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contradictions and conflicts

A conflict arises when two or more people or groups perceive their values to be incompatible, whether or not they propose, at present or in the future, to take any action on the basis of those values (Tillitt 1991). Tillitt argues that values are incompatible if they contradict or oppose each other. Conflict can also be defined as involving non-negotiable issues, such as human needs and values, they occur in developing situations. People who make new rules and regulations should realise that they lack field experience. Problems will arise and policy makers should be prepared to tackle them and to learn from experience to anticipate what new problems might occur. What is needed is a mechanism that can quickly respond and take initiative in conflict resolution.

In relation to community forestry, conflicts can be within an FUG, between FUGs, between an FUG and a forest office, or indeed between various other institutions. Conflicts can arise at several different points, for example, during the identification of users, in participation, concerning leadership, location of the forest, forest use patterns, deviation from the operational plan or objectives, sharing of benefits, or unclear and contradictory legal provisions. This chapter focuses on conflicts arising from contradictory legal provisions.

Contradictions within Forestry Legislation

Handover of the community forest – Forest Act 1993, Sec 25(1)

"The District Forest Officer may hand over any part of a National Forest to a User Group in the form of a Community Forest as prescribed, entitling it to develop, conserve, use, and manage the Forest and sell and distribute the Forest Products independently by fixing their prices according to the Work Plan. While so handing over a Community Forest, the District Forest Officer shall issue a certificate of alienation of the Community Forest."

Talbott and Khadka maintain that the tenurial rights of FUGs illustrate how legal ambiguities can impede community forestry initiatives. Strong arguments based on the Constitution of 1990 can be made for handing community forests over completely to the intended beneficiaries: the legitimate and responsible communities of local forest resource users. Indeed, the preamble clearly states that the source of all legal authority in Nepal is "inherent in the people." On the other hand, the Forest Act 1993 implies that community forestry rights continue to emanate from the state, which in turn hands them over to FUGs.

Current forestry laws clearly stipulate that FUGs do not have direct ownership rights to the land, only usufruct rights of management over the trees and the forest products derived from the land. Lynch and Talbott maintain that:

> "[G]overnment sponsored community forestry programs based on public grants that can be cancelled don't provide adequate incentives for sustainable community based forest resource management. Wherever local people are striving to protect and sustainably manage forests, the best way to establish and secure these incentives is to get appropriate government agencies and officials to recognise existing community-based rights and to consider them as being private. This way, holders of such rights would have the same protection as owners of other private property rights. Governments can express this commitment through national laws and policies prior to any on-the-ground activities, although the spatial perimeters of community-based management systems should be delineated as soon as possible." (Lynch and Talbott 1995)

Talbott and Khadka argue that contradiction apparently exists in the Forest Act's delegation of authority over the decisions and actions of FUGs. According to Forest Department hierarchy, ultimate authority rests with the Ministry of Forest and Soil Conservation, not with the people as stipulated in the 1990 Constitution. Rectifying such inconsistencies in language and the resulting uncertainties in delegated authority is an essential pre-requisite to community forestry's success.

Under Section 26(2), the DFO is empowered to veto any operational plan if it is likely to adversely affect the environment, and Section 27 (1) and Rule 37 allow the DFO to "take back" the community forest if any activities other than those specified in the operational plan or any activities that affect the environment are carried out. However, what constitutes an "adverse impact on the environment" is not specified, leaving it open to the whim of the DFO.

Section 72 of the Forest Act empowers the government to frame the necessary rules for fulfilling the objectives of the Act. The Forest Regulations promulgated by the government exercising Section 72's power seem to be impeding the objectives of the Act itself. For example, under Rule 27(g), the DFO is obliged to issue a certificate of registration to an FUG only after having a bond to comply with the Act, the Regulations, and 'the conditions prescribed by the government'. The Act does not give authority to the government to impose or prescribe any additional condition except those mentioned in the Act, the Regulations, and the operational plan. It is apparent that every person, whether natural or artificial[4] must comply with prevailing legislation. Therefore there is no logic in having a bond to comply with the Act and Regulations. The latter part of Rule 27(g) is deliberately included simply to impose unnecessary conditions and to control FUGs.

