The Report of the High Power Committee

to review various Environmental Acts administered by

Ministry of Environment, Forest & Climate Change
Government of India

A NON-TRIVIAL THREAT TO INDIA'S ECOLOGICAL AND ECONOMIC SECURITY

A Critique

by

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1. Introduction

On 29th August 2014 the Ministry of Environment, Forests & Climate Change of the Government of India (hereinafter referred to as MoEF & CC) set up a High Level Committee headed by former Union Cabinet Secretary Mr. T. S. R. Subramanian, IAS (Retd.). This Committee was given a comprehensive mandate: to review all laws and judgments pertaining to environment, wildlife and forest protection, and also those relating to pollution control, and then produce a report with specific recommendations for reforms in law and governance. This enormous and complex exercise of review of laws and judgments, and governance practices, followed by the formulation and presentation of a report with recommendations for amendments to existing laws, was to be completed within 2 months.

The Committee included Justice (Retd.) Mr. A. K. Srivastava, who served as Judge of Delhi High Court, Mr. Vishwanath Anand, IAS (Retd.), who served as Secretary of the Indian Environment Ministry and a Vice Chair of the National Environmental Appellate Authority, and Mr. K. N. Bhat, Senior Advocate. Mr. Bishwanath Sinha, IAS, Jt. Secretary of MoEF & CC and Mr. Hardik Shah, Member Secretary of the Gujarat State Pollution Control Board, were appointed Secretaries to the Committee.

Specifically, the Committee was asked to review the following laws and propose specific amendments:

I. Environment (Protection) Act, 1986
II. Forest (Conservation) Act, 1980
III. Wildlife (Protection) Act, 1972
IV. The Water (Prevention and Control of Pollution) Act, 1974
V. The Air (Prevention and Control of Pollution) Act, 1981
VI. The Indian Forests Act, 1927 (added on 18th September, 2014)

The detailed terms appointing the Committee are as follows:

i. To assess the status of implementation of each of the aforesaid Acts vis-à-vis the objectives;
ii. To examine and take into account various court orders and judicial pronouncements relating to these Acts;
iii. To recommend specific amendments needed in each of these Acts so as to bring them in line with current requirements to meet objectives; and
iv. To draft proposed amendments in each of the aforesaid Acts to give effect to the proposed recommendations.

The deadline for completion of the Committee's tasks was extended by a month, and the final report was submitted by the Committee to Shri. Prakash Javadekar, Union Minister of State for Environment, Forests and Climate Change with Independent Charge on 18th November 2014.[1] The report was not made public at that time. However, it was

1 As revealed in a release of the Press Information Bureau of the Government of India, accessible at: http://pib.nic.in/newsite/PrintRelease.aspx?relid=111520 (last accessed on 31 December 2014)

leaked, and it soon became available on various websites of media and environmental and social action groups.[2] Soon after, an embarrassed Ministry also made the report available on its website.[3]

There is not even a whisper of clarification in the Final Report of the Committee about how the phrase "...to bring them in line with current requirements to meet objectives" is to be understood, and what it means in the continuance of enjoyment of Rights and privileges listed above. Further, there is no clarification offered in the TOR regarding the implications of the recommendations of the Committee on the Government's intent to comply with a variety of International Agreements and Treaties relating to Environment, Forests, Rights of Indigenous Communities and Human Rights, etc.

When phrases such as proposing "specific amendments" to existing environmental laws "...to bring them in line with current requirements to meet objectives" are employed, it could be interpreted in any manner possible. Such a phrase does not mean anything specifically, yet could be interpreted in any manner possible. This gives rise to all sorts of suspicions and worries especially because environmental and forest protection laws of India have a direct bearing on securing the ecological and economic security of not just present generations, but generations to come.

Environmental laws of India also distinctively flow out of Constitutional Amendments 48 A that mandates the State shall protect environment and conserve forest and wildlife, while Article 51 A (g) casts upon every citizen of India the Fundamental Duty to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures. The State is obligated to conform with its duty of protecting the environment, forests, wildlife and associated Rights guided by Article 39 of the Directive Principles of State Policy, which reads as follows:

> "The State shall, in particular, direct its policy towards securing
> (a) **that the citizens, men and women equally, have the right to an adequate means to livelihood;**
> (b) **that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;**
> (c) **that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;**
> (d) that there is equal pay for equal work for both men and women;
> (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
> (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment"

2 A copy of the report is accessible on the website of Environment Support Group at: http://www.esgindia.org/campaigns/press/access-complete-report-high-level-commit.html (last accessed on 31 December 2014)

3 The report is accessible on the website of Ministry of Environment and Forests, & Climate Change at: http://www.moef.nic.in/node/4610 (last accessed on 31 December 2014)

(emphasis supplied)

It is by considering all these factors and also a variety of progressive principles of jurisprudence that secure human rights and the environment, that the Supreme Court of India has advocated for the rigorous implementation of environmental laws so that all citizens may enjoy their Fundamental Rights of Life and Livelihood, secure the Right to a Clean Environment and that the Rights of Indigenous Peoples and natural resource dependent communities are protected. When the laws have been found insufficient in securing these objectives, the Supreme Court has invoked various progressive principles of law and brought into Indian environmental jurisprudence the following principles for praxis:

1. Doctrine of Public Trust
2. Principle of Intergenerational Equity
3. Polluter Pays Principle
4. Principle of Prior and Informed Consent
5. Precautionary Principle
6. Principle of Sustainable Development
7. Principle of Ecocentrism
8. Principle of Absolute Liability

It is thereby evident that the question of implementation of environmental laws and norms, or the task of amending them, is a non-trivial exercise. Since millions are directly affected by even a minor change in any of the environmental laws, it is necessary that any changes are proposed to the basic framework are undertaken with the utmost care and sensitivity, and based on deeply democratic and wide-ranging consultations across the country. The looming question, therefore is if the High Power Committee delivers to such expectations and even its own objectives?

In our critique of the High Powered Committee Report, we find that the entire exercise has been undertaken in a hurried manner, without sufficient inquiry into the relevant factors, without addressing concerns of a range of communities, especially those which are indigenous and natural resource dependent, and without at all considering the importance of consulting elected representatives from Local Government, Legislatures and the Parliament. This report, thereby, is an outcome of a comprehensively democracy deficit effort, and promotes a schema for environmental reforms, which, if adopted could result in widespread chaos in environmental governance and jurisprudence, and also would result in irreversible damage to the environment, cause widespread loss of natural ecosystems and could further fuel fundamental violation of human rights in a country where discontents over environmental decisions are become increasingly contentious.

There are elements in the Committee's report that are worth taking note of and possibly implementing. But these are few and far between, and a bulk of the Committee's recommendations are based on an extraordinary reliance on the capacity of technical bureaucracy to deliver good environmental governance, on market forces to meet

environmental management objectives, on a slew of new regulatory and judicial forums to police the system, without actually making an effort to enquire and justify if such comprehensive makeover in the environmental decision making system is essential at all. Neither does the Committee formulate its tasks clearly, nor does it make any effort to clearly explain the basis of its recommendations. In light of which, what the Committee recommends comes across as a set of confusing proposals which if implemented could confound the environmental governance system quite fundamentally.

With this in view, and in the interest of present and futures generations of the country, and also in securing the extraordinary biodiversity of the region that has evolved over billions of years, we urge the Government of India to comprehensively reject the recommendations of this Committee. In the national interest we urge the Government to repeat the exercise ensuring terms of reference are clear and not caged by catch phrases that confound more than clarify, by involving an inter-disciplinary committee consisting of women and men, experienced and expert members, and drawn from various geographies, supported by a deeply democratic process and with sufficient time and space for public consultations nation-wide, so that the outcome would be recalled as a monumental effort that not only secured national interest, but also that of a world precariously edging towards runaway climate change induced impacts.

Key focus of this critique of the Report of the High Level Committee:

In this critique of the report of the High Level Committee to review various Acts administered by MoEF & CC, we ask if the gaps in existing laws guiding environmental governance is achievable by enacting another umbrella legislation called the Environmental Laws Management Act, 2014, as is proposed now by the Committee. We submit that such a law would be highly counter-productive and cause absolutely avoidable confusion in environmental governance in India, especially given that the Environment Protection Act, 1986 which was enacted as an umbrella environmental legislation in the aftermath of the excruciatingly painful death of thousands and continuing suffering of lakhs of victims of the Bhopal gas disaster, can very well be tweaked to address ever-changing demands of environmental governance in India and serve the needs of present and future generations. We also ask enquire into why the Committee cautiously only cites Principle of Sustainable Development, Doctrine of Proportionality, Doctrine of Margin of Appreciation as guiding lights of environmental governance in India, and completely sidesteps the fact that the evolving jurisprudence in the country is to edge towards "ecocentrism" from what today is a predominantly "anthropocentric" environmental decision making framework.[4]

Addressing questions over the legal standing of the Committee:

4 The direction of the Hon'be Supreme Court of India advancing the need for adopting an ecocentric approach in environmental decision-making was issued on 15 April 2013 in Centre for Environment Law, WWF-I v. Union of India & Ors. Writ Petition (Civil) No.337 of 1995 with IA No. 3452 in WP(C) No.202 of 1995 ; also T. N. Godavarman Thirumalpad v. Union of India and others in W.P. (C) No. 202/95, and is accessible at: http://www.stpl-india.in/SCJFiles/2013_STPL(Web)_305_SC.pdf (last accessed on 31 December 2014)

There have been some reports in the media that the legal standing of this Committee is in question as it was constituted by the Environment Minister without authority, and without prior consent of the Prime Minister of India.[5] A review of the Allocation of Business Rules, 1961 of the Central Government[6] reveals that a Ministry need not seek prior consent of the Prime Minister in setting up such High Level Committees as long as the subjects addressed are within its jurisdiction.

There have been many such High Level Committees that have been set up in the past and they have worked with various degrees of transparency, accountability and public acceptability. In many cases, such reports have been placed in Parliament for wider debate and discussion, actively shared with the wide public, particularly when addressing highly contentious issues touching on Fundamental Rights, and it is only then that Governments have acted upon the recommendations.

A good illustration is the 2005-6 exercise that resulted in the Justice Rajinder Sachar Committee Report on latest social, economic and educational condition of the Muslim community of India.[7] A review of this report reveals the critical importance of explicitly stating the Terms of Reference relating to the working of such Committees, especially when the issues addressed are highly contentious, politically charged and most importantly, relate to and have a fundamental bearing on Fundamental Rights. The Justice Sachar Committee undertook a wide variety of consultations across India, over a substantially longer period compared to the period of functioning of the High Level Committee headed by Mr. Subramanian, and also conducted its affairs in a highly transparent and accountable manner as is evident from the documentation in its final report. Despite all such precautions, the Gujarat Government, then headed by Mr. Narendra Modi, found it fit to attack the report as being "... neither constitutional nor statutory", and that too in an affidavit filed in the Supreme Court.[8] With Mr. Narendra Modi now Prime Minister of India, it is moot if similar contentions cannot be raised against the manner in which the Subramanian Committee was set up and how it has gone about conducting its business.

This is particularly important considering the fact that the Committee's recommendations are likely to be acted upon by MoEF & CC in undertaking various reforms of environmental, wildlife and forest protection laws as is evident from a statement made by the Secretary of the MoEF & CC before the Department Related Parliamentary Standing Committee on Science & Technology, Environment & Forests, Parliament of India (Rajya Sabha) on 30th October 2014, and a relevant extract is provided here:

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5 An example of this is in a report of the Times of India entitled "Green Panel not formed as per norms: RTI reply", dated 21 November 2014, accessible at: http://timesofindia.indiatimes.com/city/delhi/Green-panel-not-formed-as-per-norms-RTI-reply/articleshow/45224294.cms (last accessed on 31 December 2014)

6 A copy of the Allocation of Business Rules, 1961 is accessible at: http://cabsec.nic.in/allocation_order.php (last accessed on 31 December 2014)

7 This report is accessible at http://minorityaffairs.gov.in/sites/upload_files/moma/files/pdfs/sachar_comm.pdf (last accessed on 13th December 2014)

8 See: "Gujarat to Supreme Court: Sachar panel illegal, only to help Muslims", by Utkarsh Anand, Indian Express, 28th November 2013, accessible at: http://archive.indianexpress.com/news/gujarat-to-supreme-court-sachar-panel-illegal-only-to-help-muslims/1200518/0 (last accessed on 13th December 2014)

"The Members would also be aware that Government has appointed a High-level Committee under the Chairmanship of ex-Cabinet Secretary, Mr. T.S.R. Subramanian, which also has legal experts and experts in different fields of environment. This Committee has been specifically tasked with making recommendations on reforms which are required in various Acts which govern the functioning of the Ministry of Environment, Forests and Climate Change. The Wildlife Protection Act is one of them. The Committee has had a number of sittings, including consultation with various State Governments and expert bodies, and they are likely to submit their report within a month or so. So, we would like to also benefit from the recommendations which emerge from that Committee"[9]

9 The complete report of the Two Hundred Fifty Third Report of the Department-related Parliamentary Standing Committee on Science & Technology, Environment & Forests relating to "The Wild Life (Protection) Amendment Bill, 2013", submitted to the Parliament of India on 11th December 2014, may be accessed at: http://164.100.47.5/newcommittee/reports/englishcommittees/committee%20on%20s%20and%20t,%20env.%20and%20forests/253.pdf (last accessed on 31 december 2014)

2. Ostentatious Preamble and Executive Summary of the Report

In the Preamble to the report, the Committee states in an overarching sense that:

> "1.4 The lasting impression has remained that the Acts and the appurtenant legal instruments have really served only the purpose of a venal administration, at the Centre and the States, to meet rent-seeking propensity at all levels. This impression has been further strengthened by waves of large scale 'clearances', coupled with major delays in approvals in individual cases. It should also be added that our businessmen and entrepreneurs are not all imbued in the principles of rectitude – most are not reluctant, indeed actively seek short-cuts, and are happy to collaboratively pay a 'price' to get their projects going; in many instances, arbitrariness means that those who don't fall in line have to stay out."

