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# Common Land and Common Property Resources

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## Introduction

Common Property Resources (CPRs) are an integral aspect of the social and institutional arrangements made to meet the every day requirements of village communities. They are of particular relevance to the landless, the agricultural labourer and the rural artisan. In Madhya Pradesh, where irrigated land is a small proportion of the cultivated area and lands are often left fallow after a single crop (Buch, 1991: 74), the dependence on CPRs to fulfil subsistence needs are pronounced.

Generally, CPRs may be identified by access, common use and communal purpose. Jodha would define CPRs as a 'community's natural resources, where every member has access and usage facility with specified obligations, without anybody having exclusive property right over them'. (Jodha, 1995b).

In Madhya Pradesh, common property arrangements are ordered by the state. The MP Land Revenue Code, 1959, governs the relationship between the people and the resources.

## The Code

In Madhya Pradesh, '(a)ll lands belong to the state government... including standing and flowing water, mines, quarries, minerals and forests reserved or not, and all rights in the subsoil of any land are the property of the state government'.<sup>1</sup> This does not of course spell the decess of '[a ]ny rights of any person subsisting at the coming into force of this Code in any such property, which persists till altered by the state.'<sup>2</sup> The Code then classifies land into occupied and unoccupied land. All land in a village which are not *abadi*<sup>3</sup> or land held by a *bhumiswami*,<sup>4</sup> tenant or a government lessee are occupied lands. That which is not occupied land is unoccupied land (Dwivedi, 1980: 328). As the law stands since 1964, record of unoccupied land is to be prepared and maintained for every village setting out the land set apart for exercise of *nistar* rights.<sup>5</sup>

Nistar refers to the necessities in the carrying on of the business of living. Land set apart for exercise of nistar rights may be timber or fuel reserve; pasture, grass, *bir* or fodder reserve; burial ground and cremation ground; *gaodhan* or village site; encamping ground; threshing floor; *bazaar*; skinning ground; manure pit; public purposes such as schools, playgrounds, parks, lanes, drains; and any other purposes that may be prescribed.<sup>6</sup>

Nistar land is communal land and the nistar *patrak* provides in particular

- a) the terms and conditions on which grazing the cattle in the village shall be permitted;
- b) the terms and conditions on which and the extent to which any resident may obtain wood, timber, fuel or any other forest produce; and *mooram*, *kankar*, sand, earth, clay, stones or any other minor minerals.<sup>7</sup>

In preparing the nistar *patrak*, the Collector is to make provision for: free grazing of the cattle used for agriculture; removal free of charge of forest produce and minor minerals by residents of the village for their domestic consumption, and the concessions to be granted to village craftspersons in taking materials needed to pursue their craft.

'Unoccupied land' identified to be used for a specific communal purpose cannot be converted to other purposes before the change of user is endorsed by one-fourth of the adult residents of a village, or by the sub-divisional officer, who is empowered to modify the nistar *patrak* after undertaking such enquiry as he may consider necessary.

There is, then, a categorical recognition of the rights of the people to access resources to meet their nistar requirements. Buch's assertion is that: 'The State of MP is perhaps unique in accepting the responsibility to provide nistar, i.e., requirements of villagers of forest produce to all agriculturists, village artisans and agricultural labourers', and it finds support in the Code.

Nistar rights, it must be said, are distinct from the customary and easementary rights recorded in the *wajib-ul-arz*. The *wajib-ul-arz* is a record of customs in each village in regard to: the right to irrigation or right of way or other easementary right, and the right to fishing.

Differently from the rights detailed in a nistar patrak these rights do not pertain to land or water not belonging to, or controlled or managed by the state government or a local authority; it relates to rights available on occupied land. Inserting or modifying an entry in the wajib-ul-arz may happen, either when all persons interested in such an entry so desire, or where a court intervenes to rule on an existing entry, or decrees the existence of a custom that has not yet being recorded.<sup>8</sup> There is, further, a communalising of resources and of the right to resources, where the Collector is given the authority to extend the grazing rights of the residents of one village into another village. This may be where the Collector is of the opinion that the wasteland of any village is insufficient to meet the nistar or grazing needs of one village, and that it is in the public interest to stretch the right into a neighbouring village. Right of passage to reach the nistar or grazing ground are entered in the nistar patrak.

