



Human Rights and Poverty Reduction

Public goods and private rights: The illegal logging debate and the rights of the poor

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1. Introduction

This paper explores the potential for applying rights perspectives in policy development in the tropical forest sector, focusing especially on an area of current concern: forest law enforcement and governance (FLEG). The argument presented here is based on the assumption that where the challenges are largely rights-related, adopting a rights perspective should logically provide a powerful way to address them, with positive effects on both the long-term condition of the forest resource and the distribution of benefits deriving from its exploitation. However, this is easier said than done, as the legal framework in the forest sector is often profoundly anti-poor, if not always in its conception, at least in its operation. In consequence, there is no guarantee that forest law enforcement will improve the welfare of the poor. Indeed, there are good grounds to argue that the reverse is much more likely to occur.

2. What is meant by 'rights in natural resources'?

Beyond its core meaning of 'justifiable claims', the concept of rights has been variously interpreted in the literature. Moser and Norton (2001: 23) set out a framework which draws together a wide variety of perspectives, and which connects universal human rights and duties (which apply to every individual) to the various domains of rights as they are perceived in law. Whereas the former are implemented and monitored inter-governmentally, the latter are enforceable through the courts, both nationally and supra-nationally (e.g. regional bodies such as the European Court of Human Rights). Such laws may derive from varying sources and are not necessarily consistent in their application (for example, customary and statutory laws may well conflict).

In this paper, we adopt an approach to 'rights' that covers not only universal human rights, but also rights as defined in national legal frameworks and implemented through the appropriate regulatory regimes. Although such a broad interpretation runs the risk of threatening the universality that is the defining element of a rights perspective, it has the advantages of focusing attention on the realities of resource claims and access rights, and of making concrete connections between international discourse and the actual livelihoods of the poor.

The concept of rights is particularly important in relation to livelihoods because of the centrality of issues of tenure and control. In the forest sector, long production cycles accentuate the importance of the tenurial regime. Often lacking even the most basic tenurial rights, the forest-dependent poor are not well placed to enjoy broader human rights

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pertaining to participation and public accountability, even where such rights are ostensibly guaranteed in law (see Bird and Dickson, 2005).

Development assistance has had a rather uneven record in helping local people to reassert their rights in the forest sector. Indeed, the overall trend has often been in favour of an expansion of the claims by the state, to the detriment of resource users. The lack of progress on tenurial rights remains a major obstacle – arguably *the* major obstacle – to improving forest governance.

3. What is special about rights in forests?

Forests are unusual among natural resources in terms of the extent to which external actors claim the right to intervene in their management. While the world's forests may have important global aspects, they are – in practical terms – almost always managed as sovereign resources. The primary duty-bearer is thus the state. However, other parties can also be involved, including international duty-bearers (whose influence over forests tends to be expressed through multilateral agreements and conventions) and private sector duty-bearers (both forest owners and 'derived duty-bearers' such as forest concessionaires).

The international dimension tends increasingly to be dominated by Western environmental interests. There is an emerging and provocative literature on the influence of Western environmentalism on public accountability in the tropical forest sector (see, for example, Brosius, 1997; Chapin, 2004).

The national dimension tends to be dominated by the timber industry. This is often very powerful in the forest sector; in forest-rich countries, there are frequent allegations of 'state capture' by the industry. The industry is often the only major presence in the more isolated rural areas, functioning to all intents and purposes in place of the state. In human rights language, the duties of such derived duty-bearers relate both to the internal operations of their industrial activities (for example, safety at work) and to the effects of their operations on the livelihoods of the external actors with whom they interact (for example, relating to the damage they may cause to economic activities of rural dwellers, and the denial of public access which they may impose). However, in practice, these obligations may well conflict with – and to be overridden by – commercial claims of types which are powerful in free-market economies.

