TREADING AN UNCOMMON PATH: IN THE QUEST FOR EQUITY AND SUSTAINABILITY

An analysis of the rights and dignity owed to the forests held in common and the dwellers who reside therein.

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Environmental resources such as forests pose a particularly challenging and complex issue in the world of commons not only at the local and national level, but also at the international level. The issue of preservation of forests has led to an unending debate about the validity of conflicting approaches towards development- the anthropocentric approach vis-à-vis the conservationist approach. For forests, apart from constituting a resource held by the government for the people of a nation, have deep cultural and socio-economic linkages with forest communities and it is here that one of the most interesting debates about regulation is fostered. Even while states declare their sovereignty over such forests in a manner impossible in the case of more intangible resources, international commitments and growing national consciousness of the importance of preserving and enhancing forest cover, has contributed to forests constituting an important element of commons theory. Interestingly, there has been a significant shift in the governments' stance towards forest communities and an acknowledgment of the need to collaborate in evolving participatory regulatory models for the forests. This paper reflects our identification of key reformatory measures which should be undertaken in order to treat the forest as a commons resource in which the forest communities have a legitimate and legally recognised stake, specifically in the areas of traditional knowledge and the REDD programme. It is submitted in this paper, that the protection of forests as commons resources at a national level nested within an international level is beneficial, and could be seen, with the incorporation of adequate safeguards, as a mechanism for generating synergies, rather than trade-offs and irreconcilable deadlocks over national and international commitments especially in the abovementioned areas since they necessarily require participation of States from both sides of the development divide.

Keywords: Commons theory, India, forests, indigenous communities, REDD, climate change, legislative and institutional reforms, traditional knowledge.

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INTRODUCTION

The theory of commons is one which is noted for its ubiquity but is also one which is one of the most difficult to precisely ascertain. While being intuitive and appealing to an understanding of natural law and the reasoning of a communitarian living which addresses the issues of communal living and sacrifices for the greater good it has often been in conflict with the overwhelming mantra of private property and state-based paternalism, both of which removes the decision making powers from the local community – the former seeking to transfer it to market forces, and the latter seeking to transfer it to the State mechanism of command and control. The researchers will, attempt an exercise in reconciliation through the course of this paper. It is proposed in the course of this paper, to achieve, through legal and institutional reforms, harmonization of both a top-down and a grassroots regulatory framework, and supported by market based mechanisms. It is the researchers' belief that, given the quintessentially Indian backdrop against which this paper is set, it is imperative to try and evolve a model which keeps practicability and a potential for success as its priority. This paper will focus on the study of the forest commons and will address the issue in five sections. The first section will explore the philosophical and jurisprudential foundations for commons theory in India while the second section will address the Indian experience with forest commons through the prism of Government policies, legislations and official documents. The third section will also examine how the Indian Judiciary has discharged its role vis-à-vis the environment and specifically with respect to forests. This section is a fundamental component of the paper inasmuch as it examines a recurrent motif in this paper- that the best of policies, if they only remain on paper are completely redundant and indeed misleading. We would like to take this opportunity to reiterate the necessity of trying to evolve practicable solutions which address the issue and look towards adopting a *solution-oriented* approach towards policy making. The fourth section will address the issue of reforms to the current system which we believe are imperative from a legislative point of view in order to improve the current framework. While the previous sections are an exploration of the vagaries of the law and suggest improvements to the law as it stands, the fifth section is an attempt to play a predictive and forward-looking role in trying to evolve the law as it *should* be. Towards this end, the first sub-section will explore the recent debate on traditional knowledge and the implications it has for the forest commons. The second sub-section will discuss the recently proposed Reduced Emissions from Avoided Deforestation and Degradation [REDD] which was officially given the United Nations' seal of approval at the Copenhagen Conference. This policy aims at protecting forests in developing countries through market linked mechanisms- the section will explore their potential impact on the commons ideology and the manner in which the policy must be adopted in order to be in consonance with the Indian legislative and socio-economic framework and ideals. The final section will tie together all the disparate strands of the paper and present to the reader a holistic view of the state of forest commons in India and the reforms- both legal and institutional that are mandatory in order to achieve our policy ideals of conservation that exists in harmony with human growth and development in the India of today and the country we hope to live in tomorrow.

SECTION I: IDEAS AND IDEOLOGIES- EXPLORING THE PHILOSOPHICAL AND JURISPRUDENTIAL BASIS FOR THE COMMONS

The ideas underlying the theory of commons are neither of recent origin or restrictive in scope. They stem from ancient times when the idea of private property or imperial property marched alongside land held for the common weal. It is difficult to exactly distil a meaning of the term commons since it has come to represent a mélange of several concepts[2] and encompasses two very different types of rights within its scope- that of 'common lands' and 'common rights'.[3] It has been hypothesized that rights over common lands have existed before feudal times and have been an integral element in early German and Roman societies where the idea of community owned land ownership was entrenched.[4] Of course, the caveat must be added that the idea of land "ownership" was something of a misnomer and it was more an acknowledgment of a communal right to *enjoy* such land. However, with increasing centralization of power and the idea that all land was the sovereign property of the King, the idea of a communal right over land came to be diminished in scope and application. This was perhaps a natural corollary of the former since the idea that a community may own lands may militate against the belief that all land is owned by the sovereign who holds and uses it at his pleasure and may or may not order that they may be used for the larger public need. With an increasing growth in sovereign property except when expressly granted to private individuals, the very nature of commonly held property came to undergo a fundamental change. The perception of communal property became less about the *ownership* and more about the *right to make use of* certain aspects of another's land, giving rise to a concept of 'common rights' from the earlier belief in 'common lands'.[5]

In the Roman system of law, the philosophical foundations underlying property were better entrenched and elucidated upon. In brief, Roman law divided their civil law into *jus publicum* [which addressed the interactions between the State and citizens- that is, a vertical application of rights] and *jus privatum* [which addressed interactions *inter se* citizens]. It was the latter branch which dealt with the issue of property rights by way of a complicated web of classifications and sub-classifications. Property was first segregated into the tangible [*tangi possunt*] and intangible [*tangi non possunt*]. Alongside this division, property was divided according to whether it could be subsumed within or without one's estate or 'sphere of trade' [*in commercio* and *extra commercium,* respectively]. The latter of the previous terms has a direct bearing on the concept of commons since it was further subdivided into (i) *res divine* [the property of the gods]; (ii) *res publicae* [the things which were not, by virtue of their inherent nature capable of, or suitable for, individual ownership and were hence, reserved for the use of the public at large with the restriction of state regulation]; (iii) *res omnium communes* [that which

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[2] Juergensmeyer & Wadley, "The Common Lands Concept: A "Commons" Solution to a Common Environmental Problem", 14 *Natural Resources Journal* 362 (1974) at 367-68.

[3] Lynda L. Butler, "The Commons Concept: An Historical Concept with Modern Relevance", 23 *William and Mary Law Review* 835 (Summer, 1982) at 841.

[4] F. Pollock, *The Land Laws* (3d ed. 1896) at 18-21.

[5] Lynda L. Butler, "The Commons Concept: A Historical Concept with Modern Relevance", 23 *William and Mary Law Review* 835 (Summer, 1982) at 842.

could not be given the legal nomenclature of property since it was not capable of either control or dominion] and (iv) *res nullis* [something as yes not legally owned although it possessed the capacity to be owned].[6] Of the categories of intangible property rights, real and personal servitudes played a significant role in developing the conception of the modern day perceptions of common rights. Servitudes were both similar to, and distinct from easementary rights. The similarity was reflected in the fact that both granted a right to use property legally belonging to another; however, the very fundamental difference between the two was reflected in the fact that the former necessitated *intent* on behalf of the property owner but while the latter stemmed from long custom and the very nature of the use.[7]

In English societies, the evolution of commons has long been an unsettled question. Some authors believe that they were the result of the land policies begun at the time of William the Conqueror when the King was forced to acknowledge the reality that forest rights held in common had existed since 'time immemorial' and could not be arbitrarily abrogated without fomenting unrest and revolt.[8] With increasing attempts to regularize the manner in which common property was regulated, attempts were made to strictly circumscribe the manner in which the lands could be used and the persons who could use such land, and thus created an environment where very narrow sets of 'common rights' were envisaged.[9] Such rights have been denoted as being both easementary rights and a *profit à prendre.* Easementary rights confer a mere *right of use* and do not carry any right to use the fruits of the land, as it were. On the other hand, *profits à prendre* are non-possessory rights which permit an individual to use the natural resources from the land.[10]

The primary problem which has plagued the doctrine of commons has been the manner in which it is to be reconciled with the needs of a society which places emphasis on private ownership of land with the only exceptions to the same being land held by the government which is expected to sub-serve the public welfare at large. In this past century, possibly the most famous exposition on the theory of Commons has been by Garrett Hardin in his famous parable on the Tragedy of the Commons.[11] Economics is founded on the thesis of the "rational" human being who seeks to maximize his own

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[6] R. Sohm, *Institutes of Roman Law* (1892) at 225-227.
[7] P. Van Warmelo, *An Introduction to the Principles of Roman Civil Law* (1976) at 33.
[8] W. Hoskins & L. Stamp, *The Common Lands of England And Wales* (1963) at 6.
[9] W. Hoskins & L. Stamp, *The Common Lands of England And Wales* (1963) 34-36.
[10] W. Hoskins & L. Stamp, *The Common Lands of England and Wales,* (1963) at 5-6.
[11] Garrett Hardin, "The Tragedy of the Commons", 162 *Science* 1243 (1968) at 1244. His story is simple enough- he refers to the story of a grazing field, the traditional grazing lands of persons living in its vicinity; the field is unregulated and its use is solely at the discretion of its users. While the use of the land for common grazing purposes had long been the norm, the herders slowly began appreciating the fact that the degradation of the land was a very real effect of the untrammelled grazing- the grass became sparser, the amount of area available for each cow lessened and the terrain looked more worn. With the visible changes in the common land, each of the herders began to appreciate that each more cow added to diminishing the capacity of this already over-burdened land, but kept putting more animals out to pasture nonetheless. The reason for their intransigence was based on economic rationality, even as it flew in the face of the idea of sustainable use- each herder was able to appropriate the benefits emanating from every additional animal owned and fed, even as the costs of the degrading land were borne by *all* the herders.

self-interest, even at the cost of others and Hardin's herder indicates an individual who will continue along the same path as long as additional benefit (that is, the marginal unit of every additional animal) exceeds the cost borne by him in terms of the degraded common land.