A similar provision is found in Rule 29(2) which states that the DFO shall hand over the community forest area only after having a bond to the effect that the FUG will comply with the conditions prescribed by the government. The Forest Act does not give power to the government to impose such conditions on an FUG. Rule 29(2) is against the parent Act. How fair is it to have such a bond signed by FUGs, who have no idea of what those future conditions might be? Further, Clause 2.2.6 of the Operational Guidelines states that the operational plan approved along with conditions added by the DFO as per Rule 29(2) of the Forest Regulations will be considered to be a contract.

[4] An 'artificial' person is a legally created 'person', that is a body like a VDC or FUG treated legally in the same way as a person.

The Forest Act prohibits the removal of forest products from the forest area and the transportation, sale, and distribution of forest products (Section 49[d]) from national forests. Similarly, Section 49(g) prohibits the extraction of boulders, pebbles, sand, or soil; the burning of charcoal or lime; the manufacture of finished products from these materials; or the collection of such materials in national forest. Section 25(1) of the Act, however, entitles FUGs to independently fix the price of forest products and sell them. In practice, this has not caused much conflict, but the Act needs to be amended to remove this inconsistency. Likewise, Section 49(e) prohibits the cutting of trees and plants, the trimming of branches, the extraction of bark or resin, or otherwise causing damage to national forests in any other way. The broad provision of Section 25(1) has given all this power to the institution of the FUG subject to operational planning. However, in practice, it is the DoF which issues the license for extracting resin in community forests as well.

Rule 31(f) of the Forest Regulations 1995 curtails the rights of FUGs by prohibiting the extraction or transportation of rocks, soil, boulders, pebbles, sand, and so on from community forests. This clause is apparently inconsistent with the definition of forest products under Section 2(c) and Section 25(1), which gives absolute rights to the FUG with regard to forest products.

The notice issued by HMG following Rules 12 and 13 of the Forest Regulations 1995 prohibits the cutting, transportation, and foreign export of 'chanp' (*Michaelia champaca*,) 'khair' (*Acacia catechu*) and 'sal' (*Shorea robusta*). As the cutting of these forest products is prohibited by government notification, many FUGs will have to wait for a government decision permitting the cutting of these trees in community forests. The government's power under Rules 12 and 13 is too broad and is not subject to any conditions. Once a notice prohibiting the cutting, collection, selling, distribution, or transportation of forest products is issued, FUGs will have no option except to comply with the notice. Rules 12 and 13 need to be amended to make them consistent with Section 25 of the Forest Act. As they currently read, they are apparently beyond the legal authority of this section.

The Act provides a penalty provision for FUG members who violate the operational plan (Section 29). The FUG is entitled to penalise its members. However, where encroachment or illegal work is carried out by non-members, the Act seems ambiguous and leaves room for debate about the legal implications. Some legal experts argue that offences and penalties related to national forests provided for in Section 50 will apply.

If the DFO withdraws a community forest from an FUG, FUG members can appeal to the regional forest director and his decision will be final. No provision has been made for access to a court of law. As the DFO and the regional forest director are both employees of the MFSC, it is very unlikely that their decision would be unbiased. This perhaps violates the principle of natural justice as well. Provision for appeal at a court of law is necessary. This issue needs to be considered because the DFO takes the decision to withdraw the community forest based on a report prepared by his/her junior staff member. Thus, the investigation is carried out by a junior, usually non-gazetted, staff member whose technical expertise could easily be questioned. Finally, the regional forest director, an employee of MFSC, hears the appeal. This is a very good example of a situation where sectoral biases could easily take priority over FUG concerns. The DFO's authority to withdraw a community forest needs to be made fair, impartial, and above all consistent with the principles of natural justice.

Section 27 of the Act empowers the DFO to withdraw a community forest from the FUG if, among other things, the FUG takes any action that affects the environment to a significant

degree. The Act and Regulations do not define "significant effect on the environment." This condition seems to have been included in the Forest Act simply to give more power to government officials to control the FUG in an unreasonable way. Such a condition should be included in the Act, but it must be defined clearly. Otherwise, it could unreasonably restrict FUGs and the powers of the DFO could be misused.

Regarding the sales of forest products through an auction, Rule 66 of the Regulations gives the director general the authority to auction such forest products if the value does not exceed 2.5 million rupees, and gives the DFO the authority if the value does not exceed 500,000 rupees. Thus, any amount of sale by auction is also under the jurisdiction of the DFO. It is debatable whether this provision conforms with the objectives of the Act. This provision certainly limits the power to which an FUG is entitled as a legal entity and it is very like to create conflicts in the future.