There are then at least three kinds of common property regimes that are identified in the Code. There are the common lands and the rights of the people to this land; these are nistar rights, and do not require a customary basis. There are the customary rights, and easements, which depend on the usage and practice in the access and utilisation of occupied land. There are, further, the rights to wasteland (read, common land) and to resources on that land located in neighbouring villages.

Forests are another story. In a state where there are 155,000 sq km of recorded forests (Buch, 1991: 47), which is home to over 25 per cent of the nation's tribal population, and about 40 per cent of whose geographical area is formally covered by the tribal sub-plan with a bulk of this area being Scheduled Areas, the dependence on the forest is necessarily heavy.<sup>9</sup>

The relationship of the people with the forest has been transmogrified since the Forest Acts were enacted. Take grazing, for example. Before the Forest Acts of the 1800s, grazing was free ranging. This was circumscribed somewhat when the concept of the reserved forest was introduced, and the state closed these forests to the people.<sup>10</sup> Till 1951, there were four types of forests recorded in the state of Madhya Pradesh: reserve forests, protected forests, *malguzari* forests and small tree forests under the Revenue Department.<sup>11</sup> There were also the forests on private lands, recorded as *malik-makbuza* timber. The nistar needs of the people were met from the protected forests and the *malguzari* forests. In 1951, when proprietary rights were abolished, the *malguzari* forests were vested in the state. The legal status of these forests were altered, but neither the Revenue Department which had no field agency for the protection of these forests, nor the Forest Department which would not own responsibility since it was not the 'owner or the legal guardian', acted to preserve the resource. In the 'administrative interregnum,<sup>12</sup> between 1951, when proprietary rights were abolished, and 1961 when the forests were transferred to the Forest Department, ...almost all the forests from which nistar was obtained were destroyed'.<sup>13</sup> The disappearance of the resource in the village commons has exerted the pressure on the reserved forests, resulting in the graziers being seen as adversaries of conservation of forests.

Free-range grazing, rather than stall feeding has been the practice in the state. The relatively large livestock population in the state is augmented by migratory herds of cattle, sheep, goats and camels that are brought in from Rajasthan and Gujarat. Buch suggests that an estimate of over a million heads of migratory cattle annually enter Madhya Pradesh (Buch, 1991: 74). Saxena refers to an estimate that it could be closer to 1.5 million heads of livestock. (Saxena, 1993: 64). The fact that only 15 per cent of the cultivated area is irrigated, and 17 per cent double cropped, leaving lands lying fallow with no vegetation, shifts the onus of grazing almost entirely to forests (Buch, 1991).

The levy of rates for grazing has been one institutional mechanism intended to control the livestock let out on these common resources. In 1976-77, the MP government attempted to prohibit the entry of animals into the state for grazing; they could pass through the state, but within a maximum period of 45 days. These rules were challenged, and had to be amended. In 1979, the state made rules prescribing a different, higher, rate for grazing of 'foreign animals'. The Supreme Court, however, struck it down, and the option of excluding the reckoning livestock from other states has been outlawed (Lakshman vs. State of Madhya Pradesh, 1983). 'Forests of MP are not grazing grounds reserved for cattle belonging to residents of MP only, even as the towns and villages of MP cannot be reserved for the residence of the original inhabitants of MP only', the court said. It added: 'Accidents of birth and geography cannot furnish the credentials for such discrimination and authorise prejudicial treatment in matters of this nature'. The limit of stay of 45 days was also declared unconstitutional.

‘Overgrazing’, beyond the carrying capacity of the resource, and ‘free grazing’ have been identified as the causes for the degradation of grazing and forest land (Buch, 1991: 74; Saxena, 1993: 1). There is a ‘tragedy of the commons’<sup>14</sup> approach in this reckoning. Since the Forest Acts came into existence, however, the commons and common property resources have not been uncontrolled, though it is perhaps true that they have not been effectively managed.

It is significant that the concept of ‘encroachment’ has grown with the assumption by the state of all ‘unoccupied’ land and of the forests. Since all lands belong to the state, for the landless, accessing common lands or common property resources necessarily means dependence on the state for the legality of their pursuits. With the fencing of the forest,<sup>15</sup> the commons was transformed into an area where the people had privileges recognised by the state, but only limited to the extent of that recognition. The shrinking of these rights has accompanied the closing in of these commons. The Forest Conservation Act, 1980, which froze the status of the forests at the time of its enforcement, was also an Act of absolute exclusion – from entry, residence and use.