It defines the problem of environment administration in the following manner:

> "1.5 The Committee finds uneven application of the principle of separation of powers as established by the Constitution of India, in the administration of environmental laws. The state – arbitrary, opaque, suspiciously tardy or in-express-mode at different times, along with insensitivity – has failed to perform, inviting the intervention of the judiciary. Judicial pronouncements frequently have supplanted legislative powers, and are occupying the main executive space. The administrative machineries in the Government in the domain of Environment & Forests at all the levels, authorized to administer by Parliament's statutory mandate, appear to have abdicated their responsibilities. The doctrine of proportionality, principles of sustainable development and inter-generational equity, doctrine of margin of appreciation – these have been the basis of judicial orders in the matters of environment and forests laws. However, the perceived role of ad-hoc committees in decision-making and implementation appears to have reduced the MoEF&CC to a passive spectator, with little initiative except waiting for the Court to say what next. The Committee's aim is to restore to the Executive the will and tools to do what it is expected to do by the statutes."

On such basis the Committee claims that "(a)ll the Acts under review of this Committee fail the litmus test" and "(e)ither penal provisions are lacking, or not sufficient, or not proportionate; or the criminal justice system is not appropriately aligned". The Committee also notes that implementation of even the current penal provisions "is by itself a catastrophe." When such statements are made in the Preamble to the report, it is natural to expect that there would be a well buttressed argument offered in arriving at such conclusions in subsequent sections of the report. Nowhere in the report, though, is any analysis supplied as a basis for arriving at such stark assessments, especially when categorically asserting that the quantum of penal provisions are inadequate in enforcing existing environmental laws and regulations

Such problems in assessment of the ground situation and inconsistencies in analysing the

problems of environmental governance are replete throughout the report. This is best exemplified in another statement made in the Preamble, at para 1.6, that:

> "1.6 The time has come requiring replacement of the present ad-hocism and piecemeal approach, by a systemic, comprehensive, non-arbitrary, transparent and accountable procedure for environmental conservation and management practices aimed at demonstrable and empirical enhancement in the quality of forest cover, air and water quality standards, through credible technology aided mechanisms".

From this assertion it appears that the Committee believes that all existing laws, regulations, procedures and norms relating to environmental governance in India are comprehensively inadequate and need to be fundamentally overhauled. There is no evidence supplied in the report, however, justifying such a brutal assessment of prevailing environmental jurisprudence. There are serious limitations in the Committee's proposals for reform of environmental governance which are discussed here, and also the unequivocal support of the Committee in promoting reliance on what it terms "credible technology aided mechanisms" as the main method for salvaging existing state of environmental governance, which is summarised by the Committee as "legislations are weak, monitoring is weaker, and enforcement is weakest". How technology can address such perceived gaps in environmental decision-making, the Committee does not, however, clarify.

In the Executive Summary of the Report, the major premise for a new law and comprehensive amendments to existing laws are proposed, which are elucidated at para 1 as follows:

> "The basic principles applied by the Committee, inter alia, included primacy to conservation of the environment; reconstruction of degraded environment; transparency in the management of environment; technology-aided speedy and accountable decision making for project approval; effective monitoring; capacity building in environmental management; and elimination of ambiguity and reduction in litigation. The recommended framework relies primarily upon the principle of integration of development with environmental concerns, transparent institutional governance, accountability; effective deterrent and punitive action, and governance with the aid of technology to the extent feasible. Accordingly, the Committee has not just suggested new legislation, it has also provided a road map for amendment of existing rules, regulations, procedures and executive directions; it has also called for review of current policy, for the consideration of the MoEF&CC."

Such conclusions are arrived at even as the Committee states that "India has a strong environmental policy and legislative framework" and that "much of the problem relates to weak implementation of various acts and rules". This results in a lot of confusion, and the reader is hard-pressed to appreciate what, in effect, is being communicated, especially given that in the Preamble, at para 1.6, a somewhat audacious statement is

made that "(a)ll the Acts under review of this Committee fail the litmus test". Such rhetoric is replete throughout the report and presents a variety of problems, especially when later in the report, the Committee makes a strong pitch for a comprehensive overhauling of the existing environmental decision-making machinery based on new laws and comprehensive amendments of existing laws.

It is pertinent to note here that for a Committee whose recommendations have sweeping and far-reaching impacts on the fate of present and future generations of Indians, and of the web of life that supports the ecological security of India, which is the basis for the country's economic security, there is scant attention paid to the critical importance of appreciating the nature of our society and the discursive methods essential to formulating decisions that affect Fundamental Rights especially in a polity shaped by Parliamentary tradition. The Committee appears to base its faith almost entirely in technocratic decision making which dismisses sociological and ecological enquiry methods and relies ratherl naively only on computer aided online monitoring tools. This is evident in the manner in which the Committee has proposed the constitution of highly centralised, bureaucratic and non-representative parastatal organisations such as National Environmental Management Authority (NEMA) and State Environment Management Authority (SEMA), who would rely without in any manner justifying how it arrived at such a stark assessment of India's environmental jurisprudence in one fell stroke. It is also claimed that on such centralised databases to formulate their decisions.

The importance of interdisciplinary interpretation to environmental governance: On the critical importance of inter-disciplinarity in environmental governance is highlighted in a recent editorial of the journal *Nature*[10] which states that:

> "Physics, chemistry, biology and the environmental sciences can deliver wonderful solutions to some of the challenges facing individuals and societies, but whether those solutions will gain traction depends on factors beyond their discoverers' ken. That is sometimes true even when the researchers are aiming directly at the challenge. If social, economic and/or cultural factors are not included in the framing of the questions, a great deal of creativity can be wasted."

The journal clearly indicates that environmental decision-making cannot be sound unless it takes into account various inter-related factors and concerns and concludes that:

> "If you want science to deliver for society, through commerce, government or philanthropy, you need to support a capacity to understand that society that is as deep as your capacity to understand the science. And your policy statements need to show that you believe in that necessity."

In many ways this assessment by *Nature* about the importance of interdisciplinarity in

10 "Time for the social sciences: Governments that want the natural sciences to deliver more for society need to show greater commitment towards the social sciences and humanities", *Nature*, 30 December 2014, Vol 517, Issue dated 1 January 2015, accessible at: http://www.nature.com/polopoly_fs/1.16621!/menu/main/topColumns/topLeftColumn/pdf/517005a.pdf (last accessed on 31 December 2014)

environmental policy formulation, speaks volumes to the fundamental weaknesses in the High Power Committee's findings, in particular that its recommendations for reforms are not based on verifiable empirical evidence that are drawn from a variety of disciplines. Considering that India is demographically, ecologically and culturally extremely diverse, and that a range of livelihoods and traditions are exclusively dependent and intricately linked to nature and natural resources, and also the indisputable fact that economic and social imperatives of law and policy are critically analysed and contested at every level and fora in this country, it becomes essential for policy formulators to arrive at assessments and recommendations only after rigorous, diverse and meaningful interactions that engage with geographical, political and ecological landscape diversities of the country. Evaluated from this perspective, the Committee's assessments and recommendations are found wanting in most respects and appear to have been informed and influenced by a narrow set of priorities such as "...to bring them in line with current requirements to meet objectives" of the incumbent Government.

3 The Committee's Working: Unclear Approach and Methodology

The Terms of Reference of the Committee does not throw much light on what specific methodology or procedure was adopted in its functioning. It appears though, that the Committee made its own procedures as it went along with its review of laws and environmental decision making in India.

On its part, the MoEF & CC posted on its website the order constituting the Committee and invited public feedback through an online form, which limited the response to a maximum of 1000 words. An email ID of the Committee was provided to send in more detailed responses. There was no clear description of what would result once such submissions were made, and if there would be any other way the Committee would gather opinion of those who were not internet savvy or did not have access to internet facilities. Besides, it appears that the processes of the Committee were not reported for the benefit of those interested in engaging with the Committee. In any case, all communication appears to have been in English, without any effort to ensure dissemination in regional languages.

A few weeks into the Committee's functioning though, advertisements issued by various State Environment Departments began to appear randomly in various local dailies inviting interested public to dialogue with the Committee. From the description of its functioning in the Final Report, there does not appear to be any particular method by which the Committee went about its task. Information shared by MoEF&CC about how the Committee functioned, does not throw much light on this aspect either. It appears from advertisements and media reports that the Committee visited a few cities across India, such as Mumbai, Ahmedabad, Bangalore, Mangalore, Chennai, Delhi, etc., and met with a variety of sectoral representatives. It is possible that the Committee also met privately with certain sectoral representatives as well, in addition to the public engagements that it held based on advertisements in newspapers. An occasional post made on the MoEF&CC website calling for public feedback described this process in the following manner:

> "The Committee desires to engage in the consultation process with the State Governments officials, relevant institutions and organisations, ***enlightened and prominent citizens and civil societies*** to solicit their views/ comments and experiences in respect of functioning of Environment, Forests and Wildlife related statutes. Interested individuals and representatives of organizations/ institutions desirous to meet the committee to hand over a memoranda or directed interaction with the committee may kindly send the request to the following email address: hlc.moef2014@gmail.com" (Emphasis supplied) [11]

In its Final Report, the Committee explains the methodologies employed by it at Table-3, where "Rapid Assessment" of the ground situation is described to have been undertaken towards "understanding the issues of different parts of country" based on

11 http://envfor.nic.in/content/comments-invited-suggestionscomments-are-invited-high-level-committee-hlc-review-various-env

"visits of various parts of country...." where "(d)iscussions with Governments and interest groups" were held. Besides this, the Table also reveals that the Committee undertook a "Desk review of existing literature/data" and held "Consultations of Stakeholders" based on which it conducted analysis and proposed recommendations. There is no listing of the diversity of sites that the committee visited, of who the committee met with, and if, ever, the members met with communities impacted by environmental pollution or loss of ecology.

The Committee concedes (at para 4.3) that "two months given to the Committee are not adequate for a thorough examination, revamping and redesigning of the various Acts and rules". However, the Committee immediately thereafter justifies its hurried, insufficient and incomplete assessment of a complex terrain of law and policy and also making fundamental proposals for amending existing laws and introducing new laws on the claim that "it was better to address a very substantial part of the pending issues in a practical and pragmatic way in the time prescribed by Government, rather than prolonging the process in pursuit of 'perfection'". The question that arises now, is if any of the findings of the Committee and recommendations arrived at can be relied upon, for the idea of such processes is not to pursue 'perfection' but to encourage debate, discussion and meaningful participation of all concerned, especially because the changes proposed will directly affect Fundamental Rights of people.

About how the process of consultations were conducted and what transpired, the report of the High Level Committee states as follows:

> "4.10 Due to paucity of time, the Committee could not visit more States, and have more field visits; however, all State Governments were addressed to give their suggestions, which many did – these have been taken into account."

Which effectively means that there really was no comprehensive and sincere effort on the part of the Committee to ensure every State was provided sufficient time to meaningfully address the comprehensive range of issues that the Committee had raised for their consideration. If this were the case of State Governments, one may well imagine the condition of lay public in airing their views to the Committee.

Was the Committee really obstructed in its functioning? The Committee also noted that many 'environmentalists' and NGOs were professional and thorough in their approach. Contrary to prior expectations, most environmentalists/ organisations were positive in their presentation, contributed generously in terms of ideas and suggestions to improve the environment, consistent with the need for 'development' and provide expeditious project clearances (**barring one meeting, where a small minority of participants would not allow the proceedings to continue, thus depriving others present from expressing their views on the matter and making constructive suggestions**). The Committee also noted that the agencies and organisations representing Industry and Commerce, by and large, were well conscious of the need for preservation of the environment; their suggestions included practical ways for expeditious clearance of projects, without adverse impact on the environment. All suggestions received were examined by the

Committee, and many have been incorporated in the report, if not in the exact wording of the original suggestion. The Committee thanks all the participants who came to the various meetings, and generously gave advice and suggestions." (Emphasis supplied)[12]

It is more than evident that in its hurry to meet an impossible deadline (originally of two months) in producing a report comprehensively reviewing almost all environmental laws and jurisprudence of India, and also proposing necessary amendments to the laws, the Committee has not been able to meet with key representatives even of government agencies of all States and Union Territories. While it is said that "many" states did give their suggestions, there is no evidence supplied of how many actually did. In a remarkable statement that appears appears rather patronising the Committee reports that "...many 'environmentalists' and NGOs were professional and thorough in their approach" and that "(c)ontrary to *prior* expectations, most environmentalists/ organisations were positive in their presentation". Except "....one meeting **where a small minority of participants would not allow the proceedings to continue**" (emphasis supplied). The Committee does not state where exactly "a small minority of participants" apparently obstructed its functioning, a rather egregious omission as it now clouds almost all those who participated in the consultations as suspect of such actions. However, this raises some important pointers on how the Committee has functioned and what appears to have been its agenda.

