

# THE FORESTRY CRISIS AS A CRISIS OF THE RULE OF LAW

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## INTRODUCTION

The abstract global ideas of sustainable development<sup>1</sup> and of the rule of law<sup>2</sup> meet in the forests of the tropics, where the absence of viable community forest management institutions is driving deforestation and, therefore, the larger legal and ecological stability of the region. This interaction needs to be better understood by rule of law theorists seeking to discover and implement proper legal structures for development.<sup>3</sup>

The rule of law effort can be seen either narrowly, as a “thin” program focused on improving the mechanics of courts as well as legislative and administrative bodies, or as a “thick” conception rooted in the belief that such improvements will lead toward a stronger civil society and democracies rooted

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1. UNITED NATIONS, HUMAN DEVELOPMENT REPORT 2003: MILLENNIUM DEVELOPMENT GOALS: A COMPACT AMONG NATIONS TO END HUMAN POVERTY 10-11 (2003).

2. See generally David Kennedy, *Laws and Developments, in* LAW AND DEVELOPMENT: FACING COMPLEXITY IN THE 21ST CENTURY 17 (John Hatchard & Amanda Perry-Kessaris eds., 2003).

3. *Id.* at 20-22.

in the human rights tradition.<sup>4</sup> Such improvements are assumed to be integral to sustainable development—the process of improving the welfare of poor nations without damaging their long-term ecological sustainability.<sup>5</sup> The tools developed for use in the international rule of law effort can be usefully applied to problems of sustainability inherent in the deforestation crisis.

In this Note, I show how the process of colonial state consolidation in the tropics has led to a juridical state but an empirical vacuum, as it has replaced complex indigenous forest management systems with simplified central state governments geared toward exploitation. As the nations of the tropics now attempt to restore control to forest communities and manage for sustainability, they are confronted with what is, in essence, a rule of law problem: how to either rebuild or create a legal and social management system in a political and social space of considerable disruption.

After generations of exploitation by undemocratic colonial and post-colonial states, the world's forests are in grim shape. One-third of the world's surface (3.54 billion hectares) is forested; an average of 1.3 million hectares was cleared annually between 1980 and 1995.<sup>6</sup> At this rate of harvest, few tropical forests will survive intact far into this century.<sup>7</sup> Regionally, the data are stark: Haiti, for instance, lost half of its remaining forests in the 1980s, the Philippines forty percent, and Ecuador twenty percent.<sup>8</sup> This loss is catastrophic, as it increases flood frequency, speeds soil erosion, displaces communities, foregoes the economic possibilities inherent in sustainable forest management, and presents major threats to global biodiversity.<sup>9</sup> The result is a downward ratchet of increasing poverty and degradation as poor communities must further degrade surrounding forests to survive, kleptocratic governments capture forest wealth for themselves through corrupt concession-awarding processes, and the chances of forest recovery grow ever slimmer.

While the causes of deforestation are complex and country-specific, similar drivers appear globally. The deforestation problem can be disaggregated into two separate but related crises: one of abusive central government and the other of abused villagers and peripheral districts. In the least democratic tropical

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4. Erik G. Jensen, *The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 336, 338-40 (Erik G. Jensen & Thomas C. Heller eds., 2003).

5. UNITED NATIONS, *supra* note 1, at 10-11.

6. Ian R. Noble & Rodolfo Dirzo, *Forests as Human-Dominated Ecosystems*, 277 SCIENCE 522, 522 (1997).

7. Gary B. Hartshorn, *Ecological Basis for Sustainable Development in Tropical Forests*, 26 ANN. REV. ECOLOGY & SYSTEMATICS 155, 156 (1995).

8. WILLIAM ASCHER, COMMUNITIES AND SUSTAINABLE FORESTRY IN DEVELOPING COUNTRIES 3 (1995).

9. *Id.* at 5-8; George M. Woodwell, *The Functional Integrity of Normally Forested Landscapes: A Proposal for an Index of Environmental Capital*, 99 PROC. NAT'L ACAD. SCI. U.S. 13,600, 13,600 (2002).

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states, dictatorial governments can award lucrative forestry concessions to political allies and foreign corporations without local checks. In the Philippines under President Ferdinand Marcos, for instance, the forests were treated as resources to be liquidated.<sup>10</sup> Logging companies were encouraged to clear-cut forests in the name of efficiency.<sup>11</sup> Similarly, the Burmese ruling junta invested heavily in destructive logging in mountainous border areas both as a source of profit and as a way of controlling rebellious minority groups in these outlying regions.<sup>12</sup> The forest is seen as a source of capital and political control, not as a natural resource worth preserving. At the other end of the crisis, local communities may be deeply concerned about the forest as a resource but may nonetheless participate in its destruction as a result of economic and social factors beyond their control. Their helplessness results from a century or more of exploitation by central governments motivated by the possibility of political and economic gain that have devoted themselves to limiting community control over forest resources and to dismantling traditional patterns of shifting agriculture.<sup>13</sup> This effort, combined with massive population increases in hinterland areas, has resulted in a syndrome of poor communities, stripped of traditional forest management institutions and under considerable pressure from migrants from other areas.

The deforestation problem, then, is a problem of the rule of law at both the national and local ends of the scale. Processes of state consolidation first destroyed the legal and demographic reality that sustained forests in the pre-colonial era and then created a new political economy centered on forest exploitation. Because massive forest loss threatens existing state structures through its attendant social and ecological destabilizing effects, it demands urgent reform of these structures. In short, the survival of the forests and the survival of the state are two faces of the same coin.

In recent years, community-based forestry has emerged as a theoretical answer to this problem. Although the form of this global participatory conservation effort varies from nation to nation, its focus is essentially on removing power from the centralizing state and restoring it to local levels, rebuilding the rule of law destroyed by the colonial exploitation effort.<sup>14</sup>

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10. Marites Dañguilan Vitug, *Forest Policy and National Politics*, in *FOREST POLICY AND POLITICS IN THE PHILIPPINES: THE DYNAMICS OF PARTICIPATORY CONSERVATION* 11, 12-15 (Peter Utting ed., 2000) [hereinafter *FOREST POLICY AND POLITICS IN THE PHILIPPINES*].

11. *Id.* at 14.

12. Raymond L. Bryant, *The Greening of Burma: Political Rhetoric or Sustainable Development?*, 69 *PAC. AFF.* 341, 353-54 (1996).

13. ASCHER, *supra* note 8, at 27-29. See generally NANCY LEE PELUSO, *RICH FORESTS, POOR PEOPLE: RESOURCE CONTROL AND RESISTANCE IN JAVA* (1992) (discussing the multicentury effort to centralize forest control in Java and settle shifting cultivator communities).

