

National Biodiversity Strategy and Action Plan

Laws, Policies, Institutions and Planning

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Introduction

Laws and policies concerning conservation of biodiversity have to meet two distinct but interrelated objectives: first is the scientific objective of biodiversity conservation, that is to ensure the preservation of all ecosystems, species and genes, and of associated biological processes and second is the ethical objective of conserving and protecting biodiversity to ensure a just and equitable distribution of the costs and benefits of biodiversity conservation among human beings living in different parts of the world, between the existing and unborn generations and also between human beings and other species. In other words, ensuring equitable distribution of resources across species and across generation of species.

In order to meet these twin requirements, laws and policies have to gear themselves to confront the threats facing biodiversity conservation by various developmental project demands. Many of the bio-diversity conservation endeavors result in displacement of local people from their habitats and resources, hence, laws and policies have to provide space for people's rights. Law has to develop mechanisms to counter the increasing internal as well as external biotic pressures based on principles of democracy, so that livelihood needs of the local forest dependent people are not disturbed. In the changed scenario, biodiversity laws have to deal with newer threats arising out of patent laws, biopiracy and genetic swamping, among others; while at the same time protecting the human, cultural and environmental rights of the affected people. This involves a large scale overhauling of laws. However, in India, the colonial model of governance still influences laws and policies related to various issues, amongst which biodiversity is no exception. This has been discussed for several decades in India; laws remain deeply entrenched in the British principles of law/ jurisprudence. While the ethos of the country has changed, the laws still remain the same to a large extent.

We therefore, began this exercise of the **National Biodiversity Strategy and Action Plan (NBSAP)** with the hope of making a complete examination and analysis of the core legal regime that governs the large (visible) section of biodiversity -- forests. It was also the time when there were debates in the public discourse on bringing legislation on the biological diversity and the protection to plant varieties in the academia and policy circles of the State.

To give a brief picture of the process and the stepping stones of the report, the whole exercise, as mentioned before, began with review and examination of the case laws, statutory laws and policies on forest, wildlife, and environment in India. We have also tried to cover customary laws in the north eastern states

where such laws have significant role to play in both conservation and protection of local biodiversity; besides, international trade issues in biodiversity specifically, the Convention on International Trade in Endangered Species (CITES) and the livelihood issues of forest dependent people have been examined. Analysis of case laws was felt necessary given the fact that court's interpretation of laws and rules has greatly enhanced the scope of many biodiversity related laws. An exercise of this nature of examination of inter-linkages of laws, policies, conservation and livelihood provided us with a landscape to come up with a structure for institutions for governance of biological diversity in India and strengthened the suggestions on changes in laws. What has been attempted in the Plan is to create space for both conservation and livelihood. To the extent possible attempt has been made to plug in gaps in laws and policies that are in contravention of conservation principles and give scope to consumerism and indiscriminate industrial ventures.

The laws and policies governing biodiversity in India have been analyzed from certain broad principles of justice and equity, and learnings from international environmental laws and human rights of the local people. Spaces within the existing laws that provide for the incorporation of such principles have been identified. Where no spaces are available drastic changes in the old laws or enactment of new laws are proposed. An attempt has also been made to look at the gaps in existing laws and policies so that in the era of globalization, the nation has sturdy and well-powered laws to safeguard its rich biological diversity and the interests of its people.

This is necessary as in many instances traditional principles have to give way to more just and equitable principles. To illustrate issues arising out of the notion of ultimate State ownership of all property, enshrined through the principle of *eminent domain* it needs to be reviewed, and this has been done with the discussion on the principle of *public trust* here.

As part of the planning, visits to forest dependent communities was also carried out to gather first hand understanding of the linkages of livelihood and corresponding dependence on biological diversity and their interface with laws and policies. This however, can not be treated as a formal consultation in terms of methodology of community consultation. The advantage of having met people across the country has helped to gather people's views on various policies, laws and programs like eco-tourism, joint forest management and also community-managed (van panchayat) forests in the state of Uttarakhand. In other words, all this has given impetus to our understanding of livelihood issues of local forest dependent community issues especially in the light of several conservation, joint management of forest projects.

Conservation of the whole eco-system forms the core of planning and suggestions for legal and policy changes of the thematic group. At the same time, the centrality of the plan is to bring people into the fold of conservation endeavors and make them beneficiaries as well as participants in the process in a broader governance structure. Considering the irreversible role of laws in guarding biodiversity, laws should remain the instrument for protective enforcement purposes. At the same time customary laws and their role in the context of that culture should be recognized. Therefore, the purpose and objective of this plan is to enlarge people's space in biodiversity conservation, recognition of rights by law and governance through decentralized and democratic institutions and mechanisms, in ways:

1. That would promote and enhance both biodiversity conservation and the legitimate survival and development needs of poor communities;
2. That would simultaneously achieve these distinct but complimentary goals.

In order to achieve these, necessary legal and policy changes have been proposed.

Chapter 1

Laws related to biodiversity (specifically those concerning forest and to some extent wildlife) are in existence and operation for more than a century in India. Only laws on preservation of environment such as air, water, and pollution are a late 20th century emergence. Historically, laws evolved for protecting interests of the State on forest resources. This seems to be true even in the case of wildlife conservation laws. Both have by explicit or implicit means sought to displace

local people either from resources or from their habitat. Consolidation of resource rights for the State has thus been achieved through means of law. Therefore, it remains debatable as to how far these laws have been helpful in balancing the demands of conservation as well as consumption needs of people and at the same time have helped to withstand developmental - industrial pressures and forces of privatization and globalization.

There are at present three major laws dealing with conservation of wildlife, forests, besides several other laws and notifications within the laws that are in enforcement. Only three major laws have been studied/reviewed here:

The Indian Forest Act, 1927;
 The Forest (Conservation) Act, 1980; and
 The Wild Life (Protection) Act, 1972.

From the perspective of both bio-diversity conservation and immediate community needs, we have made what we regard to be progressive laws, in comparison to the earlier laws and policies on forests which were not in consonance with interests of biodiversity conservation and local interests. The Forest Policy of 1988 recognized local residents, dependence on forest resources and conservation requirements. However, there exists incompatibility of laws with the policy concerns for sharing the benefits of conservation of biological diversity.

This apart, conservation scenario is itself nebulous, as on the one hand the conservation discourse mandates through operation of law preservation of natural heritage, while on the other, State is giving into the pressures of industrial and development ventures such as mining, road building etc., by denotification of forest areas. for

While the same conservation discourse is rigid about any local use of resources by the local inhabitants, one of the stated objectives of the 1988 forest policy is meeting the requirements of fuelwood, fodder, minor forest produce and small timber of the rural and tribal populations. This need is not met in sanctuaries, national parks and in their peripheral areas. These limitations on resource access have been the major reasons for conflict between the forest department and the local population. In spite of all these restrictions imposed on resource accession, laws have also not been successful in arresting poaching and timber smuggling that has been going on rampantly in India, even though arresting poaching was one of the prime reasons quoted for the enactment of the Wild Life Protection Act, 1972. In the light of some of the contradictions, incompatibility and non-complementarities suitable amendments in the laws and changes in the policies need to be made so that a legitimate space is negotiated for conservation, protection and sharing of resources between the State and the local people.

In spite of this reality, one cannot ignore the positive impacts of the whole body of legislations. There are large tracts of areas that are rich in biological diversity in all the ecological zones of India. These are undisturbed by any industrial pressure and to a large extent by human livelihood pressure, all possible due to the existence of laws on protection and conservation. For example, the Wild Life (Protection) Act, 1972, despite its poor enforcement has provided protection to a large number of faunal species, and it has also been observed that, since the coming into force of the WLPA no species of wildlife has become extinct.

Analyzing laws with regard to biodiversity conservation would require a comparison with certain basic principles of conservation, equity and equality, strategies and plans that are essential to conservation of biodiversity.

Some principles that are proposed to guide policies and laws concerning conservation and protection and livelihood of people are given hereafter:

1.What to conserve and how much to conserve

This is the first task involved in conservation of biodiversity. Any choice of conservation of a particular geographical area, species of flora and fauna should be made through a process of scientific selection of sites mainly for two significant reasons:

- Given the fact that there will be some restrictions on human use in areas earmarked for biodiversity conservation, sites have to be chosen where the adverse impact of resource use restriction especially on poor communities, where many of them being tribals, living in close proximity to this biodiversity resource, is minimal. In other words, there is a need to take into cognizance factors that have adverse impact on livelihood as well as biodiversity due to conflict of human and conservation interests; and
- Resource constraints/depletion also necessitate the need to prioritize areas for biodiversity conservation through scientific selection of sites.

These two reasons therefore entail decision making at following levels:

- The extent of the country/state/region/district that should be under biodiversity conservation;
- The extent of specific biodiversity conservation areas that should be either in the form of Protected Areas legally notified or through community conserved areas i.e., the cover/size of the particular area; and
- The species to be conserved/ protected.

EXTENT OF CONSERVATION AREAS

The conservation area network in the country or a region should ideally be based on the following criteria:

1. Representation of diverse ecosystems: There must be adequate representation of each ecosystem type (biome) containing all of its distinctive features (to be scientifically determined) coming under the Conservation/Protected Area network.

2. Exceptional biodiversity values: Areas with exceptional biodiversity richness, in the sense of having an unusually large number of ecosystems, diverse species, must be conserved. Also, areas with unique biodiversity values must be conserved, for example, an area having a rare and endangered species of flora and fauna.

3. Areas of strategic importance for biodiversity conservation: Areas which might not themselves fall into any of the above two categories but which are essential for conserving one or more of the above stated priority areas must also be conserved. These could be corridors between two priority areas, breeding grounds, migratory path of faunal species or endangered species or even watersheds or other ecologically significant function areas without which the priority areas cannot be conserved.

1. **Areas free from biotic interference should be conserved:** Such areas form only a small proportion of the total area of the country, hence it is essential to conserve such areas in their pristine form. Therefore, measures should be taken to reduce biotic interference in all the conservation areas and especially in areas that have special ecological features under threat.
2. **Areas to be conserved on the basis of the Precautionary Principle through Environmental Law:** The basic premise of the precautionary principle (in relation to biodiversity conservation) is that if any activity raises/poses threats of harm to human health or environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically. Therefore, ongoing biodiversity conservation priority exercise needs to be carried out to assess any possible or seeming threat to any area, that at present may not be under protection. Also, areas that might *prima facie* seem to have a potential to be included in the list of priority areas but have not been adequately studied, must also be conserved, at least till they have been adequately studied and their status and value determined.

Action Point: There should be exchange of information through a working group on biodiversity related issues for conservation benefit sharing, legal change, health, livelihood across various recognized institutions, departments/ministries

such as, tribal affairs, MoEF, Ministry of Health, Social Justice and Empowerment, Bombay Natural History Society (BNHS), Wild Life Institute of India, Forest Research Institute, Commission for S.C. and S.T. The meeting should decide on application of precautionary measure for protection and conservation.

The Present Legal And Policy Framework With Respect To Creation Of Protected Areas.