The access to land and resources which was a significant aspect of common property appears to have been replaced by the state’s claims to ownership. With the closing of the forests, the recognition of privileges was introduced, and the privileges that were not to be continued were ‘settled’. More recently, the state has resorted to providing the nistar requirements through depots; this attempts to meet the needs of the people while keeping the people away from the commons.<sup>16</sup> The Forest Conservation Act has completed this process of exclusion.

The incapacity of the state to meet the nistar needs of the villagers, and the disappearance of grazing lands outside the forest area, have been causes of conflict and a reason for the fact that ‘encroachment’ is virtually inevitable. In this context, the admission of the Forest Nistar Committee, which submitted its report in 1979, that ‘even if all permissible availability of timber and fuel of productive forests of the state is earmarked for supply in nistar, the timber and fuel requirements of the population could be only partially satisfied, hardly to an extent of 47 and 44 per cent respectively’, is telling.

Buch is caustic in his response to this statement: the ‘entire science of forestry has been applied to producing climax forests of the high forest type, in which vegetation other than commercial timber is excluded’ (Buch, 1991: 70). And again, ‘(w)hen foresters refer to biotic pressure, they generally mean intervention at local level by villagers, conveniently forgetting that commercial felling is as much a biotic intervention as the girdling of a tree by a Gond looking for a source of fuel’. He cites an SRFI, Jabalpur, estimate that

the present demand to meet the people’s requirements (of bamboo) is half a million tonnes (mnt), whereas supply is 0.28 mnt. As against this, 0.138 mnt was extracted in 1985-86 for commercial sale and 0.211 mnt for industrial purposes, mainly for supply to paper mills. This means that as against the Forest Department meeting only 56 per cent of the people’s demands, it fully satisfied commercial and industrial demand. In fact commercial and industrial exploitation of bamboo exceeded the nistar supply by 69,000 mnt in 1985-86 (Buch, 1991: 60).

This assessment comes at a time when the state has assumed the responsibility of providing the people with their nistar requirements, even as the villagers have been edged out of direct access to the common property. The distance between legitimacy and legality is evident in a situation such as this, where control over the common property is assumed to ensure equitable distribution, while preserving the resource base, and the entry of the villager into the common property is denuded of legality even when it is for making up the shortfall.<sup>17</sup>

The context of project displacement has contributed to the marginalisation of common property resources in policies and in the planning process.

The Land Acquisition Act, 1894, has held the field for over a century and a decade in the matter of compulsory acquisition of land for a ‘public purpose’.<sup>18</sup> Project acquisition has provided a synonymy between acquisition and displacement of whole populations. The forest project showed early signs of this potential. The Forest Acts have a reputation of having, by ‘one stroke of the executive pen, attempted to obliterate centuries of customary use of rural populations all over India’ (Gadgil and Guha, 1992: 134). In the relatively recent past, project displacement, representing a dark aspect of planned development, which has invoked the Land Acquisition Act in its aid, has acquired a ruthless reputation. Large dams, mining and power projects, for instance, not only displace populations; they divert – even destroy – the original resources found on the land disrupting the rela-

tionship of the population with the resource. Submergence areas, and privatised industrial regimes render the affected area uninhabitable, and inaccessible to the original inhabitant or user. Experience of finding replacement for this loss has been discouraging, discrediting the process.

The trauma of displacement has found a voice in the last 20 years, and silent resignation has changed to resistance and vocal protest. A distinction has begun to emerge between legality and legitimacy in the context of planned development too. The movement around the construction of the dam in the Sardar Sarovar Project has done more than only prove the possibility of resistance. One of the significant effects of this movement has been to redefine development, so that it does not render people redundant, without appropriate compensation. The Land Acquisition Act, 1894, a coercive legislation which has for decades aided land acquiring agencies, and project authorities, to slash transaction costs while taking over lands, has been successfully challenged by such protest movements. The mobilisation of the affected populations has compelled the state and lending agencies like the World Bank, and project authorities to acknowledge costs beyond only the compensation prescribed in the law.

Apart from changes that have been introduced in the law, it is in policies of rehabilitation emanating from a range of agencies<sup>19</sup> that the inclusion of the landless 'displaced', and the displacement of the communities is being witnessed. Widened definitions of the displaced, of their rights and entitlements, of rehabilitation, of the necessary connection between progress of the project and resettlement of the displaced populations have been adopted by policy. There is little doubt that it is the imperatives that the protest movements have cast upon the projects process, and not altruism, welfarism or the recognition of rights, which have determined the direction of rehabilitation policy.