Hardin was not alone among his contemporaries in his identification of the problem of overcrowding of the commons[12] but his views have been both extensively critiqued and relied upon. Most of the adverse criticisms of Hardin's theory stems from the paternalistic belief that the herders are incapable of evolving regulating mechanisms *inter se* one another. This assumption has been challenged as being incorrect with Ostrom's institutional principles becoming a byword for sustainable communal management of scarce resources.[13] Indeed, the ubiquity of the phrase[14] indicates that the manner and methods whereby commonly held property must be addressed in order to find a sustainable basis of conservation which accommodates the needs of development as well is an ongoing question. However, it has also been noted that emerging commons accompany a concomitant growth in 'tragic institutions'. The latter speaks of the problem of conflicting commons concerns when regulation is left solely to local community management since the same is, by its very nature, myopic in scope and does not incorporate an attempt to resolve conflicting interests.[15] Attempts to evolve an effective commons regulatory mechanism often meets four formidable hurdles: (i) myopic visions; (ii) static institutions; (iii) entrenched interests; (iv) choosing alternative valuations and uses of commons when a choice will cause potential irreparable changes. We submit that these positions indicate two extreme situations and the solution to the apparently irreconcilable conflict lies somewhere in between. While an

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[12] Strands of Hardin's theory have been traced back to Aristotelian times [Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (James E. Alt & Douglass C. North eds., 1990) at 2-3] and contemporaries have addressed the issue in writings around the same time. [*See generally,* H. Scott Gordon*, The Economic Theory of a Common-Property Resource: The Fishery,* 62 *Journal of Political Economy* 124 (1954) at 124; Harold Demsetz*, Toward a Theory of Property Rights,* 57 *American Economic Review* 347 (1967) at 354-55.

[13] Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (James E. Alt & Douglass C. North eds., 1990) at 88-102. The principles evolved by Ms. Ostrom for effective community pool resource management are as follows:

1. Clearly defined boundaries (effective exclusion of external unentitled parties);
2. Rules regarding the appropriation and provision of common resources are adapted to local conditions;
3. Collective-choice arrangements allow most resource appropriators to participate in the decision-making process;
4. Effective monitoring by monitors who are part of or accountable to the appropriators;
5. There is a scale of graduated sanctions for resource appropriators who violate community rules;
6. Mechanisms of conflict resolution are cheap and of easy access;
7. The self-determination of the community is recognized by higher-level authorities;
8. In the case of larger common-pool resources: organization in the form of multiple layers of nested enterprises, with small local Community Pool Resources at the base level.

[14] The term and theory has cropped up in the research of pollution (of air and water), use of finite natural resources, use of ostensible inexhaustible and renewable resources, conservation, forests use as well as in non-environmental contexts such as taxation in developing countries and health care, to mention just a few. Brigham Daniels, "Emerging Commons and Tragic Institutions", 37 *Environmental Law* 515 (Summer, 2007) at 517.

[15] Brigham Daniels, "Emerging Commons and Tragic Institutions", 37 *Environmental Law* 515 (Summer, 2007) at 521.

institutional response to the issue of management of commons is indispensable, one would fall prey to the risk of being entrenched in bureaucratic 'solutions' which do not correspond to the issue at hand, and may in fact, contribute to exacerbating the problems. What is sought to be emphasised in the course of the paper is the importance of incorporation of the participation of the local community in the management and preservation of commons, and achieving institutional interlinking to allow communication and harmonization of the two.

Before proceeding further, the researchers will aim at delineating a meaning of the term commons for the purposes of this paper. This paper will seek to examine the term 'commons'. The term commons has been used to refer to property which is, by nature or convention, not possessed by any individual and available for use by the public at large [and is, as such, both non-excludable and are non-competitive in nature inasmuch as one person's use does not diminish another's ability to use the same.[16] However, for the purposes of this paper, commons will be used to refer to jointly held common resources which, although non-excludable [inasmuch it is both inherently difficult and socially and economically sub-optimal to reduce the use of the resource[17]] must necessarily be regulated since one person's use diminishes the amount of commons available to another.[18] With the entrenchment of the principle of eminent domain and the belief in a welfare-oriented, paternalistic state, in today's parlance, such commons are considered as being held by the State for the larger public good.[19] With the focus of paper being the evolution of the "quasi-commons", it would be apt to state that we acknowledge the need to balance the [often conflicting] interests of the many legitimate stakeholders in this debate and define the commons as being, quite simply, *a general term for shared resources in which each stakeholder has an equal interest.*[20] We have looked at the commons from the perspective of both "Common-pool resources" and common property regimes. Common-pool resources may be defined as *natural or human-made resources where one person's use subtracts from another's use and where it is often necessary, but difficult and costly, to exclude other users outside the group from using the resource*[21] and the common property regime is used to denote the interlinked set of social, legal and customary norms which govern the regulation of these commons resources. Forests, by their intrinsic nature are included within the ambit of CPRs. As researchers we have chosen to adopt the following definition of the term "common property resources" which is best suited to forests and also the Indian context: *common property regimes are those set of resources defined by access,*

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[16] *See Generally,* Adam Mossoff, "What is Property? Putting the Pieces Back Together", 45 *Arizona Law Review* 372 (2003).

[17] Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (James E. Alt & Douglass C. North eds., 1990) at 30; Tom Tietenberg, *Environmental and Natural Resource Economics* (5th ed. 2000) at 598; Oran Young, *The Institutional Dimensions of Environmental Change* (2002) at 140.

[18] C. Ford Runge, "Common Property and Collective Action in Economic Development", *Making the Commons Work: Theory, Practice, and Policy* (Daniel W. Bromley ed., 1992) at 26.

[19] John McKenna, et al, "Coastal dune conservation on an Irish commonage: community-based management or tragedy of the commons?" *The Geographical Journal* (June 01, 2007) at http://www.accessmylibrary.com/coms2/summary_0286-32572036_ITM

[20] The Cooperation Commons, http://www.cooperationcommons.com/node/361.

[21] Ostrom, The Cooperation Commons, http://www.cooperationcommons.com/node/361.

common use and communal purpose, over which no exclusive property rights are admissible and where members of the community possess the rights to access and use such resources and also abide by certain obligations and responsibilities towards it.[22] The difficulty of regulating the commons stems from the fact that when there is no accountability mechanism to monitor overall use, the abstention of use by one person will be made use of by another to use in his stead and because, moreover, the urge to "free-ride and shirk" can be overwhelmingly strong in such circumstances.[23] Without a common perception of threats and benefits and a degree of homogeneity in the identification of the need to protect the commons resource, enabling the momentum for common action can be exceptionally difficult.[24]

In this paper, we advocate an approach to "commons" which is comparable to infrastructure. This approach, developed by Brett M. Frischmann, looks at "commons", especially in the context of the environment, as "natural infrastructure that supports life on Earth". Traditionally, infrastructure is understood in the sense of large scale, physical resources or facilities which generate substantial social value, and are accessed and used by the public. The natural environment, too, functionally, on the merit of being an essential input into a wide range of human and natural goods and services can be compared to 'infrastructure'.[25] Thus viewed, "commons" can be viewed in a different light. This approach envisages looking at commons from an analytical framework grounded in economics, but differs from conventional economic analyses and avoids the obvious shortcomings of a simplistic "cost-benefit analysis" which fails to capture the essence of commons and common property resources. Traditional economic analysis indicates that on the supply side, private property owners are not optimal suppliers of infrastructure because they have an incentive to support only those uses that generate observable and appropriable private returns, which may or may not be the uses with the greatest social value. On the demand side, users are not necessarily optimal purchasers of access and use rights, because if they are productive users they do not themselves capture the full social value of their use, as their private willingness to pay extends only to the benefits that they expect to realize, and does not reflect the social value that can be accessed by the community at large.

Environmental resources in particular pose a particularly challenging and complex issue. The relationship between anthropogenic activity and environmental resources, and the impact of one on the other is complex and non-linear. As has been identified, the resources not only play a fundamental role in complex natural systems (ecosystems), but also complex human systems (cultural, economic, and social systems). An accurate valuation and management of natural resources would thus entail appreciation of the full range of different activities, uses, and processes that generate value, and consideration of complex, long-term implications of the nature and rate of consumption of environmental resources.

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[22] Dr. Usha Ramanathan, "Common Land and Common Property Resources". http://www.ielrc.org/content/a0204.pdf

[23] Elinor Ostrom, "Reformulating the Commons", in *Protecting the Commons: A Framework for Resource Management in the Americas* (Joanna Burger et al. eds., 2001) at 35.

[24] Mancur Olson, *The Logic of Collective Action* (1965) at 1-2.

