

**From Joint Management to Community Ownership of Forest in India
– The Legal Challenge**

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Introduction-

Forestry management in India is at a radical transition phase. Local experience, shift in policy and consequent government initiatives has led to growth of various local initiatives and institutions which can have far reaching consequences in management and protection of the forest resources especially forests which are under the common property resources (CPR) regime. Although the expanse of CPRs is broad and may include village pastures, community forest, wasteland, common thrashing ground, water drainage, village ponds, rivers/rivulets etc the present paper attempts to see the complexity of managing forests in India especially when it comes to the institutional arrangements and ownership pattern. While on one hand there is big thrust to joint forest management primarily due to the involvement of the external sector, there is growing body of knowledge and lobbying for granting community ownership in forest areas especially in non-tribal areas. Whether these approaches are complimentary or opposed or whether new strategies are required to be developed is the current inquiry of this paper. The analysis would be incomplete without the historical setting on which these approaches are premised.

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Brief History of Participatory Forest Management in India

Forestry management in India in the post independence era has largely remained a British legacy. In the words of Brandis “.....the first attempts to manage forests were to secure a permanent supply of timber and this resulted in an attempt to establish, in total disregard of private rights, a Government monopoly of timber. The Constitution of India at its inception, made forests a provincial subject, which resulted in skewed exploitation by various States. Consequently, large scale denudation and excessive felling of natural forests forced the then Government of India to take constitutional measures to exercise control over forests. By the 42nd Amendment in 1976 to the Constitution of India ‘forests’ were brought under the ‘concurrent²’ power of the state. This quickly resulted in the enactment of the Forest Conservation Act in 1980 (FCA), which comprehensively restricted clear felling, and use of forest for non-forest purpose. The Act was further strengthened³ in favour of the Central Government by insertion of two new provisions relating to restrictions in de-reserving Reserve Forests and leasing of forestland to individuals and/ or corporations. Although the FCA does not prohibit the above activities, a lengthy “prior approval by the Central Government” has been credited with reducing deforestation.

About the same time while the degradation of forests was at its worst, few experiments in the eastern parts of India particularly West Bengal and Bihar attempted informally and

² Under the Concurrent List or the List III under the Constitution are those items on which both the Centre and the State Governments are competent to legislate on.

infact “illegally” the association of local people in joint management of Reserve Forests. The successful attempts in the eastern corner of India and the promulgation of the National Forest Policy in 1988 paved the way for issuance of a Circular in 1990 by the Central Bureaucracy for large scale involvement of people in managing Government Forests. Prior to this external aided social forestry was not so successful especially due to legal impediments caused due to the enactment of FCA⁴.

The nineties witnessed a spate of Government Orders (G.O.s) issued by State Governments pledging joint management of forests. The hundred-year-old forest bureaucracy had to give way to popular acceptance of involving people in managing forests. However, contrary to popular belief, Joint Forest Management (JFM) in India even over a decade of presence has raised more questions than providing solutions to forest management.

Joint Management or Community Ownership- Are they necessary and sufficient?

This paper assumes that on one hand the forest resource management and the institutions that have been put in place to achieve the laudable objectives of Joint Forest Management (JFM) has not proved adequate in real empowerment of people. As Jeffery Campbell puts it “Foresters may view JFM primarily as a means to ensure forest regeneration,

³ Amendment Act of 1988 to the Forest Conservation Act, 1980

⁴ To cite an instance, in Andhra Pradesh, in 1983, a scheme for leasing degraded forest lands under a “tree patta scheme” by weaker sections for raising fuel wood plantations was taken up with CIDA assistance. But the communities could not access the entitlements as the Forest Conservation Act, 1980 did not permit leasing out forestland to private individuals, authorities or agencies without approval of the Central Government. As a way out the scheme was modified as “Reforestation of Degraded Forests with Family

community members may see it as a solution to a growing shortage of biomass, a means to ensure daily requirements of food, fodder and Non Timber Forest Produce (NTFPs), and/or a way to increase incomes, NGO workers/activists may view the program as a vehicle for grass roots empowerment, academic researchers may see in JFM an experiment in collective action; while politicians may view JFM as means to decentralise control over resources. It is a dynamic initiative still very much in it's evolutionary stage, full of variation, uncertainty, and conflict.”⁵ This also partly explains the fact that ownership of forests and forest land that vest with the government has not resulted in its effective management. Thus there is a need to look for partnership in governance of critical ecological resources such as forests. JFM seems to be a logical culmination of this thinking.

