

# **WHY LAW MATTERS:**

## **DESIGN PRINCIPLES FOR STRENGTHENING THE ROLE OF FORESTRY LEGISLATION IN REDUCING ILLEGAL ACTIVITIES AND CORRUPT PRACTICES**

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*FAO LEGAL PAPERS  
ONLINE #27*

*April 2002*

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DESIGN PRINCIPLES FOR STRENGTHENING THE ROLE OF FORESTRY LEGISLATION  
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The damage caused by illegal activities and corrupt practices in the world's forests is a problem of enormous proportions. In many parts of the world, forest exploitation is dominated by rampant illegal harvesting, large-scale violation of trade regulations both domestically and internationally, fraudulent practices abetted or condoned by government officials and other destructive activities in violation of applicable laws. According to the World Bank, lost revenues through illegal logging alone costs governments between 10 and 15 billion dollars annually (Contreras-Hermosilla, 2002). The environmental and social costs, though more difficult to quantify, are clearly immense.

The problems related to corruption and illegal forest activities have, in recent years, increasingly engaged the attention of international bodies, governments and civil society. Recent international meetings on the subject<sup>2</sup> signal an increasing willingness on the part of governments and the international community to talk openly about a topic that has traditionally been considered too politically sensitive. Increasing activity by international NGO's such as Transparency International, Global Witness and a growing number of other institutions, in collaboration with local partners, has been important both in publicising the scope of the problem, and in developing and testing new tools for monitoring, detection and prevention. There are also important efforts to build effective linkages and strengthen collaboration between various individual efforts, as epitomised by the recent launching of the Forest Integrity Network (Transparency International, 2001).

### **What is the role of legislation?**

This paper is concerned with one facet of this complex problem – how important is legislation in the fight against destructive and corrupt forestry practices?

A sceptic might credibly answer “not very”. In country after country, the contrast between what forestry law prescribes and what actually happens on the ground is both stark and obvious. Despite the presence of strong legislation, illegal behaviour by both public and private actors often thrives.

The explanations put forward for this phenomenon are familiar – forest departments lack the financial and human resources to monitor and control forest activities; government officials entrusted with enforcing the law often have more to gain by condoning violations or engaging in violations themselves; court systems are backlogged or bankrupt; the imperatives of daily life for the rural poor overwhelm any likely risks associated with violating the law; etc. Such explanations lend credence to the common conclusion that “the problem is not with the legislation; the problem is with its implementation.”

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<sup>1</sup> This paper will appear in Schmithüsen, F.; Iselin, G.; Herbst, P., (Eds.), 2002: *Forest Law and Environmental Legislation - IUFRO Research Proceedings*. Forest Science Contributions Volume 26 (2002), Chair Forest Policy and Forest Economics, Swiss Federal Institute of Technology, ETH, Zurich/Switzerland. Permission of the editors of the above collection to post the paper in the FAO Legal Papers Online series is gratefully acknowledged.

<sup>2</sup> Recent examples include the East Asia Ministerial Conference on Forest Law Enforcement and Governance in Bali, Indonesia (September 2001) and the FAO Expert Consultation on Policy Options for Increasing Forest Law Compliance in Rome (January 2002).

This observation obviously contains much truth. Many laws around the world lie unutilised or under-utilised due to failures of political will, weak institutional capacity, overall disregard for the rule of law and similar reasons. In such contexts, careful attention to the details of drafting legislative texts may seem academic and somewhat beside the point.

But there is danger in making too much of a distinction between legislation, on the one hand, and its implementation on the other. While no one can reasonably deny that implementation of law requires attention to external economic, social and institutional factors, it is also true that law enforcement can be significantly influenced by the way legislation is drafted in the first place. “The problem” may indeed be implementation, but the scope and severity of the problem can be affected, for better or for worse, by the text itself.

In this short paper, we explore ways in which the drafting of forestry legislation – both in terms of the substantive content of law and the process by which it is written – can facilitate or obstruct efforts to reduce illegal activities. We propose several legislative design principles that have special relevance to the problems of corruption and law enforcement in the forestry sector, derived from several decades of FAO Development Law Service experience in providing legal technical assistance. As will be apparent, these principles – which are not unique to legislation in the forestry sector – are at the same time obvious and frequently overlooked.