[25] *See* Brett M. Frischmann, "Environmental Infrastructure", 35 *Ecology Law Quarterly* 151 (2008)

The infrastructure approach to commons can be appreciated in light of the nature of environmental resources. Environmental resources are not purely non-rivalrous by nature. Rather, it is more in the nature of partially non rival. This is because consumption of environmental resources inevitably diminishes sharable capacity, i.e., the capacity to support other users, since they are finite. At the same they are renewable, and thus, the sharable capacity of the environmental resources can be regenerated over time. Thus, what is required is a model of common resource management to regulate consumption of environmental resources to avoid or minimize the possibility of resource depletion, and allowing sustainable inter-generational and intra-generational access to the environmental infrastructure to multiple users.[26] Thus, the infrastructure approach to environmental resources as commons refers to a resource management regime, entailing managing tradeoffs among potentially competing rival uses. Hence, the salient features which underpin an understanding of the regulatory approach towards the environment as commons may be stated to be: (1) that infrastructure resources generate value as inputs into a wide range of productive processes; (2) that these processes often generate positive externalities to the benefit of society as a whole; and (3) that managing such resources as a commons is often socially desirable because doing so supports these downstream activities.[27] We submit that the infrastructure approach to environmental resources as commons is the most logically consistent approach, which achieves the balance between the tragedy of commons and micromanagement of every resource, either through privatization, or through State command and control. The partially (non)rival nature of environmental infrastructures suggest that pure commons is not sustainable because it risks congestion and depletion, and what is most appropriate is a mixed strategy that regulates some uses and sustains a commons for others

Forests constitute an intrinsic component of commons resources with scholars such as Ostrom acknowledging their status as such. Forests are integral to the wealth of the land and are considered to be resources which, although renewable, are exhaustible through overuse and deforestation. Even while states declare their sovereignty over such forests in a manner which would not have been possible in the case of more intangible resources such as air, international commitments and growing national consciousness of the importance of preserving and enhancing forest cover, has contributed to forests constituting an important element of commons theory. Forests are also, in a very important way, different from other facts that make up the whole of commons property inasmuch as the preservation of forests has led to an unending debate about the validity of conflicting approaches towards development- that is, the anthropocentric approach vis-à-vis the conservationist approach. For forests, apart from constituting a resource held by the government for the people of a nation, have deep cultural and socio-economic linkages with forest communities and it is here, that we believe, one of the most interesting debates about regulation is fostered. When it comes to a commons resource such as the sea, the debate is usually about preserving a

[26] Brett M. Frischmann "An Economic Theory of Infrastructure and Commons Management" 89 *Minnesota Law Review* 917 (2005).

[27] Brett M. Frischmann "An Economic Theory of Infrastructure and Commons Management", 89 *Minnesota Law Review* 917 (2005).

common heritage of mankind from the marauding instincts of certain special interest groups. In the case of forests, the debate is intensified by the fact that the government, the local communities, the conservationists, the good of the citizens of the country as a whole and the demands of special interest [often industrialist] are all equally weighty and relevant. As mentioned above, even with the best of intentions, different individuals see different values enmeshed in the commons.[28] For example, the fishing communities, the tribal communities, the non-tribal village communities, the government, the eco-tourist and the industrialist are all likely to perceive different values- be they fishing rights, logging, mining, revenue generation, cultural touchstones, use of local forest produce, protecting endangered wildlife, preserving traditional ways of life- when they perceive the forest commons.

SECTION II: ON THEIR SHOULDERS WE STAND: TRACING THE INDIAN EXPERIENCE WITH FOREST COMMONS RESOURCES.

Given the wealth of forest cover present in India, it is unsurprising that evidence of forest use and dependence in India stems from the times of Harappa and Mohenjo-Daro.[29] The cultural and social connotations held by forests for both tribal and non-tribal populations was undiminished in Vedic times and anecdotal evidence suggests that the impact of deforestations was appreciated since earlier time and is hardly a modern construct.[30] The revenue generation potential of forest and the need for the state to manage the same was present since the Mauryan times- however, forests were viewed as being the property of the King and not precisely in the context of a commonly held resource. However, Kautilya was also possibly one of the earliest recorded proponents of the system of commons *simpliciter,* given in observation in his seminal work, the *Arthashastra* where he observed that certain designated categories of land were ideally to be set aside for non-private ownership, since the need for the common usage of that land resource would be undermined by private ownership- forests were considered to be one such category. Subsequent invasions into India maintained a relatively similar outlook towards forests in general inasmuch as empires came to be increasingly reliant on the revenue generated from forest[31] land without undertaking anything similar to the scale of deforestation common in present times. In spite of this, however, administrators largely adopted a policy of non-interference with the manner in which rural communities used forest land and collected resources therefrom.[32] However, with the various stages of economic development in India and the change in agrarian patterns owing to different

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[28] As Daniels notes in his article, *The herdsmen looked at a field and saw a pasture; salmon fishers see rivers and oceans in terms of salmon habitat; jurisdictions attempting to limit greenhouse gases look at forests as greenhouse gas sinks; wilderness advocates see remote places as areas "where the earth and its community of life are untrammeled by man."* [28] Brigham Daniels, "Emerging Commons and Tragic Institutions", 37 *Environmental Law* 515 (Summer, 2007) at 521.

[29] Rangachari & Mukherji, *Old Roots, New Shoots: A Study Of Joint Forest Management In Andhra Pradesh,* (2000) at 35.

[30] Sarah Jewitt, *Europe's "Others",* (1995) at 86.

[31] Upadhyay & Upadhyay, *Handbook on Environmental Law* [*hereinafter* 'Upadhyay'] Vol. I, (2002) at 21-22.

[32] Ramachandra Guha, "Forestry in British and Post-British India", *Economic and Political Weekly* 1882 (October 29, 1983) at 1883.

land policies and a frequently altering political structure through the centuries, a cohesive sense of a stable land policy did not emerge till the colonial excursions into India.

The advent of the British *Raj* in India brought with it an outsider's attempt to manage the Indian environment in a manner that divorced the intertwined relationships between the forests and Indian society. The British policies maintained their focus on managing forests in a manner which would maximise income for the Imperial Government.[33] Even such an attempt at management was absent in the early years of the British Raj when the Government saw the use of forests for military purposes and to meet the growing demand for timber. Driven by economic considerations and the need for uniformity in land revenue collection methods, the British attempted at evolving a forest policy which could be applied across its Indian territories; this attempt was to culminate in the Forest Act of 1865 [which completely disregarded users' rights] and its revised version in 1878. Apart from its imperialist language, the most significant aspect of the 1978 Act as it pertained to the issue of commons was that it diminished the customary rights of villagers and forest communities to the status of a 'privilege' granted by the State as opposed to it being a well entrenched right.[34] Clearly, with the advent of the British, the theory of eminent domain came to be take on a shape and form and began to be well entrenched in the Indian legal consciousness.[35] The British Forest Policy document in 1894 reflected this understanding when it declared that the Imperial Government had dominion of the forest and stated that forests must be commercialised. Ironically, they proceeded to further displace the forest communities on the charge that their presence was inimical to conservationist efforts, even as the commercial exploitation of forests continued unabated.

Concomitantly, the customary rights of forest communities came to be displaced from the consciousness of those framing the colonial forest policies. Forest communities, in this context, refer to "*those people whose existence depends on a close and ecologically sustainable relationship with the forest they inhabit*".[36] These policies sparked off revolts in India which, while, crushed by the might of the British Army drove home the uncomfortable truth that the people revolting against the state wholly considered this land as their own, as a right and viewed any attempt to abrogate such rights as being wholly illegitimate, much to the bewilderment of the British administrators.[37] British policies led to the fencing and delineation of lands designated

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[33] K. Sivaramakrishnan, *Modern Forests*, (1999) at 76-79.

[34] M. Buchy, "The British colonial forest policy in South India, a maladapted policy?", in *Les Sciences hors d'Occident au 20ème siècle,* (Waast Roland, Chatelin Yvon, Bonneuil C. eds., 1996) at 33.

[35] To illustrate this complete usurpation of community oriented rights in British India, a quote from an officer in the British administration in 1873 is pertinent: "*the right of conquest is the strongest of all rights- it is a right against which there is no appeal*". *Id.*

[36] Ramachandra Guha, "Forestry in British and Post-British India", *Economic and Political Weekly* 1882 (October 29, 1983) at 1882.

[37] It is interesting to note a comment by the Forest Settlement Officer of British Garhwal in 1913 who stated that: "*…the notion obstinately persists in the minds of all, from the highest to the lowest, that government is taking away their forests from them and is robbing of them of their own property...to a rural community there appears no difference between uncontrolled use and proprietary right. Subsequent regulations....all appear to them as a gradual encroachment on their rights, culminating in a final act of*

as reserve forests, leading to an immediate cessation of control which had originally reposed with the forest people. The poisonous atmosphere of distrust between the village people and the administration meant that they were reluctant to make use of the designated village forests since they feared that: "*not altogether without reason, the villagers believe that any self-denial or trouble they may exercise in preserving and improving their third class forests will end in appropriation of the forests by the [forest] department as soon as they become commercially valuable*".[38] It must be noted furthermore, that commentators on British policies with respect to forest administration expressly noted that while minor and major forest produce richly contributed towards swelling the British coffers, the communities from whom their livelihood had been stripped, *were almost always excluded from the benefits flowing from the forest exploitation.*

The actions of the State post Independence unfortunately continued to bear the taint of pre-Independence paternalism with a 1978 IGF pronouncement lauding Lord Dalhousie's plan of forest administration; a plan that effectively declared that "*individuals [or communities] had no rights or claims*".[39] The National Forest Policy of 1952 affirmed the relevance of the 1894 Forest Policy and reiterated its conviction that the state had an exclusive and exclusionary monopoly right over the nation's forest cover- clearly excluding the forest communities from any rights thereto. The Policy also patronizingly stated that the nation should not be deprived of such a valuable asset merely by an accident of geography- that is, by the mere fact that "*a village was situated close to a forest*".[40] In keeping with its predecessors, the 1976 Policy reaffirmed India's commitments towards industrial development and announced that communal rights and needs would be subordinated to the cause of the former.[41] The Forest Conservation Act, 1980 was the first major Central legislation to shift the focus back onto conservation.[42] However, this conservationist approach envisaged a minimal role, if any, for the forest dwelling communities; furthermore encroachment and cultivation were both made penal offences. Clearly, while this Act was an improvement inasmuch as it seemed to consider forest an integral element of the resources held in common, it gave no heed to those who had a significant stake in the continued well-being and existence of forests.

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confiscation....My best efforts have failed to get the people to generally grasp the change in conditions or to believe in the historical fact of government ownership". J.C.Nelson, *Forest Settlement Report of the Garhwal District,* [1976] at 10-11.

[38] Ramachandra Guha, "Forestry in British and Post-British India", *Economic and Political Weekly* 1882 (October 29, 1983) at 1885.

[39] B.P.Srivastava, *Building Indian Institute of Forest Management,* (R.Gupta ed., CMA Monograph No. 79, IIM, Ahmedabad, 1978) at 14.