It is, therefore, instructive, to see the place of CPRs in these policies. 'Bank projects frequently affect persons whose rights to land or other resources are not legally recognised', reads a document prepared by the World Bank (1999). '[T]he most devastating effects of displacement may be borne by individuals or groups who depend upon open access to resources, whose customary rights are not legally recognised, or whose resource use varies from dominant patterns'. Operation Directive 4.30 of the World Bank, which deals with involuntary resettlement, therefore suggests:

Land, housing, infrastructure, and other compensation should be provided to the adversely affected population, indigenous groups, ethnic minorities, and pastoralists who may have usufruct or customary rights to the land or other resources taken for the project. The absence of legal title to land by such groups should not be a bar to compensation (Operational Directive).

It goes on to say: 'Some types of loss, such as access to ...(c) fishing, grazing, or forest areas cannot easily be evaluated or compensated for in monetary terms. Attempts must therefore be made to establish access to equivalent and culturally acceptable resources and earning opportunities' (Operational Directive).<sup>20</sup>

In the context of Madhya Pradesh, the Madhya Pradesh Land Revenue Code, 1959 itself recognises nistar rights in the village; where it is found necessary, in a neighbouring village; the rights recorded in the wajib-ul-arz; there is a priority placed on housing sites; and there are the tanks that vest in the use for the use of the community.<sup>21</sup> Pasture, and fodder, are acknowledged needs of the community – not only of local villagers, but of migratory graziers from Gujarat and Rajasthan too. The government's barter with the communities that they will provide the nistar needs which are extracted from forests in exchange for the people not foraging in the forests provides an altered state of CPR access. This basket of responsibilities has been assumed by the state, both as owner of the land and water sources, and in exercising control over these resources. These do not, however, find a place yet in Madhya Pradesh's proposals for rehabilitation of displaced populations.<sup>22</sup>

Through all this, the standing of the 'encroacher' has altered beyond recognition. The encroacher on state land is often a person subsisting on common property land and resources, particularly where it is a person belonging to the class of the landless or the marginal farmer. Forest villages are also encroachments in law, where ownership of the forest vests with the state. The state's quandary is witnessed in the context of a Forestry Project proposed to be undertaken in Madhya Pradesh, supported by the World Bank. The project is expected to increase the production of timber and minor forest produce (MFP); 160,000 hectares of dense forest cover is to be generated; 75,000 hectares forest land is to be upgraded, and non-forest income generation programmes are to be implemented in 1,140 villages.<sup>23</sup> It is to be a Joint Forestry Management Project, with Van Suraksha

Samitis (Forest Protection Committees) in dense forests and Gram Van Samitis (Village Forest Committees) in degraded forests to bring the local population into the programme.

Simultaneously, with the project getting underway, the state government has started the process of regularising encroachments. Dealing with encroachments is presumably a condition that the World Bank has attached to the loan.<sup>24</sup> On 12 May 1998, a cabinet decision was taken to regularise the occupation of forest land since 24 October 1980 in Scheduled Areas under the Fifth Schedule to the Constitution. In response to a government announcement that those cultivating forest land from prior to 1980 would have their encroachments regularised, 476,596 people presented their applications. Of these, only 148,000 people were identified as eligible to get land possession papers.<sup>25</sup>

This selective conferral of status of what may be termed legal encroachments is now under contest from excluded villages, families and individuals. In the meantime, there are two aspects that invite scrutiny. 'Legal encroachment' is, clearly, an oxymoron.<sup>26</sup> In treating forest villages and use of the forest as encroachments, the villagers and users have over the years lived in a state of illegality. It is inevitable that this has impacted on their relationship with the forest, and with the state. This triangular relationship between the forest dwellers and users, the state and the resource in the context of legality and illegality needs to be understood. In terms of conservation, equations of power, poverty, and the nature of the relationship between the people and the resource, this understanding ought to precede any extension use of the law against the people, particularly those who are continued to be treated as illegal encroachers. This exercise in pragmatic legality that the state has undertaken, calls into question the use of the law vis-à-vis the forest dweller and user, which ought not to go unanswered any longer.