What is also noteworthy is that the following principles go beyond the traditional mechanisms for inducing compliance with forestry law – policing, prosecution and penalising. Such mechanisms are certainly of critical importance; indeed, in the minds of many foresters the key to improving forest legislation lies almost entirely in better definitions of offences, increased powers of forest officers, streamlined procedures for prosecuting offenders, and stiffer penalties.

Yet history has demonstrated the fallacy of focusing exclusively on the “control” functions of forestry law. Our thesis here is that law’s ability to influence behaviour will depend less on the strength of its punitive provisions than on the extent to which it enables and encourages positive behaviour.

### ***Principle 1. Avoid legislative overreaching.***

In a sense, Principle 1 serves as an umbrella for most of the principles that follow. We can speak of legislative provisions that overreach in three diverse yet inter-related ways:

- *Provisions that exceed national capacities for implementation.* Numerous laws around the world have remained largely unimplemented because they are technically unrealistic. There is a severe imbalance between the activities, procedures and institutional arrangements they prescribe, and the financial and human resources available, in government and civil society, to implement them.
- *Provisions that exceed what is necessary to achieve reasonable and legitimate objectives.* Some provisions simply overshoot their mark, because their designers were not careful in fine-tuning techniques to reach clearly defined goals. In applying a catch-all philosophy, over-zealous legislators may cast the net so widely that they end up prohibiting or obliging activities that have little to do with the goals they are trying to reach.

- *Provisions that exceed what is socially acceptable.* The drafters of forest laws have historically tended to give little priority to the social context in which the laws would apply, with the result that local practices and norms are often misunderstood, neglected or even criminalised. Again, this has implications for the success of implementation – laws frequently fail if they require abrupt reorientations of social or institutional behaviour where the incentives for such change are otherwise weak. More importantly, attempted implementation may lead to injustice, damage local livelihoods and undermine the legitimacy of law in the eyes of local stakeholders.

Of course, none of these three characterisations of “legislative overreaching” are absolutes, and using them responsibly as a basis for assessing legislation requires some careful weighing and balancing. For example, laws are not *inherently* flawed simply because they represent a striving for difficult-to-achieve ideals, or because the immediate prospects for compliance are low. It is unlikely that India lawmakers believed, for example, that passing laws against untouchability was going to eliminate a social practice that had gone on for millennia, yet these were laws that were widely seen as necessary for a new democracy that had committed itself to principles of equity and justice.

Similarly, forestry legislation cannot be faulted for attempting to restrict destructive activities, despite the fact that in some contexts the odds against success are high. Nevertheless, a failure to match legislative provisions with realistic and socially-acceptable objectives and expectations often has the effect of rendering the law difficult to implement or comply with, and of placing unjust burdens on certain classes of stakeholders, without sufficient countervailing benefits.

We can find numerous examples from forestry laws around the world that illustrate the three types of legislative overreaching mentioned above, either singly or in various combinations.

- One example is the tendency of some laws to prescribe complex and costly planning requirements for forests of all kinds, whether large or small and whether or not of special economic or environmental significance. This is a tendency that is particularly evident in the first wave of forestry laws that emerged in Eastern Europe and the former Soviet Union countries in the 1990's. In several of these countries, restitution processes have resulted in small forest areas being vested in private owners. Management and exploitation of those areas, however, often remain subject to extensive planning and approval processes (influenced to a large extent by lingering attachment to central planning amongst foresters in these countries), with full-fledged management plans required for thousands of individual small forest plots. Whatever the technical merits of this approach in an ideal world, in practice it is clearly beyond the means of smallholders and the capacity of beleaguered and downsized forest departments to implement and enforce. Compliance with the law has been rendered disproportionately expensive, with the result that very little *legal* exploitation takes place. Similar syndromes may be found in the regulation of forestry in many other parts of the world as well.
- Another example of legislative ambition exceeding capacities might be found in the case of some laws that require local processing of all timber before it can be exported. While the intent of such provisions – to strengthen national wood processing and value-added industries and to create employment opportunities – may be admirable, they can be counter-productive if they are included without careful assessment of the actual and likely processing capacity of the country in question. In some cases, that capacity may be so weak as to make compliance virtually impossible for the foreseeable future. Hence, the incentives to resort to illegal methods are increased and the rule of law is further

weakened. In the meantime, by having committed itself to an unrealistic law, government is distracted from developing and putting in place a more realistic approach to the regulation of an activity that it is powerless to eliminate altogether.