The authors of this critique participated in the consultation held by the Committee in Bangalore on 27th September 2014 and raised questions about how the members of the Committee, all of who have served in high positions and ought to be fully conversant with the letter and spirit of the Order constituting such a Committee, have agreed to such vaguely worded Terms of Reference that speciously appear loaded in favour of a ritualistic review of environmental laws and judgments. Considering that such jurisprudence bears heavily on peoples' capacities to exercise their Fundamental Rights, the Committee members were asked if men of such high standing were not aware of how the entire exercise could be perceived in a large, diverse and politically charged country such as India is, and of its implications? The response to this question from Committee Chairman Mr. T. S. R. Subramanian was rather reactionary, to say the least. When pressed to justify how such vague terms could at all be the basis of functioning of a High Level Committee whose recommendations would have substantial bearing on the Right to Life, Livelihood and Right to a Clean Environment, Mr. Subramanian chose to leave the forum quipping "lets end the joke" and also saying "its time for lunch anyway". This soon after one of the participants had expressed deep concern that amending so many laws in such a short time "is not a joke" and requires "serious consultations with a wide range of people, especially impacted communities". Clearly, the demand of the participants was that the Committee must come prepared to engage with legitimate expectations of peoples and not somewhat randomly designate an hour here and there for engaging with "enlightened and prominent citizens and civil societies", as the MoEF & CC preferred to state in a rather patronising manner.

12 Subramanian et. al., para 4.10, p. 27

Contestations against the ritual nature of the Committee's Public Consultations: The ritual nature of such consultations were contested in the Bangalore "consultation" and almost everyone gathered were deeply disturbed by the Committee's conduct and released a signed statement with specific demands for a proper review. The following is an excerpt from the statement:

> "The undersigned are deeply disturbed by the manner in which the T. S. R. Subramanian headed High Level Committee has treated this public consultation process. The undersigned demand that the Ministry of Environment and Forests and Climate Change call off this exercise as it has all the markings of being a ritual exercise. In its place the undersigned demand that the Ministry must constitute a Committee that has a clear rationale for reform and Terms of Reference that are democratic, consultative and transparent. In particular, the following demands are made:
>
> 1. Environment Ministry must first come out with a White Paper discussing the nature of the reforms that it proposes in environmental, forest conservation and pollution control laws.
> 2. On the basis of such a Paper, an accessible Committee must be constituted that would hear peoples responses across the biologically, culturally and linguistically diverse country and also from various sectors equally.
> 3. The membership of the Committee should be so constituted that it would reflect diverse concerns and sectors, and in particular ensure that members conversant with tribal and human rights, environmental management, conservation biologists, biodiversity, risk assessment, planning, etc., and not merely ex-bureaucrats or members of the legal fraternity were included. Particularly important is the need to ensure there is adequate representation of women on the High Level Committee, which presently is constituted only of men.
> 4. The process of the consultation to be followed has to be meaningful and conform with Principle of Prior and Informed Consent, even if this is not a consenting process.
> 5. The timeline for the Consultation mechanism for such a critical review has to be reasonable as laws sought to be amended, or tweaked, fundamentally affect the Right to Life and Livelihoods, and Right to Clean Environment.
> 6. The entire process has to be transparent, all meetings must be recorded publicly, none of the deliberations must be *in camera* (as it appears to be the case now), and all proceedings, submissions, minutes and reports must be in the public domain.
> 7. Adequate facilities must be made to ensure that anyone interested can participated with dignity and without being inhibited by language or geographical location. To ensure this, the process must be devolved by enlisting the support of State and Local Governments."[13]

There was, of course, no response from the Committee in addressing any of these

13 The full statement may be accessed at: http://www.esgindia.org/campaigns/press/access-complete-report-high-level-commit.html (last accessed on 31 December 2014)

concerns and demands. The Committee appears to be content with its consultation mechanisms, as it states at para 4.10 of its Final Report that "...agencies and organisations representing Industry and Commerce, by and large, were well conscious of the need for preservation of the environment; *their suggestions included practical ways for expeditious clearance of projects*, without adverse impact on the environment" (emphasis supplied). Since the Committee has not shared any of the submissions made by various sectors, it becomes rather difficult to ascertain the causative factors for a slew of wide-ranging recommendations to change existing laws which effectively and comprehensively would result in junking a range of highly progressive principles that today are an integral part of Indian environmental jurisprudence. MoEF & CC in response to a RTI application requesting access to all submissions made to the Committee by all sectors and representatives, and also the empirical evidence sourced by the Committee in formulating its recommendations, states cryptically that "the detailed report of the High Level Committee is now in public domain and is available on the Ministry's website: www.moef.nic.in".[14] Nothing further is said about access to the empirical material the Committee sourced in formulating its recommendations.

The recommendations fundamentally promote a new schema for environmental decision making, based largely on what appear to be unsubstantiated and sometimes naive assumptions, and also on the basis of sweeping generalisations and stereotyping of certain positions and sectoral characteristics. What is worrying, though, is that the MoEF & CC Minister Mr. Prakash Javadekar has already stated that the Government is seriously considering implementing several of the recommendations proposed by the Committee, even when the report has not been placed in the Parliament for debate and discussion.[15]

In summary, the Approach and Methodology adopted by the Committee, as illustrated in Table 3 of the Final Report, is found wanting in several respects, and some key indicators of the lacunae are listed here:

- The "desk review of existing literature/data" did not involve a SWOT analysis of existing law and policy. There is also no empirical evidence of what particular sections of specific laws and policies were evaluated.
- There is no evidence, whatsoever, of the Committee's efforts in reviewing international treaties, and their implications to Indian laws and policies relating to environment, human rights and rights of indigenous communities.
- There is no rigorous analysis and review of the gaps that exist in current environmental decision-making and regulation based on an empirical survey of available literature. For instance, the comprehensive assessment of the functioning of MoEF & CC and its related agencies that the office of the Comptroller and Auditor General of India undertook only a few months ago[16], does not even find a mention in the entire report of

14 Letter from MoEF & CC dated 1st January 2015(No. F.No.22/190/2014-IA-III) in response to an RTI Application from Mr. Davis Thomas (No. MOENF/R/2014/01432) received by the Ministry on 16th December 2014.

15 This is particularly evident in the interview given by the Minister to Mr. Sreenivasan Jain of NDTV, and the story entitled "Truth vs. Hype: Green Mythologies" is accessible at: http://www.ndtv.com/video/player/truth-vs-hype/truth-vs-hype-green-mythologies/347600 (last accessed on: 13th December 2014)

16 This is in Report No. 27 of 2014 of the Comptroller and Auditor General of India, release in September 2014, and accessible at: http://www.saiindia.gov.in/english/home/Our_Products/Audit_Report/Government_Wise/union_audit/recent_repo

the High Powered Committee.

[There is extensive acknowledgement of meeting with representatives of industry and business sectors, and also those from Government agencies. But there is absolutely no reference or acknowledgement that elected representatives of Local Government agencies and Legislatures were met with at all. Similarly, there is no evidence that the Committee at all met with representative of Indigenous Communities and Forest Dwelling Communities, or even fisher peoples and other such natural resource dependent communities.

[There is no evidence of review of typical violations of environmental, forest protection and pollution control laws and if they are an outcome of prevailing gaps in regulation, and then base proposals for reform. Similarly, there is no evidence if the process of assessment involved a review of typical complaints that are filed with various environmental regulatory agencies, how they have been dealt with, and gaps in addressing such concerns.

[The Final Report has also not provided any evidence of identifying gaps in environmental decision-making based on a review of case examples that brought to fore egregious violations of environmental laws and standards, for instance, extensive illegal mining of iron ore in Bellary district of Karnataka.

[Table-3 does state that MoEF & CC collected information from "stakeholders, etc.", but there is no documentation about who they were.

Tackling the "inspector raj" with "utmost good faith": Yet, despite such obvious lack of evidence, the Committee proceeds to state that "the present monitoring regime is heavily dependent on field verification through 'inspectors'" and that the "cause of environment preservation is not adequately met by the present monitoring methods". The Committee then proceeds to recommend that "the concept of 'utmost good faith' is statutorily introduced..." (para 4.8), without explaining why, even as it admits at once that the "Committee could not address all the laws, regulations, rules and executive instructions comprehensively within the time span available to it" (para 4.9). Having said this, the Committee claims that the task of adjusting all the laws, rules, notifications, etc. to the new system based on "utmost good faith" "should not be a daunting task", without, once more, justifying how it arrived at this conclusion. Clearly, therefore, the process by which this High Powered Committee has produced its report, the rapidity with which it has produced the report, the utter lack of transparency in its functioning, and the obvious nature of omissions of relevant factors indicate that the objective of this exercise was perhaps honed on delivering to a pre-meditated agenda, as is explicit in the vague and weak TOR of the Committee.

rts/union_compliance/2014/SD/Report_27/chap_6.pdf (last accessed on 31 December 2014). Similarly, the Committee fails to acknowledge the thorough review undertaken by the Comptroller and Auditor General of the Compensatory Afforestation scheme in 2013, and this report No. 21 of 2013 is accessible at: http://www.saiindia.gov.in/english/home/Our_Products/Audit_Report/Government_Wise/union_audit/recent_reports/union_compliance/2013/Civil/Report_21/21%20of%202013.pdf (last accessed on 31 December 2014)

4 . Which Forests are really worth saving according to the Committee

In its assessment of the laws governing forests and wildlife protection and conservation, the Committee lists what it says are "Strategic milestones" (para 5.3, p. 28), as follows:

- Notify forest areas with 70% or more canopy cover and PAs as 'no go' areas.
- Finalise statutory definition of what should be construed as a 'forest'.
- Encourage wide scale farm forestry on poor quality agricultural land and on peripheries of land holdings.
- Streamline the process for forestry clearance.
- Facilitate compensatory afforestation.
- Use ICT, GIS and other advanced technologies as a tool in forestry management

Dubious distinction between "Go" and "No Go" Forests: Immediately following this narration of its intent, the Committee states that "...areas which are rich in biodiversity must be strongly protected and activity allowed in these areas only when there is an overwhelming advantage in terms of economic development." The emphasis here, clearly, is on promoting economic development, the nature and scale of which is unqualified, and it appears from such an emphasis that the Committee prefers economic activity even if that entails loss of biodiversity, forest cover and displacement of communities. This is even more strikingly evident when the Committee concludes (at para 5.4) that "'no go' areas, comprising 'protected areas', in addition to forest with over 70% canopy" would be areas where "no activity will be permitted which threatens the environment and biodiversity of these areas". While the Committee seems to suggest that such 'no go' areas will be protected by not allowing "expressions of interest by user agencies (UA) thus saving valuable time and litigation", it soon after suggest "(t)here will however be one exception. Where there are considerations of national interest and issues relating to safeguarding the territorial integrity of the country, activities may be permitted in such areas subject to the prior and specific approval of the union Cabinet." Many problems result.

Firstly, there is no clarification why the Committee found it fit to classify only those forests with over 70% canopy cover as 'no go' areas. The Forest Survey of India defines forests with over 70% canopy cover as "very dense forest". According to the 2013 State of the Forests Report, merely 2.54% (or 83,502 Sq. Kms.) of the country's landmass comprises such forests. And almost all of such forests are anyway protected as National Parks and Sanctuaries, the spatial extent of which aggregates to 4.83% of the geographical area of the country (para 6.1).[17] The implications of this recommendation are dire.

All of India's forests and such other ecologically sensitive areas outside of the protected area networks are, thereby, "go" areas and can thus be diverted to non-forest

17 The aggregate Forest Cover of India is listed at Table 2.1 of the Forest Survey of India, 2013, and Chapter 2 of the report discusses the basis of classification of Forests. The entire report can be accessed at: http://fsi.nic.in/details.php?pgID=mn_93 (last accessed on 13th December 2014)

developmental purposes. Given that there is absolutely no emphasis in the report for the protection of grassland ecosystems (which currently have weak or no legal protection), of coastal commons, of marine ecosystems, or even of grazing pastures, it is more than likely that such ecologically sensitive areas, on which millions of livelihoods depend, will find no respectability in terms of protection. This is because the report implies that only forests that are protected by law, especially those with over 70% canopy cover, contain biodiversity of value, and that many other ecosystems, merely because they have not legal protection yet or do not have dense tree cover, need not be protected and can therefore be diverted. Such *naive* assessments betray utter ignorance of the Committee in appreciating the intricate relationships between people and nature, and also of its disregard for conserving for posterity the spectacularly diverse biomes of India.

Such a weak discourse in appreciating the ecological diversity of India, its value and sacredness pervades the Committee's recommendation to define 'forest' (at para 5.5) which it considers essential as "(f)orest cover has regional variations in terms of density and ecological value; it may be advisable to incorporate State specific parameters instead of uniform national criteria." It is unclear also what the Committee means by "forest cover has regional variations in terms of density and ecological value" and how it has arrived at such a notion of evaluating value of ecosystems, when there appears to be no scientific validity to such argumentation. This becomes all the more clear when the Committee argues for "State specific parameters" to define the value of a forest, which exposes the Committee's ignorance of the fact that ecosystems transcend regional and nation-state boundaries, and the only criteria that becomes useful is when geographical limits of biomes are considered for management and regulation purposes.

There is also no coherence in the Committee's recommendations on reforming laws to protect forests. This is evident in the extraordinary emphasis the Committee lays on the need to denotify certain types of woodlands such as "(p)lantations on the sides of roads, canals and other linear structures carried out on State government land which has been kept in reserve for expansion purposes" (para 5.5). Here too the committee uses terms such as "linear structures" which remain undefined and could thus result in anomalous interpretations and generalisations of all sorts, including the high possibility of areas below transmission lines and along roads and railways corridors passing through forests and ecologically sensitive areas being easily denotified, merely because they are "linear structure". Such measures, in effect, could throw open forests and biodiversity hotspots to corridor development and fragmentation, and could cumulatively contribute to rapid loss of biodiversity and fuel environmental degradation.