On the other hand the recent initiatives of the Government of India for decentralised governance through 73rd Amendment to the Constitution and especially the Panchayat (Extension to Scheduled Areas) Act, 1996⁶ (PESA) which *inter alia* transfers ownership of forest products to the lowest unit of governance, the *Gram Sabha* (Village Assembly) raises some interesting questions on the trends of governance and resource management especially in the context of forestry management.

Although the full import of this new legislation has not been evaluated, it is my case that it is the ensuring of right to access and use of resource (more specifically forests),

Assistance Method.” But when this was referred to the Central Government for approval it turned and said that the scheme cannot be allowed on forestlands.

⁵ Jeffrey Y. Campbell, Second generation issues in JFM, Introduction to Panel Presentation, May 14, 1996.

irrespective of ownership or tenure on land, that will benefit people in the longer run in both sustaining the resource as well as in ensuring equitable distribution. Mere transfer of ownership rights may not be enough. This brings us to the question of analysing the present strategies that are in place and its apparent inadequacies.

JFM in India – How Joint?

JFM in India is implemented under an “arrangement” between the village community (i. e. the beneficiaries), Non-Government Organisations (NGO’s and the State Forest Departments where beneficiaries should essentially be village communities and not commercial or other interests. The access and usufruct rights are limited to people who organise themselves as village forest committee (VFC) and in no case access or tree pattas (leases) be given to individuals. The work of the beneficiaries is to be closely supervised by the forest department.

However, the most popular form of participatory forest management in India under the JFM Scheme suffers from some fundamental inadequacies. A frequently noted weakness in the legal framework for JFM is the absence of any legislation on the subject. In most of the states the entire programme is built upon Orders issued by executive branches of governments, without clear linkages to enabling language in relevant legislation. The legal bases of the notifications on JFM and its place in legal hierarchy has been a major concern to ensure real benefits to the people along with sustainability of forest products.

⁶ It is pertinent to mention that the PESA is only restricted to “scheduled areas”. Scheduled Areas are those which are under the fifth schedule of the Constitution where the tribal population are predominant.

The benefit sharing is subject to a satisfactory performance of the duties and functions as prescribed under the Order. It is, however, not clear which particular authority would be responsible for evaluating this satisfactory performance and what are the criteria used for such evaluation. Discretionary powers have been given to the State bureaucracy, which may be exercised arbitrarily. Further, the numerous legal complexity arising in JFM relating to overlapping institutional arrangements, security of rights and responsibilities, impacts of other legislations such as panchayat laws, tenurial security and unclear guidelines to benefit sharing mechanisms are some of the many shortcomings that still needs to be addressed if JFM has to sustain itself legally as well as administratively and these are of crucial significance if the forests are to be jointly managed by the people and the agencies of the State⁷.

The above raises valid presumptions of complete state bias and thus questions the basic premise of 'joint management' of forests. As the institution that has been created is totally biased in favour of the State, this may not be helpful in ensuring public support especially in cases of disputes resolution mechanisms which are designed to be in favour of the state due to its dominant representation by state officials.