4. Rights and the issue of 'sustainability'

Tropical forests are particularly prone to motifs which justify external intervention. This derives from their global public goods dimension and the international character of the externalities (the additional benefits and costs) their exploitation generates. Such motifs often take the form of 'crisis narratives', which warn of impending disasters if affairs continue on their downward path. Over the last forty years or so, these crisis narratives have covered issues such as the energy crisis and its implications for the poor (concerns about fuelwood production), the global environment (the role of forest mismanagement in deforestation and desertification), conservation (the loss of forest biodiversity), and climate change (the role of forests as carbon sinks). A repeated call for the sustainable management of forests (SFM) has been one outcome of all these concerns, though the meaning of this is not unproblematic in natural forest environments. Juxtaposing demanding, but often imprecise, technical standards for sustainable management of public lands with other social and political concerns tends (like commercial interest) to downgrade the notion of rights, away from human rights principles (see Box 1).

Box 1: Balancing sustainable forest management and rights

'SFM is clearly not possible where there is extensive deforestation, as this reduces the forest's 'inherent values and productivity. For this reason, a basic requirement for implementing SFM is to have a clear legal definition of forestland, and, most importantly, to designate this forest land as permanent. In much of Africa, the importance of establishing a Permanent Forest Estate is understood. However, enforcement of land use designations remains a major challenge.

Reference to the social dimension of sustainability implies that *the rights of local communities and other stakeholders interacting with the forest should generally be respected* – insofar as this does not reduce the flow of desired benefits from the forest. Defining what is desired also implies democratic processes for deciding how the forest resource should be managed. This necessitates a degree of flexibility on the part of the forest administration which, in most African countries, retains ultimate ownership of the forest resource.' [Emphasis added.]

Source: SGS for World Bank/WWF Alliance (2003).

4. The issue of 'illegality' in the context of forest rights

Because of the plethora of parties with an interest in the resource, forest legislation tends to be extraordinarily dense and complicated, both nationally and internationally. International human rights instruments, standards and principles affect the interests of forest-dependent populations in a number of areas: protection of the land rights of indigenous and tribal peoples; non-discrimination; equal treatment before the law; and the right to participation in the political process. ILO Convention 169, 'Indigenous and tribal peoples in independent countries' (1991) provides one such instrument, albeit fairly limited in its scope.

The degree to which such instruments are translated into constitutional and statutory law varies among countries, and is difficult to generalise. However, what different systems do tend to have in common is low national ownership. Being largely externally generated, legislation at both national and international levels may not enjoy any real public legitimacy, or be amenable to application in any sensible way. Where the law lacks even superficial legitimacy, attempts to invoke this are unlikely to be effective. At most, this will increase the opportunities for rent-seeking by officials who exploit, to their individual advantage, the price increments that illegality confers in the market place, but with no beneficial effects for the management of the resource. This can damage the interests of the poor in at least two respects: increasing the costs of their compliance, and 'criminalising' their activities in ways that undermine both their livelihoods and the rule of law. Such criminalisation is particularly dangerous where there are no feasible legal alternatives.

The concept of 'legality' thus needs to be treated with caution, and views about the importance of suppressing 'illegal activities' need to be tempered by a recognition that such labels are often external constructs which do not automatically guarantee the presence of legal choices. Similarly, merely establishing a right of ownership does not necessarily confer on the holder an ability to benefit from that right. This fact has been at the heart of many of the problems encountered in community forestry, and many of the challenges the movement now faces (see Box 2).

The backdrop for any study of pro-poor rights in the forest sector is, therefore, one of ill-defined boundaries and relationships, ambiguities and contradictions in the regulatory regime, and massive differences in the power of stakeholders to influence the application of the law. All these factors have implications for the pursuit of pro-poor rights.

Box 2: The power of state/private sector alliances in Central American forestry

In Nicaragua, constitutional and legislative provisions exist for the demarcation and titling of indigenous territories. Yet the state continued to grant industrial logging concessions on community lands without fulfilling these requirements. The Inter-American Court subsequently found Nicaragua in violation of the American Convention on Human Rights, including the right to property, for not ensuring that an effective mechanism for demarcation and titling was in place.