In India following classification of Protected Areas (PAs) is in existence¹:

- **Category I:** Legally recognised and demarcated areas, in the form of National Parks, Sanctuaries and Reserved Forests established under the provisions of the Wild Life (Protection) Act, 1972 (WLPA) for the former two categories and the Indian Forest Act, 1927 (IFA) for the latter.
- **Category II:** Those PAs established through administrative orders such as the Tiger Reserves, Elephant Reserves, Biosphere Reserves, Ramsar Sites and World Heritage Sites.
- **Category III:** Those areas though not strictly statutory protected areas as in the above two categories, but which are given some degree of legal protection from ecologically destructive activities. This category would include the notification under the Environment (Protection) Act, 1986 (EPA) restricting certain activities in specified areas for e.g., Aravalli Ranges, Dehradun, Dahanu, Pachmari and Numaligarh, Mahabaleshwar and Panchgani (Refer to Annex for Notification).

An analysis of the WLPA, IFA, and the EPA is made here by taking cognisance of the above mentioned principles. The purpose of this exercise is also to examine the extent to which these principles have been applied in these laws and make suggestions for changes in laws and action.

THE INDIAN FOREST ACT, 1927

The Indian Forest Act, 1927 (IFA) is the first ever Central law to have dealt with scientific management, conservation and commercial use of forests in India. State control over forest resources began when the Act came into being during the British time. Since then laws have played prominent role both in controlling and commercialisation of forest resources. Nonetheless there exists space for local access of resource under the Act (Creation of Village Forests under Section 28-A). While commercialisation and control features of the Act are predominant operatives, it is significant to note that IFA is the pioneering law in introducing

¹ The legally recognised protected areas are only sanctuaries, national parks and closed areas under the Wild Life (Protection) Act, 1972. Others come either with the virtue of invocation of the Environment (Protection)Act,1986 or by administrative orders.

the concept of scientific conservation practice through creation of Reserve Forests, which could perhaps be called the foundation of protected area model for biodiversity conservation in India.

Section 3 of the Act deals with the power to constitute Reserve Forests:

The State Government may constitute any forest-land or waste-land which is the property of Government, or over which the Government has proprietary rights, or to the whole or any part of the forest-produce of which the Government is entitled, a reserved forest in the manner hereinafter provided.

It is clear from the section that none of the above principles are taken into account in the selection of area to be declared reserve. Although it can be argued that IFA, being a colonial law had the objective of consolidation of forest laws, levying duties on timber and other incidental matters; there was no space for ecosystem protection and conservation. However, despite the change in the thrust of forest policies after independence whereby forests were looked at from an ecological, livelihood and social perspective, very little consideration was given to ecological reasons in constitution of reserve forests. While it is a fact that in many instances reserve forests are the last storehouses of biodiversity, it is seldom recognized and acknowledged.

Reserved forests should be constituted only in consonance with the principles stated above. In particular, the word forest needs to be defined. There is no definition of forest under the Indian Forest Act, 1927. Section 3 confers power on the State Government to declare any area as a reserve forest. "It simply leaves it as², whatever the government notifies. This amounts to a delegated legislative power, without any guidelines or safeguards".

Action Point: Necessary legal changes need to be done in Section 3 to incorporate and seek suggestions from the forest department, revenue department and scientific communities on ecological values of the area and a consultation with local people on livelihood rights before declaration of any area as Reserve Forest. Legal changes should also take into account, wherever applicable the rationale behind the following substantive definitions of forests³.

There can be at least three different types substantive definitions of forest⁴:

- Ecological (mangroves, deciduous etc.);

² Singh, C (1997) in Draft Proceedings of the Workshop on Forest Law and Policy, Centre for Environmental Law, WWF and IGNFA, Dehradun, 14-15 Feb. Page.14.

³ Ibid.

⁴ Ibid.

- Economic (commercial, production, conservation, etc); and
- Social (tribal, lok-aranya, raj-aranya, dev-aranya, brahm-aranya; etc).

The Indian Forest Act uses a different type of classification, which is mostly done from the point of view of forest administration (reserved, protected etc) and scientific management of certain chunk of forests, while the scientific management principles need to be updated. For any effective conservation of biodiversity, the manner and principles on which forest is defined make a significant difference for administration and implementation of the law. For instance, it would certainly make the following differences:

If forests are to include wetlands or desert flora the implementation of the law through various government departments would have to be different. Therefore, to make administration and implementation of laws compatible across various departments of the government, necessary legal changes will have to be evolved.

It is hence necessary that in principle the type of definition of "forest" that we want must be clearly and comprehensively articulated. That will also decide the scope of the Act in terms of the ecosystems it can deal with.

To conclude, the definition of the word forest needs to be clearly articulated based on the above mentioned principles. Forest to the extent possible should cover all the ecosystem coming not only under the geographical boundary of the forest but necessary and complimentary ecosystem that the forest is adjacent to. For example, the survival of the faunal population in the forest area depends on the health of the river flowing in the forest, hence protection of upstream water through the Environment Protection Act, 1986 (EPA) ought to be assured. In other words, conservation can not be looked in isolation of geographical boundary of reserve forests or protected areas.

Action Point

1. Inclusion of a definition of Forest is required to provide clarity and meaning to the term forest for its ecological, social, cultural and economic values;
2. The criteria for declaring any area as Reserve Forests (RF) should be ecological and not mere commercial.

WILD LIFE (PROTECTION) ACT, 1972

In the present form and operation the sections 18, 35 and 38 dealing with formation process and establishment of PAs do not give due weightage to most of the criteria listed above.

Section 18 states:

The State Government may, by notification declare its intention to constitute any area other than area comprised with any reserve forest or territorial waters as a sanctuary if it considers that such area is of or territorial waters is of adequate ecological, faunal, floral, geomorphological, natural or zoological significance, for the purpose of protecting, propagating or developing wildlife or its environment.

The above section should clearly articulate as to what is deemed to be 'adequate significance' for the purpose of creation of a sanctuary, elaborating circumstances, why a particular area is of adequate ecological significance. At present it is only the gazette notification by the State Government that declares an area having adequate ecological, faunal, floral, geomorphologic, or natural significance. Legally and ethically this is considered sufficient grounds for the declaration of an area as sanctuary. This is not what in terms of natural justice can be described as a 'speaking order', an order giving reasons for one's 'decision'. It does not equip neither the local residents nor people's rights activists with the information that would make them aware of the significance as well as consequences of the change of status of their habitat. This would also give space for negotiation, and constitute their right to challenge the legitimacy of the declaration of an area as protected. Further, it is necessary to have a detailed independent set of guidelines regarding the criteria to be considered, when an area is proposed to be declared as sanctuary. At present there is no such provision for mandating guidelines or recommendations as prerequisite for selection of sites as sanctuaries⁵.

The guidelines should specify, besides explaining the 'adequate significance', the importance and extent of ecosystem representation, value and significance of that ecosystem, the strategic importance of the area (for e.g., corridor), and lastly the species and faunal value in that particular ecosystem. Further, the guidelines should specify under what circumstances a particular category of PA is set up for example, national park, sanctuary, biosphere reserve, tiger reserve etc.

The declaration of national parks is made under Section 35 with the following reason:

- (1) Whenever it appears to the State Government that an area, whether within a sanctuary or not, is, by reason of its ecological, faunal, floral, geomorphological, or zoological association or importance, needed to be constituted as a National Park for the purpose of protecting, propagating, or developing wildlife therein or its environment, it may, by notification, declare its intention to constitute such area as a National Park.

Like justification and rationale are given for the declaration of a sanctuary, similarly reasons and purpose should be given in the case of national parks also. Section 35 should clearly articulate as to what is of '**importance**' for the purpose of declaration of a national park. This as observed in the case of a sanctuary, ought to have a detailed set of guidelines as the criteria that must be considered when an area is proposed to be declared as a national park. At present there are no such guidelines or recommendations on selection of sites as National Parks⁶.

Action Points

⁵ National Forestry Action Program, India, Vol. 1, 1999:43, MoEF.

⁶ National Forestry Action Program, India, Vol. 1, 1999:43, MoEF.

- Scientific Institutions such as the Wildlife Institute of India, The Forest Research Institute, BSI, ZSI, Central Marine and Fisheries Institute and also NGO sector should be involved in working out the criteria to be taken into account while declaring areas as protected.
- Protected areas should be set up so that there is representation of each biological diversity that is of significance for conservation of the ecosystem.

ADEQUATE COVERAGE OF AREAS FOR CONSERVATION

The adequate / ideal areas for conservation have to be determined on the basis of at least two factors:

- The minimum extent of an ecosystem type needed for it to retain its natural characteristics and diversity and to evolve naturally;
- The minimum size for supporting viable population of all the floral and faunal species inhabiting the area.

Action Point: Determining the adequate size of a conservation area is an elaborate process. Neither the Wild Life (Protection) Act, 1972 nor the Indian Forest Act, 1927 stipulates any minimum area for conservation and protection for the Reserved Forests, National Parks and Sanctuaries. Although it may be impractical to specify any fixed areas for National Parks and Sanctuaries, however it is desirable that guidelines be specified about the minimum areas needed for conservation of certain species. This is essential, since there are many PAs but because of their limited extent serve very little conservation purpose⁷.

Conservation of species

The principle of inter-species as well as inter-generation equity demands that all species of flora and fauna be conserved irrespective of their contemporary known utility to human beings.

The Wild Life (Protection) Act, 1972

Inter-Species Equity: The Wild Life (Protection) Act, 1972 (WLPA) is perhaps the only legal instrument to ensure the realization of the principle of inter-species equity, the belief in the right of each known visible species and unknown or invisible species to live and proliferate⁸. In what is going to be discussed below, it might appear as simplification of the principle of inter-species equity. However, what is analyzed here is the relative degree of protection bestowed on

⁷ For example the Siju sanctuary which is meant to protect the elephants in Meghalaya is only 5 Sq Km while the Nogkhllem Sanctuary is only 29 Sq Km.

⁸ Arne Naess, the Norwegian Philosopher of Deep Ecology professes this belief in equity of all living beings.

a particular species. Protection accorded in its present form does not help in ensuring sufficient protection of all species that contribute to survival of their fellow species. This would also ensure the equilibrium of predator and prey population.

The Act provides legal protection to various faunal and floral species in varying degrees. Prior to 1991 amendment of the WLPA, floral species other than those within National Parks and Sanctuaries were not included in the Act. By virtue of this amendment, Chapter III A and Schedule VI were inserted. This confers protection to specified plants. However, despite the amendment plant species get only notional protection under the Act as only six species of plants are included for protection in Schedule VI. Further, criteria for inclusion of the species are not specified.

Categorization of species into different Schedules under the WLPA does not comply with this principle, though there is a need to give immediate attention to mega species. However, in practice protection and conservation of other species that have significant value for ecological equilibrium are being sidelined.