14. For discussions of community-based forestry in various contexts, see ASCHER, *supra* note 8; JEANETTE CLARKE, *BUILDING ON INDIGENOUS NATURAL RESOURCES MANAGEMENT: FORESTRY PRACTICES ON ZIMBABWE'S COMMUNAL LANDS* (1994); Peter

Community-based forestry reacts against a century of colonial discourse, in which destructive local communities were presumed to be the problem, and instead considers the use of local knowledge and management systems to be the solution.<sup>15</sup> The challenge for rule of law efforts in this area is to design a regime that encourages the development and maintenance of sustainable local forestry management practices without losing the benefits of programmatic policy planning at the state level. As William Ascher explains in his comprehensive overview of this area, “sustainable forestry activities need to be encouraged and disciplined through nongovernmental collective action, aided by supportive, rather than domineering, governmental actions.”<sup>16</sup>

But the problem is, in fact, even more complex. After years of abusive state rule, local institutions that once sustainably managed local forests have been vitiated. In many cases, the very biophysical context of these institutions is gone, washed away by changing land use, shifting populations, new economic demands, and novel legal landscapes. Moreover, even surviving management practices may nonetheless be undemocratic, favoring local village elites over the very poor, minority groups, and women. Attempting to remedy these deficiencies through state intervention risks creating “Potemkin village” management systems, in which communities merely become arms of a central state that makes all major policy decisions. And of course, any framework must be responsive not only to the political reality of the nation but also to the ecological reality of the forests. The rule of law, in a forestry context, must be scaled to both human and natural parameters. Thus, restoring a sustainable network of community management systems is both central to the maintenance of the rule of law in developing countries and an enormously complicated structural problem.

In this Note, I examine some aspects of this problem. I begin, in Part I, with a theoretical overview of the process and goals of forestry institution-building, with a particular emphasis on the importance of creating institutions that develop and maintain sustainable social and personal norms. In Part II, I discuss some of the aspects of ecological scale that must be accounted for in any viable forestry rule of law program. In Part III, I discuss how pre-colonial forestry institutions were systematically dismantled by colonial and post-colonial states, creating an empirical vacuum in the name of juridical state consolidation. Part IV examines community-based forestry programs, largely in South and Southeast Asia, with a few comparative examples. This discussion, rooted in the rule of law institutional analysis developed in Part II,

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Utting, *Towards Participatory Conservation: An Introduction*, in *FOREST POLICY AND POLITICS IN THE PHILIPPINES*, *supra* note 10, at 1-3; Rachel Wrangham, *Changing Policy Discourses and Traditional Communities, 1960-1999*, in *WHICH WAY FORWARD? PEOPLE, FORESTS, AND POLICYMAKING IN INDONESIA* 20 (Carol J. Pierce Folger & Ida Aju Pradnja Resosudarmo eds., 2002) [hereinafter *WHICH WAY FORWARD?*].

15. Wrangham, *supra* note 14, at 23-25, 27-29.

16. ASCHER, *supra* note 8, at 25.

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demonstrates how the history of colonial exploitation limits and shapes this new effort. In this Part, I examine to which “communities” power should be devolved, how much power should be vested in them, and their likely capacity to manage such power wisely. I conclude with general suggestions for combining rule of law and sustainable development goals in the forestry context, emphasizing the importance of a sustained effort to rebuild a deep and broad system of forestry management at both local and national levels.

#### I. CENTRAL AND LOCAL INSTITUTIONS IN FOREST MANAGEMENT: A THEORETICAL GROUNDING

The central insight of the community-based forestry effort is that the law enforced by a centralized state can be only one component of a broader forestry solution. This is both because of the dangers of centralization, which include corruption and lack of democratic representation, and because of the benefits of local control. These benefits include a better sense of local forest needs and conditions, potentially more focused enforcement capabilities, and some possibility of spreading forest wealth more broadly. But building this local capacity, particularly after generations of poor central management, is not by any means easy. It requires expanding the rule of law from a centralized veneer into a country-wide system of forestry institutions and organizations. As such, it demands a considerable theoretical understanding of how legal and social institutions can be created and maintained within the matrix of national law.

A successful forestry rule of law system should further the development of sustainable local management systems and maintain a rich interaction between local and national managers. The central state must be able to ensure that local management systems fit into broad landscape conservation and exploitation plans. Local managers must have both sufficient autonomy to implement local goals and sufficient control over the central government to prevent unwanted timber sales and other large-scale landscape plans. At its root, such a system is designed to foster the development of personal and social norms that will inform forest protection systems. In this Part, I develop the theoretical underpinnings of this model, tracing the interaction between laws, customs, conventions, and norms in forestry management.

This interaction can be most clearly seen in work by Cardenas et al., who, through carefully designed field studies conducted in forestry-dependent communities in Colombia, demonstrate that levels of simulated deforestation actually *increased* after a moderately enforced forestry law was implemented.<sup>17</sup> This work provides a small window into the central paradox explored in this Note: how state intervention in the name of consolidation of forest control in fact disrupted and diminished the rule of law in the forests. The Cardenas group

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17. Juan Camilo Cardenas et al., *Local Environmental Control and Institutional Crowding-Out*, 28 *WORLD DEV.* 1719, 1727-31 (2000).

designed a forestry game to be played by the villagers, in which each villager or group of villagers could determine the intensity of firewood cutting in each round of the game.<sup>18</sup> Midway through the game, one of two conditions was imposed: either a government firewood quota with low enforcement or open communications between players.<sup>19</sup> Although woodcutting initially dropped when the quota was imposed, it rapidly rose again after players realized how lax enforcement was, rising *above* pre-quota levels; “the erosion of the influence of the regulation [was] unmistakable.”<sup>20</sup> The group that was able to build its own management structure through communication, by contrast, was able to make “more efficient choices,” harvesting less frequently but capturing more economic benefit in a way that was “relatively stable” across rounds.<sup>21</sup>

There are three important conclusions to be drawn from this experiment. First, communities that are given the opportunity, information, and incentive to self-regulate can do so successfully and sustainably. Second, regulations imposed by the state without adequate enforcement rapidly become ineffective. Third, and perhaps most importantly, the effects of failed state programs are substantial, as the presence of the ineffective regulation may undermine the rule of law at both the state and community levels. The higher level of cutting post-quota, a level that exceeded initial rates, suggests that a bad state institution can disrupt a good local institution by triggering the “crowding-out of socially desirable behavior.”<sup>22</sup> In effect, by shifting individuals’ focus from the impacts of their actions on the community to the possibility that they will be caught by an (ineffective) state, the state quota vitiates community institutions maintained by norms of community participation and mutual concern. This negative interaction is of enormous importance to the forestry rule of law project, as it suggests that state and local systems can interact in either negatively or positively reinforcing ways. A state law system can encourage the development and maintenance of local systems, or it can first crowd out and then vitiate those systems.

This result is consonant with Max Weber’s analysis of the interrelationship between norms, conventions, customs, and laws. In Weber’s framework, a law is an order backed by a “coercive apparatus”—the presence of persons whose “special task it is . . . to apply specially provided means of coercion . . . for the purposes of norm enforcement.”<sup>23</sup> Thus, a state quota is certainly a law, but all laws need not be state based; laws arise wherever a specialized group within society devotes itself to enforcing them. But behavior, of course, depends much more on custom and convention than on law because most people act “in a way corresponding to legal norms,” not “out of obedience” to the legal obligation

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18. *Id.* at 1720.

19. *Id.*

20. *Id.* at 1727-28.

21. *Id.*

22. *Id.* at 1731.