<u>The proposal of "Tree Lands", and the new approach to Farm and Social Forestry</u>: While the Committee has rightly observed that certain provisions of the law are rather draconian, prevent the extraction of forest resources by communities, and disincentivise investment in growing trees, what follows is a suggestion that when "citizens", "private institutions" and "public sector units" do regenerate greenery into "tree lands" that "such land may not be treated as 'forest' falling under the definition of Act" (para 5.5, p.

30). Such a position, once more, creates a variety of problems and inconsistencies, as it dismisses a range of efforts, including of social forestry, joint forest management initiatives, of compensatory afforestation, etc., to allow lands to regenerate into forests and other natural ecosystems, even though ownership may be private, held by the community or with the public sector. In fact, the Committee makes it explicitly clear that "even if afforested, such land may not be treated as 'forest' falling under the definition of Act." This would entail a serious erosion of protection of areas with significant ecological value, merely because they are not public commons. While it is understandable that "citizens" or "private institutions" should be encouraged to plant and nurture trees, and not be restrained from utilising these for their needs judiciously, the message of the Committee appears to be one honed on promoting such areas as economic units mainly. This is once more evident in the section entitled Farm and Social forestry at para 5.6 where the Committee argues that "if there is economic incentive for increased community participation in farm and social forestry programmes this will help increase tree cover and also reduce the biotic pressure on forest for timber, fodder and fuel wood". Such measures are welcome, provided there is institutional delivery mechanisms that guarantee community oversight, such as through the Gram Sabhas, Forest Rights Committees, Biodiversity Management Committees, Village Forest Committees, etc. But no clarification has been offered how such promotion of tree planting on private and institutional lands would not result in diversion of farm land and such other areas that are critical to providing food and nutritional security.

It may be recalled that such an emphasis during the 1970s resulted in the rampant diversion of forest land, common grazing pastures and also agricultural land to growing Teak, Eucalyptus and Acacia plantations, resulting in devastating consequences to local ecology and livelihoods, especially in rural areas. These included loss of grazing pastures, depletion in ground water levels, loss of nutritional security due to diversion of farmlands, etc. While in those times the threat of large corporates leasing out private farmland for developing "tree lands" as investment zones was a serious concern, it is quite possible that the scale of such diversions could be much more massive today given liberal access to investment, and thus impacts could be far more adverse and acute. Importantly, while the promotion of growth of "treelands" appears to be progressive and benign, the fact that the Committee has not emphasised, or demonstratively provided a pathway for protection of existing forests and ecologically sensitive areas, gives room for an assumption that "treelands" are ecosystems, which they are not.

Delving into the issue of social forestry and compensatory afforestation, the Committee argues for turning afforestation initiatives on private lands as "tradable units", in effect commodities that can be "purchased" and "transferred" by user agencies to State Forest Department in fulfilment of compensatory afforestation obligations. A variety of expressions are used in defining how this mechanism could work. For instance, such "tradable units" ought to be "parcels of land so identified (that) are not disparate in nature, and large enough to have beneficial impact on the local environment", all of which are more than likely to result in a variety of operational complexities due to

interpretative difficulties. The National Forest Policy, 1988 argued for promoting economic development that would ensure at least 33% of the country's geographical area would be conserved as ecologically sensitive and forested region. But this idea seems lost on the Committee.

Promoting seamless diversion of Forest land to non-forest purposes based on *post facto* evaluation of their ecological worth: In terms of streamlining the processes involved in diverting forest land to various projects (para 5.8), the Committee states the major problems appears to be the "existence of a large number of guidelines which at times seem to lose linkages with each other, or at times are ambiguous". It states that clearance time lines may be 210 days per law but normally take upto 3 years. To address difficulties of project proponents due to such delays, the Committee presents a detailed set of reforms in according clearance to diversion of forests, and this is listed exhaustively in Table 4. The solutions offered in this Table are comprehensively oriented towards according swift clearances for diversion of forest land, and not, as is to be expected, making decision-making relating to such diversions transparent, accountable, judicious and possibly difficult keeping in mind that forests are natural ecosystems that have evolved over millenia and cannot be replaced by merely planting trees in treelands.

Some details of the proposed reforms bring out the alarming aspects of the emphasis on forest clearances even more. For instance, the Committee suggests that since "field verification involving ground truthing appears unavoidable", the application seeking forest diversion should be approved pending verification by "ground truthing". It is further suggested that such critical activities "could be speeded up by out sourcing this function to an agency under the supervision of the" District Forest Officer. Current forest laws expressly prohibit outsourcing of such fundamental statutory functions as this could result in a variety of fraudulent submissions of the actual nature of forest. In fact, the prevailing Forest Conservation Act, 1980 is problematic already as it empowers the DFO to unilaterally decide on such matters, without any democratic oversight, such as by Panchayats or independent groups, and this has resulted in widespread violations of the law and denudation of the forests. What transpired in Bellary district of Karnataka, or in Goa, where massive extents of forest lands were illegally diverted to mining iron ore by not revealing their true nature, are examples of adverse consequences of mere bureaucratic oversight, which, presently, is with the DFO who has untrammelled powers of decision-making. Truly speaking, the next real possibility of correcting a wrong decision is only with the Forest Advisory Committee under MoEF & CC, which, in any case, has largely become a forum for stamping approvals for forest diversions, and this is especially true under the present dispensation.

Given such a state of affairs in governing forests, the fact that the Committee proposes to allow enumeration of trees in forests threatened by diversion *post facto*, and that too without any local community or local government oversight, could be a recipe for disastrous encouragement of diversion of forests, and may well result in situation where conflicts would abound. While reliance on accurate maps is an essential pre-requisite for sound decision-making, and there is no argument against improving efficiency in

decision making, the intent ought to be on protecting forests to the best possible extent, and not, as the Committee appears to emphasise, quick decisions on diversions of forestland.

Fundamental dilution of Forest Rights Act, 2006 proposed: Such lack of concern for protecting forests and other natural ecosystems is even more evident by the callous manner in which the Committee recommends the dilution of the Forest Rights Act. The Committee recommends that the consent "certificate" from the Gram Panchayat that is now essential for forest diversion per the Forest Rights Act, 2006, may be given a go-by at the initial stage. What this implies, therefore, is that the consent mechanism could become a ritual and subordinate to executive decision, in contrast to prevailing Forest Rights Act where executive decision making is subordinate to oversight of elected bodies such as the Gram Sabhas. This substantive progression in law the Supreme Court upheld in the Vedanta case[18] where the right of Gram Sabhas to decide on diversion of forest land in Niyamgiri hills for bauxite mining was upheld.

By the pitch and tenor of its recommendations, the Committee appears to brazenly go against existing law and jurisprudence which strongly favours protection of rights of tribals, forest dwelling communities and forests. Instead, the Committee projects such protective measures as impediments to commercial enterprise. This is all the more clear when the Committee recommends that in the case of "linear projects.... the provisions of the FR Act be amended to dispense the obligation of approval of gram sabha". The Forest Rights Act was legislated as recently as in 2006, with unanimous support of the Parliament, based on deep and extensive debates and discussions country-wide, and with the intention of correcting historical injustices that colonial and independent Governments of India had heaped on tribals and forest dwelling communities by wantonly diverting forest land to non-forest purposes and causing irreplaceable loss to the socio-economic and ecological security of the country. Despite such sincere efforts to correct such colossal wrongs, this Committee appears rather sternly in favour of divorcing from deeply democratic environmental decision making traditions. Were such recommendations to find favour in the current Parliament, it could result in a major setback to the progression of Rights of Indigenous Communities and of protection of forests, as upheld in the Vedanta case, and could potentially result in massive degradation of forests and widespread spread of discontents amongst tribals and forest dwelling communities.

Compensatory Afforestation, or a passover for Corporates: At para 5.11, addressing areas for reform of Compensatory Afforestation, the Committee suggests that the present policy of 1:1 compensation of forest loss be enhanced to 3:1 on "degraded forest land", and 2: 1 on "revenue land" (para 5.11). While on the face of it this appears to be a progressive idea, the operationalisation of such proposals results in a variety of

18 Supreme Court decision dated 13 April 2013 in Orissa Mining Corporation vs. Ministry of Environment and Forests, Writ Petition (Civil) 180 of 2011, accessible at: http://www.indiaenvironmentportal.org.in/files/Niyamgiri%20April%2018%202013.pdf (last accessed on 31 December 2014). See also: "MoEF says final 'no' to Vedanta", Down to Earth, 10 January 2014, accessible at: http://www.downtoearth.org.in/content/moef-says-final-no-vedanta (last accessed 31 December 2014)

complications. The concept of "degraded forest land" has been widely used by various Governments to divert grazing pastures and grassland ecosystems to tree-planting, without appreciating the colossal loss of biodiversity and adverse impacts on pastoral communities. While tree-planting is important, trees ought to be planted only where they form a natural component of the ecosystem. This is particularly important given the penchant of various agencies of the Government to plant trees anywhere and everywhere, as thought they compensate for the loss of forests. Grasslands are typically victims of such efforts, and there is much to worry about when the High Powered Committee promotes without sufficient qualification that "revenue land" or "degraded forest land" must be sites of compensatory afforestation, as grasslands, typically, have been termed as such.

The Planning Commission of India in its report on Grasslands and Deserts[19] has categorically confirmed that grasslands are "the most neglected ecosystems by the Ministry of Environment and Forests which looks after biodiversity conservation of India". The Report acknowledging that "protection, development and sustainable use of grasslands are very important for the rural economy and livestock", states that there is "an urgent need for a National Grazing Policy to ensure the sustainable use of grasslands and biodiversity conservation." Specifically addressing that developmental projects have been a major cause for the devastation of grassland ecosystems, the Report states "(n)ecessary modification would be required in the new EIA guidelines by including ecologically fragile and environmentally sensitive areas where prior EIAs will have to be made mandatory. Also, presence of representatives from identified institutions and experts should be made mandatory during public hearing whenever an EIA is done in the grassland and desert ecosystems so as to review the identified impacts, prediction and mitigation." Highlighting that weak appraisal of environmental and social impacts of projects impacting grasslands has resulted in bringing grassland dependent species to the brink of extinction, the Planning Commission Report calls the attention of the Government to consider "bustard species, and Snow Leopard as flagship species of grasslands (hot and cold deserts), there is an urgent need to start multiple-state and multiple departments, centrally-sponsored Project Bustard and Project Snow Leopard, on the same pattern of Project Tiger and Project Elephant." To ensure that these sensitive ecosystems get the protection they deserve on a war footing, the Report recommends that the "Ministry of Environment and Forests (MoEF), Government of India should start a division or section to look after the grasslands issues, on the pattern of Wetland Division to be headed by a Joint Secretary."

Similar sentiments are echoed in the National Livestock Policy, Planning Commission Report on Fodder and Pasture Management, Country Report on Animal Genetic Resources of India, and the report of the National Forestry Commission which called for immediate legal protection to grasslands the lack of which, it stated, has made grasslands "the most neglected, abused and least protected ecosystems in India." It also pointed to the fact that "(m)ost of the States have excluded the grasslands and have not

19 Report of the Task Force on Grasslands and Deserts, Planning Commission of India, 2012, accessible at: http://planningcommission.nic.in/aboutus/committee/wrkgrp11/tf11_grass.pdf (last accessed on 31 December 2014)

identified them as "deemed forest" by the State Expert Committee's pursuant to the landmark order dated 12.12.1996 in the Forest Matter (T. N. Godavarman Thriumalpad V. Union of India and others in W.P. (C) No. 202/95)."

Are the findings of the CAG, a Constitutional Authority, immaterial? In 2013, the Comptroller and Auditor General of India issued a 367 page report on Compensatory Afforestation in India,[20] a meticulously constructed audit of the efficiency of the programme. The CAG highlighted the key issues with the programme in the following manner:

> "The Supreme Court of India in November 2001 had observed that there was poor utilization of funds deposited for compensatory afforestation and also that a large amount of money for compensatory afforestation was not realized by the State Governments from user agencies. It observed that in some of the States the funds were deposited as `Forest Deposit' and were readily made available for afforestation while in other States the funds were deposited as revenue receipts of the State Government and could be made available to the Forest Department only through the budgetary provisions. In order to increase the pace and quality of compensatory afforestation, the Court created a separate fund in October 2002, so that compensatory afforestation could be taken up in a planned manner on a continuous basis and to ensure timely and adequate release of money, to provide necessary flexibility in implementation of the schemes etc but the intended purposes could not be met. It also directed that the Union of India shall within eight weeks frame comprehensive rules with regard to the constitution of a body and management of the compensatory afforestation funds.
>
> Initially, an amount of ` 297 crore for CA was lying unutilised with the Forest Departments in the respective State/ UTs and this increased to ` 1,200 crore and credited to the Ad-hoc CAMPA in 2006. This amount further increased to ` 9,932 crore in 2009 and accumulated to ` 23,607.67 crore by March 2012. No funds were released during the period 2006-09 while an amount of ` 2,829.21 crore was released by Ad-hoc CAMPA during 2009-12.
>
> We observed that despite the notification of MoEF for creation of CAMPA in April 2004 the body did not become operational. This necessitated the Supreme Court in May 2006 to pass the order for creating Ad-hoc CAMPA which was to function till such time that regular CAMPA became operational. The functioning of Ad-hoc CAMPA was restricted to the mandate or directions given to it by the Supreme Court. Between 2006 and 2009 it only collected the CAF from the States and managed its investment. There was no release of funds by Ad-hoc CAMPA during the period 2006 to 2009. Effectively, this stalled the process of compensatory afforestation in India. Releases for CA activities commenced in July 2009 when

20 Report of the Comptroller and Auditor General of India on Compensatory Afforestation in India, Union Government Ministry of Environment and Forests No. 21 of 2013 (Compliance Audit), accessible at: http://www.saiindia.gov.in/english/home/Our_Products/Audit_Report/Government_Wise/union_audit/recent_reports/union_compliance/2013/Civil/Report_21/Report_21.htm l (last accessed on 31 December 2014)

> the Supreme Court granted it a limited mandate to release only ` 1,000 crore per year or 10 per cent of the principal amount pertaining to the respective State/ UT for the next five years. MoEF/ Ad-hoc CAMPA did not have an MIS regarding the diversion of forest land, collection and utilisation of the CAMPA funds.
>
> In our view the non-operationalisation of CAMPA which was envisaged as a permanent, independent authority to provide guidelines, direction and oversight severely hampered the CA activities in India. This report of the Comptroller and Auditor General of India high lights the necessity for operationalizing CAMPA which can execute the mandate of ensuring compensatory afforestation effectively and efficiently within the broader constitutional and legal framework."