The WLPA categorizes species of flora and fauna in six Schedules in ascending order of priority for protection. There is very little scientific basis in the classification of species into various Schedules. Further, varied degrees of penalties for violation of the Act as applicable to different species has encouraged the poaching of species listed in the non-priority schedules. Thus while most of the mega predators like Tiger (*Panthera tigris*), Leopard (*Panthera pardus*) etc. are in Schedule I of the WLPA, the major prey species like Chital (*Axis axis*), Sambhar (*Cervus unicolor*), Nilgai (*Boselaphus tragocamelus*) are listed in Schedule III of the Act, implying lesser degree of penalties for offences pertaining to such species. The predator species have a high degree of protection, while the lower protection accorded to prey species consequently results in low food availability for the predator species. Thus the whole purpose of conferring high degree of protection to the Schedule I species is defeated. It is therefore important that the Act takes into account the interrelationship among the various species. There is also a bias in favor of protection to large mammals and birds, more than other wild life species.

Action Point: On what criteria should the Schedules be devised needs to be worked out. Suggestions have varied from inclusion of CITES listed species in Schedule I to putting globally threatened species in Schedule I⁹.

PRINCIPLE OF INTERGENERATIONAL EQUITY

⁹ Ahmad, Abrar, TRAFFIC – WWF - INDIA Personal Communication, 2002

Intergenerational equity calls for fairness in utilisation of resources across human generations of past, present and future. This requires that a balance be attained between meeting the livelihood demands of existing societies and ensuring that adequate resources are available for future generations/posterity. In other words, ensuring sustainability of resources across generations of human species should be the golden principle of existence of human society.

Edith Brown Weiss and Joseph Sax are among the scholars who have considered environmental rights and obligations and enunciated valuable guiding principles. Weiss recommends:

...three basic principles of intergenerational equity. First, each generation should be required to conserve the diversity of the natural and cultural resource base, so that it does not unduly restrict the options available to future generations in solving their problems and satisfying their own values, and should be entitled to diversity comparable to that of previous generations... Second, each generation should be required to maintain the quality of the planet so that it is passed on in no worse condition than the present generation received it, and should be entitled to a quality of the planet comparable to the one enjoyed by previous generations... Third, each generation should provide its members with equitable rights of access to the legacy from past generations and should conserve this access for future generations.¹⁰

An innovative domestic court decision on intergenerational equity, in both its "intra-" and "inter-" dimensions, is a 1993 Philippine Supreme Court case, *Minors Oposa v. Secretary of the Department of Environment and Natural Resources* ("DENR"). The case addressed intergenerational equity in the context of state management of public forestland. In a novel situation under Philippine law, the Philippines Supreme Court permitted a class action -- although it has yet to issue a decision -- brought by Filipino children acting as representatives for themselves and future generations. The petitioners wanted to halt timber cutting by government licensees of the remaining national forests. Plaintiffs alleged that present and continued logging violated their right to a healthy environment under the Philippine Constitution and would entail irreparable harm to them and future generations of the nation. The Court considered the issue of intergenerational responsibility and decided that the petitioners had *locus standi*, i.e., were qualified to sue, on behalf of present and future generations in the Philippines. In rendering its decision, the Court accepted petitioners' statistical evidence regarding the amount of forest cover required to maintain a healthy environment for present and future generations.

The bold step by the Philippine Supreme Court in Oposa, by using intergenerational considerations as a basis for its decision regarding national resource exploitation, indicates that rights and interests of future generations are being treated as a legal issue in some national jurisdictions, including developing countries.

Action Point: It is recommended that a body of economists, environmentalists, natural and social scientists be constituted to assess domestic livelihood, industrial and public services dependence and need of forest resources. The committee should also have the mandate to propose environmental friendly alternatives for the use of forest resources.

¹⁰ Joseph L. Sax, *The Search for Environmental Rights*, 6 J. of Land Use and Environmental Law 93, 103 (1990).

ENSURING INTRA-GENERATIONAL EQUITY IN MANAGING BIODIVERSITY

Intra-generational equity refers to the fairness in utilisation of resources among human members of present generations, both domestically and globally. Schachter has contended that intra-generational equity, as manifest in "distributive justice" has become a de facto legal principle for developing countries and in general for industrialised countries. In his view:

The principle of intra-generational equity proposes that the benefits of biodiversity conservation should be shared in an equitable manner. Therefore, any strategy for conservation of biodiversity in the interest of the nation can not be justified by excluding the interests of those dependent on biodiversity for their survival. Thus the larger 'public interest' of biodiversity conservation should not suppress the local interests. The application of this principle would imply that the livelihood requirements of communities living in and around the conservation areas must be fully taken care of by recognition of local rights through legal and institutional means.

Weaving this principle in laws and policies is of paramount interest. The local community interests have always been a prime concern for many people's institutions and have also been a part of the discussions on biodiversity conservation, particularly, forests in India. Review of laws has shown that there are spaces under both legal and institutional means that have the potential to ensure intra-generational equity, however what is more pronounced is the denial of equity through legal and institutional means. The complementarities and contradictions are seen in all the predominant laws on biodiversity conservation. To an extent the Forest (Conservation) Act, 1980 protects livelihood space of local communities from being used for non-forest purposes. The Indian Forest Act, 1927 and the Wild Life (Protection) Act, 1972 too give scope for creation of livelihood spaces. Due to the lack of scientific study to assess human habitat sustenance or non-sustenance in PAs scope is generated for the eviction of local people from the PAs. There is lack of invocation of the section 28 of Indian Forest Act, 1927, that gives scope for creating village forests to meet local forest resource needs. The same holds true for the Panchayat Raj (Extension to Scheduled Areas) Act, 1996 (PESA) that provides extensive scope for decentralized natural resources management through local institutions. However, there are major contradictions within laws, which makes it difficult to ensure inter-generational equity. At the same time, the class, caste and gender inequities are largely unaddressed by laws, policies and institutional means in India. In their present form laws lack adequate provisions to ensure access of local communities to biodiversity. Therefore amendments in the laws are required to provide scope for decentralized governance of resources.

To conclude, it is important to take cognisance of the biodiversity needs of poor communities in the biodiversity protected areas, if justice has to be done to both conservation and people's interests. A glaring observation is the lack of scientific study to assess needs of local people in areas rich in biodiversity, that are under protection or proposed for protection, their dependence on forests, existing threat to sustenance of biodiversity because of human habitat in and around that area. The prejudice that prevails in the public discourse that local people are a threat to biodiversity, needs to be kept out while assessing anything from the point of intergenerational equity.

Action Point: A National Committee should be constituted to assess the extent of livelihood dependence of local communities and their contribution to ecosystem conservation (while one

may wonder success of various committees of the state in history). The committee should have an equal representation of people's institutions, conservation activists, chairperson of the National Commission on Scheduled Castes, and Scheduled Tribes, Ministries of Tribal Affairs, Social Justice and Empowerment, social scientists and natural scientists (which includes wildlife scientists). However, a clear distinction needs to be made between a scientist and a single species protection activist. usually in committees the representation of activists is more apparent than scientists).

Discussions in the succeeding section identify both complementarities and contradictions in various laws as well as provide suggestions for convergence of livelihood and biodiversity conservation.

Indian Forest Act, 1927

The Indian Forest Act (IFA) classifies forests into Reserve Forests (Section. 4), Village Forests (Section. 28), Protected Forests (Section. 29), and Reservation of Trees (Section. 30). These four categories have different implications on rights of the communities living in and around these areas.

The distinction among the three principal categories is essentially based on the rights of communities over such forests. Except the Reserve Forest there exists scope for access to resources in other forests coming under the IFA. The Reserve Forest is under the total control of the government with very limited rights (described as concessions) conferred on the local people. There however, exists much scope in the 'Village Forest', that grants rights to the 'village community' to derive benefits from the resources of forests for livelihood pursuits.

Although, village forest provides greater degree of rights to local communities, yet the fact is that the power to make rules for the management of such forests is vested with the State Government with absolutely no provision in the Act for community consultation. This in a way defeats the principle of intra-generational equity since it provides enough scope for arbitrariness by the State authorities.

Action Point: It is important to review the Act to make scope for negotiation of rights that can be accessed legally and governed locally by the dependent people. Uttarakhand Van Panchayat system is a best example for community managed forests with a clear legal basis for governance, that is unambiguously laid out.

Further, Section 35 of the Act empowers the State Government to regulate and prohibit activities in any forest or wasteland for the purposes specified in the section such as, protection against storms, winds, soil erosion, protection of roads, bridges and preservation of public health. This section only provides for consultation with the owner of such forestland (in instances where it is privately owned) and not with the community dependent on such forests, in case there are any such dependent communities. This provision needs to be extended to all communities, as there are chances of quoting false reasons for protection of forest areas used by local communities.

Overall, legally there should be provisions for mandating community consultation while declaring any forest area as protected.

Wild Life (Protection) Act, 1972

The Wild Life (Protection) Act, 1972 (WLPA) has many provisions that are invoked to severely restrict the traditional resource use of dependent communities. While the Act has served to protect vital ecological habitats from destruction due to commercial and individual pressures, it has also alienated local communities from their resources. As it exists, emphasis of the Act is on conservation, irrespective of the physical alienation of local persons (also alienation from resources) resulting as a consequence of conservation. While there is no denying that there is a need for some inviolate areas and the need to regulate certain resource use patterns and practices of communities in the interest of conservation. This however, should not be done without taking communities into confidence and providing them negotiated alternatives. Moreover, there is no considerable evidence to an exclusionist approach of this kind that assumes all community uses of resources within PAs as detrimental to wildlife; this is unscientific, unjust and unsustainable. It is apparent from community conservation efforts from around the country that communities actively managing their resources and having a stake in conservation have themselves regulated many resource use patterns that are ecologically unsustainable. Until 1991, there was no provision under the WLPA for rights of people to continue living in PAs, in spite of these being inhabited by approximately three million people. Now people can be allowed to continue living in sanctuaries but not in national parks. This gives hope to explore community governed protected areas.

Action Point: After doing the need assessment of communities and ecological sustenance a plan should be evolved in a participatory manner to legally allow local governance over forest control and resources. The forest department should however continue to have its role as a protective agency to prevent destruction from outside forces.

Equitable Sharing of benefits with Non-State Actors

The 1994 U.N. Draft Declaration on Indigenous Peoples states that, "Indigenous peoples have the right...to their traditional medicines and health practices, including the right to protection of vital medicinal plants, animals and minerals [Art. 24]...[and] ... to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs and visual and performing arts [Art 29].

The other meaning of "equitable sharing of benefits" relates to ensuring a fair economic return to those individuals or groups from whom genetic or other biological, intellectual, cultural or economic resources were obtained. Recent international instruments affirm in varying degrees that the participation of non-state actors is desirable and essential to fulfil the objectives of conservation and sustainable development. This aspect of "equitable sharing" appears to have made its international debut at the UNCED. Agenda 21, Chapter 15 on the Conservation of Biological Diversity provides that, "Governments...should...recognise and foster the traditional methods and the knowledge of indigenous people and their communities...and ensure opportunities for the participation of those groups in the economic and commercial benefits derived from the use of such traditional methods and knowledge..."