23. MAX WEBER, *ECONOMY AND SOCIETY* 313 (1968).

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but “either because the environment approves of the conduct and disapproves of its opposite, or merely as a result of unreflective habituation to a regularity of life that has engraved itself as a custom.”<sup>24</sup> By shifting the social environment from one based in customary forest practices, the state in Cardenas’s experiment made “unreflective” adherence to custom impossible. Instead, actors had to consider their place based not in a local system of approval or disapproval, but in a system of coerced legal enforcement. But in the absence of effective enforcement, the law lost much of its force. Its imposition, however, had irrevocably altered the earlier unreflective adherence to custom and the environmental boundaries on conduct by introducing a new system of force into what had been an environment of informal joint control.

The group that was allowed to communicate, by contrast, was able to construct a new “convention,” which exists “wherever a certain conduct is sought to be induced without . . . any coercion, physical or psychological, and . . . without any direct reaction other than the expression of approval or disapproval on the part of those persons who constitute the environment of the actor.”<sup>25</sup> While custom is seen by Weber as an essentially unreflective uniform process, conventions are maintained by the larger social environment through a conscious process of discussion and social sanction or approval.<sup>26</sup> A convention may be just as effective as a legal obligation, “if not more,” because “the individual depends on his environment for a spontaneous response not guaranteed by any earthly . . . authority.”<sup>27</sup> While convention can mature into law as norms gather specific enforcement authorities, it need not do so.<sup>28</sup> In the Cardenas experiment, it was mutually agreed upon convention—not law—that ultimately optimized forestry activities. This result indicates that legal reformers must be particularly sensitive to the ways in which proposed legal structures may shape the broader structure of social conventions and norms. The central legal structure may be best thought of as a sort of matrix that shapes local institutions.

The manner in which this shaping may occur can be viewed through Avner Greif’s work, which provides some insight into the substructure of conventions and legal systems. Greif sees both as manifestations of institutions, entities that “generate[] a regularity of (social) behavior” through interacting systems of “rules, beliefs, norms, and organizations.”<sup>29</sup> This perspective fuses agency and structural perspectives on institutional dynamics, recognizing that individuals

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24. *Id.* at 312.

25. *Id.* at 319.

26. *Id.* at 319-20.

27. *Id.*

28. *Id.* at 323.

29. AVNER GREIF, INSTITUTIONS AND THE PATH TO MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE, ch. 2, 2 (2006) [hereinafter GREIF, LESSONS FROM MEDIEVAL TRADE]. See Avner Greif, *Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders*, 49 J. ECON. HIST. 857 (1989), for an application of Greif’s model.

both shape institutions and are shaped by them.<sup>30</sup> The focus, however, is on the underlying systems of motivations and beliefs that lead individuals to behave in ways that, “at the aggregate level, contribute to creating the structure itself.”<sup>31</sup>

Greif prompts us to examine two motivational drivers: “beliefs about the behavioral responses of others” and “internalized beliefs” (or norms).<sup>32</sup> A behavioral belief is one about the “behavior of others in various contingencies,”<sup>33</sup> essentially a prediction of how people around one will act based on past experience and knowledge about legal and social structure. An internalized belief, or norm, is one “regarding the structure and details of the world we experience . . . and the implied relationship between actions and outcomes.”<sup>34</sup> Acting together, these beliefs explain much of institutional structure (both legal and conventional). An internalized belief both shapes personal behavior and, through the transmission and discussion of such beliefs among communities, the behavior of a community generally. Internalized beliefs, which set forth what are essentially internal theories of how the world works, obviously shape the ways in which we expect others to behave. The behavior of others, however, may deviate from our expectations, thereby reshaping both behavioral and internal beliefs. These beliefs, operating in social interactions, shape the institutions that groups of people are likely to form and to tolerate.

This attention to motivation and belief sheds light on the Cardenas results. We can now see that a poorly designed state law, with limited enforcement, initially changes behavioral beliefs: A person might believe that others will behave in conformity with the law. In the absence of enforcement, however, individual behavior soon turns largely on internalized beliefs about the value of the forests and of obeying the law. As some individuals begin to exceed the law’s quotas, the behavioral beliefs of members of the community shift; many now anticipate that other people will break the law. This widespread law-breaking in turn does violence to internalized beliefs; as others benefit from the forest cutting (even at the expense of community well-being), personal norms come under the stress of potential profit. A Weberian convention is erased as the imposition of the state law first disrupts existing institutions (and the beliefs that sustain them) and then leads to the development of new beliefs: that others will violate the law and that such violation is appropriate because cutting in the forest is now not an assault on the community, but a mere act of disobedience against an absent and distant state.

Weber’s and Greif’s analyses provide a strong theoretical basis for understanding the ways in which state interventions have disrupted community

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30. GREIF, LESSONS FROM MEDIEVAL TRADE, *supra* note 29, at 13-27.

31. *Id.* at 26-27.

32. *Id.* at 3, 6-7, 8-9.

33. *Id.* at 9.

34. *Id.* at 8.



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forestry institutions and suggest important factors to consider in rebuilding these institutions. These factors include the degree to which state intervention can vitiate local institutions, the importance of maintaining and developing local norms and beliefs around forest protection, and the superiority of well-informed local institutions to poorly enforced national laws in forest protection. Considered jointly, this is a strong argument for a community-based element in any forestry plan. However, an attractive theory, unmoored from pragmatic ecological, political, and sociological considerations, can easily do substantial harm. In the remainder of this Note, I consider these complicating factors.

## II. ECOLOGICAL LIMITATIONS ON FORESTRY RULE OF LAW MODELS

Although this Note's focus is on human, rather than biophysical, realities, it is worth pausing here to assess the sobering ecological limitations on combining forestry law with truly sustainable development. A forestry rule of law regime may have a number of goals, not all of which may be mutually compatible. Such goals may include the preservation of national forest biodiversity, the maintenance of forest cultures and cultural knowledge, national economic growth, and regional economic growth. The trouble is that for many countries, a perceived need for short-term profit may compromise all these goals. While forests provide significant long-term national economic benefits through the provision of free ecosystem services, including clean air, clean water, biodiversity maintenance, and soil erosion control,<sup>35</sup> poor nations are more likely to see the short-term profits in liquidating the forests. Indeed, logging does present one of the most profitable ways of using tropical forests in the short term.<sup>36</sup> The presence of this profit incentive puts significant stress on any legal/social infrastructure in the forestry sector. As discussed below, with the destruction of most traditional management systems, any new system will essentially have to be generated from scratch under difficult conditions.

If such a system is to preserve even a modicum of the diversity of old-growth tropical forests, it will have to include large preserved areas as regions of refuge for rare species.<sup>37</sup> Realistically, however, a great portion of the forests will be exploited to some degree. The challenge is to design systems that minimize the damage associated with this exploitation. Tropical forests provide a uniquely difficult ecosystem management problem. They are highly diverse, with many different tree species in any given area, and the trees often regrow very slowly.<sup>38</sup> As a result, logging can completely eliminate entire species from

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35. Hartshorn, *supra* note 7, at 161-63.

36. See Gary D. Paoli et al., *An Ecological and Economic Assessment of the Nontimber Forest Product Gaharu Wood in Gunung Palung National Park, West Kalimantan, Indonesia*, 15 CONSERVATION BIOLOGY 1721, 1721 (2001).