It would also be important to understand how the communal nature of the right to resources and land is affected by this manner of regularisation. It is probable that the legal apparatus will, through a process of reductionism, restructure the relationship of the people with the resource in formulae with which the law is familiar, for instance, ownership, possession and conditional privatisation of a part of the land and resources while retaining exclusion as a norm, as of old.<sup>27</sup> There is a devaluing of the purpose of, and need for CPRs inherent in this exercise which may need to be challenged. The law makers' imagination may have to be activated to find alternatives to illegalising and excluding people, or inflicting the incidents of individual ownership and possession on them.<sup>28</sup>

The issue of exclusion from the forest areas has acquired more stridency in national parks and wildlife sanctuaries. Declared as such under the Wildlife (Protection) Act, 1972, national parks and sanctuaries have become the zone of contention between environmentalists and tribals. Two reported cases where environmentalists approached the Supreme Court to prohibit tribals access to, and activity in, national parks and areas brings this into sharp focus.

In *Pradeep Krishen vs. Union of India* (1996) at issue was the collection of *tendu* leaves from sanctuaries and national parks in Madhya Pradesh by villagers/tribals '(k)eeping in view the traditional rights of the villagers living around the boundaries of (notified) national parks and sanctuaries'. The petitioner, an environmentalist, explained that he was concerned that while the state was permitting the collection of *tendu* leaves ostensibly with a view to providing employment and livelihood to the tribals, it was pressure from the business lobby which had led the state to revise its position on collecting the *tendu* leaves in the areas identified as parks and sanctuaries in the state. Of the 11 national parks and 33 sanctuaries in Madhya Pradesh, three parks and one sanctuary had been notified; in the rest, the rights of the people had not yet been acquired, and the process remained incomplete. The petition was specific that the rights of the tribals to minor forest produce from these parks and sanctuaries were not in contest.

In the Supreme Court's judgment, however, the language of exclusion slips in. Not returning to the control of the business lobby anywhere in its decision, the judgment focussed on the shrinking forest cover as a reason for interfering in state policy.

If one of the reasons for this shrinkage (of forest cover) is the entry of villagers and tribals living in and around the sanctuaries and the national parks, there can be no doubt that urgent steps must be taken to prevent any destruction or damage to the environment, the flora and fauna and wildlife in those areas,

the Court said

If the only reason which compels the state government to permit entry and collection of tendu leaves is it not having acquired the rights of villagers/tribals and having failed to locate any area for their rehabilitation, we think that inertia in this behalf cannot be tolerated (ibid.: 609).

The Court then ordered the state to take urgent steps to complete the procedure for declaring/notifying the areas as national parks and sanctuaries.

The use of public interest litigation (PIL) to agitate against these conflicting interests is significant. PIL is a judicial innovation, which was intended to provide a route to judicial recourse for classes of persons whose constitutional rights were violated but who, by reason of indigence, illiteracy, ignorance or any other disability, were unable to reach out to the judicial institution. The Court therefore relaxed the rule of standing, and permitted matters of denial of constitutional rights of such classes of persons to be brought before the court by any bona fide person *in the public interest*. Environmental concerns have, regularly, been canvassed in PIL proceedings; and the setting up of 'Green Benches', for instance, is illustrative of the court according priority to environmental concerns. That environmentalists have been the ones to access the courts has, inevitably, led to the interests of local villagers, tribals, and even workers, remaining unrepresented or under-represented. This, surely unintended, topsy-turvy effect of PIL has made the environmentalist a more-than-equal adversary of the tribal, the villager and the worker. The binding nature of court decisions has also placed the under-represented, affected community at a distinct disadvantage. In the Pradeep Krishen case, for instance, the exclusion of the local community, euphemistically termed as 'settling their rights', was mandated by the Supreme Court, leaving little negotiating room for the affected community. The incongruity between court-mandated exclusion and government policies of Joint Forestry Management, for instance, which are working at involving local communities in conserving and developing the forest is unresolved in this process.

The closing of areas marked out as national parks and sanctuaries invariably displaces communities who live in, and off, the land and resources in the notified area. It also displaces their traditional rights which are then converted into licences which permit them limited access, within the constraints placed on them as conditions in the licence. This is an uneasy compromise which, it appears, is some environmentalists view with a certain hostility. In *Animal and Environment Legal Defence Fund vs. Union of India* (1997), the Supreme Court was presented a petition by 'an association of lawyers and other persons who are concerned with the protection of the environment'. They challenged the 305 fishing permits that had been issued to the tribals who had been displaced from their forest villages in what is now the Pench National Park. The villagers who had claimed that their traditional right to fishing should be preserved as this was the source of their livelihood, had been permitted by an order of 30 May 1996 to fish in the Totladah reservoir. The reservoir had come into existence in 1986-87 on construction of a dam across the Pench river as part of the Pench Hydro-electric Project. The reservoir falls within the national park area, and straddles Maharashtra and Madhya Pradesh.