This definition of equitable sharing also appears in a wide variety of post-UNCED resolutions, declarations, platforms for action, and other norm-creating materials. These materials include the Draft Declaration and Draft Platform for Action for the Fourth World Conference on Women, which calls upon governments to, "Encourage through national legislation and subject to it, indigenous women's traditional knowledge, innovations and practices and skills, including those concerning traditional medicines, biodiversity and indigenous technologies ...and encourage the equitable sharing of benefits arising from the utilisation of such knowledge..."

The long-term ramifications of equitable sharing between state and non-state actors are still evolving under the international and national legal instruments. However, radical departure, is likely from much of the current intellectual property law which does not contain adequate protection for the types of knowledge regarding resource utilisation maintained by many traditional long-term local inhabitant communities. Ensuring that local communities receive adequate compensation from outsiders (national or foreign) for utilisation of knowledge and genetic resources that they have managed or husbanded could provide positive stimuli for them to conserve these resources. The 1994 Desertification Convention expressly requires equitable sharing by local communities and thus is the most progressive enforceable international agreement to date encapsulating this concept.

Action Points

Non timber forest produces amount to bulk of the direct benefit biodiversity protection. A policy for equitable sharing of benefits must therefore focus on this crucial output from forests. Several scientific, legal and policy actions need to be taken for protection as well as equitable sharing of NTFP. Some of the suggested measures are as follows:

- 1. Study of the conditions of availability of Non Timber Forest Produce (NTFP) across the country needs to be done.** There are reports that availability of NTFPs is getting scarce due to receding forest cover and also attack of disease on NTFP in some places.
- 2. List of traditional NTFP right-holder communities needs to be made across the country.** This is required for consolidation of traditional right holders who should be included in pertinent laws as legal right holders. This will also help in preventing outsiders from harvesting forest produces. There are several instances of unscientific harvesting of resources done by outsiders.
- 3. Ban on collection of any variety of NTFP shall be supported by a scientific study on the unsustainability of harvesting/collecting that particular**

variety of produce. In the state of Madhya Pradesh, Gum karaya (*Sterculia urens*) collection is banned in many districts in spite of the fact that this item has export market value, on the ground that the existing practice of debarking is destructive to tree survival. In such cases attention needs to be paid to promote sustainable practices among tribals (additionally all traditional collectors) through training and extension¹¹.

4. **NTFP rules of various states need to be streamlined so as to meet the issues of equity and equality in terms of benefit sharing, access and marketing.** The system of auctioning the rights for NTFPs over specified area for a specified period, with very little control over the right holder has resulted in unsustainable harvesting practices and over-exploitation of resources. In Orissa, the monopoly exists for a tree called *Oroxylon indicum*, the bark of which is used for making incense sticks. The traders who enjoy the monopoly of entering the forests not only remove the bark, but often cuts (sic) the entire tree. Several cases of injury to forest caused by the traders' labour have been reported by the Forest Department itself, but the lease still continues¹².
5. **There needs to be compatibility of rules in marketing and collection of NTFPs:** Different states have different laws to govern the collection and marketing of NTFPs. 'Mahua' (*Madhuca indica*) is nationalized in Gujarat but in its border states - M.P. Maharashtra and Rajasthan, it is non-nationalized. This results in a lot of thefts causing enormous difficulties to traders who adopt fair practice¹³.
6. **Gaps in existing legislation on matters related to NTFPs:** Many State forest acts and rules are not properly drafted. For example the botanical names of NTFPs are missing leading to confusion about the identity of the plants. Further, in many cases local and vernacular names of the NTFP species are not used all over the region. Hence, the suggestion would be that the acts and rules should clearly mention the botanical name along the local names to avoid confusion. Medicinal plants form an important part of the NTFP. The demand for herbal product and herbal medicines is on the rise; much of the demand is being met from the forests. Farmer friendly laws and policies encouraging and facilitating cultivation of medicinal and aromatic plants should be formulated.

¹¹ Ramji and Bhatnagar (2000:50)"Empowerment of Tribals and Sustainable Development of Non-Wood Forest Producue", *Yojana*, Vol.44:No.4, cited in Jain, Ashok (2000:xxv) Regulation of Collection, Transit and Trade of Medicinal Plants and other Non-Timber Forest Produce in India - A Compendium, TRAFFIC-India/WWF, New Delhi.

¹² Shukla R.S, (2000) *Forestry for Tribal Development*. A.H. Wheeler & Co.Ltd., New Delhi, India, 274 cited in ibid page, 24.

¹³ Misra, A.P. (1998): cited ibid page. xxiv - v. "Evolving Mechanism for NTFP - Oriented Forest Management", Surya Publications, Dehra Dun, 164.

- 7. Adequate emphasis shall be given to marketing, distribution and sustainable collection of NTFPs of all kinds and not just to the ones that have market value.** There exists a tendency to concentrate policies around harvesting and marketing *tendu* leaves.
- 8. Natural Resource Based Items shall be protected from the point of view of intellectual property.**

One of the useful field studies and exercises done by various NGOs across the country is evolving People's Biodiversity Registers in villages across the country that contain information on traditional knowledge of the use of local biodiversity. A document of this nature has enormous potential in guarding local knowledge from commercial pressures. An exercise of this nature should be carried out throughout the country to safeguard indigenous knowledge from piracy of intellectual property. For ensuring authenticity of the document writers and the document itself, it should be endorsed by the local Gram Sabha, Gram Panchayat, D.F.O. and the District Collector.

RIGHT TO INFORMATION

The principles of *Right to Information* as applied to biodiversity would imply that communities are informed and consulted on all matters concerning their individual and community interests in decision making. Legal and institutional mechanisms and appropriate checks and balances would have to be set in place to guarantee the right to information—and also space for negotiation. State authorities would be required to share information formally and not just nominally, to demystify and actively disseminate all relevant information for informed decision making by communities and the State machinery.

The right to information of communities should include in its fold information about activities that are related to conservation of biodiversity as well as activities that are harmful or pose threat to livelihood of local people.

One of the activities that poses harm to local livelihood, is acquisition of land under the Land Acquisition Act in order to displace people from their habitats. The procedures under the Land Acquisition Act have to be followed for all acquisition done in implementing the Indian Forest Act, 1927 and the Wild Life (Protection) Act, 1972. The operation of the Land Acquisition Act makes a number of presumptions for its successful results:

- **First** that there are land records on the basis of which people can claim their rights; for among majority of the rural Indian population, especially amongst the tribal population such records of rights do not exist.

- **Second** the presumption that the notification issued under the forest laws will actually reach the people whose land is being considered for acquisition and that they will be able to read and interpret such notifications. There is no provision in the contemporary forest laws that holds official machinery accountable if the notifications do not reach the concerned people.
- **Third** that it is sufficient to compensate owners of private property based on the current market value of the property. There is no provision of compensation for common properties, for land without *patta* and resources like Minor Forest Produce, that have been traditionally in use, assumption is that they are not legal entitlement. Hence, it is not required to compensate those who are dependent on common resources for their livelihood to ensure that they are not affected badly as the result of acquisition.

One space that can be extended to consult communities on socio-economic impact is the Environment Impact Assessment Notification, 1994. The Environment Impact Assessment Notification, 1994 provides for a procedure of public hearing for environmentally damaging activities. However, the rights of the citizens are very vague. In this local people have access only to the executive summary of the Environment Impact Assessment (EIA) report that does not explain the actual impact due to the proposed activity.

Action points

1) New methods have to be worked out so that people are informed about any activity that is harmful to the biodiversity on which their survival is critically dependent. Secondly, a system of accountability should be incorporated in all the legislations intending to acquire lands by making the officials accountable if the notifications do not reach the people. The concerned department should have list of all the acknowledgements received and enclosed, against the name of each project-affected person.

Free, Fair and Negotiated Settlements of Rights and Public Participation

The concept of free and fair settlement of rights emanates from the principle of right to information. Communities should not have just right to be informed but to take part directly on issues concerning their livelihood. It would imply not only the right to be consulted on the choice of area and the extent of the area to be conserved but also in determining the arrangement for benefit sharing from the conserved area, be it in the form of rights over Non Timber Forest Produce (NTFPs) or benefits arising out of tourism.

Kiss and Shelton have discussed participation of affected groups in environmental and developmental decision-making as their right. Public

participation is based on the right of those who may be affected to have a say in the determination of their environmental future.

The role of public participation as a necessary means for achieving sustainable development was first clearly identified in 1987 in *Our Common Future* ("OCF"), the Brundtland Commission's report. It was found that , " In the specific context of the development and environment crisis of the 1980s, which current national and international political and economic institutions have not and perhaps cannot overcome, the pursuit of sustainable development requires: *[inter alia]*...a political system that secures effective citizen participation in decision making."

The Brundtland Commission identified "effective participation" as *sine qua non* for realising sustainable development. It refers particularly to the significance of participation in promoting sustainable development by specific groups of the public, namely indigenous people and NGOs.

Identifying participation as a precondition for sustainable development implies that neither environmental nor developmental strategies are likely to be sustainable unless all affected actors, both state and non-state, and particularly those with special dependencies on the resources at issue, are involved in decision-making. At the level of non-state actors, participation leading to sustainable development requires that affected groups, such as local communities inhabiting and utilising biologically rich areas must play an active role in the shaping and implementing laws for protecting species and ecosystems in the area, and in benefiting from the use of these resources.

International instruments concerning indigenous peoples have been much more direct in referring to participation as a right. In these texts, participation is expressed as a key to the realisation of other rights and values. For example, the ILO's 1989 Convention on Indigenous and Tribal Peoples recognises "[t]he rights of the peoples concerned to the natural resources pertaining to their lands...[T]hese rights include the right of these people to participate in the use, management and conservation of... resources." The 1994 draft UN Declaration on Indigenous Peoples likewise recognises right of indigenous people to participate "...in the political, economic, social and cultural life of the State...[Article 4]...if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies [Article 19]... if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them...[Article 20]"

Treating the right to participation as a means for facilitating the realisation of other human rights is a norm reiterated in the 1994 Draft Principles on Human Rights and the Environment. It states that, "All persons have the right to active, free and meaningful participation in planning, decision-making and in processes that may have an impact on the environment and development. This includes right to a prior assessment of the environmental, developmental and human rights consequences of proposed actions."

The IUCN Draft Covenant on Environment and Development also refers to the right to public participation as a facilitating right. The IUCN draft states that "All persons...have...the right to participate in relevant decision-making processes." Meaning here, conservation related processes and programs.

The participation of "stakeholders", "affected groups", and other non-state actors is now well recognised in UNCED and post-UNCED international legal materials dealing with the environment and socio-economic development. The instruments reflect the emergence of two broad dimensions in the concept of "public participation."

First, people should be accorded the opportunity to participate in official socio-economic development decision-making processes and activities that will directly affect and have impact on their lives and well-being. Initiatives that fail to include affected groups in decision-making and project implementation may be discredited. The acclaimed Merck-IN Bio agreement between a trans-national pharmaceutical company and a Costa Rican national scientific institute for the collection and processing of resources of biological diversity with the aim of developing marketable commercial products provides a valuable example. The text of the agreement does not take into consideration the rights and interests of local communities from which the resources are derived, and fails to include the participation of these communities in the implementation structure of the agreement. As a result, the parties to the agreement have been subject to public criticism.

