of legislation prepared by a foreign lawyer, then worked on by local lawyers, including Ministry lawyers
- first draft can no longer be found – no organized file exists with previous drafts
- main conflicts as regards community forestry were foreseeable, but it was decided to deal with those in the implementation stage rather than the drafting stage

- unclear why some procedural aspects are included in the Act and not left for the regulations
- donors were quite involved in developing the legislation
- contradictions between the Forest Act and other pieces of legislation were identified in the Forest Master Plan, but not were rectified in the legislative process
- although the Ministry of Law and Justice is supposed to harmonize the proposed legislation with other pieces of legislation, in practice the control of the drafting remains with the lead Ministry (it may be in the interest of the Forest Ministry to leave the inconsistency? – i.e. would lose in an over power struggle with other Ministries?)
- international rules did not play a role in the preparation of the draft
- legislation is very vague, more like a policy document
- law-making process not sophisticated enough to resolve competing interests
- **recommendations for improving the legislative process:**
  - **resolve conflicts beforehand about the handing over of valuable land and benefit sharing**
  - **clarify the role of the State as the guardian of forest for all citizens**
  - **expand knowledge base so as to explore alternatives (foreign consultants have an important role to play here)**
  - **expand the process of dialogue with stakeholders to explore alternatives – create a negotiation process**
  - **between clarify the role of the user groups vis-à-vis the state**

## II. Mr. Santosh Bikram Shah, CFORDS

- Process of law reform part of the democracy process going on in Nepal at the time
- the lead was taken by the Department of Forests at the request of the Ministry of Forests

- As a result, the FD constituted a working committee that also included people in the Ministry: Secretary, Chief Planning Officer, 1<sup>st</sup> Class Division Heads, Regional Directors and a lawyer
  - This committee prepared the first draft
- Several meetings were then held on the draft, including with the Minister himself
- Donors Coordination Committee also consulted – the donors themselves developed a sub-group to work on the Act, as they were especially interested in community forestry
- Consultations also occurred with: journalists, law-makers, Forestry Association, Forest Users Groups, district Forest Officers
- The Department and the Ministry then finalized the draft bill which was submitted to Parliament
- Strategic decision was taken to keep the Act simple and sort out ambiguities and possibly even conflicts in the regulations
- The process leading up to the 1995 regulations was conducted by the government in a manner that allowed it to keep control – no dissent was allowed during the high-level meetings, although diverse views were expressed at the working group level
- A result is that some of the regulations severely restrict the scope of the Act, in a manner that allows the government to keep control.
- Donor pressures meant that the government concentrated too much on developing community forestry, to the detriment of really developing other types of forestry on other types of land
- Once Parliament has a bill before it, the bill goes to committee, which tends to invite input from Ministry officials, but not independent experts
- No effective practice in Nepal of harmonizing legislation
- Ramsar, CBD, CITES, etc. were not considered in the process because they were the responsibilities of other Ministries
- It is not feasible in Nepal to have a truly inter-Ministerial law-making process
- **Recommendations to improve law-making on forests:**
  - **Develop a strategic vision for forests across the country in all classifications – these classifications should be made**

**rapidly, clearly and such that they embody a clear government commitment**

- **Then management regimes can be developed for each classification, based on an overall land-use policy**
- **The consultation process should include expert evaluations of the physical geography, as well as inputs from local populations taking into account populations pressures**

III. Mr. Hari Neupane, FECOFUN

- problem with consultation process in lead up to law-making on forests is that only those close to Katmandu were consulted
- the government did not consult with FECOFUN (the federation of forest user groups) before passing the recent amendments to the Act
- in early 1990s, donors acted as intermediaries between the government and the grassroots, so as to allow grassroots some input into law-making process – this was not inappropriate, since donors are motivated for the right reasons
- large problem is inconsistency between different pieces of legislation (e.g. between Forest Act and Regulations and the legislation on decentralization)
- there is currently a Danida-funded Ministry project reviewing the Act and the Regulations, but without consulting stakeholders
- **recommends:**
  - **participatory process should be in rounds, with different levels of engagement that takes on board views of:**
    - **grassroots (only a selection based on sampling)**
    - **central experts**
    - **resolution process as regards conflicting interests**

IV. Mr. Tulsi Prajapati – Nepal-Australia Community Resources Management Project

- **recommendations as to improving the participatory process:**

- **begin with expert evaluations of the problems and conflicts**
- **consult with some local users**
- **consult with those charged with implementing the legislation**
- **important to have some guiding principles in mind during the law-making process, e.g. national interest, such that forests benefit all people**
- **donors cannot dictate, but can bring in new ideas or alternatives into the debates**
- **consultative workshops need proper preparation**
  - **e.g. documents targeted for the audience and circulated well in advance**
  - **preparatory process in separate groups so as to identify similarities and differences, and then focus the consultative workshop on the differences**
  - **apply a problem-solving approach to non-technical stakeholders, rather than focusing on the detail of the instruments**

V. Mr. K.B. Shrestha, Community Forest Project

- consultation process in the lead up to the Forest Act was sufficient, as regards stakeholders and donors
- process for adopting the Regulations took about 2 years
- drafting of the regulations originally done by a team within the Department working with a lawyer from the Ministry. This was then sent out to a local legal consultant. That draft was then further revised by the team within the Department and was then the subject of intensive discussions within the wider Ministry, including the Minister himself and the Secretary.
- It was the Forest department that had the lead throughout
- There were no interministerial discussions on the Regulations, as they were seen to emanate purely from the Act

- Problem of discontinuity of people involved in the preparation of the Forest Master Plan and those involved in preparing the Act – therefore there was no institutional memory.
- New phenomenon of Directives being passed which go against the spirit of the Act – Directives being the product of purely internal processes
- Donors can help bridge the gap between the government and the actual users in the field (since the national association of forest users has become too politicized). This can be done through consultative workshops, information materials, etc.

VI: Mr. Amrit Lal Joshi, Danida

- process of law making leading up to the FA was influenced by actual experiences in the field, as DFOs gradually became in favour of community forestry
- politicians (senior civil servants and MPs) are now taking action against community forestry because they are afraid of losing control (e.g. recent amendment will only lead to increased corruption and not benefit the forest)

VII. Mr. Nick Roche, UK-Nepal Community Forestry Project

- first drafts of the Forest Act were prepared in 1987-90, first as part of the Master Plan process, and then decoupled from it.
  - first draft prepared by an Australian lawyer
- donor projects saw their support for the law-making process as part of implementing their community forestry programmes
  - they began working on a document that was then fed into the Ministry so as to create “ownership” by them
  - they pushed community forestry because they viewed it as the only realistic alternative to forest destruction in a situation where the government is not a constructive partner
  - the process stalled in the early 1990s and then activity by the Ministry was rekindled as a result of pressure
- **recommendations:**
  - **key is to have an iterative public forum for debate that would systematically feed into the law making process --**

- **legally-constituted committee with a mandate to draw members from all interest groups, but also facilitate a process of negotiation such that the loudest voices (Ministry) are balanced – i.e. where an empowered civil society can effectively participate**
  - **precedents in the agriculture and environment sectors**
- **crucial to consult people charged with actual implementation (very few in the Forest Dept with recent implementation experience)**
- **do not rush into legislative change – allow for experience to be garnered and the people to be empowered**
- **approach to law-making should be proactive, not reactive**