37. See Kamaljit S. Bawa & Reinmer Seidler, *Natural Forest Management and Conservation of Biodiversity in Tropical Forests*, 12 CONSERVATION BIOLOGY 46, 52 (1998).

38. Hartshorn, *supra* note 7, at 160-61.

the logged area because even relatively selective clear-cutting may remove all the individuals of that species.<sup>39</sup> Thus, timber management alone presents problems that may not occur in other forest types. Broader biodiversity concerns complicate the picture, as relevant patterns of biodiversity occur at scales ranging from the pattern of species and habitats in a landscape to the variation of individuals and ages within a species population to the distribution of genes within a given population of a species.<sup>40</sup> Logging practices can affect all levels of this diversity. As a forest begins to be logged, a once-continuous area becomes fragmented by logged areas and logging roads.<sup>41</sup> As the process continues, cutting directly changes the distribution and abundance of tree species, which leads to similar changes in the distribution of plant and animal species dependent on the existing forest structure.<sup>42</sup> With these shifts come basic changes in ecosystem function, as once shady areas become sunny, native species distributions shift, the composition of the forest floor changes, alien species migrate in along disturbed routes, and so on.<sup>43</sup> Although diversity loss increases with the intensity of the intervention, any use of the forest will set off these cascades of change, with only very limited use protecting all aspects of biodiversity.<sup>44</sup> Shaping interventions to fit within existing types and patterns of forest disturbances in relatively natural ecosystems is enormously difficult within such diverse ecosystems; indeed, melding biodiversity conservation and logging has been difficult even in structurally simpler temperate zone forests.<sup>45</sup> In tropical nations, where economic exigencies and government plundering have led largely to the thoughtless wholesale “mining” of forest resources,<sup>46</sup> developing the institutional and scientific capacity to build appropriate forestry systems is very difficult indeed.

What is clear is that tropical forests require large areas of minimal disturbance in order to preserve maximal biodiversity and sustain the ecosystem services—pollination, fresh water, carbon storage, and so on—that they provide. Coordinated logging in areas that have already been logged may serve to maintain core preserve areas if markets can be found for species that grow in these secondary forests.<sup>47</sup> Multiple use of forests, integrating some logging with the use of nontimber forest products (such as fruits and game) and ecotourism may also provide some economic gain at minimal ecological

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39. *Id.* at 157-58.

40. Francis E. Putz et al., *Tropical Forest Management and Conservation of Biodiversity: An Overview*, 15 CONSERVATION BIOLOGY 7, 8 (2001).

41. *Id.* at 12.

42. *Id.* at 12-16.

43. *Id.*

44. *Id.* at 17.

45. Bawa & Seidler, *supra* note 37, at 53.

46. Putz et al., *supra* note 40, at 8-9.

47. Bawa & Seidler, *supra* note 37, at 51.

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expense.<sup>48</sup> The central argument for the preservation of tropical forests, however, remains the maintenance of long-term ecosystem services. Massive deforestation may bring an economic boom to a narrow segment of society, but it leads rapidly to impoverishment, as without forest cover, topsoil vanishes, fuel wood becomes unavailable, forest fruits and animals become extinct, and water quality and quantity decline.

Because the effects of massive deforestation occur on a national level and coordinating a strategy to protect the forests requires substantial large-scale land-use planning to identify appropriate areas for reserves and various types of exploitation, the ecology of tropical forests appears to push away from community-based forest management. The benefits of central control, however, can only be realized if central planners are competent, disinterested, well informed, and supported by the communities they regulate. As discussed below, this is rarely—if ever—the case. Instead, a century of centralizing forest management has led to a massive wave of tropical deforestation. Worse, centralizing states have systematically attempted to strip control from local forest communities, with the effect of destroying the knowledge base that might allow us to sustainably manage tropical forests. The relationship between individual communities and their forests—the delicate network of institutions and norms discussed by Greif and Weber—has been fundamentally disrupted. The absence of these former institutions means that, on both the local and national level, few are likely to resist the economic pressures for short-term gains from deforestation.

The ecological reality, then, might be better addressed not through a narrow emphasis on central control, but rather through the creation of a rule of law that is both broad and deep. Well-educated national bureaucracies can establish broad strategic goals for regions while allowing communities within those regions to carry out and modify those goals as appropriate. The role of national government is to ensure that the many micro-level management decisions of local community governments aggregate into a coherent policy, not to mandate a policy in ways that disrupt and marginalize the community members who ultimately form the state/forest interface.

In the following Parts, I track the history of that interface, beginning with its disruption in the colonial period and continuing through modern efforts at reform.

### III. THE DISMANTLING OF TRADITIONAL INSTITUTIONS

Before introducing the grim history of forestry management in the tropics, it is important to explore the distinction between empirical and juridical statehood. The latter is simply the legal identity of a state—the presence of

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48. *Id.* at 51-52. For an economic analysis of gaharu wood, one potential nontimber forest product, see Paoli et al., *supra* note 36.

boundaries, a government, international recognition, and so on.<sup>49</sup> A state achieves concrete sociological importance, however, only in its empirical characteristics.<sup>50</sup> These include, as Weber wrote, how well the state is able to exert control over its population and accomplish its policy goals.<sup>51</sup> The two conceptions need not overlap; Africa's states, for instance, have maintained their juridical boundaries largely intact throughout the post-colonial period but often lack the empirical ability to provide basic services and control within those boundaries.<sup>52</sup> Indeed, the process of juridical consolidation may disrupt empirical statehood. This happened as colonial authorities, attempting to consolidate forestry control in the central colonial state, systematically dismantled and destabilized the subsidiary local institutions that had once managed forests. Centralized force came to ineffectually substitute for what had been a broad and deep network of interacting institutions. The result has been pervasive deforestation resulting from what has become a rule of law vacuum, with no relevant checks on capricious and profit-driven central power.

There is a dreary regularity to the story of colonial forestry practices. In country after country, bold colonial officials attempted to at last impose "scientific forestry" upon unenlightened natives who had somehow managed to survive in forested landscapes for hundreds of years. This Note focuses particularly on the situation in the vast tropical forests of Southeast Asia and the Indian subcontinent, but the pattern is not unique to the region. Throughout the tropics, colonial officials—recognizing both the economic value of the forests and the difficulty of controlling semi-nomadic forest dwellers—nationalized and centralized the forests. This effort, of course, led to massive cultural disruption and, in some cases, complete cultural extinction. State forestry efforts then generally led to gradually increasing forest exploitation, which became particularly acute in the post-colonial period as undemocratic regimes rapidly converted forests into profit in crony capitalism systems.

The Indian Forest Act of 1878 provides a typical instance and a particularly important one, as it established, in one fell stroke, central control over the forests and forest peoples of the vast subcontinent.<sup>53</sup> Debates over the law centered on the idea of local communities as being essentially opposed to forest preservation and incapable of conserving forests.<sup>54</sup> Customary use was to be sharply restricted, with the new Forestry Department only allotting traditional

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49. Robert H. Jackson & Carl G. Rosberg, *Why Africa's Weak States Persist: The Empirical and the Juridical in Statehood*, 35 *WORLD POL.* 1, 3 (1982).

50. *Id.* at 2.