[40] The full quote reads as: ""*Village communities in the neighborhood of a forest will naturally make greater use of its products for the satisfaction of their domestic and agricultural needs. Such use, however, should in no event be permitted at the cost of, national interests. The accident of village being situated close to a forest does not prejudice the right of the country as a whole to receive the benefits of a national asset*." *National Forest Policy,* (1952). http://forest.ap.nic.in/Forest%20Policy-1952.htm

[41] Government of India, Ministry of Agriculture, *Report of the National Commission on Agriculture, Part IX, Forestry* (1976).

[42] The Forest Conservation Act, 1980 (69 of 1980).

It was not until the National Forest Policy of 1988, that a turning point in Indian forest administration was reached and the rights of forest dwellers were finally acknowledged. The policy statement explicitly recognised the need to involve local people in management of forests for ensuring their effective conservation and stated, furthermore, spoke of balancing rural and tribal needs on the one hand and ecological sustainability on the other.[43] The policy spoke, furthermore, of the "carrying capacity" of the forests. The Government of India would then issue detailed guidelines in the year 1990 on the concept of implementing Joint Forest Management.[44] While the Guidelines and Policy documents were doubtless well-intentioned, efforts at forest conservation only established itself subsequent to the seminal Supreme Court decision in *Godavarman.*[45] While the case was undoubtedly of massive significance in the history of Indian forest administration, it had the unfortunate effect of a significant curtailment of the rights of the tribal communities in India.[46] The administration took the Supreme Court's injunction to prevent illegal encroachments a little too literally and pursued mass evictions of the forest communities before the Supreme Court could pass an order clarifying their stance.[47] The magnitude of the backlash against this indiscriminate use of executive force to dispossess the most vulnerable segments of our society put the Government on notice and it began to explore more sustainable, codified statements affirming a forest policy which was in consonance with Constitutional commitments and ideals and which would protect the rights of forest communities came to be discussed and finally culminated in the Scheduled Tribes (Recognition of Forest Rights) Act, 2006 which has been exhaustively critiqued in the fifth and final section, *infra.*

SECTION III: JUDICIAL POLICY-MAKING: TRACING THE EVOLUTION OF ENVIRONMENTAL ADJUDICATION IN INDIA

The Constitution of India is an exhaustive document embodying the ideals and aspirations of a nation. Framed when India was making tentative forays into an independent existence, the Constitution of India has embodied the hopes of its framers by being a living, organic document which has come to adapt itself to the needs and demands of a dynamic nation living through turbulent times without sacrificing its core ideals. The Constitution of India, above all, is a document that represents the manifestation of hope in the Indian Republic and hold out to all Indians the promise of economic, social and political justice and the affirms our belief in the foundational ideals of liberty and equality. Article 38 of the Constitution directs the State to State to secure a

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[43] Government of India, Ministry of Environment and Forests, *National Forest Policy* (1988). http://envfor.nic.in/divisions/fp/nfp.pdf

[44] The policy of "Joint forest management" was founded in the need to foster greater mutuality and partnerships between forest communities and the administration authorities. The Policy envisaged a relationship based on goodwill and trust with delineated functions and mandates for each stakeholder in conserving and developing the forest. The effective and meaningful involvement of local communities in sustainable forest management is now recognized as the main approach to address the longstanding problems of deforestation and land degradation.

[45] *T.N. Godavarman Thirumulkpad* v. *Union of India*, AIR 1997 SC 1228.

[46] Jean Dreze, *Tribal Evictions from Forest Lands,* (2005) at 2.

[47] Jean Dreze, *Tribal Evictions from Forest Lands,* (2005) at 4.

social order for the promotion of welfare of the people.[48] Article 39(b) directs the State incorporate *certain principles of policy to be followed by the State.*[49]Article 40 mentions the need to organize village panchayats.[50] Article 48A mentions the need to protect and promote the wellbeing of the wildlife and forests of the country.[51] Article 51A (g) mentions the fundamental duties that Indian citizens owe towards the country.[52] Entry 17A and 17B in List III (or the concurrent list) in the Seventh Schedule mentions forests, and protection of wild animals and birds. Finally, the 73rd and 74th Constitutional Amendments in 1993 set the tone to spark off concerted efforts at decentralizing governance at building grassroots levels of democratic self-governing institutions including the *panchayati raj* institutions.

No discussion on the state of the law as it pertains to forests and tribals in India would be complete without a discussion of the crucial role played by the judiciary in protecting the rights of the forest dwelling communities over the forest commons.[53] The Supreme Court has been lauded for its interventionist, ideal oriented role in upholding the constitutional principles and has been considered as the last refuge of the marginalized sections in society. However, the Court's inherent limitations in the enforcement of its orders have often raised questions about its appropriateness as a forum for environmental litigation. However, it is undeniable that the Courts have usually been the first [and often the only governmental institution] to recognize the rights of forest dwelling communities and several of their judgments mark a concerted attempt to understand the magnitude of the problem of the manner in which the forest commons resource is administered.

In the case of *Banwasi Seva Ashram,*[54] the Court was requested to delve into the matter of the Government's policy of displacing forest communities in order to ostensibly establish reserve forests. In reality, the Court wanted to acquire the land for the setting up an electricity generation plant of the National Thermal Power Corporation. The Court directed the Government to replace the existing Committee overseeing the matter [the Court deemed it to be biased] with another investigative committee and even gave recommendations for its composition. Subsequently, the Court accepted that while the

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[48] **38.** 1[(1)] The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. 2[(2) The State shall, in particular, strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.]

[49] Article 39: The State shall, in particular, direct its policy towards securing—[….] (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good.

[50] Article 40: The State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

[51] Article 48A: The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.

[52] Article 51A (g): to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

[53] See, *infra,* for cases from the High Courts of the states of Maharashtra and Orissa which have had implications for the forest commons.

[54] *Banwasi Seva Ashram* v. *State of Uttar Pradesh* AIR 1987 SC 374.

tribal communities did possess some manner of rights over the land, the same would need to be subsumed for the greater common good served by electricity generation.[55] While the decision has been criticised on grounds of its vacillation on the issue of tribal rights inasmuch as the Court seemed to be saying that potentially the tribals possessed some manner of rights over the land and, furthermore, that their dispossession was wrong, *but* the same was still justifiable in the name of the greater common good. Even more disturbingly, the Court seemed to be saying the in spite of the Supreme Court's decision, the tribals should explore alternative forums for redress- an understanding which defeats the very purpose of an apex Court and its final adjudicatory processes. On the positive side however, the Court crafted a rehabilitation package for the tribals- this has been lauded as being a careful attempt at granting reparations to the dispossessed; this rehabilitation package was adopted as a model by the NTPC for its later projects.[56]

In the case of *Fatesang*[57] the Gujarat High Court upheld the right of the forest dwellers to gather bamboo and use it as a source for their livelihood. The forest department officials in the instant case had attempted to curb the movement of bamboo from forest to non-forest areas- the tribals had alleged that the motive for the same was in order to force the tribals to sell the bamboo to a local paper mill. Similarly, the case of *Shankar Reddy,*[58] the Court chose to read the need to conserve the forest resources in tandem with the basic needs of the forest communities and hence stated that an executive order which permitted the felling and transport of trees and the transport of trees (in contradiction of statutory provisions prohibiting the same[59]) was *ipso facto* void. While the above cases are possibly the most significant on the point, the issue has been tangentially addressed in other cases as well. In the case of *Sri Manchegowda,*[60] the Court stated that legislations preventing the sale of tribal lands to non-tribals were grounded in the philosophy of protecting the tribals from unscrupulous land sharks and to preserve the deep cultural linkages between the land and certain of the scheduled tribes. The Court hence, barred the transfer of tribal land to non-tribals.

However, the two cases which take centre-stage in any discussion on the development of environmental jurisprudence in India are undoubtedly the cases of *M.C.Mehta* v. *Kamal Nath*[61] and *Godavarman*. The former case laid down the *public trust* doctrine whereby it was held that the State held the natural resources of the country- a broad understanding which encompasses the ecosystem at large in trust. This had massive repercussions on the manner in which the state's responsibility towards the environment

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[55] The Court, in its judgment commented that: "*We cannot lose sight of the fact that for industrial growth as also for provision of improved living facilities, there is great demand in this country for energy such as electricity. In fact, for quite some time, the entire country in general and special parts thereof in particular, has suffered a tremendous setback in industrial activity for want of energy. A scheme to generate electricity therefore, is equally of national importance and cannot be deferred*."

[56] *Rehabilitation Policy and Law in India: A Right to Livelihood* (W. Fernandes, V. Paranjpye eds., 1997) at 331-344.

[57] *Fatesang Gimba Vasava* v. *State of Gujarat* AIR 1987 GUJ 9.

[58] *Shankar Reddy* v. *State of A.P.* 1992(2) ANDHLT 514.

[59] Chapter III A of the Andhra Pradesh Forest Act, 1967.

[60] *Sri Manchegowda* v*. State of Karnataka* AIR 1984 SC 1151

[61] 1997 (1) SCC 388.

and its citizens came to be perceived- it had moved from the position of eminent domain with absolute powers of control towards being a trustee who owed a moral and legal obligation to protect and preserve the environment and who owed a duty towards the public at large for this purpose.

The Indian experience seems to be characterised by an emphasis on rhetoric over substance, in the large part. However, over the past few decades, harbingers of welcome change have been noted. There has been a significant shift in the governments' stance towards forest communities and an acknowledgment of the need to collaborate in evolving participatory regulatory models for the forests. We believe that such policies are necessary and would advocate more robust administration of the same. The following section closely examines case studies from the grassroots levels in three Indian states so as to give an effective micro-picture of the situation as it is on the ground.