Despite such exhaustive investigation into the efficiency of the Compensatory Afforestation programme by a Constitutional authority, the High Power Committee report makes no reference to this audit. It is plausible that the High Power Committee has chosen to ignore such critical findings of the CAG, just as it has of so many other Committees. This probably in its enthusiasm to present that original forests can be diverted to secure economic progress, and that the same can be replaced by planting trees, on 3 times the area of forests lost as the Committee recommends! This High Power Committee has presented somewhat similar proposals (at Table 5) that when "revenue land is not available then CA on thrice the amount of degraded forest land should be permitted". This once more indicates that the Committee, in it *naive* understanding of ecological systems, has termed planting tree as a one-stop solution to the ecological degradation caused by loss of forests. In the process it has overlooked the fact that all grasslands and grazing pastures are termed revenue land with little or no legal acknowledgement of their ecological status and importance, and thus, if its recommendations were to be followed, then the 2:1 compensatory afforestation ratio could well result in diversion of such critical dryland ecosystems, which supports millions of livelihoods and extraordinary biodiversity, and potentially result in their commodification as "tradable units" under the "compensatory afforestation" scheme.

<u>The question of "degraded forest land"</u>: The further frightening aspect of the Committee's recommendation is that its repeated emphasis on replacing forest loss with tree-planting in "revenue land" or "degraded forest land", could come in the way of various others ecologically wise possibilities. Hundreds of examples from across the country and the world have demonstrated that it is only when afforestation and ecological restoration programmes are undertaken with oversight by local communities and local elected bodies that they succeed in achieving the goal. Similarly, there are examples how when Forest Departments and Corporates have engaged in such activities, they have not only ended up planting mono-cultures honed on servicing the timber and paper industry, but also have destroyed ecosystems, wildlife habitats and displaced livelihood systems of forest dwelling and pastoral communities. If the measures proposed by the Committee are indeed accepted by the MoEF & CC, it could result in laying the pathways for a massive corporate land grab of "revenue" and "degraded forest land", and could result in a social and ecological disaster.

5. Conserving Wildlife, Weakening Forest Rights

The recommendations of the Committee in promoting reforms of the Wildlife Act, 1972, in particular its harmonisation with CITES[21], are welcome. However, the absolute lack of cognisance of the implications of the Convention on Biological Diversity, 1992, the Biological Diversity Act, 2002 and the Forest Rights Act, 2006, on the implementation of Wildlife Act, belies explanation. Keeping this in view, in a broad sense it may be said that the Committee's recommendations for reform of the Wildlife Act are largely centred on what could be described as management problems, such as "(d)epredation of standing crops by wild animals" (para 6.3), the emphasis on "(g)iving statutory recognition in the WLP Act to Wild Life Management Plans" (para 6.4), "(p)rohibition on manufacture and possession of mouth and leg hold traps found outside protected areas" (para 6.6), etc. For instance, the section dealing with "(p)ermission for observational research", where it is proposed that the Park Director be given independence to approve research is done without any congnisance of applicable provisions of the Biological Diversity Act, 2002, wherein the emphasis is on preventing loss of biodiversity or tackling biopiracy through research. If accepted, such proposals could result in anomalous interpretation of law, and genuine research projects may be mis-interpreted as acts of biopiracy, whereas biopirates may well enter biodiversity rich areas masquerading as researchers.

Privileging Wildlife Act over the Forest Rights Act? The particular choice of the Committee to view Wildlife Act as a stand alone legislation results in a variety of problems. Similarly, proposals on "(a)lteration in the boundaries of protected areas" (para 6.5), "(s)ettlement of rights" (para 6.7) and "(d)elineation and demarcation of Eco-sensitive Zones" (para 6.12) are all proposed as though they are independent of the Forest Rights Act, 2006. In fact, the logic of proposing deletion of Union Government oversight on expansion of protected areas, exposes the Committee's lack of awareness of the fact that it is in asserting the territorial rights of the Forest Department through enforcement of protected area limits, that most conflicts with tribals and other forest dwelling communities have emerged, which was sought to be resolved through democratic processes embedded in the Forest Rights Act. It is also that per the Forest Rights Act read with Union Government's Transaction of Business Rules, the Ministry of Tribal Affairs is provided oversight in such matters, and for good reason – to attend to conflicts and ensure there was an harmonious outcome where biodiversity and rights of indigenous communities would be protected. However, the recommendations of the High Powered Committee, if adopted, in privileging the Wildlife Act, over other legislations, could most likely result in a highly avoidable mess in the contentious question of settlement of rights.

Weak appraisal of the typical problems in protecting wildlife in India: Besides the fact that some areas of wildlife management are addressed, including the need to strengthen tackling of wildlife crimes (para 6.8), there is not much the Committee has offered in

21 More details about the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973 are accessible at: http://www.cites.org (last accessed on 31 December 2014)

terms of ideas in protecting India's extraordinary biological diversity and habitats. Similarly, besides endorsing the need to enforce CITES compliance mechanisms, not much is offered in addressing the huge gaps that exist in tackling the loss of critically endangered and threatened flora and fauna due to trade and poaching.

Missing the woods for the trees: The total abdication of appraising the inter-dependence between Wildlife Act, Forest Conservation Act, Biological Diversity Act and the Forest Rights Act, is a problem systemic to environmental governance in India. The colonial construct of asserting territoriality over forests as a "property" of the State, with the Forest Department as "owner" has resulted in a variety of problems, especially in tribal dominated areas, where for decades now local communities have been projected as opposed to wildlife conservation. In efforts to advance protection of wildlife by creating a protected areas network, Adivasis communities, in particular, and other forest dependent communities as well have been ruthlessly displaced and dislocated, especially following the enactment of the Wildlife Protection Act, 1972. In many cases this has resulted in violent conflicts between the department and communities, as the displaced fought back to reclaim their right to their forests. The response of the State has been largely to employ brute police force to quell resistance, and this in turn has only fuelled greater discontents. In acknowledgement of the fact that such approaches are colonial and against Fundamental Rights, and in an unprecedented effort by the country in acknowledging the legitimate and ancient rights of tribals over forests, and also as a measure of correcting the injustices done to them historically, the Forest Rights Act was enacted in 2006 with unanimous support from the Parliament. It is a widely known fact that this law has been staunchly resisted by the Forest Department.

Be that as it may, it would be expected of the High Powered Committee to appreciate objectively how the implementation of the Wildlife Act, to secure wild flora and fauna, could be undertaken harmoniously along with the operation of the Forests Rights Act. And in the process identify steps to close gaps and also to find remedies to points of conflict. Such an effort would have helped imagine a new way, perhaps an uniquely Indian way, of protecting nature, wildlife and the rights of indigenous communities. It appears that the Committee has been guided largely by notions of conservation as have been projected to them by wildlife conservation groups and the Forest Department, based on their notions as "owners" and "protector" of the forest, that the larger Constitutional schema of evolving harmonious ways to work towards the objective of protecting forests and wildlife in collaboration with local communities, seems to have been entirely missed. Similarly, not a single reference is made in the entire Report to the import of the Biological Diversity Act, 2002 and its basic purpose of protecting local community's traditional rights to bioresources and knowledge associated with nature. If such fundamental omissions are taken into account, it is easy to appreciate why the Committee seems content on making some references to wildlife management concerns, without structural addressing core issues relating to the true nature of the challenges involved in protecting wildlife, advancing biodiversity conservation and securing indigenous rights.

6. Environmental Governance:

At the outset the Committee acknowledges the nature of the problem confounding environmental decision-making in India as "...segmental legislation brought into force from time to time, (and that) the major initiatives in the matter of protection and management of environment have been driven through isolated policy statements and elements of strategy announced from time to time" (para 7.1). The Committee finds the "present system is procedure-oriented, with insufficient focus on the need to safeguard environmental considerations", which it claims "(f)rom the analysis of the data seen by the Committee, the average time taken for clearances works out to significantly longer than specified in most cases, whereas most projects sooner or later obtain approval". The nature and empirical strength of the data reviewed by the Committee is not revealed anywhere in the report when the Committee holds that in the prevailing environmental governance systems "the focus is not on substance". Perhaps alluding to an assessment by Jairam Ramesh, former Union Minister of State for Environment and Forests, who had said that the rate of according environmental clearances to projects was "unnaturally" and "unhealthily" high, the Committee describes the nature of the problem by saying that "one analysis indeed indicated that the percentage of approved projects works out to 99.1%".[22]

The Committee also lists at paras 7.3 to 7.6 of its Report a range of factors that currently dog environmental decision-making in India. But it is in the solutions that it proposes that it becomes clear the Committee wants to further bureaucratise this problematic system of decision making. There is little or no emphasis towards enhancing democratic participation and accountability in environmental decision making, as has been repeatedly found necessary when tackling the poor quality of poor environmental governance. Instead, the Committee's emphasis clearly is on instituting a regulatory mechanism that is controlled centrally, managed by technocrats, reliant on electronic filing and monitoring system, and without any accountability to statutory and democratic institutions such as District/Metropolitan Planning Committees and Biodiversity Management Committees. The Committee's recommendations, thus, clearly and categorically side-step crucial Constitutional requirements as instituted by the Constitutional 73rd Amendment (Panchayat Raj) Act, 1992 and the Constitutional 74th Amendment (Nagarpalika) Act, 1992.

NEMA and SEMA – New Parastatals: The solution to the prevailing environmental governance problems, according to the Committee, is to be achieved by the setting up of National Environmental Management Authority (NEMA) and a similar institution at the state level called the State Environmental Management Authority (SEMA). A model Bill has been made available by the Committee, entitled the Environmental Laws (Management) Act, 2014, to help establish these authorities. The clearance and regulatory authorities, as proposed, would subsume the Central and State Pollution

22 See "*Only 19 projects were denied green clearance from 2008 to Aug 2011"*, Nitin Sethi, The Times of India, 16 August 2011, accessible at: http://timesofindia.indiatimes.com/home/environment/Only-19-projects-were-denied-green-clearance-from-2008-to-Aug-2011/articleshow/9617490.cms (last accessed on 31 December 2014)

Control Boards and also the clearance functions now with MoEF & CC and State Environmental Impact Assessment Authority/State Environment Appraisal Committee. Both these authorities are proposed to be established as technocratic entities, directly by the Centre. NEMA and SEMA are promoted as authorities that would function as 'single window' clearance agencies to ensure "making doing business easier in the country" (para 7.13.xvi).

While there is some emphasis on ensuring there is representation in these authorities of experts drawn from various disciplines, there is no emphasis at all that the process of selecting candidates for these powerful regulatory authorities would be an outcome of a process that is transparent and open to public review. This is clear from para 7.10.2 of the Committee's recommendation, that the Central Government would not only be involved in appointing the members of NEMA, but would also appoint members to SEMA. This raises a variety of questions, including, in fact, whether the Centre can arrogate to itself the right of appointment of authorities that are under the jurisdiction of State Governments given the federal polity of the country. Such proposals also raise doubts about the independence and autonomy in the functioning of these authorities, given that its members are directly appointed by the Union Government, even as the feasibility of such an approach is in question.