Despite being in possession of usufruct rights, small-scale forest producers in Honduras are frequently unable to meet transaction costs of securing permits and other approvals, owing to regulatory complexity and bureaucratic corruption. This forces reliance on well resourced timber traders to secure permits and other approvals. This in turn fuels collusion between traders and public officials, and elite capture of community forest management rights as a means to 'legalise' illegal timber production.

A conclusion that can be drawn from these two examples is that establishing rights may have little practical value unless supported by the state. As the Honduras case shows, where the state is not enabling, the poor may have little option but to collude with those who control the resource.

Source: Wells et al. (2004).

5. The movement for forest law enforcement and governance (FLEG)

Over the last four years, and at an accelerating pace, the thrust of development assistance to forestry has been focused on illegal logging and its suppression. A series of international initiatives have been launched (the G8 Action Programme on Forests [1999]; the US President's Initiative against Illegal Logging [2003]; the EU Action Plan for FLEGT [2003]; the regional FLEG processes [Asia, 2001; Africa, 2003; Latin America [pending]]); and a number of bilateral agreements allied to FLEG (by e.g. UK, Norway, Finland and Indonesia [respectively, 2001; 2002; 2002]). Timber-producing countries now find themselves under increasing pressure, from their development partners, international NGOs and consumer countries, to prove the legality of their timber exports. This represents something of a departure from the established principle (in which the onus of responsibility usually rests with the proof of illegality, not the confirmation of legality).

A range of donor-funded projects and programmes has already been funded in support of FLEG. Public attention in the West has been particularly drawn to the various attempts to use private sector and NGO providers (both national and international) to apply checks and balances on public institutions, as a form of global 'hybrid accountability' (see Goetz and Jenkins, 2001; Brown *et al.*, 2004).

There is no doubt that illegality is a major problem in the tropical forest sector, often amounting to flagrant criminal activity (Box 3). In this regard, it provides further evidence of the low levels of governance and popular rights enjoyed in many forest-rich states. Its effects are felt at a number of levels, including loss of national revenues, distortion of international markets, and long-term damage to the condition of a resource on which the poor depend disproportionately. However, it does not necessarily follow that attempts to address the problem will automatically improve the welfare of the poor, nor strengthen their rights, and specific conditions may need to be met for these outcomes to be achieved. The next section considers some of the emerging issues, both positive and negative, as judged by the single standard of the promotion of the rights of the poor.

Box 3: The extent and nature of illegality and ‘forest crime’

The scale of illegality

- Percentage of the national/regional trade that is illegal: Cambodia [94%]; Amazon [90%]; Bolivia [90%]; Myanmar [80%]; Indonesia [>51%]; Cameroon [50%].
- Cameroon: Loss of government revenue estimated to be c. £56 million per year, and damages owing because of illegality, c\$465million/year.
- Canada: Estimated that between C\$300 million and C\$1bn is lost to theft and fraud each year (1990 to 1995).

Effects on timber markets:

- Estimated that 23–30% of international hardwood lumber and ply is traded illegally, depressing world prices by 7–16%.
- Losses to the US economy by the depressive effects of illegal competition estimated to be c. US\$460 million/year.

Sources: Forest Trends (2003); Auzel et al. (2001); Flynn (2004).

The nature of illegality

Illegality as ‘forest crime’ typically means:

- Harvesting without, or fraudulent use of, title.
- Logging out of boundaries/encroachment on protected areas.
- Logging of unauthorised or undersized species.
- Excess harvest.
- False declarations of harvest.
- Non-compliance with licence, non respect of contract conditions.
- Pollution of the environment through industrial activities.

However, there are also some important barriers to legality which inhibit law-abiding citizens from operating ‘legally’ (see Box 4).