SECTION IV: LEGISLATIVE REFORMS- CHANGING THE CONTOURS OF *DE LEGE LATA.*

From the preceding section, it is evident that efforts to protect commons suffer from a trifecta of problems- legislative lacunae, administrative apathy and corruption have combined with a lack of community involvement in the process of conservation [in the status of integral stakeholders] have all combined to create a scenario where changes are imperative in order to achieve the aims and ideals as set forth in the Constitution, in international treaties to which we are signatories and in a plethora of policy documents. As far back as 1973, the Planning Commission Document noted that *"Reviewing the policies and programmes of the preceding Five Year Plans, we are of the opinion that the efforts so far made for social and economic development of the scheduled tribes have not brought an appreciable change in their condition.*"

Even worse, it is commonly agreed that the benefits accruing from the denudation of the forests considered as spiritual and physical homes by tribals, have been siphoned off to benefit others. Very often, the environmental impact assessment mandated under Indian law is not carried out as envisaged originally and the costs and benefits are not adequately weighed as has often been the perception in the case of untrammelled mining activity. For every *Lafarge* decision by the Supreme Court, permissions have been granted to corporations such as *Vendanta* to destroy a highly fragile ecosystem. As the forest communities view it, they have been forced to bear the impact of all the costs even as they have received no share of the benefits. As Ramachandra Guha has noted, a significant degree of commonality with the colonial period has existed for a large segment of the decades since Independence with respect to forest policies.[62] It should not be surprising then, that then, as now, the forest communities have risen in

[62] Ramachandra Guha, "Forestry in British and Post-British India", *Economic and Political Weekly* 1882 (October 29, 1983) at 1892.

rebellion against what they perceive as being an abrogation of their rights.[63] The following sections reflect our identification of key reformatory measures which should be undertaken in order to treat the forest as a commons resource in which the forest communities have a legitimate and legally recognised stake.

I. One of the primary issues concerning the issue of commons has been the fact that it is hardly ever explicitly enunciated. Rather than as a reflected value, it is important for the commons ideology to receive explicit acknowledgment as a good, in and of itself.

II. It is important, moreover, to attempt at evolving a uniform understanding of the term commons in light of India's socio-economic and historio-cultural context. Forests [among other commons resources] are not merely a source of livelihood- as they have been perceived in developed countries [the classic case of herders and pasture lands] but have deeper cultural and psychological linkages for the forest communities. Against this backdrop, it is important to arrive at an Indian understanding of the term which incorporates the above points and also mandates an inherently polycentric benefit sharing model of governing the commons resource. The need for uniformity is even more acute given our federal structure and the different understandings adopting by the administration and the Courts [both vis-à-vis each other and even within their own organisations]. Even without sacrificing the need for flexibility in planning and decision making, broad guidelines towards achieving a broad-based and stable commons policy must be arrived at, especially in the case of forests.

III. As has been noted above, environmental law and the law of commons is a highly specialized science requiring experts in tribal conditions, economics, sociology, policy and administration. Furthermore, evolving solutions for such balancing of conflicting, legitimate interests, requires the processing of vast quantities of highly technical data. All of the above indicate that our traditional Courts may not be best suited to adjudicate such matters and arrive at solutions- both with regard to the lack of specialized knowledge possessed by the Court and because of the massive existing case-load of the Supreme Court. The researchers believe that the Law Commission's recommendation that special environmental courts or tribunals should be established[64] is a valuable suggestion that merits speedy implementation. This suggestion came about as a consequence by the Supreme Court itself[65] and we believe that an urgent attempt must be made so as to make them functional. The researchers would like to suggest, moreover, that these Courts should be granted the power to specifically adjudicate on commons

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[63] People's Union for Democratic Rights, *Undeclared Civil War,* (1982) at 19. The revolt led by Birsa Bhagwan, the Praja Mandal Movement, the Tana Bhagat Movement, the Naxalbari Movement, the Jharkhand Movement and the Santhal rebellion are but a few examples of tribal unrest and disaffection over the past decades. http://www.dhdi.free.fr/recherches/environnement/articles/rout.htm

[64] Law Commission of India, One hundred and Eighty Sixth Report on Proposal to Constitute Environmental Courts, September, 2003.

[65] M.C.Mehta v. Union of India 1986 (2) SCC 176. This suggestion has been repeatedly urged by the Supreme Court in the cases of *Indian Council for Enviro-Legal Action* v. *Union of India* [1996 (3) SCC 212] and AP Pollution Board v. Union of India [I & II] [1999 (2) SCC 718 and 2991 (2) SCC 62].

matters- especially with regard to the manner in which forest commons resources are shared the policies implemented.

IV. In order to recognize the presence of commons rights and give these customary rights legal status, the state governments should initiate the process of recording such rights in the record of rights concerning commons. A similar initiative should be adopted with respect to customary rights (*nistar patrak*).

V. In keeping with the importance given to legal recognition in the previous point, there should be legal sanction given for policies which encourage communal resource management of the commons- for example, in the case of the Joint Forest Management programme and the water participatory management system. This would allow them an independent legal identity, free of administrative whims and encourage better relationship building between the administration and the forest communities.

VI. Better oversight measures must be undertaken to monitor the work of administrators in the forest sector- such accountability measures should be institutionalized and involve civil society actors and the local communities themselves. Administrative oversights and corruption, especially in the matter of poorly conducted impact assessments must be explicitly made a penal offence. Special administrators should be appointed, with the express mandate of protecting the commons aspect of forest resources.

VII. States should attempt at evolving more egalitarian benefit sharing plans and programmes with the forest communities with an attempt to incorporate the eight principles identified by Ms. Ostrom as being crucial to foster effective community management the commons resource.

VIII. The Central and State governments should also attempt at creating an industrial policy and mineral policy that balances conflicting interests. Several states in India- such as Orissa, have policies that heavily favour the industrial lobby. Given the stories of the massive environmental degradation caused by the bauxite mining in Orissa, better oversight and policy making seem necessary.

IX. The increasing incidence of eco-tourism should be curbed and such initiatives carefully monitored and regulated in order to ensure that they do not worsen the problem of environmental degradation. Local communities should be involved in the process.

X. The Central government should, in consultation with the states bring out a policy framework which absorbs best practice models from different states so as to implement successful, state-based policies and encourage inter-state cooperation in conservation efforts. For example, the Orissa government's initiative to give greater management and sanctioning powers to the village level sabhas might reduce the administrative work-load and promote a community oriented dispute settlement mechanism. The dispute settlement bodies at the sabha level could

have mandatory representation from the vulnerable and marginalized sections of society.

SECTION V: TRADITIONAL KNOWLEDGE

"What kind of a civilization is it, what kind of humanism is it that plunders and destroys the sacred sites of power of traditional cultures due to its measureless hunger for resources and energy, that in its mania for progress literally walks over corpses, and everything that cannot be integrated and digested is shoved aside in blind ignorance and usually destroyed? Can such a humanism, can such a civilization truly speak about justice and human rights and praise all these high ideals without losing its credibility?"

~ Prince Albert von Liechtenstein

One of the most interesting new areas for the application of the commons ideology has been that traditional knowledge and its implications for intellectual property. Traditional knowledge has increasingly come to be represented on the global agenda, especially with the increasing omnipresence of both the World Trade Organisations' Trade Related aspects of Intellectual Property Rights [TRIPs] and the Convention of Biodiversity. These, in conjunction with an international commitment to fight bio-piracy and create partnerships with indigenous communities have led to increased attempts to create a global framework for the protection of traditional knowledge. The scope of the phrase "traditional knowledge" has meant that arriving at a precise definition of the term has been difficult; for example, according to the World Intellectual Property Organisation [WIPO], it encompasses everything from agrarian knowledge, knowledge of medicines and bio-diversity to that of folklore and performing arts.

The researchers will not go into an exhaustive definition of traditional knowledge and the exact contours of its possession by indigenous communities and those who make use the forests commons resource since that is a subject deserving of an exhaustive elucidation in its own right. However, what we seek to do is to critique the recent Traditional Knowledge Bill, 2009 and its provisions as it pertains to the forest commons and suggest changes towards the same. We believe that this reflective of the mandate of this paper which is to examine the present institutional and legal structures and recommend changes towards the same. We believe this is even more significant in light of the need to prevent bio-piracy and explore sustainable partnership oriented approaches towards the idea of traditional knowledge in a manner that allows the forest communities to benefit from the sharing of their commons knowledge. The recent case of the Kani tribe in Kerala is a case in point. The Kani tribe are in possession of an enormous wealth of information about the medicinal properties of plants in the forests of the Western Ghats where they reside. Within their community, the healers have the customary right to transfer and practice such traditional knowledge. The members of the tribe used leaves from the plant *arogyapaacha* for its abilities to remove fatigue and stress and improve the immunity. In consultation with scientists, the active compounds were isolated, patents obtained and licensed and a trust fund was created in order to ensure that the receipts from the commercialization of the plant would be received by tribe itself. This, we believe, points to a possible structure which, if institutionalized, could lead to a proper benefit sharing relationship between those who possess such

traditional knowledge and the world at large which may benefit from the discovery of new medicines.[66]

The impetus to create an Indian regulatory mechanism for the regulation of traditional knowledge has gained traction for a variety of sources, not least of which is the complete unsuitability of the presently applicable patent regime. Firstly, traditional knowledge is, by its very definition, communally owned- the present patent regime emphasizes the individuality. Moreover, traditional knowledge does not come with the monopolistic time limits which accompany the grant of a patent. Moreover, the definition itself is controversial in the extreme- it does not satisfy the every aspect of the three criteria of novelty, utility and non-obviousness which are crucial in order to be granted a patent. Traditional knowledge defines easy definition owing to the breadth of its scope and the fact that it is extremely regionally diverse. To take a simple example, in India, music would involve a variety of allied things- the costumes and the instruments to begin with which do not fit comfortably within the nomenclature of "folk music".[67]

One of the models which has been included in the Bill and is, we believe, a model which deserves due consideration is the *access and benefit sharing* model.[68] This model effectively states that if a member of a traditional community possesses a certain amount of knowledge and another person wants to access it, they have the right to exclude them from accessing the resource. Moreover, the utilization of this particular resource by another, grants the community the right to claim a royalty. The model envisages the establishment of a quasi-fund where such royalties are to be deposited in order that they may be used for the benefit of the community. The primary criticism of this model comes about in terms of its practicability- how are these communities to be defined discretely so that they may be identified as the beneficiaries of such royalties. The problem further intensifies when it is acknowledged that several tribes are scattered geographically and are not bound within state boundaries. Furthermore, the question of defining a traditional community has, as yet, not been conclusively been answered. One

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[66] http://www.law.ed.ac.uk/ahrc/files/67_varkeytraditionalknowledgeinindia03.pdf.