Promoting Federated Governance or Centralisation? It has been widely held that in federated governance systems, the Centre taking dominant charge of decisions, especially when they relate to environment, livelihoods and protection of biodiversity, and in securing the socio-economic and ecological futures of present and future generations, is not in the public interest. International treaties and conventions and national laws are in agreement that such decisions must be deeply democratic as they offer the best guarantee for safe guarding public welfare. This is especially the case because projects that are assessed in environmental decisions entail high risks and their impacts are quite often irreversible. Thus, the Precautionary Principle should become a guiding light in such decision making. The Parliament has repeatedly endorsed this position through various key legislations. In particular, the following laws mandate federated decision making on matters concerning to peoples lives and livelihoods, health and environment, especially involving the third tier of governance: local governments.

i. Constitutional 73rd Amendment (Panchayat Raj) and 74th Amendment (Nagarpalika) Acts, in 1992
ii. Biological Diversity Act, 2002
iii. Right to Information Act, 2005
iv. Forest Rights Act, 2006

No role for District/Metropolitan Planning Committee in Environmental Decision Making: The Panchayat Raj and Nagarpalika Acts brought into force an important institutional tier of decision making: that of the District Planning Committee. Article 243 ZD of Part IX A of the Constitution mandates that "(t)here shall be constituted in every State at the district level a **District Planning Committee** to **consolidate the plans** prepared by the

Panchayats and the Municipalities in the district and **to prepare a draft development plan for the district as a whole**." In formulating the draft development plan for 5 years, the Committee is required to "have regard to — **matters of common interest between the Panchayats and the Municipalities including spatial planning, sharing of water and other physical and natural resources, the integrated development of infrastructure and environmental conservation**". Similar provisions are made for metropolitan areas by constituting a Metropolitan Planning Committee. (Emphasis supplied)

When this Constitutional provision is read with the 7th, 11th and 12th Schedules of the Constitution, it becomes clear that the Centre cannot exclusively decide on matters relating to health, environment, etc. Local Governments have a direct role in engaging with such decisions, especially in developing district development plans that appreciate environmental limits to growth based on natural resources available. Besides consolidating these plans, the States have a role in developing broad policies on addressing disparities in development and as an oversight mechanism on decisions at the district level. All such progressive provisions that devolve power to the level of government closest to the people would become infructuous if the Centre arrogated to itself the power to regulate and control environmental decision making in the country, as is now proposed in the Committee's report. This proposal is therefore insidious and will have deep, cross-cutting and probably irreversible impacts on many sectors, besides centralising and bureaucratising decision making, which has already caused a variety of systemic problems, fuelled discontents and given room for massive corruption in the system.

Weak Appraisal of Serious Problems in EIA based Environmental Decision Making?: A close reading of the 6th January 2014 direction of the Hon'ble Supreme Court of India in T.N. Godavarman Thirumulpad v. Union of India, in what is popularly referred to as the Lafarge ruling, reveals that the emphasis of the directions to MoEF & CC is to reform environmental decision making so as to enhance transparency, accountability and public involvement in environmental decision-making, besides ensuring that they are competent and autonomous. Pithily summarising the state of EIA-based regulation in India, the judgment is critical of EIA-based systems in general. The Supreme Court explicitly states that "the present mechanism under the EIA Notification dated 14.09.2006, issued by the Government with regard to processing, appraisals and approval of the projects for environmental clearance is deficient in many respects and what is required is a Regulator at the national level having its offices in all the States which can carry out an independent, objective and transparent appraisal and approval of the projects for environmental clearance and can also monitor the implementation of the conditions laid down in the Environmental Clearances."

This decision also references and extensively quotes from the '*Report on Scope, Structure and Processes of National Environment Assessment and Monitoring Authority (NEAMA) 2011*'[23] which concludes that most of the problems with the EIA mechanism in

23 A copy of this report prepared by Indian Institute of Technology, Delhi in 2011on the request of Ministry of Environment and Forests, is accessible at: http://envfor.nic.in/sites/default/files/division/Report--NEAMA.pdf (last accessed on 31 December 2014)

India relate to institutional structures and processes. The paragraphs from this 2011 Report – as quoted by the 2014 Supreme Court order – merit reproduction in full below as these points are highly relevant for any serious exercise of evaluating the functioning of the MOEF & CC and any authority at any level of the government involved in regulation of matters relating to forests, biodiversity, wildlife, pollution control and the environment in general:

> "4. We analysed the implementation of EIA 2006 notification and the proposed CZM notification 2010 in terms of policy, structure and process level issues. Almost all the problems in implementing these notifications relate to structure and processes. Key issues are mentioned below
>
> a. The presence of MoEF in both the appraisal and approval processes leads to a perception of conflict of interest. The Member Secretary (who, according to the 2006 notification, was supposed to be the Secretary) is involved in the processing, appraisal and approval of the EIA applications.
>
> b. Lack of permanence in the Expert Appraisal Committees leads to lack of continuity and institutional memory leading to poor knowledge management.
>
> c. Current EIA and CRZ clearances rely predominantly on the data provided by the project proponent and the absence of authenticated and reliable data and lack of mechanisms to validate the data provided by the project proponent might lead to subjectivity, inconsistency and inferior quality of EIA reports.
>
> d. Though the EIA notification requires several documents like ToRs (for every project), minutes of public hearing meetings (for each project), EIA report (with clearance conditions) and self-monitoring reports to be put in public domain (predominantly on the website), this has not been done for lack of institutional mechanisms. This leads to a perception of lack of transparency in the processes.
>
> e. Several studies have pointed toward the poor monitoring of the clearance conditions. Huge gaps in monitoring and enforcement of clearance conditions actually defeats the very purpose of grant of conditional environmental clearance."

Clearly, as identified by the Supreme Court of India, the operation of the EIA regulatory framework under the EIA Notification 2006 is seriously flawed,[24] as are procedures of decision making under the CRZ Notification. The Supreme Court's judgment is instructive and illustrative of the quality of reforms that are essential for environmental decisions, and not merely for those contained within the constricting framework of the EIA Notification 2006. The fact that the Supreme Court has recommended a national level Regulator with offices in as many States as possible in order to carry out independent, objective and transparent appraisal and approval of the projects for environmental clearance, and also for monitoring the implementation of the conditions laid down in the environmental clearances, suggests the great value in decentralising environmental decision making and involving the public in decision-making. Instead, what the High Power Committee has now proposed is for an environmental regulatory authority that is subservient and subordinate to the MoEF & CC, and that too with least transparency and accountability to State Governments, leave alone Local Governments

24 For a detailed discussion of the flaws in the EIA Notification, see Leo Saldanha et al, "Green Tapism: A Review of Environmental Impact Assessment Notification 2006 (2007)".

or the people.

Emphasis on Centralising Environmental Decision Making: The categorical emphasis on ensuring the powers of decision making are centralised is evident at para 7.16 when the Committee states that "the final approval or rejection powers should be retained by the MoEF & CC" including the possibility that "it is entirely conceivable in certain circumstances that the Ministry may not be in a position to give detailed reasons for its decisions, which may be couched in generic terms". This the Committee believes is necessary when certain sensitive factors relating to national security, regional amity, etc. Yet, it seems to suggest that the Ministry should have the final say in all matters, and not just specific and sensitive cases. The problem with such argumentation is that it encourages anomalous decision-making as in the case of the controversial environmental approval by the MoEF of the POSCO project, claiming it was in the "strategic interests" of the country. That when two committees appointed by the Ministry had recommended that clearance be rejected on a host of environmental, social and human rights considerations.[25]

Ritual treatment of Environmental Clearance to continue: It is an undisputed fact that the bane of environmental decision making in India has been the propensity of the applicant agencies securing environmental and forest clearances to treat the procedural demands as though it were ritual. From the very inception of EIA based environmental decision making in 1994, where proponents of high impact projects have had to submit Environment Impact Assessment to secure clearance before proceeding with the project, which since 1997 was also subordinated to mandatory Public Hearings, the difficulty has been one of relying on the information supplied by the applicant. In most cases it has been found to be insufficient, in many cases wrong, and in several cases deliberately fraudulent. The infamous example of the international consulting firm Ernst & Young completely plagiarising the EIA of Tattihalla dam project (proposed in Dharwar district of Karnataka) and presenting it as though it were of Dandeli Dam (proposed in Karwar district of Karnataka), a document that went through several rounds of clearances before the fraud was exposed in a Public Hearing in 2000, stands out as a striking example of the difficulty in relying on applicant submitted data. Despite calls to criminally prosecute the applicant and the consultant under the criminal procedure provisions of the Environment Protection Act, 1986, no action was taken.[26] Such examples have continued to dog the system in subsequent years, and the most recent shocking example of such frauds continuing to pervade the system is in how several dams were thoughtlessly cleared on the Bhagirathi river and contributed to destroying the river system and accentuated the devastating impact of floods that killed thousands in 2013. The Supreme Court was forced to intervene and directed "...the MoEF as well as State of

25 For a detailed analysis of environmental decision-making related to the POSCO project, see: "*Tearing through the Water Landscape: Evaluating the environmental and social consequences of POSCO project in Odisha, India*", Leo F. Saldanha and Bhargavi S. Rao, Environment Support Group, May 2011, accessible at: http://www.esgindia.org/resources/reports/resources/tearing-through-water-landscape.html (last accessed on 31 December 2014)

26 A detailed discussion of this case is available at: "The Dandeli EIA Fraud", Environment Support Group website, accessible at: http://www.esgindia.org/campaigns/press/dandeli-eia-fraud.html (last accessed on 31 December 2014)

Uttarakhand not to grant any further environmental clearance or forest clearance for any hydroelectric power project in the State of Uttarakhand, until further orders."[27] Despite such glaring evidence of fraud both by leading private and public sector companies, no action has been initiated per Sec. 15 and 16 of the Environment Protection Act, 1986 by environment regulatory authorities.

Reliance on 'utmost good faith' for environmental decision making: It is in this context that the Committee's proposal of "utmost good faith" in investor supplied data while securing environmental and forest clearances must be reviewed. The Committee proposes that the "utmost good faith" principle demanding "voluntary self-disclosure" with mandatory public disclosure of information will work when saddled with serious consequences for wrongful and fraudulent disclosure, including penalty and imprisonment. The Committee also appears satisfied that providing the information supplied by the investor along with "a web-based ICT tool to enable the project proponent to file and track their application as well as obtain the decision online" (para 7.14.xvi) would suffice in fundamentally improving the present problem ridden system. The Committee claims "inspector raj" has burdened decision making processes even as it concedes that over 99% of the proposed projects are accorded environmental clearances, which, it is widely acknowledged, is largely based on fraudulent information. So it is difficult to appreciate what compelled the Committee to promote an environmental clearance system with almost complete reliance on "utmost good faith" principle with no clear and statutory support for public review, and also with an emphasis on not promoting a site visit based inspection of the project's impacts.

The Environment Protection Act, 1986 (S. 15, 16 & 17) and related laws regarding forest protection, biodiversity protection, wildlife protection and pollution control laws are all based on criminal jurisprudence. Thus, for decades now there has been the possibility of initiating criminal prosecution against violators of environmental and forest protection laws, including against those securing clearances by falsifying information. However, even when Ministers and Secretaries of MoEF & CC have repeatedly admitted that most environmental and forest clearance cases are obtained based on falsified and fraudulent information, they have not explained why there is so much reticence on initiating criminal prosecution against violators. Whether this systemic indifference to tackle environmental violations on the part of regulators can be remedied by instituting a new law and new regulatory authorities, that too more centralised and more bureaucratic than the prevailing dispensation, is a moot point.

Lessons to learn from Karnataka's Environmental Clearance System Flaws: The authors of this critique were amongst those enlisted by the Department of Forests, Ecology and Environment of the Government of Karnataka in reviewing environmental clearances decisions of the State over the past decade. In undertaking this effort, the research team reviewed 447 clearances accorded by the Karnataka State Environment Clearance

27 For a detailed discussion of this direction, and the background in which the Supreme Court intervened, see: "Uttarakhand Flood disaster: Supreme Court's directions on Uttarakhand Hydropower Projects", SANDRP, September 2013, accessible at: http://sandrp.in/SupremeCourtsdirectionsonUttarakhandHydropowerProjects.pdf (last accessed on 31 December 2014)

Committee during 2002-2012, including visiting 10% of the projects cleared for site assessment, and submitted a comprehensive report to the State Government. The publication of the Report was promptly banned by the State! The authors felt it was written for the public to review, and the public must be provided access to the report and have shared it online.[28] From this detailed empirical analysis of the environmental clearance system in Karnataka, the conclusions that could be drawn were that:

1. There is an acute need to decentralise the clearance mechanism by building competence at all levels of decision making, in particular the District level and enhancing the quality and opportunities for public participation in decision making.
2. That the principle of "utmost good faith" which is at the base of the idea of self regulation by industry was practised in Karnataka for securing clearances from the State Environment Clearance Committee and has resulted in a colossal fraud on the decision making system.
3. That any proposal for reform that enhances bureaucratic control over decision-making is likely to enhance the possibility of fraud and corruption, and resultant environmental degradation and violation of human rights.
4. That the way forward is to democratise and decentralise decision making as provided for in the Panchayat Raj and Nagarpalika Acts, various land use planning laws, and also the Forest Right Act and Biological Diversity Act. This, it was discovered, not only enhances the quality of the decision, but also results in a situation where needless or fraudulent projects are weeded out early, and essential projects are encouraged and are commissioned without delays, litigation or controversy.

Weak or No Empirical Basis for Committee's Recommendations: The High Powered Committee in its hurry to produce its report has apparently not invested the necessary time and effort in reviewing the findings of studies that probe deep into factors why India's environmental decision making is not working optimally. The Committee, instead, appears to have made its recommendations relying on views it gathered from specific sectors that it met with. This is apparent in the fact that the Committee has not made available the empirical basis for its recommendations. In that sense, it appears to have worked to an agenda as set by the Government, which seems to be one of reducing the quantum and quality of democratic and competent review of environmental decisions, and ensure investments are passed through the environmental clearance system with least difficulty, regardless of the impacts.