Second, in order to participate fully, the public must be provided with (or at least have access to) adequate information concerning the decisions and activities of government. Kiss refers to this aspect of participation as "obtaining information."

Obtaining information is a prerequisite for the major role played by the public, which participates in decision-making, especially in environmental impact or other permitting procedures.

The Indian Forest Act, 1927 and the Wild Life (Protection) Act, 1972

The Indian (Forest) Act, 1927 (IFA) permits very minimal participation in the management of forests. As noted earlier IFA has three categories of forests:

- Protected Forests
- Reserved Forests
- Village Forests

It is pertinent to note that the IFA was conceived during the British time, hence, conservation of wild life was not in the scheme of scientific management of forest mandated through the IFA. People were mostly restricted from accessing wood based resources rather than wild life. Village forests provided scope for access to resources to meet the local needs. Except this, there was no scope for consultation of communities in creation of forests. Reserve forests are akin to the present day national parks and sanctuaries that seek settlement of rights of local people. Further, Section 35 of the Act gives power to the State government to

regulate and prohibit activities in any forest or wasteland for the purposes specified in the section such as, protection against storms, winds, soil erosion, protection of roads, bridges and preservation of public health. This section only provides for consultation with the owner of such forest land and not with the community dependent on such forests. As such it would imply that only private ownership can attract the provisions of this section without any consultation with the community.

Under the Act, settlement of rights does not per se imply eviction of people from resources and from their traditional habitat, however the exclusionist approach hindering local people from resources and absence of community participation in any process of creation of forest categories, can not be overlooked.

Action Point: Community consultation should be made a mandatory requirement for any program that will affect local communities, for example, conversion of the status of forest for exclusive protection, hydel projects, industrial projects etc.

The Wild Life (Protection) Act, 1972

The Wild Life (Protection) Act, 1972 (WLPA) in PAs restricts access to forest resources either partially or fully. In several instances WLPA mandates dislocation of local people from their habitat coming within the purview of the PA.

The Land Acquisition Act, 1884 (LAA) is the legal basis for acquisition of land for conservation under the WLPA. LAA lacks scope for democratic processes in acquisition of land. There is also a need to make necessary changes and include provisions for consultation with project-affected persons negotiation, right to information and transparency in the process of acquisition. Only such a process can determine the final acquisition. A set of rules have to be evolved on these processes, so that by definition and spirit one could call it a negotiated settlement of rights.

Forest (Conservation) Act, 1980

The Forest (Conservation) Act, 1980 (FCA) vests virtually all powers with the Central Government to decide on whether or not to permit use of forest land for non-forest purposes. Public participation in the entire process is marked by its absence. However, there is some development towards meaningful participation in the decision making process. In a letter issued by the MoEF (No.11-30/96-FC (Pt.) dated: 26.02.99) to the Chief Secretaries of all the States and Union Territories regarding the scrutiny of proposals submitted for diversion of forest land for non-forest purposes under the FCA, emphasis has been given on the

significance of consultation with local people on the requested non-forest use of forests:

...it has been decided that whenever any proposal for diversion of forest land is submitted, it should be accompanied by a resolution of the '*Aam Sabha*' of Gram Panchayat/Local Body of the area endorsing the proposal that the project is in the interest of people living in and around the proposed forest land

Action Point: This circular should be disseminated to all the *Aam Sabhas - Gram Sabhas* in all the states. Also, the MoEF annual report should reflect the number of such processes held annually across the country.

Joint Forest Management and Eco-development Program

Programmes like eco-development and joint forest management offer much scope for convergence of local people and forest department in management of conservation related issues. Both in their present format envisage reduction of dependence on forest resources, regeneration of forests, participation in conservation and help ensure livelihood support to local communities. Both have endeavoured to enable the forest administration to establish a dialogue with the locals. However, there are observations that both these programs have not helped in strengthening local institutions, developing practices that contribute to conservation of resources, meaning reducing dependency on forest resources. In several places the activities have stopped after the project funding came to an end. Overall, lack of long term impact of these programs and ramifications of the program have been highlighted by activists, academics and forest historians.

1. In a way eco-development has tremendous potential, but its approach remains limited. Especially since the emphasis has been on encouraging people to leave their traditional systems and become a part of the "mainstream" governed by the market systems. Though there will be some people who want to take this route, it is unfair to impose this on all of them. Changes will have to be made in design of the eco-development programme to integrate traditional knowledge and provide livelihood options that are culturally sensitive and relevant to the community¹⁴.
2. Appropriate selection of place, dissemination of project proposal amongst the locals, experts in forestry and community development is necessary. Need assessment is required, duplication of programs like this in places such as Uttarakhand, where a community management institution such as van panchayat is already in place should be avoided.

¹⁴ Shantha Bhushan and Neeraj Vaghlikar, Comparison of the WLPA and the PESA, Kalpvriksh, 2002

3. Sustainability of these programs needs to be evolved by linking them with existing institutions like van panchayat, gram sabha and community organizations for long term impact, even after funding is over.
4. Lastly, an evaluation of the existing eco-development and joint forest management across the country is required. As such there are evaluations of these programs done by various people and organizations on their planning, implementation and impact. A compilation of these findings is necessary to see if both the programs need an overhaul in terms of perspective and implementation. For example, in Huddu gram panchayat in Okhimutt, Rudraprayag district in the state of Uttarakhand, villagers said, giving cookers and LPG gas stoves have very limited role to play in reducing pressures on local forests as replacing a cylinder is an economically non-viable proposition for many poor families and during winters having firewood stoves becomes necessary to keep oneself and the house temperature warm.

COMPENSATING COMMUNITIES FOR RESTRICTIONS ON BIODIVERSITY USE

There may be situations in which even limited/minimal extraction of biodiversity resources may endanger the biodiversity. In such instances, considerations of inter-species and inter-generation equity may require complete restrictions on biodiversity extractions – it may be necessary to create inviolate zones.

However it has to be borne in mind that communities in the vicinity of precious biodiversity are usually precariously placed from the perspective of survival. Therefore decisions to restrict their access to biodiversity must be taken with utmost care and through transparent process. The rational for this decision must be shared both with independent experts and the affected communities. They must be given full opportunity to legally challenge this rationale.

In the event that access to biodiversity is restricted or barred, the state must be legally bound to provide alternative livelihoods in tune with the socio-cultural practices. Further, in the event of restriction on access to a particular species which is part of the livelihood activity, the state shall as far as possible try to provide alternative to that species/resources, otherwise adequate compensation for loss of that species/resources in line with socio-cultural practices/ways of life.

Action Point: For conservation of biodiversity a system for reward on custodianship of biodiversity and knowledge should be developed. It is important that the reward is to be in the form of assertion of community rights over public lands and water within defined territory. The

reward should flow primarily go to a geographically defined community; though they can also go to individuals, to caste or tribal groups or to clusters of village communities. However, it is absolutely essential that they should have adequate authority to exclude outsiders and to regulate the harvest by group members, as well as an assurance of long-term returns from restrained use of such a system to operate effectively.

Such additional rights of access to publicly held resources would serve as a positive incentive for making prudent use of public lands and waters to meet local biomass needs. But decentralization of natural resources management may by itself be inadequate to promote maintenance of high levels of distinctive elements of biodiversity within the community, since there may be better economic rewards from monocultures, be they of high-yielding crop varieties in private lands or eucalyptus on public lands. Specific incentives, which should be viewed as service charges, are therefore necessary to maintain diversity, whether of medicinal plants, wild relatives of crop plants, fruit trees in homestead or troops of primates or crocodiles on public lands and waters (Gadgil & Guha 1995). Individuals or communities participating in such efforts must therefore be paid certain rewards linked to the levels and values of biodiversity within their territory. Such rewards could be untied funds coming to the community to be devoted either to community works such as educational and health facilities, or to be shared among all community members. The rewards could also take the form of building capacity for maintaining enhanced value of biodiversity within their territory, or for setting up biodiversity based enterprises. Apart from these rewards, there could be one time reward such as fees for collecting some genetic resources from the territory, or fees for sharing some piece of knowledge relating to use of biodiversity. There may also be short-term rewards such as royalties from commercial application of some elements of biodiversity or knowledge to be traceable to a particular set of localities, communities or persons. It might therefore be better to pool such royalties in a **national biodiversity fund** and use this for rewarding communities for the ongoing maintenance of biodiversity within their territories (Gadgil and Rao, 1994). In this manner, community efforts at biodiversity conservation would innovatively supplement and perhaps in the long term largely replace conventional schemes for the protection of wild areas and wild species through national parks and sanctuaries.

PUBLIC TRUSTEESHIP FOR BIODIVERSITY RICH AREAS

Biodiversity to be held as a Public Trust by the government.

Areas that are rich in terms of biodiversity must be regarded as being held in trust by the State. This is essential for the long term conservation as well as utility to the community dependent on such biodiversity. The doctrine should be made applicable not only to those areas on which the community has *de jure* right but also where they have *de facto* right or even where they derive no direct benefit. Thus even protected areas and other such closed areas would come under the purview of public trust. The Supreme Court in fact has held that public trust doctrine is applicable in India:

The notion that the public has a right to expect certain lands and natural areas to retain the natural characteristics, is finding its way into the law of the land. The ancient Roman Empire

developed a legal theory known as '*the doctrine of public trust*'¹⁵. It was founded on the idea that certain common properties such as, rivers, seashores, forest and the air were held by the government in trusteeship for the free and unimpeded use of the general public. ... the public trust doctrine imposes the following restrictions... first, property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public, second, the property may not be sold, even for a fair cost equivalent; and third, the property must be maintained for particular types of uses...

The Supreme Court of California summed up the powers of the state as trustee in the following words:

... the public trust is more than an affirmation of state power to use public property for public purposes. It is an affiliation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right only in rare cases when the abandonment of that right is consistent with the purpose of the trust...the state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible...

In terms of natural resources the Public Trust doctrine has to ensure the livelihood security of the local communities such as, fisherfolk, nomadic graziers, forest dependent communities, shifting cultivators etc. In this sense, the principle of *Eminent domain* should be complimented by the doctrine of public trust.

SCIENTIFIC INPUTS IN MATTERS RELATING TO BIODIVERSITY CONSERVATION AND USE.

In matters relating to conservation of biodiversity scientific inputs are taken as the basis for drawing out the management plan and conservation strategies. However, the attempt is to blend modern scientific/conservation inputs with the traditional conservation practices of the local people.