- A final example – a particularly vivid example that illustrates all three types of legislative overreaching – involves the definition of the forest estate. In many parts of the world, the “legal” definition of land as forest may have little to do with what actually exists on the ground in terms of tree cover, the potential of the land for forestry, or the importance of keeping the land under forest. In some extreme cases, forests may be a sort of catch-all legal category that includes virtually all land that is not privately occupied. More frequently, the definition of land as forest or non-forest is largely a matter of whether the government has taken the steps prescribed by law for classification. For example, the Indian Forest Act and many laws of its generation provide little substantive guidance as to what types of areas should be considered forests – forests are, in essence, simply what government designates as such in accordance with the prescribed procedures. In the case of marginal or “waste land”, designation as forest or non-forest may at times be a matter of administrative convenience, or an artefact of the balance of power between different government institutions. Moreover, once land has been designated one way or another, any later redesignation intended better to reflect on-the-ground realities may be constrained by the natural desire of institutions to maintain control over their domain.

The legal designation of inappropriate or unnecessary lands as forests poses a number of problems for government, for local people and for society at large, problems that correspond to the three types of overreaching described above. First, it raises the problem of *capacity*: limited government resources are spread thinly, making it difficult to devote necessary attention to priority areas. Second, it may involve application of legal restrictions that are *unnecessary* for achieving reasonable objectives: some land is kept in the legal forest estate simply because it has been classified as such for a long time, not because there is any meaningful relationship between that classification and the objectives of sustainable forest management. Finally, and often most importantly, it raises the question of *social acceptability*. Inappropriate legal definitions of forests may unnecessarily limit the land-use options of local people, undermine local practices and traditions, threaten local livelihoods and override local conceptions of rights and tenure.

Forest laws can be improved in this regard in a number of ways. First, they can include basic guidelines and criteria for forest designation, setting forth basic purposes for designating forest areas in general; and requiring that the reasons for specific forest designations be explained publicly in light of the criteria set forth in the law. Secondly, they can incorporate provisions designed to require meaningful local input into land designation decisions (including mechanisms for appeal), to provide stronger protection for local rights, to enable collaborative management where appropriate (see Principle 4), and to ensure adequate compensation and mitigation where the forest protection imperatives are deemed strong enough to warrant curtailing long-established local practices. Such provisions will not in themselves eliminate the possibility that land is inappropriately included or excluded from the forest estate, or that it is accorded the “wrong” level of protection. What they can contribute, however, is better guidance for the exercise of government discretion, more transparent decisionmaking (see Principle 3) and a framework for more effective recognition and protection of local rights.

**Principle 2. Avoid unnecessary, superfluous or cumbersome licensing and approval requirements**

This principle obviously overlaps with the preceding one, and to some extent it is difficult to disentangle the two. Forestry laws and regulations not infrequently set forth burdensome approval requirements for many types of private action where the policy rationale for imposing such requirements is dubious. One of the problems of excessive regulation is that government often lacks the capacity to implement the procedures stipulated in law. The result can be at times that even persons inclined to comply with procedural requirements may find that there are tremendous obstacles to doing so – that approval mechanisms are distantly located, are very slow, or in extreme cases do not exist at all.

Once again, the cutting and removal of trees from private lands in a number of countries serves as a case in point. Some Indian jurisdictions, for example, in the name of soil conservation, impose a 10-year felling programme on a more or less blanket basis to much of the private land in the state. Obtaining permission to cut under the rules that accompany this programme is a lengthy and discouraging process if all the steps are followed faithfully, as many observers have noted. Other examples might include the imposition of detailed licensing requirements for exercising recognised local rights to extract wood or non-timber forest products for domestic use.