51. *Id.*

52. *Id.* at 12.

53. Ramachandra Guha & Madhav Gadgil, *State Forestry and Social Conflict in British India*, 123 *PAST & PRESENT* 141, 145-48 (1989).

54. K. Sivaramakrishnan, *Colonialism and Forestry in India: Imagining the Past in Present Politics*, 37 *COMP. STUD. SOC. & HIST.* 3, 5-6 (1995).

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users a set quota of timber each year.<sup>55</sup> At the same time, however, the Forestry Department itself was to produce revenue for the empire.<sup>56</sup> This massive insertion of a central forest exploitation system led to Forestry Department control of nearly twenty percent of India's land area, with an attendant massive shift in native land rights and even the composition of the forests, as revenue-minded officials worked to transform diverse tropical forests into monocultures of profitable timber species.<sup>57</sup> Because state control could only be disputed by showing, through legal means, that forest land was in fact already in use, the takeover from preliterate communities was essentially complete.<sup>58</sup> Long lists of species were reserved for state exploitation, often cutting off long-settled village practices.<sup>59</sup> State foresters throughout maintained that villagers simply could not be trusted to manage forests; they were, the state insisted, intent upon clearing forests for grasslands and therefore had to be controlled.<sup>60</sup>

The resulting social disruption was enormous. The hunter-gatherer peoples of the forest, who had survived into the beginning of the last century, were driven to extinction.<sup>61</sup> These peoples were once distributed across the subcontinent, living largely on forest resources and some minimal trade with agriculturists.<sup>62</sup> But the great diversity of tropical forests that makes such lifestyles possible comes with an attendant restriction: any given area of the forest contains many species, but few individuals of any given species. As a result, a large area is necessary for subsistence bands to find adequate numbers of the species they require at any particular time.<sup>63</sup> As the state took over the forests, these tribes found themselves confronted with sharp hunting and habitat restrictions as the state attempted to force them out of the forest.<sup>64</sup> The consequences were disastrous; the nomadic Chenchu people, for instance, found themselves reduced to serfdom on the farms of agricultural peoples.<sup>65</sup> Similarly, the Kadar people, now dependent on the mercy of the Forestry Department, essentially became servants of the state, deploying their knowledge not for cultural survival, but in order to guide state exploitation of their forest.<sup>66</sup> The nomadic Birhor tribe saw its population drop by nearly half in just ten years.<sup>67</sup>

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55. Guha & Gadgil, *supra* note 53, at 146.

56. *Id.*

57. *Id.* at 147.

58. Sivaramakrishnan, *supra* note 54, at 13-14.

59. *Id.* at 15.

60. *Id.* at 16.

61. Guha & Gadgil, *supra* note 53, at 148-51.

62. *Id.* at 148.

63. *Id.*

64. *Id.* at 148-49.

65. *Id.*

66. *Id.*

67. *Id.*

The Forestry Department also ended the traditional way of life of tribes that had depended on shifting cultivation. This practice is referred to as *jhum* in India,<sup>68</sup> but it is globally common in tropical forest systems. Tropical forest soil frequently becomes infertile when cleared but can be successfully farmed by shifting cultivators, who burn small areas of forests, thereby fertilizing the soil with ash, farm the area for a few years, and move on, allowing the original area to regenerate.<sup>69</sup> This practice was almost universally disfavored by colonial administrators; in India, it was wrongly believed to be “the most destructive of all practices for the forest” because it competed with timber production.<sup>70</sup> As a central component of forest agricultural systems, *jhum* was difficult to eradicate. Some tribes fled to other states outside of immediate colonial control,<sup>71</sup> while others rebelled directly.<sup>72</sup> Such efforts were ultimately unavailing; as the colonial state brought both military force and economic pressure on shifting cultivators, this ancient and sustainable way of life was largely abandoned.<sup>73</sup>

As the traditional conventions and laws relating to forest use were disrupted, communities reacted with a sense of despair throughout India. The nomadic Baiga believed that they stood on “sinful earth” when they became settled.<sup>74</sup> As the forests of the Gond people disappeared, they predicted that they were entering the age of Kaliyung, a time of darkness when their medicine would fail them.<sup>75</sup> They were right.

This pattern has repeated itself across Southeast Asia. In Sarawak, for instance, where the Brookes family managed the nation as a private concession, the state took control of all “unoccupied and waste lands” with the Land Order of 1863.<sup>76</sup> The Order converted native forest rights to leases granted by the state.<sup>77</sup> As the timber industry grew, the Forestry Rules of 1919 and 1923 emphasized exploitation and limited local “wasteful methods of cultivation” and “primitive methods of extraction of timber.”<sup>78</sup> Although a sufficient area of forest was to be maintained for local needs,<sup>79</sup> by 1940 all communal forests were essentially under state control; native groups had to apply for permits to

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68. *Id.* at 151.

69. *Id.*

70. *Id.* at 152 (quoting C.F. Muhafizi-Jangal (pseudo.), *Jhooming in Russia*, in *INDIAN FORESTER* 418-19 (1877)).

71. *Id.* at 152-53.

72. *Id.* at 152-53, 156.

73. *Id.* at 157.

74. *Id.* at 174.

75. *Id.*

76. Amarjit Kaur, *A History of Forestry in Sarawak*, 32 *MOD. ASIAN STUD.* 117, 127 (1998).

77. *Id.*

78. *Id.* at 129.

79. *Id.*

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conduct basic traditional activities.<sup>80</sup> By the end of colonial rule in Sarawak, the forest was essentially seen as an exploitation reserve, with the area of communal forests shrinking to one-sixth of what it had been at independence just twenty-nine years earlier.<sup>81</sup> Native land rights were essentially sacrificed to timber profit; in 1974, land tenure rights could effectively be erased for any “public purpose”—which was generally logging.<sup>82</sup> Thus, in Sarawak, as in India, state consolidation that began with pious conservation-based justifications rapidly devolved into an unchecked exploitative system. Local institutions and civil society structures that might have controlled exploitation were swept away.

Indonesia’s story is similar. Even under the Dutch East India Company in the 1600s, the emphasis was on territorial control and forest exploitation.<sup>83</sup> Over the centuries, the Dutch colonial state increasingly consolidated control.<sup>84</sup> By 1832, the forests had come under the control of a central Director of Cultures, which, while maintaining local administrative control, imposed regulations on communities such as requiring local people to cut and transport wood to factories.<sup>85</sup> By 1870, the forests were officially declared the domain of the state.<sup>86</sup> Traditional village use rights vanished; villagers were even required to purchase wood from the state for their own housing.<sup>87</sup> Protests were numerous; perhaps most notable was the Samin Movement, which mobilized civil disobedience and absurdist protection techniques.<sup>88</sup> However, as state consolidation progressed, forest peoples continued to be seen as both a military and economic threat and were suppressed, sometimes violently.<sup>89</sup> The forests continued to be managed centrally, with major efforts to exclude peasants from their land and end native land rights.<sup>90</sup> Under former President Suharto, this exploitation was particularly egregious, with directives emanating from Jakarta with essentially no local participation or involvement.<sup>91</sup>

Distressingly similar patterns appear in nations as diverse as Burma, where “progress was equated with the assertion of the state’s proprietary rights over forest lands,”<sup>92</sup> the Philippines under Marcos,<sup>93</sup> and the former British North

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80. *Id.* at 130.