¹⁵ The Supreme Court in M.C. Mehta Vs Kamal Nath and others [1996 (9) SCALE 141]

Conclusion: Societies have evolved over the years in the history of India and had consequent resource use structure defined in the prevailing paradigm of political economy of resource use and regulation. Each society at different points of history had folk, cultural, social and legal regimes to govern forest resources (Rangarajan, M: 2000; Ravi, S.K.: 2002). It is significant to note that regimes are defined by the economy of resources, history has moved from moral economy to market economy in its relation to forest resources (Guha and Gadgil: 1989). The binary of demand and supply determined the legal structure to control forests and in the late 20th century, biodiversity in India. In the friction of demand and supply, what has emerged is the need for conservation of biodiversity in the light of its limited coverage from most of the ecological zones of India. In the whole course of history there is glaring observation about the friction between state and local people on resource sharing and benefits. The prevailing state regimes, commercial and conservation discourse essentially define access and control over resources. Observation of people's rights activists is that laws and policies have failed to turn the colonial approach of resource control to democratically shared concerns. Over here, an attempt has been made to propose conservation and democratic principles for a fair and transparent governance of natural resources that can guide both laws and policies concerning conservation of biological diversity in India.

CHAPTER II

SPECIFIC LEGAL AND POLICY ISSUES

I. Centre and State Relations

The relation between the Central Government and the State Government is of strategic importance to biodiversity conservation, since conservation responsibility is in most instances shared one. However, the exact nature of this shared responsibility is nebulous. One consequence of this is the conflicts that take place between the Central Government and the State Governments on conservation of forests. Therefore, clarity is essential in the division of power between the Central and State Governments. It is also required to safeguard the interests of the stakeholder communities, as there are conflicts in implementation of forest laws. The conflict is best exemplified in the case of forest laws.

Forest and wildlife come in the Concurrent List (List-III) entry 17A of the Constitution of India (COI), but land (Entry 18) and water (Entry 17) are in the State List (List II) of the Seventh schedule of the COI. Hence, an integrated approach is not possible due to different jurisdiction and power of the States and the Central Governments. What is apparently found is the conflict arising out of differing Constitutional mandates. There are many policy decisions on forests that have implications on land and water resources, for example, policies relating to water have implications on forests, like irrigation activities undertaken by the state have impact on forests due to water logging, soil erosion and salination. Also after 73rd amendment, eleventh Schedule has brought Minor Forest Produce, Social and Farm forestry within the ambit of the Panchayat Institution. There is a grave need to bring complementarity amongst various mandates of the Constitution of India and other laws and policies.

The Forest (Conservation) Act, 1980 (FCA)

FCA is a classic example of a law handicapped by contradictions arising out of implementation of other laws. It empowers the government to make decisions about how to use the forest lands, but is not a substantive law. In its operation it is a land use law that primarily mandates forest use of forestland. In spite of being for conservation of forests in spirit, in reality it fails in conserving forests. As conservation cannot be achieved unless the law mandates that decision be taken on scientific lines and the conflict of powers under the Indian (Forest) Act, 1927, the Forest (Conservation) Act, 1980 and the Wildlife (Protection) Act, 1972 are resolved. The land use issue gets further complicated due to the 73rd Amendment to the Constitution that empowers the Panchayats to manage village forests. According to the Panchayati Raj (Extension to Scheduled areas) Act, 1996 the Gram Sabha shall be competent to decide the land use pattern in Schedule V areas. There seems to be absence of clarity on conservation, while the mandate on the management and use of village forests clearly comes in Schedule V areas.

One documented work on the Centre State relations that exists today is the *Sarkaria Commission* 1988. It was pointed out in the report that by enacting the Forest (Conservation) Act, 1980 the Union legislature has occupied only one aspect of the concurrent field, viz., "conservation of forests". The legislative and executive competence with respect to the remaining aspects of the subject "forests" remains with the states. However, there is no detailed analysis of State and Central laws concerning biodiversity in terms of conflicts arising out of differences in powers

vested with them. The Commission basically concentrated on the Forest (Conservation) Act, 1980. It is an incontrovertible fact that deforestation in India has been going on at an alarming rate. All the states are seriously concerned about the loss of forests. Even the states that wanted that forests be a state subject conceded before the commission that the "loss of the forest cover continues to be a serious national problem. The Commission noted that "...it inevitably flows from this admission that the conservation of forests cover is not a matter of exclusive state concern. Therefore this matter cannot be put back on the state list as a matter of exclusive state jurisdiction. It is obviously a matter of common and concurrent interest to the Union and the States". The Commission noted that "... in fact the Union has occupied only one aspect of this concurrent field, viz., "conservation of forests" by enacting the Forest (Conservation) Act, 1980. Except to the extent covered by this Act, the legislative and executive competence with respect to the remaining aspects of the subject 'forest' remain with the States. The Forest (conservation) Act leaves the planting, development, extension and care of forests to the States. Even exploitation of the reserve forests in a scientific manner and appropriation of the income from those forests is with the States". Further according to the Commission "...If the States are unwilling or unable to extend the forestation or develop the forests and usefully deploy the manpower under the special employment programs, that is no argument for transfer of 'forests' back to List II".

The states' main grievance before the Commission was that there has been a centralization of power by virtue of section 2 of the FCA. The states wanted measure of delegation in various respects. Further they wanted a blanket clearance for projects like the construction of power transmission lines where damage to forest areas was minimal.

The Commission emphasized that there is a need to distinguish between illicit felling of trees and dereservation of or interchange (sic) by the States. According to the Commission, " the centralization of power in regard to dereservation of forests will not yield that desired results. The commission therefore recommended that powers should be delegated to the States to divert to a small extent, say not exceeding 5 hectares of reserved forest, land which is urgently required for public purpose".

Specific recommendations:

- As far as possible the Government of India should give clearance under section 2 of the FCA simultaneously and with the project clearance.
- A lot of effort and time would be saved if the Central agencies are associated with the formulation of large projects/ schemes involving reserve forests, right from the beginning, so that adequate measure can be built into them not only to compensate but also to improve forest resources. The Forest Conservation Act, 1980 as an umbrella law should have clear mandate of protecting all forests across the country irrespective of forests being fully or partially managed or governed by any other prevailing law of the country. However, no provision, with any future amendment to the Act, should curtail local livelihood interests of the people.
- It is important to review complimentarities and contradictions emerging from forest conservation between State and Centre laws and powers vested in them.

Comments:

While dealing with the complex issues involved in Centre State relations, the Sarkaria Commission concentrated on the FCA and to some extent on the IFA. It left the whole of the Wild Life (Protection) Act, 1972 out of its purview. Besides its recommendation was intended to simplify the procedure for the diversion of forests for non-forest purpose. The assumption that it

is not dereservation of forests but rather the illicit cutting of trees that is at the root of the massive decline in tree cover is doubtful.

Action Points

- Specific details on the nature of Centre - State relation with respect to varied aspects of biodiversity conservation and use needs to be clearly worked out.
- There are areas of confusion with the overlapping of power to denotify forest areas between the Central and State Act. This needs to be resolved. The conflicting provisions in the Forest (Conservation) Act, 1980, the Wild Life (Protection) Act, 1972 and the Indian Forest Act, 1927 with respect to dereservation of forest land need to be resolved with suitable amendments. .

Convergence of Laws

Prior to 1980, forest was a state subject and the states have legislated many laws which now need to be taken into consideration for a review of conflicting provisions in the interest of conservation. These relate to exploitation of raw materials for industrial purposes, such as Saw Mills Acts/Rules of different states, rules concerning transit and felling of timber, Acts for regulating the collection of Non Timber Forest Produce (NTFP) etc. Besides these Rules and Acts which have direct impact on forest produce, there are also various revenue, tax and land laws which have direct impact on forestry work. In Himachal Pradesh, for example, land is acquired under the H.P Land ceiling Act, 1972, and the forestry work is carried out on such "ceiling lands" without the land records being accordingly modified to be officially identifiable as 'forests'.

In several instances social forestry and joint forest management work is being executed on land belonging to the revenue department. This does not fully ensure conservation of forests as the land is with the revenue department. Though all the forests come under the cover of the FCA, the ownership of land lies with the revenue department. This gives scope for conversion of forest land into non-forest purposes. In Gujarat usufruct and beneficiary rights on revenue wastelands (not Gochar¹⁶ or Panchayat lands) are regulated by the Revenue department¹⁷. On the other hand the usufruct and beneficiary rights on Panchayat and Gochar lands are regulated by the Forest Department¹⁸. These are not in synchrony with the purported principles of common properties such as, gochar and panchayat lands ideally should come under the autonomy of the local governance. Another type of anomaly is noted in Rajasthan where under the Rajasthan Land Tax Act, 1985 (Sec. 2 (a) (ii), (f), (g) (I-iii)) a wealth tax of 50 percent is imposed on the total annual sale price for private farmers, and 2 percent for industrial or commercial purposes. Such a law evidently promotes only commercial forestry and agroforestry, that too in a state which requires a higher degree of tree coverage. Thus defeating the whole conservation of forests, that ideally should be done through afforestation.

Action Point: All state laws having implication on biodiversity need to comply with the overall national policy framework for biodiversity conservation. Provisions in the Acts and Rules relating to biodiversity conservation need to be replaced on a priority basis for conservation. For this purpose state-wise analysis of the laws has to be undertaken to identify contradictions and complimentarities with central laws.

¹⁶ Grazing land. Also known as Gomal in Karnataka.

¹⁷ Order No: 3986-226(m) of 1st Jan, 1987

¹⁸ Order No: PRS 1080-87452-V-3 of 30th April, 1987

For any conservation goals to be achieved, synchrony of views, interests, laws and policies of the State and Central governments is of paramount importance. This would also mean, respect to customary laws of several tribal areas, especially in the northeastern states. Overall, the local and central laws have to display convergence for better protection of biodiversity in India.

Conflict Resolution among Laws

The Forest (Conservation) Act, 1980

The Forest (Conservation) Act, 1980 like the Indian Forest Act, 1927 is a 'Use Law' since it transfers the power to the Central Government to decide on the use of forestland for non-forest purposes. To that extent, it supersedes the Indian Forest Act, which confers power on the state government (section 27) to denotify a reserve forest. Further, complication arises due to the fact that the Wild Life Protection Act, 1972 (WLPA) confers power on the state legislature to denotify a sanctuary or national park. Although in all these cases the destruction of forest is involved, yet three different authorities or institutions have been given power to decide the use. Therefore, while it is the state legislature which decides under the WLPA it is the Central Government under the provision of the FCA and the State Government under the provision of the Indian Forest Act, 1927 (IFA). Hence, there exists multiplicity of authorities creating confusion in decision making. This is further complicated by the fact that forest is in the Concurrent List whereas land is in the State List of the Constitution of India.

Suggestion: Clarity and mechanisms needs to be brought to resolve conflicts arising out of simultaneous operation of various laws.

Forest Administration Structure

The current administrative apparatus for conservation of biodiversity, which includes making technical decisions as well as policing, are in the hands of the state apparatus. Three basic questions arise in such a situation (Gadgil and Guha 1995):

1. Does this apparatus have at its disposal the information needed to make appropriate decisions?
2. Is this apparatus adequately motivated to maintain biodiversity?
3. Is this apparatus competent to carry out effectively the task of regulating human intervention in the interests of the maintenance of biodiversity?