[67] The 2009 Bill defines traditional knowledge as: "*the collective knowledge of a traditional community or a family related to a particular subject or a skill passed down from generation to generation for at least 3 generations including but not limited to*

- *cultural products and practices from traditional communities such as weaving patterns, pottery, painting, poetry, folklore, music, and the like;*
- *genetic material discovered, selected, cultivated, domesticated, developed or conserved by traditional communities, regardless of whether they were used or can be used in the development of new plant varieties or animal breeds or which can be harnessed for other potential uses;*
- *agricultural practices and devices developed from indigenous or traditional material, customs, and knowledge;*
- *medicinal products and processes developed from indigenous or traditional material, customs, and knowledge by traditional communities;*
- *all other products or processes not made by person which was discovered through a community process, or when the person making the innovation does not claim the knowledge as his own or when the person has discovered it to be used openly for common purposes*
- *discoveries, innovations and technologies made by communities that are usually not recorded in written form, and are transmitted orally from generation to generation."*

[68] It is interesting to note that one of the primary objectives of the Convention on Biodiversity is to create fair and equitable benefit sharing mechanisms.

of the potential solutions to the same is to evolve inter-state mechanisms for both knowledge sharing and the receipt and disbursement of the funds; such a mechanism may be coordinated by a Central authority to ensure the seamless working of the mechanism.

Furthermore, the National Biodiversity Authority model has been proposed for the management of traditional knowledge resources- these aim at giving representation to grassroots level workers and members of tribal communities so that they may have a voice in the manner in which the commonly held knowledge is being used. Such a model aims at a democratic representation across the board and is better at allowing a grassroots level representation and voice in policy making. We believe that this is an important movement in order to create an intellectual property regime that is *sui generis* and explores the complexities of the Indian context within which it is expected to operate. It is a triumph of the indigenous movement that has spearheaded an international campaign for the respect of the rights of the forest communities. We have not gone into more detail on the point since, as mentioned before this is an aspect of law which is undergoing a massive flux in India. Hence, we have merely indicated some areas of concern.

SECTION VI: REDUCING EMISSIONS FROM AVOIDED DEFORESTATION AND DEGRADATION

Environmental resources in the form of forests are valuable commons, not only in the local and national level, but also at the international level. They tend to include water regulation, soil protection, non-timber forest products including food and fibre, protection of biodiversity, and climate regulation.[69] Furthermore, there is gradual recognition of the key role of forests in the international efforts at climate change mitigation. Forests embody a substantial form of natural carbon sequestration, and removal of forest cover not merely depletes the regenerative capacity of the environment, removal of carbon dioxide from forests and release into the atmosphere contributes to the concentration of greenhouse gases. Tropical forests store 120-400 tons of carbon per square hectare of vegetation, which is released into the atmosphere when the forests are burned or harvested. So much so, according to scientific studies, forest sinks have the potential to contribute up to one-third of total abatement by 2050, with the largest share coming from avoided deforestation in tropical forests.[70] As things stand, at present, it has been indicated that deforestation is the second largest source of greenhouse gas emissions, and accounts for upto eighteen percent of global carbon dioxide emissions annually.[71] There is a growing recognition of this aspect, especially with the growing urgency of

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[69] UN REDD Programme *Year in Review* (2009) Available at http://www.un-redd.org/NewsCentre/2009_Year_In_Review/tabid/3499/language/en-US/Default.aspx.

[70] Tavoni, M., Sohngen, B., Bosetti, V. "Forestry and the carbon market response to stabilize climate", 35 *Energy Policy* (2007) at 5347.

[71] Sir Nicholas Stern, The Stern Review on the Economics of Climate Change 171 (2006), available at http://www.hm-treasury.gov.uk/stern_review_report.htm.

climate change concerns, especially in the wake of the expiration of the first commitment period under the Kyoto Protocol.[72]

Climate change necessarily requires participation of States from both sides of the development divide. While commitments relating to climate change mitigation should not be imposed iniquitously on developing countries, the participation of developing countries is indispensable. In the international debate, the issue of sharing the responsibility and burden of the costs of actions taken towards mitigation of climate change forms the bone of contention. Especially in the context of India, a non-Annex I country under the United Nations Framework Convention on Climate Change, even though there are no binding international commitment to undertake measures to mitigate climate change, it is in the interest of India to signal its commitment towards the global response to climate change while preserving some measure of differentiation.[73] The programme of REDD, properly implemented, holds the promise of solution to tide over the deadlock of international commitment of developing countries by meaningful participation in a beneficial manner.

It is proposed in this paper that the conflict between economic compulsions and environmental concerns can be bridged by being supplemented by market mechanisms co-ordinated at the international level. Sight must not be lost of the fact that the core interest at the heart of the debate is the protection of forests and biodiversity without adversely affecting any other right or entitlement. Keeping this in mind, we seek to propose a workable model for implementing REDD by structuring an alignment of interests as opposed to merely trading off one stakeholder's interests with another's towards a zero-sum game. We believe that it is far better to try and achieve a win-win model which adopts a polycentric approach for implementation and incorporates institutional linkages across levels.

The initial market mechanisms envisioned under the Kyoto Protocol to allow nations to meet their international commitments in reducing greenhouse gas emissions did not adequately address the issue of reducing carbon emissions from deforestation, especially in developing countries. Since prevention of deforestation was not duly credited, developing countries without any commitments under the Kyoto Protocol, had no incentive to curb emissions from deforestation. Simply put, market forces, as they stand, give rise to a situation in which it is more profitable for developing countries to adopt deforestation rather than forest conservation.[74] The idea of REDD is to remedy this by affixing economic value to the virtue of forest conservation, besides afforestation or reforestation. The term REDD was first brought into currency in 2005 in the proposal

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[72] Speech given by Elinor Ostrom, Co-director, Workshop in Political Theory and Policy Analysis, Indiana University, 13 December 2009. Available at http://www.cifor.cgiar.org/publications/pdf_files/cop/cop15/Ostrom-speech.pdf.

[73] Navroz K. Dubash, "Will Low Carbon Growth Plans Help or Hurt Low Carbon Growth?" Centre for Policy Research, India (November, 2009) Available at http://www.cprindia.org/policyupload/1261026040-NDubash%20-%20CPR%20Climate%20Brief%20Nov%2009.pdf

[74] Gustavo A. B. da Fonseca et al., "No Forest Left Behind", 5 Public Library of Science and Biology 1645, 1645 (2007), available at http:// biology.plosjournals.org/archive/1545-7885/5/8/pdf/10.1371_ journal.pbio.0050216-L.pdf

of Papua New Guinea and Costa Rica, on behalf of the Coalition for Rainforest Nations at the eleventh Conference of Parties to the UNFCCC in the agenda item entitled "Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action".[75] In 2007, REDD featured again, listed among the possible mitigation methods to achieve emissions targets in the Bali Roadmap. The fourteenth Conference of Parties in Poznan in 2008 also included a thorough consideration and endorsement of REDD and again, most recently, discussed extensively at the fifteenth Conference of Parties in Copenhagen. The most significant development in this respect was the appearance of the proposal of REDD in the policy resolution document that was arrived at the Copenhagen conference, the Copenhagen Accord. For the first since the inception of the idea, the mechanism of REDD is sought to be given official recognition, and concrete steps towards it, in the form of proposing establishing a financial mechanism, have been undertaken by the international community.[76] At the same time, simultaneously with the growing recognition of the proposition in the political realm, the implementational issues are sought to be creased out by many parallel initiatives. For instance, the Forest Carbon Partnership Facility (FCPF) launched by the World Bank is researching the building capacity for REDD in developing countries as well as testing a performance-based payment program to lay a foundation of positive incentives and financing in the future.[77] Furthermore, there are parallel initiatives outside the Kyoto compliance regime to implement REDD, the most prominent among these being the UN REDD, a collaborative programme launched by the UN Environment Programme, the UN Food and Agricultural Organization, and the UN Development Programme in September 2008. As its initiative venture, a pilot project was announced in March 2009 in which the Democratic Republic of Congo, Indonesia, Papua New Guinea, Tanzania, and Vietnam are to receive $18 million to reduce GHG emissions from deforestation and support indigenous peoples' interests in the forests.[78]

India, as a prominent player in the debates unfolding at the international climate change negotiations, has represented its support in favour of the REDD programme. In its official submission to the Bonn meeting of the UNFCCC, India particularly voiced its support in favour of the implementation of "market based approaches" to "provide positive incentives" for afforestation, reforestation and "reduced deforestation."[79] The Copenhagen Accord itself, of which India was one of the drafters, particularly included not only REDD, but also REDD plus commitments, which we expect to take effect in the

[75] U.N. Framework Convention on Climate Change, Conference of the Parties, Montreal, Can., Nov. 28-Dec. 9, 2005, Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action, 1, U.N. Doc. FCCC/CP/2005/MISC.1 (Nov. 11, 2005).

[76] Erin C. Myers Madeira, Reduced Emissions from Deforestation and Degradation (REDD) in Developing Countries: An Examination of the Issues Facing the Incorporation of REDD into Market-Based Climate Policies 8 (2008), available at http://www.rff.org/RFF/Documents/RFF-Rpt-REDD_final.2.20.09.pdf.

[77] Erin C. Myers Madeira, Reduced Emissions from Deforestation and Degradation (REDD) in Developing Countries: An Examination of the Issues Facing the Incorporation of REDD into Market-Based Climate Policies 8 (2008), available at http://www.rff.org/RFF/Documents/RFF-Rpt-REDD_final.2.20.09.pdf.

[78] UN scheme provides $18 million to five countries to slash emissions, create jobs, UN News Centre, Mar. 18, 2009, http:// www.un.org/apps/news/story.asp?NewsID=30221&Cr=deforestation&Cr1.

[79] Climate Change Negotiations: India's submissions to the United Nations Framework Convention on Climate Change (2009) http://moef.nic.in/downloads/home/UNFCCC-final.pdf.

near future. This paper, thus, flags the issues that are necessary to be considered in the imminent adoption of the REDD programme.