Some positives

The FLEG movement is intended to serve multiple purposes and benefit numerous actors, not only the forest-dependent poor. From a donor perspective, it may provide a powerful tool for leveraging broad governance reforms and introducing discipline into a sector well known for its anarchic tendencies. These reforms could generate wider benefits for the citizenry at large: for example, as regards overall public accountability and transparency, and enhanced revenue capture. Similarly, for the timber industry (or at least, its better operators), it could lead to an improved environment for future investment, both from improvements to the long-term condition of production forests and by creating a more realistic pricing regime that can sustain the investments needed for sound management.

Yet it is precisely because its focus is not necessarily, or only, on the rights of the poor that the movement needs to be carefully monitored; at first sight, it would appear to conform to a long line of forest sector initiatives where developmental and pro-poor agendas are grafted rather unsatisfactorily onto other and pre-existing concerns and interests.

In a comprehensive series of recent publications (themselves an output of FLEG-related work, and supported by DFID and PROFOR), a CIFOR-led team of researchers has drawn attention to the dangers that preoccupation with legality can entail in such complex legal environments, and the risks which are posed for the livelihoods of the poor (see Box 4).

Box 4: Barriers to legality

These barriers include:

- *Complex and inconsistent laws*
Environmental issues are typically subject to numerous competing jurisdictions, which profoundly affect the potential for effective forest management. Federal, state and municipal governments may have conflicting roles (as in Brazil and Indonesia). Legislation tends to proliferate bewilderingly. Over 900 legal instruments pertain to forest management in Indonesia (CIFOR, 2003). In Brazil, 141 new legal instruments were established in the period 1965 to 1998.
- *Regulations that victimise the poor*
Regulations are often so impractical or out of tune with reality that they undermine the rule of law; e.g. expensive permits which need to be applied for in capital cities to allow the killing of one low-value game animal or the cutting of a single tree. Tree-cutting regulations are often biased towards the needs of industry (as in Cameroon, where industrial concessionaires are allowed three years of felling to cover the cost of preparing management plans, but communities have to pre-finance plans themselves).
- *Failure of the law to recognise legitimate claims*
National laws are often ambivalent on the issue of indigenous rights. In Indonesia, the 1999 Forestry Act defines State Forest Lands as those 'unencumbered by rights'. Yet, it is not clear how these can be distinguished from forests with 'rights attached'. In particular, the law classifies customary forests (*hutan rakyat*) as falling within State Forest Lands. Customary rights are, therefore, seen merely as a form of usufruct on state land, rather than a form of collective ownership (CIFOR, 2003)
- *Unclear distribution of powers between levels of government*
In Uganda, central government controls conservation areas and logging concessions, and trees on public and private lands, but local governments are responsible for monitoring and stewardship. Rules on sanctions, arbitration and enforcement are unclear (Bazaara, 2003). In Indonesia, Implementing Regulation (PP) 25 of Law 22/99 (now 32/04) on 'Decentralisation' devolves administrative authority for forest management to the regions, including licensing powers. As the same time, the Ministry of Forests has deemed community logging permits issued by the regions as illegal, under Implementing Regulation (PP) 34 of Law 41/99 on Forests. Arguably, PP34 (as a sector regulation) cannot diminish administrative authority devolved under PP25. The courts are still to rule on this, leaving communities in considerable legal uncertainty.
- Such contradictions lead in turn to *lack of coherence in national planning*
- *Selective use of legal instruments to restrict access to the resource*
Forest zonation frequently overrides existing claims, in the interests of industrial exploitation. Cameroon's *plan de zonage* takes customary claims into account only in relation to present usage (thus fallows are disregarded, though they are an essential part of the farming cycle), and seeks to restrict agriculture to narrow slivers of 'non-permanent forest estate', regardless of historical claims or future needs.

See also CIFOR (2003).

Problem areas?

It is apparent from the above discussion that focusing only on formal legal channels by upholding a legal framework which already fails to accommodate local rights could merely compound injustices. State agencies often enforce forest-related regulations more vigorously, and with less respect for the rules, when poor people are involved, leading to a tendency for law reform initiatives to develop into exercises in victim-blaming. Criminalising the vast majority of the resident population is unlikely to serve as a very positive incentive for governance reform.