Although Rule 67 of the Forest Regulations empowers the MFSC to develop and issue the necessary manuals for the purpose of fulfilling the objectives of the Regulations, the Operational Guidelines issued by the Department of Forests, Community and Private Forest Division in 1995 do not quote the Forest Act. The Operational Guidelines issued in 1995 were not issued under the Regulations. However, as already mentioned, they limit various powers of the FUGs. The MFSC needs to make sure that the Operational Guidelines do not limit the powers of FUGs provided by the Act and Regulations and that they are consistent with the same.

HMGN issued community forestry directives in 1995 by exercising the power conferred by Rule 67 of the Forest Regulations 1995. Section 12 of the directive stipulates that the DFO must depute a technical employee, of at least non-gazetted first class level, to the area where it is claimed that the FUG has been unable to work according to the work plan, has done something that has had a significant adverse effect on the environment, or has not complied with the Act, the Regulations, and the conditions prescribed by HMGN. The directive states that an on-the-spot inspection must take place and action must be taken on the basis of the report prepared by that employee. The Forest Regulations need to be amended to delegate this authority to make inspections to an independent expert and/or a group of experts, which should include one representative from the DFO, one from the relevant VDC, and an independent expert.

The Forest Act provides absolute discretion to the FUGs in relation to sale of forest products from the community forest, but the MFSC issued a circular in April 1996 stating that without fulfilling the demand of the local community and adjacent districts, an FUG cannot sell forest products in other places. If the community does not consume the forest products, they are permitted to sell the product within the district. Only if the products are not consumed or purchased in the district are they allowed to be taken outside the district with the permission of the DFO. Some experts view this as contravening the Forest Act, and maintain that the powers and functions entrusted to FUGs by the MPFS have been limited by the Forest Act, and that the powers and functions entrusted by the Act have been limited by the Forest Regulations and government notices, and that the DoF's circulars are even more limiting.

Contradictions Between Forestry and Decentralisation Laws

Members of local government mistakenly believe that forests within the area of a VDC or DDC are the property of that VDC or DDC. Section 17 of the Forest Act states that except when any right or facility has been obtained through a permit or a license, or in any other way, from HMGN or an authority empowered by HMGN, no person shall be entitled to any right or facility of any type in national forests. Similarly, Section 68(1)(c) of the LSGA stipulates that

the forest granted by the prevailing forest laws and HMGN are the property of the VDC. Further, the VDC can only dispose or sell its property with the permission of HMGN.

Contradictions within forestry laws

- The language used in Section 25(1): "The DFO may hand over the forest."
- The DFO may direct the FUG not to implement the work plan (Section 26[2]).
- No definition of what constitutes "significant effect on the environment" (Section 27[1]).
- Discretionary power of DFO is unreasonable and can be misused.
- Lack of provision for appeal against the decision of regional forest director violates the principles of natural justice (Section 27[2]).
- No provision of penalty for encroachment on a community forest by a person who is not a member of the community forest user group (Section 29[5]).
- The provisions of Section 49 (d)(e) and Rule 31 are against the spirit of Section 25(1) and the broad definition of forest products under Section 2(c).
- Rules 27(g), 29(2) of the Forest Regulations and 2.2.6 of the Operational Guidelines relating to bonds are unnecessary and against the spirit of the Act.
- Rules 12 and 13 as well as different notices issued by HMG are apparently beyond the legal authority of Section 25 of the Forest Act.
- No auction right to FUGs (Rule 66).
- Forest minister's circular of April 1996 is against the spirit of the Act (Section 25[1]).
- Only possession, no ownership rights to FUGs (Section 67).
- Forest Regulations 1995 seem to be impeding the objectives of the Act itself.

The LSGA stipulates that natural heritage is the property of the VDC. Natural heritage usually includes forests, lakes, ponds and rivers.

Sections 215 and 218 of the LSGA stipulate that any proceeds accrued from the sale of river sand, stone, concrete, soil, driftwood, and the bone, horn, feather and skin of any wildlife which is not prohibited by prevailing Nepali laws, go into the DDC fund. These provisions violate the definition of forest produce under Section 2(c) of the Forest Act, which includes rock, soil, stone, concrete sand, birds, wildlife, and their derivatives. Section 25(1) of the Act empowers the FUG to sell, distribute, or use such forest products by independently fixing their prices.