81. *Id.* at 139.

82. *Id.* at 141.

83. PELUSO, *supra* note 13, at 36-43.

84. *Id.* at 44-46.

85. *Id.* at 48-49.

86. *Id.* at 50.

87. *Id.* at 57.

88. *Id.* at 67-72.

89. *Id.* at 91-123.

90. *Id.* at 124-57.

91. Wrangham, *supra* note 14, at 23-26.

92. Raymond L. Bryant, *Romancing Colonial Forestry: The Discourse of ‘Forestry as Progress’ in British Burma*, 162 *GEOGRAPHICAL J.* 169, 172 (1996).

93. Vitug, *supra* note 10.

Borneo, where despite a hortatory effort to register native land claims, the Land Code drove shifting cultivators into plantation agriculture.<sup>94</sup> Even in Papua New Guinea, where respect for native land rights has been a central principle since independence, environmental policy is largely set on the federal level, and the benefits of conservation do not often reach local communities.<sup>95</sup>

As a result of this history of systematic efforts to marginalize and destroy traditional forest communities, modern efforts at reform are being built on very shaky foundations. Rather than simply returning power to existing forest communities that can resume traditional ways of life, reformers in this area must, in fact, create an entirely new rule of law. The old institutions that once created a deep empirical structure of management were swept away in the name of creating a juridical centralized management system that, in fact, cannot exert meaningful control throughout much of the state. The factors driving modern deforestation—massive government mismanagement, economic privation, population growth, and disruption of forest communities—make creating a viable community forest model enormously difficult. We are not in a situation where Weberian conventions have survived the imposition of state law. Indeed, if the mere presence of poorly enforced state law in Cardenas's study could disrupt traditional conventions, we must assume that a century of systemic state intervention has washed these conventions away. We must, instead, join with Greif in considering the underlying beliefs and motivations that may drive novel forest protection institutions that will be responsive to the thorny ecological and economic context.

#### IV. MODERN EFFORTS AT REFORM

Only in the last ten to fifteen years has the pervasive hollowness of the forest consolidation effort triggered serious reform efforts throughout the region. In this Part, I briefly review the more important of these efforts to develop problematic areas for this rule of law rebuilding program. These include the problems of: (1) defining appropriate "communities" for management, (2) determining the appropriate degree of power to devolve to these communities, and (3) assessing the capacity of communities to adequately manage forests. Community-based forestry programs must confront these questions wherever they are established.

By far the largest of the modern reform efforts is the Joint Forestry Management (JFM) program in India.<sup>96</sup> Instituted in 1988 and expanded in

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94. M.C. Cleary, *Plantation Agriculture and the Formulation of Native Land Rights in British North Borneo c. 1880-1930*, 158 *GEOGRAPHICAL J.* 170, 172-74 (1992).

95. Gordon Brent Ingram, *Institutional Obstacles to Conservation: Fergusson Island, Papua New Guinea*, 67 *PAC. AFF.* 26, 36-37, 41-42 (1994).

96. See Sanjay Kumar, *Does "Participation" in Common Pool Resource Management Help the Poor? A Social Cost-Benefit Analysis of Joint Forest Management in Jharkhand, India*, 30 *WORLD DEV.* 763, 765 (2002).



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1990,<sup>97</sup> JFM directs India's states to devolve many forest protection and management duties to local institutions at the village level.<sup>98</sup> As of 2001, 15.5% of India's forests had been enrolled in the program, an area covering 11.63 million hectares.<sup>99</sup> Because JFM designs vary from state to state, the program is actually a series of programs, representing a range of experiments in management across the subcontinent.<sup>100</sup>

India is not alone in its efforts to return control to communities in the region. In 1990, the Philippines embarked on its own community-based forestry effort, expanding to 214,889 hectares by 1995.<sup>101</sup> The program has expanded slowly, beset by administrative difficulties, limited management capacity within the villages, and other challenges.<sup>102</sup> Indonesia has also begun to implement community-based forestry programs, gradually dismantling what had been an extremely centralized management program to village organizations.<sup>103</sup>

This Note's purpose is not to delve into the administrative details of these fledgling programs. Rather, it seeks to understand the inherent structural tensions within this rebuilding effort that the rule of law approach implicates.

The first of these is the basic problem of determining how to define communities for purposes of the program. As Arun Agrawal explains, the concept of community management is an "enchanted" one, with its overtones of holistic, people-centered management.<sup>104</sup> This enchantment rests, however, on the assumption that a geographic community is also what Agrawal calls a "community-as-shared-understanding,"<sup>105</sup> as opposed to a simple "community-as-social-organization."<sup>106</sup> The former is a group that shares common goals and interests and that, unified by a series of Weberian conventions and customs, can make equitable decisions as a group. The latter is simply a collection of individuals in a location whose interests may be quite diverse and who may be unable to make meaningful decisions in an equitable way. For community-based forestry to succeed, as Agrawal emphasizes, devolution of power to a community-as-social-organization must work to create and maintain a

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97. *Id.*

98. *Id.*

99. *Id.*

100. Mark Poffenberger & Chhatrapati Singh, *Communities and the State*, in *VILLAGE VOICES, FOREST CHOICES* 56, 66 (Mark Poffenberger & Betsy McGean eds., 1996).

101. Vitug, *supra* note 10, at 32-36.

102. *Id.*

103. Rita Lindayati, *Ideas and Institutions in Social Forestry Policy*, in *WHICH WAY FORWARD?*, *supra* note 14, at 36, 46-53.

104. See generally Arun Agrawal, *Community-in-Conservation: Tracing the Outlines of an Enchanting Concept*, in *A NEW MORAL ECONOMY FOR INDIA'S FORESTS? DISCOURSES OF COMMUNITY AND PARTICIPATION* 92 (Roger Jeffery & Nandini Sundar eds., 1999).

105. *Id.* at 101.

106. *Id.*

community-as-shared-understanding.<sup>107</sup> Further, the shared interest must be around forestry protection, not liquidation.

Ascher, considering this problem, rightly emphasizes that devolving power to existing community rulers, such as village councils, may not produce interest-based communities.<sup>108</sup> There is, he writes, an “important difference between community governance and local government.”<sup>109</sup> This is because the easily identified leaders of the local government are likely to be those who are least dependent on the forest as a source of survival, as they are among the wealthiest and most powerful in the community.<sup>110</sup> There is no indication that traditional chiefs are any less likely than national leaders to resist the blandishments of rapid profit from forest liquidation.<sup>111</sup> Also, traditional structures very often directly exclude the most vulnerable members of the community, with women, for instance, generally marginalized.<sup>112</sup> There is significant early evidence that JFM, managed by existing community leaders, may actually further impoverish the poorest of forest users by restricting their access without compensation.<sup>113</sup> Similar evidence from tribal areas of the northern Philippines demonstrates that the devolution of state power in areas where a strong tribal power structure still persists enables the leaders of the tribal power structure to “forum shop,” selecting the legal system that best allows them to perpetuate undemocratic control over the poorest peoples of the area.<sup>114</sup> Thus, simply devolving power to communities can produce either no positive change or even negative change, if devolution reduces the power of the national government to stop local resource misuse that might once have been limited by national policy.