As observed, the implementation of the REDD programme would entail the creation of a billion dollar market, through which the economic value in preserving forests is sought to be reflected. However, at the implementational level, methodological concerns and concerns of indigenous people pose substantial challenges. It is pertinent to note that principles of environmental justice not only as they apply to inequalities regarding the impacts of climate change on vulnerable communities, but also as they extend to the environmental injustices that arise from policymakers' responses to climate change.[80] Without adequate safeguards, it has been opined that there may be victimization of indigenous people by harmful policies and programs developed and forced upon them without their input and consent.[81] It would be the most vulnerable section of the society, who have their livelihood linked to the forest resources, that would bear the brunt of the policy, and suffer disentitlement, while the pecuniary benefits are distributed between the influential communities, and possibly, even without any effective translation of the object of the policy into reality in the first place.[82]

The principle at the heart of REDD implies that the State undertaking to maintain and preserve the forest should receive proportionate and adequate monetary compensation for the same, which ideally, should at least be equal to the opportunity cost of any alternate use of the forest in the absence of the policy. The monetary compensation could be either in the form of direct monetary compensation, or in the form of trading credits, as is to be negotiated among nations under the UNFCCC.[83] It is suggested that the compensation thus received should be diverted to address the problems associated with deforestation in very poor regions of a country, for example, slash and burn farming, and development of economic development projects.

The mechanism of funding can be built on the development of the World Bank's Forest Carbon Partnership Facility (FCPF), which was launched at the December 2007 Conference of Parties in Bali.[84] Institutional checks and accounting could be employed to ensure plugging the loopholes, and address problems of corruption and unaccountability. Furthermore, funding under the REDD should be made contingent on the State having established a transparent system of accounting, in which the indigenous communities participate. Lessons could also be drawn from the policy of the World Bank for projects involving involuntary resettlement which include internal policies

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[80] Melissa Farris, "The Sound of Falling Trees: Integrating Environmental Justice Principles into the Climate Change Framework for Reducing Emissions from Deforestation and Degradation (REDD)" 20 *Fordham Environmental Law Review* (2010) at 515.

[81] Forest Peoples Programme (FPP), "Some Views of Indigenous Peoples and Forests-related Organisations on the World Bank's' 'Forest Carbon Partnership Facility' and Proposals for a 'Global Forest Partnership'" (2008), available at http://www.forestpeoples.org/documents/forest_issues/fcpf_ip_survey_feb08_eng.pdf.

[82] Donald M. Goldberg, Tracy Badua "Do People Have Standing? Indigenous Peoples, Global Warming, and Human Rights" 11 *Barry Law Review* 59 (2008)

[83] "REDD plus and Benefit Sharing" Available at *cmsdata.iucn.org/downloads/benefit_sharing_english.pdf*

[84] Erin C. Myers Madeira, Reduced Emissions from Deforestation and Degradation (REDD) in Developing Countries: An Examination of the Issues Facing the Incorporation of REDD into Market-Based Climate Policies 8 (2008), available at http://www.rff.org/RFF/Documents/RFF-Rpt-REDD_final.2.20.09.pdf.

and formalized standards which need to be satisfied in order to gain qualification as a project funded by the World Bank and an invigilatory body that can be accessed by private individuals.[85]

The United Nations Permanent Forum on Indigenous Issues (UNPFII) has sought to increase the involvement and input of indigenous peoples in this area of policy-making. In making its policy recommendations, the UNPFII emphasizes the human rights based approach to development and the principle of free, prior and informed consent. Correspondingly, duty-holders, like national or local governments, would be held accountable under this approach and indigenous peoples, as rights-bearers, would help to shape the development process.[86] The U.N. Declaration on the Rights of Indigenous Peoples further outlines these rights and obligations.[87] They should be taken into consideration in the course of implementation of REDD, and the utilization of the funds realized from the REDD programme towards reducing the negative social impacts of potential REDD projects.[88] This subset of the self-determination environmental justice principle is especially crucial for REDD because many REDD proposals "commodify" forest lands, potentially displacing forest indigenous communities. We seek to emphasize that the establishment of a broad-based consultation mechanism can

[85] The World Bank Inspection Panel, Res. 93-10, International Bank for Reconstruction and Development, Res. 93-6, International Development Association, Sept. 22, 1993. The Inspection Panel was envisaged and established to provide private citizens direct access to the Bank if they believe that they are being directly and adversely affected by a Bank-financed project. The Panel became operational in 1994. The first case inspected by the Panel was the planned Arun III Hydroelectric Project in Nepal. After the panel submitted its report, validating most of the complaints submitted by the local people, the Bank management reassessed the project as proposed and decided to withdraw its support for financing in June 1995. Richard E. Bissell, "Recent Practice of the Inspection Panel of the World Bank" 91 *American Journal of International Law* 741 (1997).

[86] International Conference on Engaging Communities, Brisbane Austl., Aug. 15, 2005, "Engaging Indigenous Peoples in Governance Processes: International Legal and Policy Frameworks for Engagement" [hereinafter Engaging Indigenous Peoples].

[87] Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Art. 10, 107 Plenary Meeting, U.N. Doc. A/RES/61/295 (Sep. 13, 2007). Some of the key provisions have been highlighted as follows: Article 10 discourages the forced removal of indigenous people from their lands. Relocations may be permitted with the peoples' free, prior and informed consent and with just and fair compensation. Article 26 gives indigenous peoples the right to develop and control lands and resources that they have traditionally owned and occupied. States in which these areas are located must extend legal recognition and protection to these lands. According to Article 27, States must establish and implement a fair process to recognize and adjudicate rights of indigenous people regarding their lands. Indigenous peoples also have the right to redress for lands that have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. This redress can be in the form of similar lands, monetary compensation, or other appropriate redress. Article 29 addresses the rights of indigenous peoples to conserve and protect the environment and productive capacity of their lands, and it dictates that States are to establish programs to help with the conservation and protection of these lands. States are also discouraged from storing and disposing of hazardous materials on those lands without the free, prior, and informed consent of the concerned indigenous peoples, and those States are to establish programs to monitor, maintain, and restore the health of indigenous peoples who are affected by the placement of those hazardous materials. Moreover, Article 25 provides that indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands.

[88] Donald M. Goldberg, Tracy Badua "Do People Have Standing? Indigenous Peoples, Global Warming, and Human Rights" 11 Barry L. Rev. 59 (2008).

dramatically increase confidence in the process among all stakeholders, and thus, the institutional developments contemplated should not sideline these concerns. The State is the most appropriate body to undertake the measures that are required for the implementation of the REDD programme – firstly, it is the State that undertakes the national commitment, and ascertains the position and obligations of the nations in the international arena. At the national level, it is up to the State to establish the necessary legislative, executive and judicial framework such that the programme can be given effect to at the ground level. Therefore, the State is the primary actor, inasmuch as it provides the framework for the implementation of the programme, and facilitates the co-ordination of various organs and stakeholders to operate. At the same time, there should be sufficient mechanisms to safeguard against State corruption and excesses. Thus, in the course of our research, we have identified two primary issues that need to be addressed on terms of law reforms for the implementation of a successful forest policy, which is in line with larger international concerns – harmonization, and accountability.

We seek to deal with the issue of harmonization in light of a case study of the implementation of forest policy in Uganda to identify the necessity of harmonization, and suggest a solution for the same.[89] This cautionary tale highlights the culmination in the worst possible outcome in which there is not only an overall negative impact, but a situation in which all the stakeholders acted in cross purposes and ended up worse off from the entire endeavour. We submit the necessity of harmonization of policy, implementation and adjudication to avert such a disastrous outcome. In the first place, if the national plan for the implementation of the reforestation policy was drawn up incorporating the inclusive participation of the local communities, and in a just fair and reasonable manner with at least adequate compensation for such evictions, it would not tantamount to the outcome it finally resulted in. Therefore, we suggest a legislative framework which embodies principles of natural justice, equity, and provides for participation of the indigenous communities. Furthermore, the executive organ of the State should act responsibly, and in a manner clearly laid down in the course of any programme undertaken pursuant to, and within the framework of the legislation. In such a situation, the adjudication of rights and obligations by the judiciary, also, is along a well-defined scope, and therefore, not confusing. Since the State acts as the harmonizing framework within which the programmes of forest policy are implemented, it should, first and foremost, be a well-oiled machinery, and more importantly, not function at cross purposes, negating any benefit purported to arise from the undertaken programmes.

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[89] Stephan Faris, Planting Trees in Uganda: The Other Side of Carbon Trading, Fortune, Aug. 30, 2007. http://money.cnn.com/2007/08/27/news/international/uganda_carbon_trading.fortune/. In the early 1990s indigenous farming communities living near the borders of Uganda's Mount Elgon National Park were forcefully evicted to make room for reforestation projects. The project was undertaken by the Face Foundation to offset greenhouse gas emissions from the Dutch Electricity, and in 2002, the Face Foundation began selling carbon credits. In the meanwhile, the evicted communities pursued legal remedies to regain title of their historical lands, leading to the culmination of a judicial decision in their favour in 2006, with the Court issuing injunctions against further evictions to three border communities. However, the pronouncement of the Court inspired the evicted indigenous communities to reclaim their lands, and they chopped down more than half-a-million of the trees planted by the Face Foundation, clearing the land for their own use.

Public accountability is the hallmark of any successful initiative by an authority at any level. As identified, the State is the most appropriate player to implement and co-ordinate the implementation of forest policy and to pursue programmes pursuant to such forest policy, and international commitments. In the context of REDD, in this paper, we seek to establish an institutional structure which involves two levels of State accountability. At the first level, the State is to be accountable to the international community. With the institutionalization of the REDD under the UNFCCC, there is to be, most likely body to oversee the implementation of the programme in the undertaking State. It is suggested that there be established a mechanism similar to, or aligned with the World Bank FCPC with inbuilt checks and mechanisms which would carry a concomitant pressure to conform to standardized levels. This, we propose as accountability from the top. At the second level, we propose accountability from the bottom. Increasingly, in the context of common property resource management as well as other contexts, there is a growing recognition of the need for a bottom-up approach, with participation of the primary units of any initiative. In the present context, this would imply the indigenous communities. The legislative framework we suggest should be one which provides for institutionalization of a consultative process with the indigenous communities and civil society prior to their submission of the national programme proposal for the REDD programme. Instances of successful implementation of this can be recounted. For instance, in the implementation of the UN-REDD Programme Policy in Panama, six experts from COONAPIP, (*Coordinadora Nacional de Pueblos Indígenas de Panamá*, an umbrella organization for Indigenous groups in the country) provided considerable time and input to revise the Panama UN-REDD Programme Document.[90] This approach is consistent with the proposition of Elinor Ostrom, who cautions against single governmental units at global level to solve the collective action problem of coordinating work against environmental destruction.