The judgment records the petitioners' fears that the tribals, potentially, posed a threat to the 'bio-diversity and ecology of the area'. Fishing activity could lead to poaching and illegal felling; crocodiles and other water life could face extinction; migratory birds may be disturbed; the fishermen may light fires, or 'throw garbage and polythene bags'; and the national park being a tiger reserve, permitting fishing could have a direct bearing on protection of wildlife in the area. It is a unilateral litany of possibilities. What seems to have weighed with the Court is 'difficulties in monitoring the fishing activity of all permit-holders'. The paucity of information before the Court is evident when it records, for instance:

We are not in a position to say whether these outlying parts of the reservoir are accessible or whether they are suitable for fishing, in the absence of any material being placed before us by the State of Madhya Pradesh (ibid.: 553).<sup>29</sup>

Yet, the redefinition of the tribal as a foe of ecology, and of the outsider as its protector, has become a part of the decision-making lore of the court. In this case, the court was content to impose further restrictions on the movement of the villagers in the national park area, prescribing stringent surveillance,<sup>30</sup> saying:

If one of the reasons for the shrinkage is the entry of villagers and tribals living in and around the sanctuaries and the national parks there can be no doubt that urgent steps must be taken to prevent any destruction or damage to the environment, the flora and fauna and wildlife in those areas (1997: 555).

In the judicial arena, then, the tribal has been depicted, and accepted, as a danger to the forest, from whom the resources should be protected. The legal status of the encroacher has played its part in treating the involvement of tribal concerns as welfarism, and not located in rights. The remedies being forged in protecting biodiversity and ecology have tended to marginalise the relationship between the tribal and the forest.

In the meantime, the Panchayats (Extension to Scheduled Areas) Act, 1996 has been enacted to define devolution in Scheduled Areas. This legislation holds the potential to re-order the control over resources. A skirmish has already occurred in the matter of minor forest produce. The 1996 Act gives the 'ownership of minor forest produce' to the 'panchayats at the appropriate level and the gram sabha'.<sup>31</sup> An Expert Committee was constituted by the Ministry of Environment and Forests to examine the issue of conferring ownership rights over minor forest produce on panchayats and gram sabhas. The report of the Committee (Government of India, 1998b), dominated by foresters, reveals a reluctance to pass on control over minor forest produce to these decentralised institutions. Citing reasons of resources needed to maintain the resource, the scale of operations involved in the exercise of maintaining the forest, and the possibility of exploitation of the poor by vested interests, the Committee resorted to an interesting device to prevent ownership, and consequent control, over the minor forest produce being transferred to the community. It was the device of reinterpretation. Faced with a categorical transfer of ownership from the Forest Department to the panchayats and gram sabhas, the Committee says:

The Committee feels that the Parliament in its wisdom, while making the enactment, never had the intention of conferring such unbridled rights. Their intention was, obviously that in order to improve the economic condition of poor tribal forest dwellers, they should enjoy usufructuary rights. The net revenue therefrom should be their property, distributed judiciously in accordance with their contribution in collecting the minor forest produce (ibid.: 24).

Reading the law as intended for the purpose of 'social security and economic upliftment of tribals', the Committee suggested that, while extending usufructuary rights to minor forest produce in all government forests except in protected areas, 'the state should continue to regulate the trade of important minor forest produce through corporations, federations, local enterprises, etc.', and the net surplus revenue be distributed among the gram sabha (25 per cent), for community development (25 per cent), and individual collectors in proportion to the value of the produce collected by them. The passing on of 'ownership' from the forest departments would take tendu leaves, *mahua* and gum, for instance, out of their jurisdiction. It is therefore only natural that forest departments, trained in commercial forestry,<sup>32</sup> will resist this shift of ownership, and consequent control.