Because forestry legislation bypasses the political tiers of the VDC and the DDC, these institutions could be displeased because they do not have funds, while the FUG may have plenty of money for development work.

Although VDC members may also be FUG members and may cooperate with the CF programme, if the Decentralisation Act is followed fully and to the letter, the CF programme could run into political trouble (Joshi 1997) with various conflicts arising.

Awareness and training to bring about attitudinal change among VDC and DDC representatives would be useful, since in reality, FUGs, VDCs, and DDCs depend on each other and work towards common goals.

Confusion also arises from dissimilarities in the language used by the LSGA and the Forest Act 1993. The LSGA gives DDCs and VDCs essentially unchallenged authority over UGs, their decision-making procedures, and their project implementation. Rule 87 of the DDC (Working Arrangement) Regulations states that projects to be executed with the participation of the people will have to be implemented through UGs and under the direction of the DDC. Similarly, Rule 91(2) stipulates that the district development office heads will have to follow the directions of the DDC when planning, implementing, monitoring, and evaluating the district development plan. There is a considerable difference between FUGs registered under the Forest Act and UGs set up under the LSGA. However, while the DFO is under the DDC, maintaining the autonomy of FUGs and avoiding conflicts will be very difficult. This issue needs to be taken up by national decision-makers in the near future.

Section 33(l) of the LSGA vests the right in the VDC to initiate and decide cases relating to the pasture, grass, and fuelwood of the village development area from the date of notification published in the Nepal Gazette. However, the Forest Act does not provide such a right to the VDC. Pasture and grass outside community forest areas may not create conflicts, but such resources within community forests could create various problems. Hearing and disposing of cases under the Forest Act regarding fuelwood, which is a forest product, is under the authority of the DFO when the value of the forest product is less than Rs. 10,000, and offenders are punishable with imprisonment for one year.

Contradictions between forestry and decentralisation legislation

- Misconceptions among members of local government that forests within the area of VDC/DDC are the property of the VDC/DDC.
- Section 17 of the Forest Act stipulates that no person shall be entitled to any right or facility of any type in national forests.
- Section 68(1)(c) of the LSGA stipulates that the forests granted by the prevailing forest laws and HMG are the property of the VDC.
- The LSGA stipulates that natural heritage, which includes forests, lakes, ponds and rivers, is the property of the VDC.
- Section 218 of the LSGA stipulates that monies accrued from the sale of sand, stone, concrete, soil, and so on become DDC funds. This violates the definition of forest products under Section 2(c) of the Forest Act.
- If the Decentralisation Act is followed to the letter, the CF programme may be in trouble.
- There is confusion from dissimilarities in the language used by the Forest Act and various laws related to decentralisation.
- It will be difficult to maintain the autonomy of FUGs and avoid conflicts as long as the District Forest Office is under the DDC.
- Section 33(l) of the LSGA empowers VDCs to hear complaints relating, among other things, to pasture, grass and fuelwood, but the Forest Act does not provide such a right to VDCs.

Contradictions Between the Forest Act and Other Laws

Section 4 of the Public Roads Act 1974 empowers the government to acquire any land for the construction, development, and improvement of public roads in accordance with prevailing Nepalese law relating to land acquisition. Similar provisions are also made in the Water Resources Act 1992, the Electricity Act 1992, and much other development-related legislation. Section 3 of the Land Acquisition Act 1977 empowers the government to acquire any amount of land for the sake of public welfare by providing compensation. Further, the Department of Roads may order the taking of the necessary quantities of soil, stone, or sand from any land adjacent to a road for construction, repair, and maintenance of roads. If the taking of stone, sand, or soil destroys crops, trees, plants, or anything else, the owner is to be compensated. An FUG with few negotiating skills and little comparative strength is very unlikely to receive the appropriate compensation.

The Nepal Mines Act 1966 has vested the ownership of any minerals (whether located, found, or discovered) on private land in the government. A mineral is defined as any kind of natural material which can be extracted from the earth except petroleum. This definition is so broad as to include rock, sand, soil, stone, and anything else that could contain minerals. At present the Department of Geology and Mines and the DDCs force FUGs to give such areas on lease, except where FUGs are strong enough to resist district level political pressure. In most cases, FUGs are forced to give up these forest products either to the DDC or to the Department of Mines.