Similar problems are likely to result in cases where, as in the Indian state of Orissa, the new “community” groups have in fact been formed by the government.<sup>115</sup> There, the forestry ministry rapidly formed thousands of new groups which were, of course, entirely dependent upon the forestry department rather than local community leaders.<sup>116</sup> Even new groups formed in Orissa were required to register with existing village councils, essentially subsuming

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107. *Id.* at 103.

108. ASCHER, *supra* note 8, at 48-49.

109. *Id.* at 37.

110. Jeffrey Y. Campbell, *Differing Perspectives on Community Forestry in Indonesia*, in WHICH WAY FORWARD?, *supra* note 14, at 110, 116-17.

111. *Id.* at 117.

112. Betsy McGean et al., *Learning To Learn: Training and Gender Sensitization in Indian Forest Departments*, in VILLAGE VOICES, FOREST CHOICES, *supra* note 100, at 230, 244.

113. See generally Kumar, *supra* note 96.

114. M.G. Wiber, *Levels of Property Rights, Levels of Law: A Case Study from the Northern Philippines*, 26 MAN 469, 485-86 (1991).

115. Poffenberger & Singh, *supra* note 100, at 71.

116. *Id.*

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communities of interest in the existing power structure.<sup>117</sup> Rather, the effort should focus particularly on community groups that have been specifically formed to manage the forest. Such groups, formed by individuals who recognize the need to preserve local forests, are substantially more likely to include members who rely upon the continued existence of the forest. They may also be more likely to include traditionally disempowered members of the community. Self-organization, to the maximum extent possible, should be the focus of the program, and devolution should seek out such self-organized groups which, by their very nature, represent communities of interest.

Once appropriate communities of interest have been identified, the appropriate degree of power to devolve to them must be determined. This question is in part contingent on the capacity of the group to appropriately use that power, discussed below, but the focus here is instead on the degree of independence that is most likely to rebuild a local rule of law and result in ecological gains. Here, the Cardenas study serves as a useful guide.<sup>118</sup> The more the government inserts itself into the affairs of community groups, the more likely that the systems of social negotiation and sanctions that produce useful conventions will be crowded out by central regulations. On the other hand, of course, some government involvement will be necessary both to build management capacity and to coordinate local forestry policies within the context of a larger national strategy.

Nadja Ottiger provides some sense of the range of possibilities, dividing community-based forestry schemes into (a) participatory forest management, where the community largely participates as labor for government-directed projects, (b) joint forest management, where priorities are negotiated between local and national parties, and (c) community forest management, where the government largely lends support to local initiatives.<sup>119</sup> Because the deforestation crisis has arisen, as discussed above, by a shift from category (c) toward category (a), at least in the near future, joint forestry seems the most promising alternative. This partnership, however, must be truly equal or very nearly so. As Jesse Ribot trenchantly notes with respect to participatory forestry efforts in the African Sahel, it is all too easy for governments to simply co-opt existing community power structures to carry out centrally determined goals.<sup>120</sup> Cloaking a centralized initiative in the garb of community work is structurally identical to the indirect-rule policies of colonial governments, in which local governments were merely a screen for the European powers, creating a sort of

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117. *Id.* at 67-68.

118. See generally Cardenas et al., *supra* note 17.

119. Nadja Ottiger, *Joint Forest Management: Merger of Two Traditions?*, in *INDIGENOUS KNOWLEDGE, FOREST MANAGEMENT AND FOREST POLICY IN SOUTH ASIA* 121, 132 (Klaus Seeland & Franz Schmithusen eds., 2003).

120. Jesse C. Ribot, *Decentralisation, Participation and Accountability in Sahelian Forestry: Legal Instruments of Political-Administrative Control*, 69 *AFR.: J. INT'L AFR. INST.* 23, 23-27 (1999).

“legislated apartheid.”<sup>121</sup> This “coercive conservation” reaches its extreme in Burmese “participatory” conservation, where the ruling junta forcibly requires villages to perform reforestation activities without any compensation.<sup>122</sup> Reformers, then, must guard against simply privileging “community” projects without seriously considering the degree to which the community actually sets the direction of the project and is able to hold decisionmakers accountable.<sup>123</sup> The goal here is not to splinter the state, returning all power to communities, or to merely cloak the state in the garb of community. Rather, it is to rebuild the empirical apparatus of statehood at all levels of society that was vitiated by the colonial effort to consolidate all power in a small set of nonindigenous institutions, as discussed above. As Ribot writes, “[c]onstituting community participation does not have to be a state non-state dichotomy. Rather, it can be about the structure and role of local state formations.”<sup>124</sup>

What the appropriate structure of these new community institutions will be turns on the third, most critical factor: the capacity of local communities to manage their own forests. Capacity includes both administrative control—a real question when so many forest regions are under pressure from migrant groups—but also the presence of remaining traditional forest management customs and conventions. These customs may or may not be adequate to modern forest management, as they were generally developed at times when the forests were under significantly less population pressure, but they do provide a grounding on which new innovations may be tried. There is considerable evidence that the colonial effort to emasculate such conventions has, unfortunately, been quite successful and that, even without colonial intervention, the conventions may never have been wholly effective.

Chuck Zerner’s careful study of the Maluku Islands of Indonesia demonstrates this point.<sup>125</sup> Indigenous land management practices in the area are referred to as “sasi”<sup>126</sup> and have recently been valorized in Indonesia as “capable of guarding the sustainability of natural resources.”<sup>127</sup> Zerner demonstrates, however, that this modern faith in sasi as a historic management system is misplaced. In the earliest statement of the rules, there is no evidence that “local villagers were either conscious of, or took steps toward, conservation of forest species, management of natural forest habitat, or what has come to be known as sustainable economic development.”<sup>128</sup> Rather,

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121. *Id.*

122. Bryant, *supra* note 12, at 350-51.

123. Ribot, *supra* note 120, at 27-28.

124. *Id.* at 30.

125. Chuck Zerner, *Through a Green Lens: The Construction of Customary Environmental Law and Community in Indonesia’s Maluku Islands*, 28 *LAW & SOC’Y REV.* 1079 (1994).

126. *Id.* at 1080.

127. *Id.* at 1089.

128. *Id.* at 1093.

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conservation rules were imposed from above by Dutch colonial officials on a fractious local community.<sup>129</sup> Sasi as a modern conservation instrument appears to have been created as recently as the 1980s by a village official who, concerned that “[n]o one on the island knew about or obeyed the rules,” decided to reformulate “sasi as an instrument of conservation. I saw the youth rejecting the sasi so I typed them up and added a few rules.”<sup>130</sup> This local effort was then adopted by a national government eager to co-opt communities in its national conservation efforts using appeals to a dubiously historic past.<sup>131</sup> I do not intend to condemn the creation of local conservation codes or suggest that no conservation tradition existed among pre-colonial groups. However, this evidence does point to the malleability of “tradition” and the improbability that a panacea native land management tradition simply waits to be realized through community-based forestry.