One can question the adequacy of the state apparatus on all three counts. The personnel of this apparatus are primarily from State forest bureaucracy. The forest bureaucracy has monopolized the scientific research on natural resource management in India. There prevails a view that many a times researches done by these agencies are carried out in a casual and unscientific fashion, this puts the competence of the state apparatus under doubt. Moreover ecological systems are exceedingly complex. The behavior of such system's can be predicted only to a very limited extent on the basis of general principles. At the same time, historical observations of the systems behavior are a valuable input for predicting the outcome of human interventions in any specific system. In other words, official apparatus has always neglected local livelihood interests as well as knowledge of folk ecology available with local population.

Secondly, no member of the official apparatus has a personal stake in the maintenance of biodiversity in any given locality. If that were the case, the interest in conservation of biodiversity

would have been grounded well. The general experience is that local people who have stake in biodiversity have used them on sustainable principles. At the same time, it is also true that the local people may or may not have stake in biodiversity maintenance as it depends on how different elements of biodiversity affect their personal well being.

Finally, the state apparatus is quite ineffective in discharging a policing function unless it has local co-operation, as has been strikingly seen in the failure to apprehend poachers and timber smugglers (eg. Veerapan). However, one must mention here that the apparatus has always succeeded in controlling access of the local community to the forest resources even for livelihood purposes. The bottomline is that the machinery has not given priority to mega destruction of forests and resources by powerful illicit elements.

There is therefore every reason to believe that the system of biodiversity conservation could be made more effective by utilizing local folk ecological knowledge and by creating a stake for the local population in conservation of biodiversity, if necessary by a **system of monetary reward as service charges** (Gadgil and Rao: 1994).

The need for specialization

Despite the emphasis on decentralization, the role of the government bureaucracy managing the forests is not reduced. In fact being the catalyst of change it has a critical role to play.

The forest administration together with the services managing the forests need to be overhauled keeping in view the changed focus in forest and wildlife management. At present the lone administrative agency, the Indian Forest Service (IFS) and the respective state forest service manage the forests. The training pattern is basically designed to meet the requirements of scientific management of forests with minimal amount of inputs/knowledge on social, conservation and wild life protection issues. Further, no consideration is given to the professional background of these personnel. Although the forest service was envisaged as a specialized service, the diversification of activities of the forest department into areas such as, wild life conservation, joint forest management, eco-development, research, social forestry etc., has meant that even the IFS has become a kind of generalist service with very little specialization. The present recruitment, training and operation of the system has no mechanism of linking specialization with the nature of the job/service.

There is therefore an urgent need to create specialized services or divisions within the existing Forest Service to cater to the diverse specialized requirements such as:

- Forest Conservation
- Wild life and Protected Area Management Services
- Timber and NTFP
- Social Forestry - Community Participation/Organization

It is a undisputed fact that in the prevailing conservation system forest department has a significant role to play in conservation of biological diversity. It is therefore important to strengthen the system with adequate training, person power, resources to safeguard biological diversity in a participatory and democratic way by involving local communities that are dependent on them.

Biodiversity conservation programs in India are concentrated predominantly in Protected Areas (PAs). Conservation of biodiversity outside the ambit of PAs has not received much attention by the policy and law. It is an open access regime in which no segment of society has a long-term interest in sustainable resource use. This can possibly be achieved by creating an institutional structure for conservation and governance of biodiversity. What is however of paramount importance is that the institutional and legal structures have to meet the demands of biodiversity conservation both within and outside the PAs.

To a large extent Protected Areas (PAs) have been instrumental in keeping industrial and agricultural ventures away from forest areas. However, the conflict between local livelihood interests and conservation are increasingly emerging in many of the PAs. This is mainly because of three reasons:

- (a) Displacement of local communities from their habitat;
- (b) Curtailment of usufruct rights;
- (c) Increasing conflict between people and wildlife. .

Since 1972 the coverage of PAs is on the increase. The PA network now extends over an area of about 4.7 percent of India's land area. Of these only 1 per cent is under National Parks. It is an acknowledged fact that these areas constitute the last remaining areas of pristine biodiversity. According to Singh, "...the internal and external biotic pressures on the carrying capacity of such habitats conflicts with the equally important need for protecting the human, cultural and environmental rights of the affected people". Further he suggests that, (ibid.)"...the protection of these habitats calls for a disaster management strategy" (2000:37).

The uniform strategy of wildlife conservation as embodied in the provisions of the WLPA does not take into account the local dynamics. Therefore there is a need to integrate local conservation initiatives, needs and livelihood requirements while implementing PA mandates. Many a time, blanket reduction or regulation of local resource use turns detrimental to livelihood interests of people. This needs to be supported by scientific studies. For example, there have been differences of opinion as to the impact of the ban on grazing in the Keoladeo Ghana National Park and the Valley of Flowers. Regarding ban on grazing in Keoladeo Ghana National Park, scientific studies have proved that bird diversity and population has declined with the ban on grazing. However, in the Valley of Flowers the floral diversity has declined with the stoppage of pastoral grazing. Sometimes, absence of planned program can turn detrimental to conservation initiative itself. For example, Karera Bustard Sanctuary in the State of Madhya Pradesh, where after the area was declared a PA for the Great Indian bustard, the blackbuck population significantly rose, causing severe damage to farmers' crops. Farmers earlier had their own ways of keeping the buck population under control, but with the declaration of PA, all these practices were stopped. Once harmless to the bustard, and indeed living in harmony with it, the farmers soon turned against it since the sanctuary was declared in its name and had ended up causing more problems for them. Today there is no bustard left in the Karera Bustard Sanctuary (Kothari, 2003)¹⁹.

Given the present situation two approaches emerge, the traditional exclusionist approach and the community based approach (observed by Singh, 2001).

The Traditional Exclusionist Approach: This approach is based on the premise that exclusion of people and the resultant reduction in biotic pressure would lead to better protection and conservation of biodiversity. The present legal structure is basically designed to achieve this objective. Thus in Reserve Forests and in National Parks there is a virtual exclusion of the local inhabitants in the entire scheme of management. Although in some instances this approach has

¹⁹ Kothari, Ashish (2002), Feedback on the BSAP.

resulted in biodiversity conservation yet its net impact has been far from being productive both for biodiversity and locals. The reasons are not difficult to locate. For example the present approach to conservation is not holistic but a lopsided one. In other words by creating islands of biodiversity rich areas in a sea of degraded areas through PA network, what is not taken into consideration is the resultant impact on other ecologically important areas that are neglected both from the point of view of conservation and reduction of biotic pressure. Over the years, due to lack of protection to PAs pressure on buffer as well as core areas has increased. In many cases the protected sites have not taken important approaches in conservation like creation of buffer area, landscape and wildlife corridors.

The exclusion approach is also constrained by initiatives of litigations on local peoples' rights that are both constitutional, legal and customary, on the basis of which they can litigate, results in prolonging of the protective measures to such a degree that the goals of conservation become unattainable, due to increased biotic pressure in the meanwhile or due to depletion of resources (Singh, 2000).

The Community Centered Approach.

This approach recognizes the full rights of the local people over traditional use of biodiversity. The community is vested with the power to decide on management aspects encompassing use of resources. However, the problem with the strategy according to Singh (2000:44), "...is that in the end it defeats the goal it attempts to achieve, namely, the sustainability of the tribal autonomy or way of life and the freedom for economic options for livelihood. " In all these cases, the main question is: how much control does the community as a whole, as opposed to some members of it, have?

Some of the situations which have arisen in community centred access to resources are²⁰:

1. In 'Scheduled areas', and also where tribal land non-alienability laws apply, the local people have not been able to resist the exploitation by external forces. The land have been sold away in "*benami*" transactions, and the resources have been exploited by external agencies, including the government itself.
2. There are examples from "Social Forestry" where 'Village Woodlots' or 'Community Forests' (sic) have been handed over to panchayats or to local communities. Hardly any of them have survived the onslaught of external or internal market interests. All such experiences make it evident that mere establishment or recognition of community rights, despite the fact that such local people have been living in these areas since centuries, does not guarantee that in the modern context the rights of wildlife or the resource rights of the local people will be protected. A paradigm shift in conservation approach and necessary legal thought is required if the interests of the sanctuaries and the local people are to be safeguarded...".

Many of these conditions are in the absence of full legal control and tenurial security, and therefore "communities" or rather individual members of such communities, are unable to stop elements from outside or inside who are destroying the biodiversity. A balanced model would therefore include both rights/control and responsibility, as also appropriate checks and balances to ensure that no one with authority has the leeway to misuse it; but the rights need to be complete, not half-hearted. This also supports the argument for joint management, where such checks and balances can be attempted.

There are many reasons why absolute rights to natural resources that happen to be located in the geographical proximity of a community cannot be granted exclusively to that community. This

²⁰ Singh (2000:44),

would not only undermine the very nature of a state, but is also inimical to biodiversity conservation.

The argument that democratic institutions like the Parliament and the Legislatures are the right place to resolve the *prima facie* conflict between a community's right to survive and the nation or state's right to use and allocate resources in the larger "public interests" needs to be reviewed. Representatives of people, rather than the people themselves, should deliberate on such conflicts and come up with just and workable solutions. However, the history of the modern world belies such expectations. Conflicts are rarely resolved keeping the interests of the local communities in mind. Therefore, demand should be made to move from a representative democracy to a participatory one. In a participatory mode members of the community have a decisive role to play in decision making as opposed to a representative one in which only the representative decides for the community as a whole.

In practice however, in India, as also in , other countries, traditional access and control over natural resources by local communities has been withdrawn or substantially abridged by the state. The discussion of the Indian Forest Act, 1927, the Wild Life (Protection) Act, 1972 makes this point very clear. The dominant legal regime which regulates natural resources in most countries, is the "eminent domain" of the state. In simple language, the state is deemed to be the ultimate owner of all the resources of land, water, forests or minerals, which are located within its jurisdiction. The principle of eminent domain needs to be replaced by the principle of Public Trust Doctrine²¹.

The major ideological rationale for exclusive state control over natural resources has been the alleged irresponsibility of local communities in their access over natural resources. It is suggested that unless these communities are kept in tight rein, all restraint would be thrown to the winds, and short-term acquisitiveness and greed for striving for accumulation would predominate biodiversity use. However, it is now a acknowledged fact that if local communities are empowered, they can act collectively as responsible custodians of the biodiversity that is situated in the vicinity of their physical locations But it has also been observed that such responsible community behavior in relation to biodiversity is neither uniform nor universal.

Comparative studies on the management of biodiversity (Singh et al, 2000) has revealed that if local communities are entrusted with the protection of biodiversity, in an appropriate facilitating environment and with the fulfillment of certain conditions, the results are likely to be favorable. But, at the same time, it is not the case that local communities in all circumstances respond optimally if entrusted with unrestricted access to local biodiversity. Therefore it cannot be stated that the goals of biodiversity conservation would be best met, if local communities were entrusted with absolute, unmediated, entirely unregulated control over biodiversity.

Taking the above limitation into account, what holds the key is the idea of "**negotiated and contractual management of biodiversity**". According to Ignacy Sachs "...the negotiated and contractual approach goes beyond the management of biodiversity...it could become the cornerstone of democratic middle-way regime, as creative response to the present crisis of paradigms - the collapse of real socialism, the running out of stream of welfare states, the unfulfilled promises of the neo - liberal counter revolution...." (Sachs 2000).