The approach of the Indian Government in the international arena is unequivocal in indicating its support in favour of REDD. So much so, the Government has cited other initiatives of reforestation, and sought to align it with its international commitments. The most notable of this is the 3 billion dollar programme institutionalized by the Supreme Court in the *Godavarman* case under the Compensatory Afforestation Management and Planning Authority.[91] However, there are many apprehensions that have been voiced in light of such developments which deserve close attention.

We propose that the existing legal framework should be reworked and supplemented such that REDD is not implemented as an instrument of deprivation and exploitation. This segment of the paper analyses the application of the Forest Rights Act to ensure that the rights of the forest communities are not abrogated in any manner. We seek to point out that the Forest Rights Act, 2006, as it stands, is inadequate. Although there is a path-breaking effort to articulate the entitlement of the indigenous forest community as “rights” instead of “concessions” or “privileges”. This has been criticized citing concerns

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90 http://www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/Documents/PDF/Feb2010/FCPF_FMT_Note_2010-8_IP_Capacity_Building_02-20-10.pdf

91 *M. Godavarman Thirumulkpad* v. *Union of India*, AIR 1997 SC 1228.

of the possibility of the destruction of biodiversity and the degradation of forests.[92] We seek to submit that such concerns should be viewed, not without a pinch of salt. In fact, the obvious lack of consistency regarding the concerns for the environment, making concessions for economically rewarding prospects, while imposing the burden of ecological concerns on forest communities, is indeed a symptom of bureaucratic hypocrisy of the highest degree. The illustrations of the Government approving projects of the nature of POSCO and Vedanta prove a case in point.[93] We submit that the rights of the indigenous communities cannot be compromised at any cost. On an optimistic note, besides the Constitution of India providing for the protection of the indigenous peoples rights' over their land, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (in short the Forest Rights Act) aims at correcting historical injustices in the reservation of forest land, which previously disregarded the presence of forest-dwelling communities, the majority of them being indigenous peoples. In the earlier legislations related to forest, the forest dwellers were regarded as illegal occupants or trespassers. This law recognises community rights as well as individual rights, including the rights to hold, live and cultivate the forestland and ownership over minor forest produce. The forest dwellers are also given the right to protect, regenerate and conserve community forest; the right to have access to biodiversity; and community right over traditional knowledge. Another important aspect is that the Act is not solely or even primarily about individual land claims. Many of the rights, such as the right to minor forest produce, are to be exercised as a community. The most powerful sections of the Act concern the community right to manage, protect and conserve forests, the first step towards a genuinely democratic system of forest management (sections 3(1)(i) and 5). It must also be noted that India is a signatory to the UNDRIP, and therefore, has an obligation under international law to respect and give effect to the commitments undertaken to respect and recognize the right of the indigenous communities.[94]

We believe that REDD should be perceived as an opportunity to initiate a long-term strategy for the sustainable development of tropical forest regions, rather than merely a program to compensate smallholders for not deforesting. Based on the experience of Brazil with respect to the implementation of REDD and related forest policy, a three part performance-based REDD smallholder development strategy could be adopted to give effect to the aspirations and expectations out of the programme: i. A consolidation of user-based forest governance institutions so as to reduce deforestation and forest degradation; ii. To provide funds to develop economic activities that conserve forests and improve household incomes once initial deforestation targets have been achieved,; and iii. Implement of REDD payment schemes that enable smallholders to make the transition to sustainable household economic strategies.

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[92] M.K. Ramesh, "The Scheduled Tribes (Recognition of Forest Rights) Bill, 2005: Movement Beyond Rhetoric and Political Correctness?"

[93] http://www.forestrightsact.com/statements-and-news/32-posco-vedanta-similar-projects-still-illegal

[94] Joint Statement on Implementation Of The UNDRIP: International Indian Treaty Council And International Organization Of Indigenous Resource Development, United Nations Human Rights Council http://indigenouspeoplesissues.com/index.php?option=com_content&view=article&id=1445:joint-statement-on-implementation-of-the-undrip-international-indian-treaty-council-and-international-organization-of-indigenous-resource-development&catid=65:indigenous-peoples-general&Itemid=92

Towards this end, a suitable atmosphere to induce the precipitation of the benefits should be created by the State. For instance, staff of government agencies operating at the municipal level must be trained in participatory management approaches and REDD protocols. In addition, institutional arrangements for co-management can be extended to municipal and regional scales. Through these institutional linkages settlement, municipal and District wide REDD targets can be harmonized, monitored and verified.[95] Rather than paying families to not clear forests, REDD compensation programmes should be designed to help families make the transition to economic activities that do not depend on cutting down their forests. Towards this end compensation programs can be designed in conjunction with the development of local governance capacity and development of sustainable economic activities. Payments should be linked to smallholder performance in reducing deforestation and in the implementation of integrated forest management and farming strategies that conserve their forest resources. In conclusion, many concerns regarding the impact of REDD on smallholders and traditional forest peoples can be resolved if more attention is paid to how REDD can fund the structural changes needed to address the problems of insecure land tenure, inadequate forest governance and lack of sustainable economic alternatives. Rather than a mechanism to reduce deforestation, REDD should be seen as a long term strategy for the sustainable development of smallholder settlements in tropical forest regions.[96]

CONCLUSION: SCALING THE THREE PEAKS OF THE SUSTAINABLE DEVELOPMENT TRIANGLE

In the Indian context, commons, today, has come to denote a wide variety of shared resources and assets which are held by the State in trust. Increasingly, there are suggestions that the use and monitoring of these resources should be devolved and more responsibility and a more egalitarian benefit sharing approach should be arrived at with the local communities who may, properly be called the custodians of the commons property along with the government. This is especially true in the case of forests since not only are forests an intrinsic part of the national assets held in the interests of public welfare, it has deep socio-economic and cultural linkages with the forest communities who live in close physical and emotional proximity to the forests. This approach is possibly one that reflects India's social, cultural and economic realities inasmuch as it tries and increase community participation in regulation thereby reducing the potential for solely special interest group led change. As the past few years have shown, development cannot be a catchphrase for allowing the denudation of natural resources and the Government cannot be considered the sole custodian of such resources- more mutuality in the relationship is imperative for conservation purposes. The researchers would like to propose a theory of quasi-commons for the Indian context. Such a policy gives official recognition to the concomitant need for both State and community

[95] David G. McGrath et al, "Smallholders, Rural Development and REDD in the Brazilian Amazon". Available at www.whrc.org/policy/CopenhagenReports/pdf/Smallholders.pdf

[96] David G. McGrath et al, "Smallholders, Rural Development and REDD in the Brazilian Amazon". Available at www.whrc.org/policy/CopenhagenReports/pdf/Smallholders.pdf

participation in conserving and utilization of the country's resources. Doing so gives neither absolute control but incorporates the need to acknowledge both the macro and the micro-level aspects of any proposed intervention with respect to the country's resources. The rights granted to a community are not intended to be individual but instead, communal, so that individual self-interest and the perils of private property do not usurp the fundamental impetus for such partial devolution of rights and duties which is to ensure than forest resources are held in trust by, of and for the welfare of the local communities and the country at large. As Ostrom out it, given today's multiple stakeholder environment, only a policy which legitimizes polycentric governance is likely to prove practicable and effective. Internationally as well, there is increasing acceptance of the need to accord legitimacy to the rights of indigenous communities over the forest commons, especially in keeping with the unique cultural connections that the indigenous and forest communities possess with these forests. In the seminal case of *Awas Tingni*,[97] the Inter-American Court of Human Rights held that Nicaragua's persistent dismissal of complaints by the indigenous Mayan people against the Government's grant of concessionary logging permits on Mayan traditional land was in violation of the American Convention on Human Rights. The Court's decision is notable inasmuch as it unequivocally held in favour of "collective land rights" and thereby tacitly accepted the notion of a communal right over traditional land for the Mayans.[98]

As we have noted in our paper, there is often a vast chasm between the law as in the books as opposed to the law in action. We are hopeful that this chasm is being bridged with the untiring efforts of those who have brokered partnerships and collaborative efforts between communities and interest groups. The fact that civil society in India is robust has meant that we are truly transforming into a participatory democracy with a multiplicity of voices holding those in power responsible. Our courts, too, have played an important role in trying to invoke equity and constitutional provisions in order to hold the government and special interest groups accountable. However, given the plethora of stakeholders involved, very often, even the best intentioned of laws adversely impact one group in order to benefit another. Development clashes with conservation, wildlife conservation clashes with human habitation, one community's interests clashes with another's. As we see it, the only way to reconcile such extremes is to facilitate continuing dialogue and continue to seek dynamic solutions. At the same time however, we willingly acknowledge the need to accept the inevitability of change and the necessity of preparing it. To that end the reforms that we have suggested in this paper range from changing provisions in the law towards effective larger institutional changes. We believe that each of them will have positive repercussions if properly framed and implemented. To our mind, inaction is also a choice. The need of the hour is to be innovative and attempt to create sustainable solutions which are equitable, in consonance with the environment and economically sound. We believe that India, as a nation, occupies a *sui generis* category by virtue of our vast environmental and biodiversity resources and the fact that we remain committed to concomitant economic

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[97] *Mayagna Awas Tingni Community* v. *Nicaragua*, 2001 Inter-Am. Ct. H.R. (Ser. C) No. 79, P 121 (Aug. 31, 2000).

[98] S. James Anaya & Claudio Grossman, "The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples", 19 *Arizona Journal of International & Comparative Law* 1 (2002) at 15.

growth. This position should not be underestimated and it is imperative that India forms international coalitions with countries in similar positions so to stand up as a counterpoint to the dominant discourse of the developed nations.