Community Ownership- A distant hope

The concept of community ownership of resources (including forests) is still a distant concept under the formal legal regime. However, community controlled areas especially

in the tribal dominated areas and areas conserved under moral sanctions, (For example *Dev Aranya*- God's Forest Abode) in Rajasthan) including sacred groves do qualify as 'community controlled areas'. The biggest legal impediment to such traditional systems is the lack of formal legal recognition to such informal practices. This not only creates legal inadequacy at a theoretical level but also results in practical ground-based conflicts⁸. The state dominance over natural resources still pervades and overrides the spirit of democratic decentralized governance. In fact the most significant forest law i.e. the Indian Forest Act, 1927 makes clear that the entire reserve forest category under it (which forms the major part of forests including protected areas in India) are under the proprietary regime of the Government. The only exception to this general trend is the unique position that the North Eastern States of India enjoy under the Sixth Schedule of the Constitution. Most of the forests are community owned and controlled by folk law and traditional systems. However, the state of forests in this region too is as questionable as any part of India. In the ongoing (perhaps the largest case ever on forests) *T.N. Godavarman vs Union Of India*⁹ and *ors* the Supreme Court of India has passed several strictures to the Governments of North Eastern States for large scale destruction and denudation of natural forests. In short the most popular example often given by supporters of community forest management has not shown the best forestry management practices.

⁷ For detailed legal analysis on the subject see Upadhyay S; *Legal Issues in Bankability of Joint Forest Management in Andhra Pradesh*, FAO, Rome (May, 1997) and Upadhyay S; *Forestry Laws India*; The World Bank; (October 2000)

⁸ A famous example of this nature is the allocation of fishing rights by the State in a rivulet in Rajasthan, which was rejuvenated by local initiatives. The state exercised its right over water resource only after the area was converted from a 'dark zone' to a 'green zone' due to its own initiatives. The use of traditional water harvesting structures was deemed illegal structures under the formal system of law.

⁹ AIR 1998 SC 769

Control over resources and its management

A significant trend that is now clearly emerging is in relation to control and management of resource. While the control and vesting of natural resources (land, water and forests included) largely remains under the domain of the state, there is a significant shift of power in its management. The 73rd Amendment to the Constitution relating to Panchayats and subsequent enactment of Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996, mentioned above, has attempted a genuine transfer of power making the *Gram Sabha* (Village Assembly) the cornerstone of process of democratic decentralisation in India. A radical piece of legislation by any analysis, the PESA proposes to shift the entire power structure from the state to the lowest level of governance of the local self-government the *Gram Sabha* or the Village Assembly. The ownership rights to minor forest produce, the control over land resources, the power to manage minor water bodies, the control over minor minerals now are under the various levels of administration under the Panchayat Raj Institution system (i.e. the Local Self Government System). Again this sudden shift of power structure, a top down model without actual consultation, has not produced the desired effect that it sought to achieve atleast in its six years of existence. The example of PESA given above is just an illustration of the manner in which state deals with specific resource management issue where the role of people although is at the central concern but gets mired in the complex language of law.

The other attempts in law of introducing community reserves under the proposed Amendments to the Wildlife Protection Act of India and handing over of protected areas to local communities as being lobbied by active NGOs of the newly formed state Uttaranchal¹⁰ are still not approved by the cabinet or accepted as a popular strategy respectively.

Specific Resource Management Issues and the Gram Sabha

To extend the argument of ownership further, let us take the case of the PESA in the context of forestry management. As stated earlier, the PESA provides that the ownership of minor forest produce (MFP) shall be given to Gram Sabha and the Panchayat at appropriate level. However, in most of the States this power seems to be restricted to the local areas of the Panchayat of the respective Gram Sabhas. It is common knowledge that the Protected Area regime as well as the Reserve Forests and Protected Forests¹¹ in a number of cases are contiguous to the village boundary and sometimes the boundaries are not clearly demarcated. Hence distinguishing the areas of ownership of MFP is difficult. In any case granting of ownership in relation to forests such as those under the PESA seems to be a dangerous trend. This is because it only seems to be a token “grant of ownership of forest produce” rather any logical follow up or debate of propriety of handing over forests or forest produce to the community. It seems to be a hurried attempt garbed under the PRI system, and interestingly, only confined to scheduled states. In my view there is need to comprehensively assess the propriety of these different legal

¹⁰ The Rural Litigation Entitlement Kendra, a Dehradun based NGO has been actively pursuing this concept among others.

regimes of forestry management and it is only then that a more accepted or workable model would emerge.