Parliament, the Forest Department and the judiciary appear to be working on different sets of assumptions, not only about the right of the villagers and the tribals to the forest and forest resources, but also about the need to give them a role in the process of regeneration and conservation. The perception of villagers and tribals as 'beneficiaries', or 'encroachers', or that their nistar needs have to be provided for while access may be prohibited, conflicts with the participative models being constructed to save the resource. The priority given to fulfilling the needs of industry, (Buch, 1991: 60),<sup>33</sup> and the destruction of these resources in the process of 'developmental projects'<sup>34</sup> too has occasioned much comment and strife.

When Jodha refers to the 1980 drought in East Africa (Jodha, 1995a: 556), and the prediction of ‘famine, miseries and some deaths in Tanzania’, he says: ‘The year passed and none died. The secret of people’s survival was the sustenance-support they received from the village commons’ – an illustration of the connection between common land, CPR and survival. The recognition of nistar rights in Madhya Pradesh makes this connection between subsistence and common land and common property resources. There are customary attachments to the land which the law does not deny. The nistar policy in the state is however entwined with the forest policies. The concern for regeneration of degraded forests and conservation has been caught in a cleft: it has endorsed policies for exclusion, and often set environmentalist versus the villagers/tribals, even as it has required those dependent on the CPR to become a participant in regenerating and protecting the forests.<sup>35</sup> This is a contradiction that will have to be resolved. In the meantime, there is a devolution of rights of ownership and control to the community over common land and CPRs which has got underway with the Panchayats (Extension to Scheduled Areas) Act, 1996.

The pressure on the land due to overgrazing and the increasing numbers of cattle, goats and sheep has been a cause for concern; stall feeding, and retention of only high quality livestock, have been recommended as possible solutions. The significance of common land to women whose task it all too often is to forage and collect fuel, fodder and food, and the effect that illegality has on the women, has been recognised in passing.<sup>36</sup> The relationship between child work and common land and common property resources has not been reckoned with, though child employment has been under debate in the national arena.<sup>37</sup> Further there is the pressure of the population on the common lands and CPRs to be taken into account.<sup>38</sup>

Interestingly, Jodha’s field study also suggests that it is not only optimally productive land which sustains the community; in fact, the poor in a community have relatively little competition when the land is degraded and difficult to render productive. (Jodha, 1986: 1,173). While regenerating degraded land, therefore, the issue of competition for a productive resource will have to be taken into the reckoning, as will any change in the regime that may accompany the regeneration.

The claims of the villager and the tribal, the forester, the environmentalist and the advocate of devolution, with their interests and concerns which are often represented as being in conflict, call for resolution in a common land and common property resources regime. It is however increasingly clear that the answer does not lie in exclusion.