In situations where multiple permissions are required and where processes are lengthy and/or costly, the opportunity for rent-seeking by officials increases, as does the temptation for applicants to take action outside the law. In addition, the administration of such schemes can put burdens on forestry bureaucracies that detract from enforcement of more important aspects of the law.

Of course, the point is not that permits, approval processes and the like are inherently bad. Indeed, and perhaps paradoxically, measures designed to create greater transparency and accountability (see Principle 3) may well *increase* paperwork and result in some procedural delays. What *is* detrimental is the accretion of procedural hurdles that serve no apparent policy objectives, or that are likely to serve their ostensible objectives poorly. In a significant number of countries one can point to complex and costly processes and bureaucracies that have taken on a life of their own, and the related phenomenon of entire professional sub-specialities, in both the public and private sectors, devoted to arranging, obtaining or granting exemptions or permissions, the reasons for which may be unclear or forgotten.

In the context of drafting legislation, the addition of another permission or approval process may seem the height of prudence and little attention may be directed to its likely costs, consequences and collateral effects. To reduce this tendency, scrupulous consideration should be given to the following questions:

- What precisely are the purposes of regulating the activity in question, and are they sound?
- Are existing or proposed regulations clearly targeted on fulfilling those precise purposes?
- In defining objectives is there a need to differentiate between different types of situations, such as, for example, natural growth vs. plantations?
- Can regulations be simplified and streamlined without threatening the basic objectives?
- Are regulations realistic in terms of the capacity of Government to implement them and the capacity of private people to abide by them?
- Can policy objectives be better achieved by focusing on establishing broad parameters for private action (say through the formulation of criteria and indicators) rather than through a continuing reliance on permits and penalties?

**Principle 3. Include provisions that enhance the transparency and accountability of forest decision-making processes.**

Official misbehaviour, including official collusion with or neglect of private misbehaviour, is more difficult to sustain in environments where actions are open to public scrutiny and where decisions can be judged against measurable criteria. Until relatively recently, many if not most forest laws around the world have done little to contribute to the creation of such environments (Rosenbaum 2002).

An example of where these issues come into play concerns the granting of commercial concessions. This is a subject on which many older forest laws and regulations are relatively silent, thus exacerbating a tendency in many parts of the world for the granting of concessions to be a secretive affair, often conducted at high political levels on an *ad hoc* basis. There is a growing trend in national legislation in the direction of spelling out in some detail the steps leading up to the awarding of a contract, sometimes in principal legislation, sometimes in regulations, or most often in a combination of the two. Such legal frameworks set forth, for example, the basic mechanical elements of an auction and bidding system, such as the content of call for bids, the form and content of submissions, deadlines and decision-making timeframes, the professional qualifications and independence of auctioneers, etc. Laws may also specify when government can use non-economic criteria to distinguish between competing bids. Disclosure of proposed deals to nearby communities may be required, and the government may be required to listen to public concerns.

There are a host of other measures that can be taken to enhance transparency and accountability and that are beginning to appear with increasing frequency in national forestry law:

- One is to include more explicit reference to some **basic criteria for decisionmaking**. For example, older legislation typically created a power on the part of a government official to grant a permit within a government-managed forest, but did little to guide the exercise of that power. Now it is not uncommon for legislation to stipulate that such a power must be exercised in a way that is compatible with the management plan for that forest, or with the overall management objectives for a particular type of forest. Similar efforts to guide official actions (or, put less positively, to limit official discretion) are evident in other areas of forest law as well.
- Management plans themselves, as well as other major forest-related decisions are increasingly subjected to an approval process that includes **public review and comment**. In some instances, environmental impact assessment-style concepts are appearing in forestry legislation.
- Laws may create **oversight bodies**, such as commissions or “forestry forums”, consisting of members drawn from non-forestry sectors and civil society, whose role it is to review major decisions, establish policy guidelines, facilitate public debate and the like.
- There is increasing attention to legislating a **public right to information**, sometimes in forestry legislation itself, sometimes more generally in laws dealing with environmental protection or freedom of information.
- Several new laws provide increased opportunities for private citizens to bring suit against government for the violation of forest laws, through **expanded concepts of standing**.