Whittling down Public Accountability and Transparency in Environmental Decision Making: It appears that the Committee is keen on further whittling down of existing weak procedures of public review of environmental decisions which are widely known to be practised ritualistically and often the outcome of which has no bearing on the final

28 "Addressing Gaps in Environmental Decision-Making in Karnataka: Review of Existing Norms and Procedures of the State Environmental Clearance Committee (SECC) and Proposal for Reforms", Final Draft Report prepared by Abhayraj Naik, Bhargavi S. Rao and Leo F. Saldanha for Environmental Management and Policy Research Institute, February 2014, accessible at: http://www.esgindia.org/campaigns/bajpe/press/karnataka-scraps-state-environmental-cle.html (last accessed on 31 December 2014)

project decision. The prevailing weak procedure too, the Committee finds problematic to accept, and instead proposes that the mandatory statutory public review mechanisms be further reduced, and, if necessary, done away with. This is evident at para 7.14 of the Committee's report:

> "vi.The method of public consultation prescribed in the existing notification should continue with the modification that only environmental, rehabilitation and resettlement issues are captured in the public hearing. A mechanism should be put in place to ensure that only genuine local participation is permitted
> vii. The extant provision of dispensing with public hearing should be continued only in respect of situations when it is reported that local conditions are not conducive to the conduct of hearing, or in the matters of projects of strategic importance and national importance.
> viii.The public hearing may be dispensed within the locations where the optimum pollution load or the cumulative pollution load is pre-determined, such as in a planned industrial zone or manufacturing zone.
> ix. There is no necessity for public hearing in locations where settlements are located away from the project sites."

In effect what the Committee is suggesting is that Public Consultations to formulate an environmental decision must be limited merely to issues of environment, rehabilitation and resettlement, and not, as is presently possible, to examine the cost-benefit of the project, to propose alternatives, or even to examine if the project is in conformance with various Principles of good governance. It appears that the Committee has very little faith in the power of the people to assist in environmental decision-making, for it repeatedly, and in many different ways, recommends whittling down of existing public participation provisions.

The ELMA Proposal: A review of the proposed Environmental Laws (Management) Act, 2014, a draft of which the Committee has produced, claims in its Preamble that "the Committee after interacting with diverse groups of people in different parts of the country concerned with the subject and with officials at various levels has come out with recommendations and suggestions; and to give effect to the same and to deal with other aspects of environment protection". The Committee has not provided any evidence of such interactions with "diverse groups of people in different parts of the country". MoEF & CC has also not provided any report of how the Committee went about its efforts in preparing the report. Clearly, therefore, there is much to be suspect about such a claim. The major purpose of this Act clearly is of promoting an environmental regulatory system governed essentially by NEMA and SEMA which would formulate decisions and regulate based on information supplied in "utmost good faith".

Are District and Appellate Environmental Courts required? To ensure that regulation is seamless, and punitive measures would follow against violators, the Committee proposes that Special Environmental Courts be set up at District Level officiated by a judge of the rank of "sessions or additional sessions judge" to "entertain complaints and

try offences under the Act" (S. 12). Further, the Draft Act proposes the establishment of an Appellate Board constituted by the Government (which is clarified as Government of India in the Definitions clause) which would be presided over by a retired judge of a High Court and "also consisting of two officers of the rank of Secretaries to the Government of India retired or serving" (S. 13). This Appellate Board would hear appeals from aggrieved parties against any decision of MoEF & CC or SEMA. It is proposed that "the principle seat of the Appellate Board shall be in New Delhi with seats in such other place or places as may be notified". In addition, "(m)ore than one Appellate Board may be constituted by the government for different areas, if needed". The Committee then proceeds to propose that decisions of Special Environmental Courts and Appellate Boards cannot be questioned "by any court or tribunal either suomoto or at any ones behest on any ground what so ever" except "subject to the powers of the National Green Tribunal" Act (S. 16).

Truncating the Powers of the National Green Tribunal: The role and relevance of the National Green Tribunal, the Committee proposes, should be relegated to merely hearing appeals against decisions made by the Special Environmental Courts and Appellate Boards, thereby. By inference, an appeal against the decision of the Tribunal continues to lie in the Supreme Court. Consequently, a disturbing question emerges if this Committee has at all appreciated the fact that environmental issues are intricately linked with the Right to Life, Livelihoods and a Clean Environment, factors that are justiciable under Article 226 and 32 of the Constitution of India by the High Courts and Supreme Court. Since the Special Environmental Courts and Appellate Boards are barred from entertaining such Fundamental Rights appeals, and it is now proposed that even High Courts should not intervene in such matters, an aggrieved party would have to approach the Supreme Court to secure relief.

Making Access to Environmental Justice Difficult: A fundamental question is how many in this country have the resources to invest in securing their Fundamental Rights when access to justice is made so difficult and remote. The poor, clearly, are being told that the doors of justice, at least as far as Fundamental Rights relating to environment are concerned, are even more farther away than before. Besides, these proposals, far from reducing bureaucracy, has ended up creating several more regulatory institutions and judicial forums, and there can be very serious doubts if such mechanisms are at all feasible. This because four years after the National Green Tribunal has been set up, the reach of these across the country has been marginal (with one Tribunal covering as many as four or five states), putting litigants at risk of bearing huge costs in approaching a forum and thus discouraging them from approaching such forums for justice. Even this skeletal frame of the Tribunal has not been supported adequately by the MoEF & CC with office support and infrastructure. In most, there is insufficient secretarial support, and in many Tribunals there is not even a toilet!

7. Rapid Legal reforms

The purpose of this Committee was expressly:

i. To assess the status of implementation of each of the aforesaid Acts vis-à-vis the objectives;

ii. To examine and take into account various court orders and judicial pronouncements relating to these Acts;

iii. To recommend specific amendments needed in each of these Acts so as to bring them in line with current requirements to meet objectives; and

iv. To draft proposed amendments in each of the aforesaid Acts to give effect to the proposed recommendations.

In the Public Consultation held by the High Powered Committee in Bangalore, a majority of those who gathered urged the Committee to clarify how it could undertake such an onerous task in a period of 60 days. The Committee members were encouraged to negotiate with the Government to revise the terms of their contract, ensure there is more time invested in this exercise, and thus provide for a meaningful, country-wide consultation, that would engage people from diverse backgrounds, ecologies, geographies, etc., and not merely "sectors" and "stakeholders". Mr. T. S. R. Subramanian, Chairperson of the Committee, brushed aside these requests as irrelevant, a remark that remained uncontested by any of the other Members of the Committee, who, after all, had an equal standing and could have expressed their views, if they were divergent. They chose not to.

In the Final Report of the Committee, produced in approximately 90 days, the Committee now concedes "(i)deally, if there had been time, the Committee would have also recommended detailed revisions to the existing Water and Air related Acts" (para 9.6). This in the context of the Committee's proposal to enact a new 'Environment Laws (Management) Act', that would oversee the amalgamation of the Water (Prevention and Control of Pollution), Act, 1974, Water (Prevention and Control of Pollution) Cess Act, 1977 and the Air (Prevention and Control of Pollution) Act, 1981 into the Environment Protection Act, 1986.

The Committee at no point in time sufficiently justifies the need for a new law, the ELMA Act, through which it proposes to bring in the NEMA, SEMA, the Special Environment Court, and Appellate Board, besides truncating the powers of the National Green Tribunal, when in fact the same could well be achieved by amending the existing umbrella law: Environment Protection Act, 1986, if all such 'reforms' were indeed essential. When the Committee admittedly states that it did not have sufficient time to examine in detail complicated issues involved in amending and repealing existing environmental laws, it should not have proceeded to provide the draft of a new law, the cross-cutting and deep implications of which the Committee itself has not had time to fathom. Legislative reform is a deliberate and deeply democratic exercise, especially when it matters directly to Fundamental Rights, as India's environmental laws do.

8. Incongruent Institutional Reforms

There are several institutional reforms that the High Powered Committee proposes, and some of them have been proposed for years, such as the need for establishing an Indian Environmental Service. However, not much has progressed on such ideas as the political will to bring in necessary institutional changes has been lacking, or there has been administrative interference when the reforms proposed involved democratisation of decision-making, such as in the case of the Forest Rights Act, where Gram Sabhas have been vested with statutory power to decide on diversion of forest land. The High Powered Committee does not dwell on such issues which have been of great concern to millions across the country. Instead, it promotes certain institutional reforms, the necessity of which is hardly explained, and, sometimes, past proposals are re-presented without context. Some aspects of the institutional reforms proposed by the Committee are discussed here.

Another NEERI? The High Powered Committee recommends that "national research institution sponsored by the MoEF&CC needs to be established, which will act as the premier research and innovation centre in the field of environment sciences. This state-of-the-art research institution would sponsor regular degree/ diploma/ post graduate courses on various aspects of environment sciences and applicable practices, including standard-setting; as well as short-term courses on specific topics. This institute would also act as the apex technical advisory national agency on all matters relating to management of the environment, and will coordinate with other designated national laboratories in the field of environment management" (para 9.1). This is all that that Committee offers as rationale for promoting a new National Environment Research Institute when, in fact, India already has the National Environmental Engineering Research Institute (NEERI),[29] which amongst other things, already performs the functions the new Institute is proposed to, and has been doing that for decades. The Committee does not discuss if NEERI has been found to be irrelevant, or that it is so incompetent requiring the establishment of a brand new Institute.

A new IES, or an improved IFS? A major prong of the Institutional Reforms proposed by the High Powered Committee is the proposal to institute a new All India Service – Indian Environmental Service. This is essential, the Committee argues, because "(c)urrent approval systems and monitoring mechanism function in a quasi-amateurish manner, leading to sub-optimal management of environmental issues" (para 9.2). This Service would "act as an expert group to man positions in this field in the public and quasi-governmental sectors over the next decades". There have been many proposals in the past to establish such a service, given the weak competence amongst the technical bureaucracy of environmental regulatory agencies, most amply evident in the quality of their decisions and the frequency with which they are ridiculed and quashed by judicial forums. While the question of building capacities has been repeatedly addressed by various efforts of the MoEF & CC, including by way of expensive loans sourced from the World Bank for the Environmental Management Capacity Building Technical Assistance

29 See About NEERI, accessible at: http://www.neeri.res.in/aboutus.php (last accessed on 31 December 2014)

Programme[30], and the need for an All India Service of environmental decision-makers has been repeatedly raised, this Committee has not rationalised how the mere establishment of an Indian Environmental Service would help address and resolve the problems dogging the system presently. Clearly, much more thinking is necessary before such a huge investment is made of the country's exchequer in the development of a new cadre of officers, and that when the Forest Services are already struggling to find resources to pay salaries of their foot soldiers: foresters and watch staff, who do the bulk of the effort involved in protecting forests, but are only occasionally paid, poorly equipped and most are actually daily wagers.

Ecological revamping of IFS: The Committee also makes several proposals to revamp the Indian Forest Service, and build expertise, such as "encourage specialisation in various aspects of forestry and wildlife management, among members of the service" (para 9.3). The Committee does not explain why there is a need for such emphasis, when, in fact, nothing prevents such possibilities under the present rules and dispensation. In the same vein, the Committee proposes that "MoEF&CC may like to undertake a comprehensive review of departmental forest management policies, practices and procedures, to initiate wide-ranging improvements and reforms. This preferably should not be an internal exercise, and should include independent knowledgeable experts from India and abroad, as well as qualified researchers" (para 9.4). Again, it may be argued, nothing prevents the Ministry from undertaking such reviews to strengthen decision making relating to forests and their ecology within the current framework of law and policy. In fact, there is much mutual learning that can take place when foresters work with local communities and appreciate their traditional knowledge and wisdom, as is imagined in the Biological Diversity Act, and not only from "experts" from an academic or administrative setup.

Weak Strategies in Tackling the EIA/CRZ Mess: In addressing the problems latent to environmental decision making, it is well known that the enactment of laws such as the Environment Impact Assessment Notification and Coastal Regulation Zone Notification by invoking the power of the Ministry to enact subordinate legislations, has resulted in a colossal mess of the system. A comprehensive critique of how the EIA Notification, 2006 was destined to create this mess has been offered in "*Green Tapism: A Review of the Environmental Impact Assessment Notification, 2006*". One of the significant problems of such Notifications is that it gives in easily to the penchant of the bureaucracy to amend or clarify or issue orders to suit demands of specific high-profile projects without any Parliamentary oversight (as such is not required for subordinate laws). Thereby, the very objective of such laws are so comprehensively diluted. Besides, such efforts cause confusion of such epic proportions, confounding various judicial forums as well.

The 1991 version of the CRZ Notification was amended at least two dozen times before it was replaced by its 2010 version. As far as the EIA Notification, 2006 is concerned, it has been amended, clarified multiple times, tens of orders and circulars have been issued to amend its applicability to particular projects, that now it is difficult to even

30 More details of this programme can be accessed at: http://www.worldbank.org/projects/P043728/environmental-management-capacity-building-technical-assistance-project?lang=en (last accessed on 31 October 2014)

appreciate the purport of the original Notification as there is always a circular or clarification that is thrust on by the Ministry to re-interpret the intent of the original law. Clearly, therefore, there is no doubt that the Notification route to empower the Ministry in such critically important and politically powerful clearance powers should be rationalised and democratised, so that transparency and accountability is enhanced. In fact, there is a long standing demand that the EIA Notification, CRZ Notification, and such other subordinate laws that have a direct bearing on the Fundamental Right to Live, Livelihoods and a Clean Environment, should be enacted as a full-fledged law subordinate to the Environment Protection Act, 1986, thus preventing their manipulation out of bureaucratic and political compulsions to meet the demands of certain high-profile projects. Instead, all that the Committee proposes in fixing the problematic interpretations of the intent of the EIA Notification, 2006 is that, "MoEF&CC may consolidate all existing Notifications/ circulars/instructions into one comprehensive set of instructions. Amendments or additions may normally be done only once a year. (Naturally, this will depend on decisions taken by Government on the recommendations of this Committee)" (para 9.5). Interestingly, the Committee found it essential to include only for this particular proposal, a *caveat,* and that in parenthesis.