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## Endnotes

- 1 See Section 57 of the Madhya Pradesh Land Revenue Code (MPLRC), (1959). This vesting of the land not in the State, but in the State Government, 'appears (in principle) to be abnormal and unconstitutional': H.N. Dwivedi, (1980: 323).
- 2 See Section 57, MPLRC (1959).
- 3 Defined in Section 2 (a) as 'area reserved from time to time in a village in non-urban area for the residence of the inhabitants thereof or for purposes ancillary thereto' including within its ken village sites and *gaosthan*.
- 4 See Section 158, MPLRC (1959).
- 5 See Section 233, MPLRC (1959).
- 6 See Section 237 (1), MPLRC (1959).
- 7 See Section 235, MPLRC (1959).
- 8 See Section 242 (5), MPLRC (1959).
- 9 See Government of Madhya Pradesh, Rehabilitation Department (1996: 1).
- 10 For this part, I rely on Buch (1991).
- 11 See note 10.
- 12 See note 10.
- 13 See Buch (1991: 67).
- 14 Hardin (1966) and P.J. Dilip Kumar (1993) would have it approached in terms of the 'tragedy of freedom in a commons'. The resistance of the forester to community ownership and control over CPRs is in evidence in this article.
- 15 A phrase I borrow from the title of Mahesh Rangarajan (1996).
- 16 See for example, Buch (1991: 73).
- 17 See for example, K. Subramaniam (1994: 816) where he refers to Amartya Sen's argument that most cases of starvation and famine in the world are not as a result of people being deprived of what they are entitled to, but as a result of people not being entitled, within the prevailing legal system of institutional rights, to adequate means of survival.
- 18 A striking feature of 'public purpose' is that, over the years, it has acquired a manner of immunity from challenge in the court. That is, courts have generally sustained the view that a state's perception of what constitutes 'public purpose' cannot be judicially reviewed.
- 19 Maharashtra, Madhya Pradesh and Karnataka have rehabilitation laws. Orissa has enunciated a state policy; the policies of Coal India, NTPC, the Operational Directives of the World Bank and the OECD Guidelines are set out as annexures in Walter Fernandes and Vijay Paranjpye (1997). A draft – National Policy Packages and Guidelines for Resettlement and Rehabilitation 1998 – prepared under the aegis of the Ministry of Rural Areas and Employment is currently under discussion (see Government of India, 1998a).
- 20 The Orissa Policy, for instance, suggests that tribals be resettled in forest lands wherever possible, or be enlisted in the state's forestry programmes.
- 21 Section 251, MPLRC (1959).
- 22 See Madhya Pradesh Pariyojana Ke Karan Visthapit Vyakti (Punasthapan) Adhiniyam 1985, note 30, page 381 in Fernandes and Paranjpye (1997: 441-506).
- 23 Note from Gautam Bandhopadhyay of Ekta Parishad, Raipur, at a personal interview in December 1998 at Bhopal.
- 24 This is the understanding of activists like Gautam of the Ekta Parishad and Anil Garg of the Satpura Kisan Evam Mazdoor Kalyan Samiti, Betul, personal communication in Bhopal in December 1998.
- 25 These figures are from a note on the 'Madhya Pradesh World Bank supported project worth Rs. 800 crores' received from Gautam Bandopadhyay. This regularisation will, of course, have to be expressly permitted by the central government under the Forest Conservation Act, 1980.
- 26 The Orissa Resettlement and Rehabilitation of Project Affected Persons 1994, Schedule I, for instance, draws a distinction between objectionable and unobjectionable encroached land (see Fernandes and Paranjpye, 1997: 441-506).
- 27 On privatisation of common lands, generally, see, N.S. Jodha (1986: 1178-79). For a study of

- the inefficacy of the law in preventing the alienation of land by tribals, see Harsh Mander (nd).
- 28 This analysis does not, for instance, reckon with the cultural connotations of communal property.
- 29 The fishing permits given by the state were subject to these conditions: identified families would be given photo-identity cards; between July and October, i.e., in the rainy season, fishing would be totally banned; during the rest of the year, entry in the water would be permitted between 12 noon and 4 pm, and transport allowed before sunset; the national park area and the islands in the reservoir would be out of bounds; and transport of fish would be allowed only on the Totladah-Thuepani Road from the reservoir.
- 30 The court amended these conditions to narrow the right to a personal right, where a non-transferable personal right would be given to an individual, not a family; asked that rigid lines be drawn on the route that may be traversed and the area where fishing may be done; directed that check posts be set up 'along the route of these fishermen'; a daily record of entry, exit and catch be maintained; fishermen be prohibited from lighting fires or throwing litter; and 'an adequate number of personnel and vehicles and boats' be sanctioned, and a monitoring squad posted all along the route.
- 31 See Section 4(m)(ii) (Panchyat Act, 1996).
- 32 See for example, Buch (1991: 70).
- 33 The conflict in Karnataka when Karnataka Pulpwoods Ltd., a joint sector company formed by the Karnataka Government and Harihar Polyfibres, a unit of Grasim, a Birla company, was allotted 75,000 acres of common lands on lease for 40 years for captive eucalyptus plantations, is documented in Samaj Parivartana Samudaya et al. (1988).
- 34 See for example, Buch (1991: 63-64), Supra note 1 in *Prescriptions for the Future*.
- 35 See for an instance of participative forestry experiments, V.K. Bahuguna (1992). See also, B.M.S. Rathore (nd) and B.M.S. Rathore and Jeffrey Y. Campbell (1995).
- 36 For example, Expert Committee, supra note 49 at p. 25 (Government of India, 1998b). Yet see, Tony Beck (1994) who found in the 60 poor households he selected for his study 'that one of the main subjects that respondents were interested in discussing was CPRs, given that it is women, who made up the majority of respondents, who are the main gatherers of CPRs'.
- 37 Jodha (1986), referring to the productivity of child labour in terms of collection of a number of products remarks that it was often equal to or higher than of adults – work that is commonly devalued as marginal or Supplementary in assessing the contribution and capacity of child labour.
- 38 Supra note 2, p. 3,281, where Jodha identifies the three factors of rural transformation, rapid population growth and the conversion of CPRs into private lands.