A particular area of concern is with the ways in which external actors are drawn to some causes but not others in their desire to champion the rights of the forest-dependent poor. For example, Western publics often have no difficulty in identifying with local constituencies when these appear to live in idealised harmony with their environment. Forest-dwellers who live by hunting and gathering, in a primarily subsistence mode, tend to be perceived very positively.

However, those elements of the poor who do not appear to support sustainable forest management – for example, peasant farmers who engage in ‘slash and burn’ agriculture (often by far the numerical majority) – tend to figure much less favourably, and are at best left at the margins of the development narrative, if not openly stigmatised. There is thus a danger that external attempts to champion the poor will end up – perhaps unintentionally – generating a hierarchy of rights claimants, in which the concept of ‘rights’ is promoted not because of its inherent merits, as a component of universal human rights, but only where it is seen to be supportive of the needs of sustainable forest management. It would be perverse if the notion of the ‘deserving poor’, as a positive factor in environmental policy, led to the emergence of a counter-category of the ‘undeserving poor’, with contrary effects.

6. Looking to the future

Tackling forest law enforcement has the potential to leverage greater accountability. But by upholding national laws, it also threatens to compound existing power imbalances. If the focus on legality is to improve the ability of poor people to claim their rights, there is a need to support the development of accountability mechanisms which provide democratic spaces for them to shape and uphold their claims. Box 5 suggests some of the areas in which forest policy can be developed in ways that enhance popular rights.

Box 5: Some areas of interest for policy development

- Land demarcation and titling
Support to land demarcation and titling processes to reduce legal uncertainty, with an emphasis on community titling to minimise the risk of elite capture and an ultimate loss of tenurial rights by the poor.
- *Regulatory frameworks*
Simplify administrative procedures, to reduce transaction costs of securing and benefiting from rights as well as the risk of capture by elites.
- *Open up and protect legal channels*
Ensure that the poor have access to legal outlets for their legitimate economic activities, so as to minimise the risk that increased enforcement will merely generate new opportunities for official rent-seeking and corruption.
- *Protect space for the poor*
Protect access by rural communities to the forest areas on which they depend for their livelihoods, minimising and regulating the involvement of the capital-intensive industry.
- *Monitor the environmental monitors*
Widen the platforms for public involvement, to ensure that important national debates are not hijacked by well funded and internationally vocal external constituencies.
- *Lengthening time frames for development assistance*
As community forestry experience shows, establishing the law is only the start – implementing it is a much bigger challenge. By its nature, forest sector activity demands a long time-frame.
- *Institutional mechanism to achieve reforms*

Many of these policy areas presuppose that there are effective institutional mechanisms to secure legal reform. Support is needed in the overseeing of decision-making in the forestry sector by other publicly mandated agencies, and to the capacity of citizens to access these agencies.

7. Conclusion

A conclusion that can be drawn from this discussion is that, while the record of development assistance in relation to rights promotion may have been mixed to date, it is nevertheless likely to have a vital role to play in promoting rights agendas. Indeed, there are few if any alternative champions of the poor in many forest societies, with the power to resist pressures of the politico-industrial complex. Though development assistance to the forest sector is strongly conditioned by sovereign control of the resource, there is much to be said for strengthening its ability to focus on rights. The holistic framework that a rights perspective

demands helps to reconcile the local, national and international dimensions that are crucial to developing equitable forest policy, thereby ensuring an upward and 'non-victim-blaming' orientation for the formulation of environmental advocacy.

To this end, development assistance in the forest sector needs to focus not only on the enforcement strategies that promote sustainable production, but also on the ability of citizens to secure broader legal reform at national and local levels. In this way, a link can be made between social and economic rights (secure tenure and resource access) and fundamental human rights (democratic participation and accountability).

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