Legislation alone obviously cannot create transparency and accountability in the forestry sector. In the absence of determined civil society institutions committed to pushing these



goals forward, the legislative innovations discussed above are likely to be neglected and little used. But measures such as these are nonetheless essential in creating a viable platform from which the performance of public officials can be observed, controlled and improved.

**Principle 4. Enhance the stake of local non-government actors in the sustainable management of forests.**

In recent years, community-based forest management has been promoted for a number of reasons – most prominently as a way of improving local livelihoods and of recognising legitimate local claims to rights over land and resources, and as part of a general trend towards devolving or decentralising various governance functions. It is also increasingly recognised that without local people having a significant stake in the management of local forest resources, the efforts of under-staffed and poorly financed forest officials to patrol and protect forests will often be futile. The absence of such a stake both reduces the incentives of local people to comply with the law, and prevents them from insisting on the compliance of outsiders, including government officials themselves.

Some emerging legislative responses related to this issue have been alluded to already under Principle 3: required consultation between national forest authorities and local people over key management decisions, such as the creation and delineation of forest reserves; required consideration of local peoples' concerns in the granting of concessions in public forests; mechanisms by which the public can serve as watchdogs over the activities of other forest users and government officials, along with a right to challenge government decisions at administrative and judicial levels.

More fundamentally – and the subject of this section – there have been increasing efforts to improve the legal environment for direct local participation in forest management.

Throughout history, national legislation has generally been unfriendly to local forest management. Indeed, in many parts of the world, the overall trend has been an inexorable assertion of government legal control over forests at the expense of local practices and local perceptions. While local usage rights have frequently been given some recognition, forest laws have provided little scope for local people to play a meaningful part in the planning, management and allocation of forest resources on which they may have depended for generations – and which, in numerous cases, they may have actively managed and protected. Frequently, the state has taken on this role itself through the creation of state forests. In other contexts, national law may have left the tenurial status of forest areas unclear, giving weak or no legal protection to existing community-based systems and providing no alternative mechanisms by which local groups or individuals might assert effective control.

Efforts to address these shortcomings in recent legal changes have taken various forms.

First, there has been a proliferation of new mechanisms for the devolution of forest management to local communities, villages, user groups or households through site specific arrangements such as co-management agreements, village forest reserves, community forestry leases and related devices. Nepal's 1993 Forest Act offers a notable example of this approach, providing for the "turning over" of portions of national forest to local user groups who agree to manage the areas in accordance with an agreed-upon plan. A range of variations on this approach may be found in recent laws or regulations in a growing number of jurisdictions, including (to name a few) Philippines, Laos, India, Guinea, Guinea-Bissau,

Tanzania, Burkina Faso, Cameroon, British Columbia (Canada), Mozambique and South Africa.

Second, some countries have accorded increasing recognition to the historical land or territorial claims of local peoples. The 1997 Indigenous Peoples' Rights Act from Philippines is an example of this trend, and the rights of indigenous communities figure prominently in several Latin American laws. A number of other countries, including Canada, Australia, South Africa, as well as several countries in central and eastern Europe, are engaged in restoring the lands of dispossessed communities and individuals, some of which include natural forests or commercial plantations.

Despite the unmistakably higher profile given to local forest management in recent legislation, many of the reforms are characterised by significant limitations and ambivalence, both on paper and in practice. In most cases, government forest departments continue to retain most of the important decision-making powers, including the power to draft and approve management plans, and to decide about the selection of species, the marketing of harvested products and the use of benefits by local groups. The strength of the rights granted or recognised under local arrangements may be unclear because the government has apparently wide powers to terminate agreements or legal recognition for poorly-defined reasons.

This suggests that laws designed to promote local management need, at a minimum, to improve in terms of the extent to which they provide for security and flexibility.