Popular strategies sans legal bases

Another reason why the above assessment becomes necessary is the advocacy of new popular strategies in forestry management. For example the extension of 'Joint' kind of management under the externally aided 'eco-development' in Protected Areas¹² and of Joint Protected Area Management (JPAM) in National Parks and Sanctuaries by some groups¹³ or increasing pressure to advocate "Community Based Conservation" have at best been peripheral attempts to look at forestry management afresh. Further, the advocacy of "Community Conserved Areas" and "Community Forest Management" have still not gained any mass acceptance in India. However, it is rather surprising that some states like Andhra Pradesh has now accepted 'Community Forest Management' as a State Policy under the aegis of the World Bank rather than its own initiative.

Search for new a Legal Frame

With so much of legal uncertainty of control and management and ownership of resource in the forestry sector, it may be necessary to search for a new legal frame within which both the concern of sustainability of resource and its equitable sharing needs to be

¹¹ Reserve Forests and Protected Forests are the three of the two categories under the Indian Forest Act, 1927

¹² Protected Areas are normally used to denoted National Parks and Sanctuaries under the Indian Wildlife Protection Act, 1972.

assessed in an unbiased manner. As seen above, the Joint management regime is heavily tilted towards the state and the devolution of power for forestry resource management through the Panchayats under the recent Constitutional amendments only transfers the burden of management and not control or ownership of the resources. The traditional system of forestry management where state is the owner of forests has not worked in the fifty-five years of Indian independence. The emergence of JFM, PFM, CFM is a clear indicator to that. Lastly the example of North Eastern states where community ownership is dominant has also not favoured the argument of management of forests through community ownership. If all the above are true there is a sufficient case for developing an argument that communities need to draw new strategies for forest management. In my view the debate over ownership or joint management may be necessary but is not a sufficient criteria to ensure sound forest management practice. One view that is advocated here is based on community's right of equal opportunity of access and use of resources irrespective of the nature of ownership of land especially in case of forests. Clear guidelines need to take the shape of law, which would define "communities who are dependent on forest resource". Arbitrary administrative boundaries defining village as per revenue records are not adequate and may have to be replaced with hamlet based, contiguous and proximity to forest resource based communities who may exercise community rights over access and use. The exercise of such rights can be based on the basic tenets of the Constitution of India i.e. under the Fundamental rights regime especially the fundamental right to life (Article 21). Fundamental rights to access and use of natural resources where the state or a higher community based Organisation drawing

¹³ A National level Workshop in 1994 in the Indian Institute of Public Administration at New Delhi advocated the view of JPAM.

from traditional wisdom and modern science may impose ‘reasonable restrictions.’ This potentially negates a popular argument that granting of ownership rights has the risk of communities’ freedom to sell such rights. Thus granting the above fundamental right to access and use would only strengthens the stand of bonafide users of forest resources, without the risk of sale, a power which might accrue due to ownership. If such a scenario were to be advocated then the role of the state agents, the Forest Department in this case, would be of a ‘facilitator’ rather than controller or owner of forests. In any case the over all scheme of the Constitution do not advocate ownership on natural resources by the state but only views the State as its custodian. Thus by following the new legal frame proposed, the state could be the ‘real’ custodian while communities would exercise their right to access and use under the constitutional obligation of being monitored by ‘reasonable restrictions’. The detailing of such “reasonable restrictions” as well what would constitute the “right to access and use” would certainly be a legal challenge if participatory management were to be viewed from a fresh perspective where neither ownership system nor traditional joint forest management would provide a lasting solution to a complex legal regime of forest management.