Efforts to mobilize this vanished tradition resulted in “despairing voices” in a community forestry project in Zimbabwe,<sup>132</sup> despite significant government efforts to mobilize local groups.<sup>133</sup> The authors there emphasize that while there is “still a complex of customs and norms that impact” resource use, these local institutions “have generally been unable to cope with the rapid pace of change.”<sup>134</sup> Confronted with fast-moving market forces, growing social and economic inequality, and rising community heterogeneity, conventions developed for slower times simply cannot keep pace.<sup>135</sup> This result is consonant with the collapse of peasant forestry systems a world away in the Araucania of southern Chile.<sup>136</sup> There, as is true globally, surviving peasant forestry and agriculture systems exist only in “regions of refuge,” areas so marginal that the global market has not yet reached them.<sup>137</sup> Even there, where “internal differentiation and external investment are insignificant,” many subsistence farmers interact with the market economy through migrant labor.<sup>138</sup> What relative stability exists there is precarious and can be easily disrupted by “exogenous technological change” and other market forces.<sup>139</sup> In such regions across the world, where peasant conventions have survived the colonial onslaught only tenuously, a rebirth of tradition prompted by the intervention of state power is unlikely. As the Zimbabwe study found, common themes

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129. *Id.* at 1092-95.

130. *Id.* at 1101.

131. *Id.* at 1102.

132. B. CAMPBELL ET AL., CHALLENGES TO PROPONENTS OF CPR SYSTEMS—DESPAIRING VOICES FROM THE SOCIAL FORESTS OF ZIMBABWE (2000).

133. See generally CLARKE, *supra* note 14 (describing government program).

134. CAMPBELL ET AL., *supra* note 132, at 3.

135. *Id.*

136. Roger Alex Clapp, *Regions of Refuge and the Agrarian Question: Peasant Agriculture and Plantation Forestry in Chilean Araucania*, 26 *WORLD DEV.* 571 (1998).

137. *Id.* at 572-73.

138. *Id.* at 575.

139. *Id.* at 575, 586.

included lax enforcement, low observance of old traditions, and “the lack of any emerging alternative institutions” for community-based management.<sup>140</sup>

All hope is not absent. The tentative success of JFM in India<sup>141</sup> gives some reason for hope. There are success stories scattered across the globe, many suggesting an important role for nongovernmental organizations (NGOs) in local capacity-building. In Loma Alta, Ecuador, for instance, a small American NGO was able to educate villagers in the importance of local forest conservation to water supply protection and provide organizational support in the early phases of community organizing.<sup>142</sup> The community, however, already had a secure property rights system and a substantial history of local decisionmaking.<sup>143</sup> Perversely, the most vulnerable forests and forest peoples are also the most likely to have splintered decisionmaking systems and uncertain property rights.

The result of this inquiry is a concerning paradox. Weber, Greif, and the rule of law industry’s general emphasis on using and encouraging organic community organizations favors relying upon local communities to manage their forests within a loose rubric of state control. But because state control was so tight for so long, devolving power to communities may essentially be shifting power to Potemkin villages, which exist in name but not in authority. The consolidation of the juridical state may now force the state to act through communities as proxies rather than as partners, even though such a model is less likely to be organically and persistently adopted by villagers. The legacy of a century of rapacious consolidation is a massive barrier to the sort of community-based management that is so desperately needed.

#### CONCLUSION

The deforestation crisis can usefully be viewed as a crisis of the rule of law. The history of colonial exploitation and state consolidation has left many tropical states hollow, with few viable forestry management institutions at the local level where they are most needed. As a result, modern efforts to create a community-based forestry operate in a political, legal, and social milieu of chaotic and rapid change. Despite this complex context, these efforts should be encouraged, but from a realistic perspective. Rule of law experts can and should lend their expertise to the global effort against deforestation, both because the process of rebuilding local institutions will benefit from their assistance and because continued deforestation threatens the rule of law generally through cascading ecological and social disruption.

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140. CAMPBELL ET AL., *supra* note 132, at 5.

141. Kumar, *supra* note 96, at 772-73.

142. Constance Dustin Becker, *Grassroots to Grassroots: Why Forest Preservation Was Rapid at Loma Alta, Ecuador*, 31 WORLD DEV. 163, 164-69 (2003).

143. *Id.* at 165.

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The substantive “thick” goals of rule of law proponents—i.e., democratic, stable societies—are threatened by the rule of law vacuum in the forestry sector. In order to reach these larger goals, reformers should apply themselves to improving the “thin” procedural aspects of local rule of law. As discussed above, the hollowing out of these institutions by centralizing colonial states rests near the root of the deforestation crisis. Yet the political economy of the rule of law industry has often disfavored locally focused reforms.<sup>144</sup> The vast bulk of rule of law funding goes to improving salary and training for judges and lawyers and for courthouse capital improvements.<sup>145</sup> Marginal communities are much less able to organize and advocate for themselves than the legal elite and so tend to receive significantly less attention.<sup>146</sup> Yet it is these communities, on the margin of society and with limited ability to absorb the large capital payments favored by major world lenders, that most urgently require institution-building assistance to address the deforestation crisis. Unable to resist abusive governments and equally unable to control and democratically allocate their own resources, the poor both help cause and suffer most directly from a deforestation crisis that ultimately threatens even the elite classes.

Viewing the deforestation crisis as a crisis of the rule of law helps focus our attention on these most marginalized communities. It suggests that small monetary expenditures on improving the transparency and efficiency of village government and large amounts of time spent training forest communities to organize in their own best interests should be a significant focus of the rule of law and development industry. The rule of law might be viewed as a tree, with national appellate courts and the rest of the central state apparatus forming its upper branches. It is on these large and visible institutions that the rule of law industry has historically focused. But the roots of the tree, down in the tangled earth of custom, convention, and belief, are where the problem lies. Too long ignored or actively degraded, these myriad small institutions support the rest of the tree of the state, and if further neglected, their collapse can topple the whole.

The fact that these efforts to rebuild the roots of the rule of law will be slow, contingent on diverse and difficult local conditions, and relatively unglamorous should not recommend against them. Community-based forestry can be a source of hope for both the world’s forests and its poor. But it is a hollow hope without sensitive attention to the need for gradually rebuilding the communities whose destruction began at the creation of the current crisis. Returning power too rapidly or completely to communities creates the risk of making community-based forestry a sort of mask in which the state manages the communities’ forests through the local elite. Such a situation will do nothing to renew the local systems of conventions and custom that are required

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144. Jensen, *supra* note 4, at 350-58.

145. *Id.* at 348-50.

146. *Id.* at 354-57.

for the regrowth of the rule of law at the community level. Rather, community-based forestry can and should grow with the capabilities of the communities in question, beginning not as a forestry reform effort but as a rule of law effort, creating and strengthening basic institutions of community governance. Only once these institutions are in place can community-based forestry hope to be successful.

The model towards which we aspire is one of ecological federalism, in which communities have substantial say over their destiny within broad national forest management goals that they have had a hand in creating. This model, which is capable of both managing forests in the large units that tropical forest ecology requires and giving communities a sense of ownership in their local woodlands is, today, much more dream than reality. But understanding that the lineaments of this dream are rooted in the creation of a novel rule of law and that its limitations result from an earlier, unsuccessful rule of law project is an important step toward realizing it.