The specific contours of an alternative political blueprint are still blurred, but the goal of equity and basic rights are to be achieved not by representative regimens or ideologically driven vanguard political parties, but by communities themselves._The foundations of this new politics

²¹ discussed in chapter I

is that justice can never be achieved, and preserved by the people without their own participation. Seen in this light, participation is not an optional instrument of governance, it is a basic right and necessary condition for achieving justice.

There is no denying of the fact that the structure of the administration of public land including forest remains essentially colonial in nature. While reform of agricultural land was pressed forward following independence, the management of public land has remained frozen. There is thus a need for a drastic reorientation (*Gadgil and Guha, 1995*).

Lands could be divided into three categories:

- Lands devoted to ecological security (included in this category are PAs);
- Community-managed lands devoted to providing livelihood security through a production system compatible with biodiversity conservation. For example, Van Panchayat; and
- Commercial plantation activities.

Given this framework, the forest and other departments together with people would play the role of joint managers of lands devoted to ecological security or to livelihood security.

This management system should be worked out and implemented on the basis of a detailed decentralized land use planning exercise which would start afresh with land capability rather than the nature of bureaucratic control over land as the starting point. Once an appropriate land use plan, with emphasis on the urgency of biodiversity conservation and livelihood security, is worked out, then its proper implementation could be organized, not as a centralized bureaucratic exercise, but as a location specific, people oriented exercise. This calls for the strengthening of the village and district level planning geared to ensure that the twin considerations of ecological security and livelihood security are given due weight.

The separation of the objectives, functions and management systems for the three main categories of land use – Protected Areas, community forests and farm forests must be the starting points of the governance structure. A shift away from state monopoly is an essential precondition for both biodiversity conservation and livelihood security. However it has to be remembered that villagers with open access to forests are today in no way equipped to manage these areas. There are no resources, no institutions and no laws to help them keep away outside commercial interests, nor to regulate the behavior of any member of their own community who tries to liquidate these assets. . Some institutional and legal measures need to be taken to safeguard these areas from commercial and vested interests. Otherwise, it is only to be expected that such lands would be worse off than reserve forest lands managed by the State. The fact is that there are few exceptional cases, such as the Van Panchayat of Uttarakhand, the forests are better preserved than the tract of reserve forests (*Gadgil and Guha, 1995*). The example shows that local communities have the potential to manage the country's natural resources in India, a potential they have largely failed to realize in the absence of adequate institutional and legal support.

This latter point has to be taken into account when one is devising a governance structure aimed at justice, equity, as well as biodiversity conservation. Real empowerment is not just handing over control to local communities. The larger society must help local communities through providing appropriate institutions that would link local self government, best equated with the Gram Sabha or assembly of all adults at the village level, with the democratic structures at the village cluster, taluka, district, state and national levels. These higher level institutions should provide financial incentives for local communities to undertake actions in the larger interests. Higher level institutions such as science and technology departments must

support endeavors such as local level value addition to biodiversity resources through technical inputs. Rejecting modern science and technology would be suicidal.

There is a need to encourage empowerment through adequate legal and social support, as empowerment can not be construed as ownership/governance without accountability. Otherwise the institution may degenerate and become waste and corrupt. The transition should lead to creating transparent system of governance, open to public scrutiny and accountable to those it is intended to benefit. One can develop such a system by linking it with the system existing in the Panchayati Raj (Extension to Scheduled Areas) Act, 1996 (PESA).

PROVISIONS OF PESA RELEVANT TO NATURAL RESOURCE USE AND CONSERVATION

The provisions of PESA, 1996, relevant to natural resource management are:

- (a) A State legislation on Panchayats that may be in consonance with the customary law, social and religious practices and traditional management practices of community resources;
- (b) Every Gram Sabha shall be competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution;
- (c) The Gram Sabha or the Panchayats at the appropriate level shall be consulted before making the acquisition of land in Schedule Areas for development projects and before resettling or rehabilitating persons affected by such projects in the Schedule Areas, the actual planning and implementation of the projects in the Scheduled Areas shall be co-ordinated at the State level;
- (d) Planning and management of minor water bodies in the Scheduled Areas shall be entrusted to the Panchayat at the appropriate level;
- (e) The recommendations of the Gram Sabha or the Panchayats at the appropriate level shall be made mandatory prior to the grant of prospecting license or mining lease for minor minerals in the Scheduled Areas;
- (f) Prior recommendation of the Gram Sabha or the Panchayats at the appropriate level shall be made mandatory for grant of concession for the exploration of minor minerals by auction;
- (g) While endowing Panchayats in the Scheduled Areas with such powers and authority, as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed specifically with:
 - (i) Ownership of minor forest produce;
 - (ii) Power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of a Scheduled Tribe;
 - (iv) Power to exercise control over institutions and functionaries in all social sectors;
 - (v) Power to control local plans and resources for tribal sub-plans

The PESA formulation opens significant windows of opportunity for tribal communities to construct alternate community-based structures for delivery of justice. However, before these opportunities can be realised, a host of extremely difficult questions need resolution. The broad framework of the model of governance could be the base for developing the governance structure for management of biodiversity.

- **Management of biodiversity**

PESA is an Act that empowers the Gram Sabha of a village. PESA, while empowering communities to control their natural resources, needs to have a component on the responsibilities of communities in conservation of wildlife and ecosystems. One of the **responsibilities of the Gram Sabha** would be to ensure that there is sustainable harvesting of Minor Forest Produce (MFP), i.e., over harvesting must be avoided and they must ensure that wildlife dependent on certain MFP are not deprived of their source of sustenance. In most cases, where the people are largely dependent of MFP for their livelihood, they would ensure **that harvesting is done in a sustainable way without damaging the eco-system in any way**. On the other hand, it is possible that high economic returns for certain MFP, especially those which have medicinal value or have high international demand, could lead to over-exploitation. It is here that safeguards are needed. The other conflict that could arise as a result of recognising traditions could be that some of them may not be in the interest of conservation. For example some traditions such as mass hunting may not be relevant today and would probably lead to imbalance within the eco-system. While it is important to understand local knowledge and traditions, we have to evaluate them in the light of modern market forces and globalisation. On the other hand, the Wild Life (Protection) Act, 1972 itself and the implementation of this Act has more or less ignored customary laws and practices related to conservation. Hence there is a need for balance that would depend on factors such as location, the practices in question, possible alternatives for livelihood/conservation and the local administration (Bhushan and Vaghobikar, 2002).

- **Customary modes for conflict resolution²²**

A literal interpretation of the PESA formulation seems to suggest that restoration of customary modes of conflict resolution in itself would ensure more reliable justice. However, such uncritical faith in traditions and customs as intrinsically superior vehicles for justice delivery, cannot be supported empirically. This is especially true when one looks at the gender discrimination prevalent in the justice delivery system. Also it is essential that provisions are made to incorporate the environmental principles such as the inter generational and intra generational equity.

Panchayat literally means five persons sitting together to adjudicate, but panchayats have often been a bastion of male dominance, excluding women, young people, the poor and socially disadvantaged groups. For example, the Warli tribals traditionally resolve disputes by inviting both the disputing parties to nominate any two persons as panches to adjudicate. The four nominated persons in turn nominate a fifth panch. This seems an excellent mechanism, except for one critical rider, that traditionally only men can be nominated as panches, even where women are parties to a dispute. In the discussions this writer held in various Warli gram sabhas in the

²² A good option would also be to look at the judicial system in the North East India which is largely based on legal pluralism (meaning plurality of legal systems within a given political system). And for the enforcement of these multiple sets of laws (such as customary, religious and statutory) there are multiple administrative and judicial bodies. But the plaintiff has the right to choose from the various foras, as to where to take their grievances. This is known as forum shopping (Pant, Ruchi in personal communication, 2003).

Thane district of Maharashtra, women consistently stated their preference in favor of the formal systems of conflict resolution even after knowing limitations of these systems. This was probably a reaction against the severe gender bias of traditional systems.

Our problem is that though the need for alternate local community-based institutions for justice delivery is fully acknowledged, the extent to which these institutions must be rooted in tradition is unclear. The need to seek, unravel and understand traditional modes is also admitted; however, the yardstick of contemporary universal standards of justice and equity must also test these modes. There is need for far greater understanding, based on empirical research, about what are the principal traditional modes of justice adjudication in major tribal groups in Schedule V areas. Are these traditional systems accessible to all sections of the community? Can they deliver quicker, cheaper and more reliable justice, when compared to the formal judicial system? Answers to these questions must be framed with particular reference to women, dalits and other disadvantaged groups within tribal communities.

The experiences in schedule V areas must be taken into account while also dealing with issue relating to biodiversity conservation. Although there is no denying of the fact that most communities have intimate knowledge on various aspects of biodiversity, however the limitation of the customary modes of conflict resolution must be clearly taken into account and safeguards in the form of checks and balances must be developed.

Another set of problems relates to the procedure for a rural collective to adjudicate. The language of PESA requires that the gram sabha be competent to safeguard the customary mode of dispute resolution. This seems to suggest that detailed procedures would be laid down by the gram sabhas, drawing from tradition, and not spelled out in detail in the law itself. Whereas this interpretation has the merit of enabling local wisdom to flourish, definite broad safeguards are required to ensure conformity with universal principles of justice and biodiversity protection, including the principles of intra generational and inter generational equity.

Some of the other major issues on which the law must be unambiguous include the following:

- On which type of issue should gram sabhas be empowered to adjudicate? Should their jurisdiction be voluntary or mandatory? If the two parties desire to access alternate institutions, which would prevail? What would be the procedures and powers to summon witnesses, secure justice and enforce decisions? What would be the powers, if any, of the gram sabha to award punishments?
- There are also other issues related to the interface between the community-based and formal systems. Would their jurisdiction be concurrent or exclusive? Which agency/agencies would be bound to implement the decisions of the gram sabha? What powers would the gram sabha enjoy for the enforcement of its decisions? What would be the appeal mechanisms?

Ownership over NTFPs

- Even as PESA empowers communities to gain control over natural resources, it is necessary to emphasize conservation aspects of natural resource management, because the traditions of indigenous communities are falling apart as they are increasingly becoming a part of the larger political, social and market system. While being critical of the IFA and other Acts we also need to be critical of PESA, as it does not have explicit provision for conservation. Thus a new legal frame work for the management of biodiversity must incorporate specific

provisions for the conservation of biodiversity. Therefore adequate **checks and balances** will have to be in place to ensure the sanctity of our ecological resources.

The framework explained above is neither comprehensive nor an exhaustive one. Yet, the idea is that the governance framework follows to a very large extent the PESA model. Looking at the new challenges and threats to biodiversity and the declining significance of traditional systems of sanctions, the state certainly needs an important role in the new governance system. The state has to provide safeguards against any abuse of power and at the same time financial, technical/scientific inputs necessary for the local institutions to manage biodiversity.