*Security* of rights will mean different things to different people. Nevertheless, whatever the context, and however limited or extensive the nature of the rights involved, a local management arrangement must not only provide a realistic hope of significant benefits to its participants, but it must instil confidence that the rights to those benefits are secure and cannot be taken away arbitrarily. The concept of "security" can thus be broken down into several key attributes:

- there needs to be clarity as to what the rights are;
- there needs to be certainty that rights cannot be taken away or changed unilaterally or unfairly;
- rights need to be of a reasonable duration – that is, if the rights are not to be perpetual, they should be for a period that is clearly spelled out and that is long enough for the benefits of participation to be fully realised;
- rights need to be enforceable against outsiders and the government itself;
- rights need to be exclusive, that is, the holders of rights need to be able to exclude or control access of outsiders to the resource over which they have rights (though this suggests that the definition of who is a rights-holder needs to be handled carefully to ensure that no one with legitimate claims to the resource is unfairly excluded; attention will be required to identify and protect different types of rights of access and use, such as grazing, hunting and fishing).

Along with security, law needs to provide *flexibility*. Community-based management is about local choices and local adaptation, qualities that are put at risk if legislation imposes a rigid, uniform approach. The legal framework should allow flexibility in deciding what the objectives and methods of management should be, as well as the structure and internal rules of local institutions. Obviously, flexibility can never be unlimited, as both society at large as well as individuals within a particular management group have interests that need to be taken into account, ranging from environmental interests to basic human rights. The challenge for law-makers is to find approaches to defining and defending those interests in ways that do

not unnecessarily limit the ability of local people to make choices that reflect their unique needs, conditions and aspirations (Lindsay 1999).

The establishment of sustainable local forest management arrangements faces many formidable challenges, and legal issues may well be of secondary significance in many contexts. Where political, social, economic and ecological conditions are unfavourable for motivating and sustaining local management, a supportive legal framework may not make much difference. And of course, community members themselves are not inherently immune from temptations to engage in corrupt or destructive activities, and the strengthening of property rights or other stakes in forest management may not always be sufficient to dispel such temptations. On the other hand, despite the mixed track record of community-based initiatives over the last decade or so, the underlying rationale for real local involvement remains persuasive and urgent. It is likely that the search for better mechanisms and methodologies for local management will remain an important aspect of national forest strategies for the foreseeable future, and attention to legal aspects will be a necessary piece of the puzzle.

***Principle 5. The drafting of law needs to be a broadly participatory process.***

The drafting of sound and workable law requires genuine involvement of all categories of stakeholders – government and non-governmental institutions, central and local institutions, communities and local forest-dependent people, private sector organisations, etc. This is not a recommendation that flows only from a belief that people should have the *right* to be involved. Instead, we are making a practical point here – without this involvement, there is simply little hope of passing laws that reflect reality and are capable of being used and implemented.

It is important to stress that this recommendation goes beyond simply holding a few seminars or workshops at the end of the drafting process. It requires a true commitment to listening to and understanding the needs, objectives, insights and capacities of the intended users of the law, and finding ways to accommodate the multiple interests at stake. It requires a determination to avoid letting the process be driven by the preconceptions of lawyers, donors and other outsiders, however well intentioned. This is time consuming work, that ideally should entail patient consultations in the field with people directly affected, not simply in a distant capital city. And these consultations should start early, not only when a first draft has already been completed.

Efforts to genuinely promote such consultative processes have been made in several countries in the recent past, particularly in Latin America. Especially noteworthy is the experience of Honduras, where a forestry forum, called *Agenda Forestal Hondureña*, was established with the specific objective of developing a new forest law in a participatory manner. Comprising representatives of all public and private stakeholders concerned, including farmer, indigenous, environmental and other civil society groups as well as industry, it produced a forest bill in the course of a lengthy and hardly-fought process, during which all parties could fully voice their concerns and defend their interests. Successive drafts were developed within the forum and posted on the Internet, which not only helped make the process more transparent, but also prompted wider social debate. The eventual outcome was a relatively balanced and satisfactory draft law, which the government had then no difficulty to endorse and to table in parliament, where it is now pending approval. A similar participatory drafting process is currently taking place in Paraguay within an *ad hoc* forestry forum (*Mesa Forestal Nacional*), specifically created with the same goal of producing a new forest act through extensive consultations. Earlier processes of this kind achieved

varying degrees of success in other countries, including Bolivia (Pavez and Helbingen 1998), Ecuador and Peru (FAO 1998).