The Soil and Watershed Conservation Act 1982 (SWCA) has provisions for watershed declaration that conflict with the Forest Act. The SWCA empowers the government to designate protected watershed areas and to entrust the Watershed Conservation Officer (WCO) with extensive powers to administer such sites (Section 3, SWCA). The designation of a watershed area gives extensive governmental control over the chosen locality, as the WCO has the authority, *inter alia*, to,

- construct check-dams,
- undertake torrent control,
- improve irrigation channels,
- protect water courses and take up other necessary activities of erosion and landslide control,
- protect vegetation in landslide-prone areas and undertake afforestation programmes,
- direct the cultivation of specified crops, and
- regulate any other agricultural practices pertinent to soil and watershed conservation (Section 4, SWCA).

Where necessary, the WCO may confiscate privately owned property (Section 14, SWCA). Although the landowner is entitled to compensation, as assessed at market value rates (Section 8, SWCA), the impact of this action upon family and community life remains unaccounted for. The SWCA needs to be reviewed in light of community forest related legal provisions and amended to become consistent with the Forest Act.

The National Parks and Wildlife Conservation Act is not clear about wildlife in community forests and concentrates on the protection of wildlife within national parks and

wildlife reserves (Amtzis, 1995). This is likely to create conflict in the near future as wildlife increases in community forests.

The MFSC should make legal arrangements to entrust FUGs with harvesting wildlife in community forests. If the ministry is serious about increasing wildlife in community forests, it should develop a sustainable harvesting strategy. If the Department of National Parks and Wildlife Conservation can permit hunting in buffer zones, the DoF should be allowed to do so in community forests. Existing legislation may not be enough for this purpose. The MFSC should consider enacting endangered species protection legislation to ensure, among other things, the sustainable harvesting of those plant and wildlife species that are neither endangered nor vulnerable.

Section 10 of the Environment Protection Act 1996 empowers the government to designate any area as a conservation area if it contains biological diversity, rare wildlife, rare plants, or places of cultural and historical importance, and is considered extremely important from the point of view of environment protection. The government is also empowered to prohibit all kinds of activities in such conservation areas. Many FUGs operate in areas containing rich biological diversity and rare plants and a few community forests contain rare wildlife as well. This provision, which is not subject to community forest laws, will come into conflict with the Forest Act once the Ministry of Population and Environment starts delineating conservation areas.

The Forest Act explicitly mentions that in matters covered by the Forest Act the Regulations shall be applied accordingly, and in other matters the provisions of prevailing law shall be applicable. No such provisions exist in the LSGA. In places where the Forest Act and Regulations are inconsistent with the LSGA, forestry legislation should prevail. Lawmakers do not want local government or decentralisation legislation to prevail over forestry legislation. However, in relation to the Nepal Mines Act it is unclear whether the Forest Act would prevail because this Act includes a similar provision to the Forest Act. Nevertheless, the Supreme Court has stated that the Forest Act 1961 is a special act that delineates provisions for forest management; therefore the Forest Act should prevail in respect to forest management. The Supreme Court has specifically decreed that whatever is found within the government forest is within the jurisdiction of the Forest Department, so driftwood is under the Forest Department's jurisdiction. Only driftwood outside forest areas is under DDC jurisdiction (Bir Bahadur Lama v. Ministry of Forest and Soil Conservation, 1997). However, Section 48A of the Forest Act, included by the first amendment to the Act in 1998, says that the DFO must deposit 50% of the amount received from the sale of unclaimed timber and driftwood in the DDC fund and the rest must be deposited in the consolidated fund. It further requires that 20% of the 50% deposited in the DDC fund must be spent on the conservation of forests.

Contradictions between the Forest Act and other legislation

- The following legislation empowers the government to acquire any land to fulfil the objectives of the Acts.
  Section 4 of the Public Roads Act, 1974
  Section 16 of the Water Resources Act, 1992
  Section 21 of the Electricity Act, 1992
  Sections 3,4 and 25 of the Land Acquisition Act, 1977
- The Nepal Mines Act 1966 has vested the ownership of any minerals in HMGN.
- The provisions relating to declaration of a watershed area under the Soil and Watershed Conservation Act 1982 are contradictory to the Forest Act.
- The National Parks and Wildlife Conservation Act 1972 is silent about the wildlife within community forests.
- Section 10 of the Environment Protection Act 1996 empowers the government to designate any area as an environmental conservation area. This provision will come into conflict with the Forest Act once the Ministry of Population and Environment starts delineating conservation areas.
- Forestry legislation prevails over other local government legislation.