Designing manageable participatory processes involves several challenges. There is, for example, a need to reconcile the role of participatory approaches at the *drafting* stage with the role of elected representatives of the people – ie, parliaments – at the *approval* stage. Divergent perspectives between “civil society” and formal political institutions may well become apparent at the point of transition from the first stage to the second. Conflicts may also emerge if care is not taken in co-ordinating multiple consultative bodies with similar or overlapping functions, such as forest and environment advisory committees.

**Principle 6. There is a need to increase the effectiveness of direct law enforcement mechanisms set forth in forestry legislation.**

Here we are referring to the penalties and procedures that come into play in the event of a violation of the law. Such mechanisms may be enhanced, in the first instance, by evaluating the *penalties* with the following questions in mind:

- Are the penalties for a particularly infraction severe enough so that they may act as a deterrent, or are they so insignificant as to be considered at worst a minor increase in the cost of doing business to most lawbreakers?
- On the other hand, are there penalties that are *too* severe, out of proportion to the nature of the offence? In such cases, courts and other enforcement bodies may be reluctant to apply the penalty at all, and the crime will go unpunished.
- Does the law provide for the timely and easy modification of penalties to take into account the effects of inflation? A number of countries have included indexing provisions in their laws, to allow for the automatic updating of penalties rather than requiring legislative action for every penalty increase.
- Does the law allow for consideration of the severity of the damage done in determining the penalty? In addition to fixing a flat penalty for a specific offence, some laws also require the offender to reimburse government for the cost of damages done to the forest estate.

It is also essential to evaluate the *procedures* by which laws are enforced:

- Does the law provide enforcement officers with sufficient powers to apprehend, detain and prosecute alleged offenders?
- Are expedited procedures available for minor offences, thus, on the one hand, helping ensure that a case does not simply get lost in the backlog of lower court cases, while on the other hand freeing up courts to focus on more severe breaches of the law? The difficulties and delays associated with public prosecutions can, in many cases, discourage forest officers from pressing forward with a case.
- Does the law provide for compounding minor offences, that is, the payment of a prescribed fine as a way of disposing of uncontested cases without the need to pursue full prosecution?
- Does the law provide for the possibility of resolving cases outside of the court system, through administrative tribunals or alternative dispute resolution mechanisms?

Of course, forest law enforcement must be seen in the context of law enforcement overall. Any attempt to significantly improve the legislative framework for enforcement in the forestry sector will almost certainly require attention to laws that apply more generally to law enforcement in society at large. And even more importantly, the effectiveness of any of

these mechanisms needs to be evaluated against an overarching concern for fairness – their legitimacy will depend on the extent to which they are perceived to be applied transparently and even-handedly, and not treated as additional opportunities for rent-seeking or coercion. Compounding, for example, runs the risk of being seen as a new tool for extortion, not as a legitimate way of expeditiously resolving cases, if its use is not carefully circumscribed and monitored.

## Conclusion

The role of legislation in the fight against illegal activities and corrupt practices should neither be exaggerated nor underestimated. Obviously, effective action on this front requires efforts that go well beyond the drafting of legislation – to name a few, technological innovation, improved surveillance techniques, sustained application of political will and commitment of financial resources, attitudinal changes in all parts of society, committed advocacy by civil society organisations, international and regional co-operation and economic reforms.

But while it is a truism that legislation is not sufficient in and of itself, this should not obscure the important role it has to play. For any of the above actions, law is an essential tool, one that can significantly enhance – or just as significantly undermine – their efficacy. In presenting the six design principles above, we have tried to show that drafting stronger legislation requires a broader approach than strengthening standard law enforcement provisions. If legislation is to create a realistic foundation for its own implementation, then it needs to provide scope for meaningful participation in forest decision-making; to increase the stake that people have in sustainable management; to improve the transparency and accountability of forest institutions; and to set forth rules that are coherent, realistic and comprehensible.

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