Environment Reconstruction Fund: The proposal to consolidate all environmental fees, cess, penalties, etc., into an Environment Reconstruction Fund is welcome. But it is surprising that the Committee has chosen to ignore that close to Rs. 30,000 crores lies in the CAMPA funds, about the management of which the CAG has raised several serious concerns. Many Pollution Control Boards are also flush with funds, and more often than not, not much is done with these monies to promote public interest. The establishment of a new Fund without dealing with the mess in the large amounts of monies already collected, is only likely to cause greater confusion. This particularly when the Committee proposes an highly centralised environmental decision making with very little transparency, accountability and democratic participation.

Repositioning federal relationship in matters of environmental management: In 1992, the Parliament of India introduced significant reforms in governance by decentralising administration and devolving powers to Local Governments by way of the Constitutional 73rd Amendment (Panchayat Raj) Act and Constitutional 74th Amendment (Nagarpalika) Act. The 11th and 12th schedules were introduced indicating list of items that local governments would be involved in. Both lists include a wide range of illustrative functions that could broadly and specifically relate to environmental management and conservation, and protection of forests and wildlife. Besides, per Articles 243 ZD and 243 ZE, local governments were empowered with the exclusive task of democratically evolving 5 year District/Metropolitan Development Plans taking into consideration "spatial planning, sharing of water and other physical and natural resources, the integrated development of infrastructure and environmental conservation". Clearly, the intent of the Parliament has been that local governments must be intricately involved in decision-making relating to environmental matters. The High Powered Committee seems to have missed this point, which becomes apparent when we consider their proposal that "District Collector/District Magistrate should be declared District

Environmental Manager. Every district must have an environmental management plan", etc. (para 9.8 c).

Such recommendations betrays, once again, the fact that the Committee appears to be extremely comfortable with a bureaucratic schema for administration, and not, as proposed by the Constitutional schema, a Parliamentary process of democratic decision making. It is clear that one of the most over-burdened officials in civil administration is a Deputy Commissioner/District Collector/District Magistrate, and officiates over at least 180 items of administration. When there is a provision in the Constitution to ensure that the process of District planning is based on a democratic process that comprehends environmental issues, the need for promoting the District Commissioner/ Collector/Magistrate over democratically elected bodies is highly questionable.

Marginal role for States in Environmental Governance: The High Powered Committee also seems to have perceived the role for the State in addressing environmental concerns in a rather marginal manner, and this is evident in how it proposes that the "State Governments would be closely associated with the functioning of State Environment Management Authority (SEMA), which will act as the implementing arm of the State Government's polices in the field of environment". The Committee also proposes that funds from the Environmental Reconstruction Fund must be apportioned to SEMA and that that State "is expected to supervise the functioning of SEMA", without clarifying, though, that the appointment of the officials of SEMA would be done by the Central Government. It is difficult to appreciate how this is an example of federated governance when the role of the State is relegated to "overall control over garbage collection and pollution control in urban and semi-urban areas" in which aspects "the State Government is expected to guide the SEMA to ensure effective implementation of the monitoring process" (para 9.8.b).

Centralising Environmental Governance: It appears that the Committee is content in empowering the Centre in most matters relating to environmental governance, as is evident in its argument that "(f)orest and wildlife are subjects in Concurrent List whereas Environment is a residual matter and is within the competence only of Parliament for legislation". The Committee further argues that even if "the subject of environment falls within the purview of the Centre", "instruments for implementation are few and ineffective" especially in term of "integrating environment into development strategies". And then concludes that the "main issues today relate to enforcement and implementation". On such basis, the Committee proposes that the "primary responsibility of the Central Government should remain legislation in the field of environment along with administration of environment management laws prescribing for standard setting for pollution levels, project approvals, administration of Environmental Reconstruction Fund, research and development for enhancement of environmental quality, environmentally sustainable technology hunting, supporting and sponsoring pollution control methods at local levels, environmental policy formulation" (para 9.8 and 9.8.a). In effect, what the Committee is proposing is an highly centralised environmental governance framework that agitates against various Constitutional proposals that require

decentralisation of environmental governance as is explicitly stated in the Constitutional 73rd and 74th Amendments, Panchayat Extension of Scheduled Areas Act and also the Forest Rights Act, 2006. Such proposals also go against the grain of various international covenants that promote decentralisation in environmental governance as an essential pre-requisite of securing ecological and economic security and a good quality of life and livelihood for all.

The following Principles of the Declaration of the United Nations Conference on Environment and Development, 1992, also known as the Rio Declaration, which India has ratified,[31] are instructive on how environmental governance ought to be perceived and shaped so every nation and the world is ecologically and economically secure:

> "Principle 10
>
> Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.
>
> Principle 11
>
> States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and development context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.
>
> Principle 15
>
> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.
>
> Principle 16
>
> National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with

31 The full text of the Rio Declaration may be accessed at: http://www.unep.org/Documents.Multilingual/Default.Print.asp?documentid=78&articleid=116 3 (last accessed on 31 December 2014)

due regard to the public interest and without distorting international trade and investment.

Principle 17

Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority."

No Public Access to Centralised Environmental Database: The Committee recommends that there "is urgent need for creation of a comprehensive database, using all instruments available, on an on-going basis, in respect of all parameters relating to environment" (para 9.10). The intent of creating such a database, the Committee states, is so that it "will usher in the benefit of reliable and factual data" and that this "will reduce the scope for fudging data by consultants, will quicken decisions, will help pre-designate inviolate areas, will assist in studies of carrying capacity of each location from the pollution point of view", etc. All these are laudatory objectives provided the data sets are publicly verifiable, for which they have to be publicly accessible. Only then can independent scientists, experts, lay persons or interested journalist probe the data set to establish its reliability, and also to run against it any of the data sets supplied by applicant organisations seeking clearances. Without such a system in place, there would not be any point in creating a centralised database, as the problem presently, and admittedly, is the very low credibility of environmental regulatory agencies in formulating decisions that are scientifically and legally sound. Which means, though the database is managed centrally, its credibility can only be established following a public and independent review. This is possible only when free access to the database is guaranteed. In fact, it may even be argued that the database must be in the public domain as it has already been paid for by the public through founds sourced from the public exchequer in compiling such information. Instead, what the Committee proposes is that "(t)here should be a cost parameter for data mining and accessibility from the centre which will provide for the cost of regular updation in terms of technology and manpower". Clearly, this sort of rationale for the establishment of a database is more than likely to make it opaque to critical review, mainly because access to it would be unaffordable to most independent reviewers, and thus the credibility of the database, and decisions based on it, would be at risk, and probably in perpetual doubt. The same may be said of the Committee recommendation for Environmental Mapping of the country (para 9.10).

Environmental Reconstruction Fund: Perhaps relying heavily on its hope that the principle of "utmost good faith" will ensure that investors will report honestly information relating to their project, the Committee proposes that "(i)dentification & recovery of environmental reconstruction cost relating to each potentially polluting unit should be in-built in the appraisal process" and that "(e)ach development project must indicate the extent of environmental degradation, reconstruction programmes and the indicative cost thereto" (para 9.11). This when, the Committee proposes, for instance, that minimum

safeguards and opportunities to review credibility of information supplied by investors for environmental clearances, predominantly possible now due to public review in Public Consultations, are in fact whittled down and done away with. Unless there is comprehensive transparency in reviewing information supplied in securing environmental and forest clearances, it is quite likely that investors interest in minimising costs, as is the wont of any profit-seeking entity, could result in tokenistic contribution to environmental rehabilitation for damage caused.

Making Project Consultants Honest: The Committee proposes that when consultants who generate EIA reports for projects resort to "(a)ny misrepresentation of facts or furnishing of incorrect data or information by the consultants in any of the documents in the approval process of the projects will make consultants and project proponent both liable for prosecution, including black-listing of such consultants from having any engagement or transaction with Governments for a period of 10 years, including the Directors and employees of the consultant company and/ or partners and employees in consultant firms" (para 9.12). Surprisingly, the emphasis that is clearly missing here is that such Consultants should be criminally prosecuted per the Environment Protection Act for distorting facts and lying on record on çritical matters which, due to their dishonesty, could result in irreversible damage to the environment and destroy thousands of lives and livelihoods.

India is witness to many such instances, most infamously known through the heartrending experiences of peoples of Bhopal, those who suffered from the Uttarkhand floods, those who die silently due to adverse impacts of nuclear facilities, and the extensive pollution in places like Vapi, Lucknow, Vellore, etc. Once more the Committee's penchant on monetising environmental information contained in the centralised database is evident when it states "(t)he central database available with NEMA can be used on payment basis, by the project proponents in preparation of EIA report/ EMP through the accredited consultants". Such steps would only ensure that the public at large would be unable to access such databases, and thus kept in the dark in this information exchange between consultant and decision maker.

Unholistic application of Science and Technology to Environmental Decision Making: On matters relating to application of science and technology, the Committee "lays high stress on high value georeferenced database captured through satellite imagery and analysed by IT applications which should be put to use for scientific management of forest and environment" (para 9.17). This is further clarified as "Objective decision making should be based on technology-aided tools that are value-neutral to maintain the ecological pristinity and fragility of eco-sensitive zones and 'no go' area by super-imposing such geo-referenced maps in the matters of environmental governance". While the need for technology aiding environmental decision-making is well understood, appreciated and employed world over, it is also true that the same is buttressed increasingly within a framework of rationalisation that involves local community participation in decision making. This is because it is widely appreciated today, more so than in the past, that the latent traditional wisdom of communities of the value of nature

and natural systems remains largely undocumented due to the practice of oral traditions, and thus, unless they are actively sought out for and specifically consulted, very little about nature, about habitats and their value to humanity would be known.

This is particularly true in decisions that involve diversion of forests and such other biodiversity rich areas, wherein traditional knowledge of such ecosystems would be highly deterministic of the final outcomes of decisions, especially those involving the futures of indigenous communities whose lives are intricately linked with nature. Which is also the reason why the Biological Diversity Act, 2002, the Forest Rights Act, 2006 and the United Nations Convention on Biological Diversity, 1992 all promote a framework of environmental decision making that considers meaningfully traditional knowledge, and even demands consent of communities in many cases, as nature, after all, is sacred. The Committee though has in a dramatically reductionist approach reduced appreciation of nature and its values to a set of technocratic tools for decision making, and when it does acknowledge the need for "human intervention and application of expertise" in such decisions, it essentially means that which is provided by "a cadre of experts".

"Devil's Advocate" to review GMO: There is, however, a point in the report when the Committee does acknowledge the limitations of employing appraisal techniques that are derived by reductionist approaches to scientific enquiry, and that when it refers to "potential consequences of mindless use of science and technology could possibly be illustrated by referring to the potential for medium/ long-term adverse affects through unprepared introduction of Genetically Modified (GM) food crops" (para 9.17). The Committee does not clarify what it means by the term "unprepared", even though it acknowledges that such decisions are politically shaped and that MoEF&CC ought to be a "Devil's Advocate to advise due caution". The Committee does not also explain why such precautions have to exercised by the Ministry in the case of introduction of GM foods, when similar caution is not advocated in issues relating to mining coal, or building a dam, or laying through thick jungles roads and industrial corridors, or such other linear projects, which the Committee has recommended ought to be 'fast tracked'.

On Mining, CRZ, etc.: The Committee then goes on to make various recommendations relating to environmental education, solid waste management, mining operations, coastal zone regulation, etc. There are many proposals therein which merit attention, especially because they are critical areas of environmental concern. But what is not clear is the methodology that the Committee employed in arriving at a conclusion that these issues merit attention of the nature of Legal Reform, when in fact several of these are essentially issues of environmental management. Indeed, there are concerns of fisherfolk that their Fundamental Rights have been slighted historically, and especially since the enactment of the Coastal Regulation Zone Notification in 1991. But the Committee makes no reference to it, barring raising issues of coastal management as in "(t)here is much confusion among the general public as well as the entrepreneurs about the actual demarcation/ line of the CRZ, which is based on the concept of HTL (High Tide Line), which varies from time to time". That the former Union Environment Minister thought it fit to conduct several public hearings on coastal management issues, and several

suggestions for reform were made, seem to have been comprehensively ignored by the Committee when formulating the recommendation that "MoEF&CC may finalise the CRZ demarcation, and bring it into public domain to pre-empt ambiguity" (para 9.18). Similarly, when it comes to mining operations, the Committee proposes that mining operations be streamlined and cleared rapidly including that "NEMA may have a suitable cell, with specialisation, to speedily deal with environmental approvals in these sectors, with due regard to environmental considerations" (para 9.19). The emphasis again, clearly, is on an hurried approval of the project, not careful verification of environmental and socio-economic implications in an inter-generational perspective, given the irreversible impacts of such projects.

8. Conclusion

There is little doubt that India's environmental laws need to be reformed to meet with the demands of a fast growing economy. Rapid and rather unplanned exploitation of natural resources is witnessed all over the country, cities are expanding without let and care about environmental limits to its growth and a variety of infrastructure is being built almost everywhere in catching up with the world. It is essential that there is some thoughtfulness and consideration of long term implications of such economic activity, else it is like that the fast churning wheels of the economic growth engine may overshoot the tracks laid within the capacity of the nation.

The High Powered Committee was vested with all necessary resources and power to reach out across the country to appreciate meta dimensions of the complex issues involved, and then arrive at clear and precise conclusions for reforms within a Constitutional framework. This also keeping in mind that India has labouriously and painfully constructed a variety of laws and policies to advance environmental and social justice, based on securing Fundamental Rights of the most vulnerable communities, and to which ongoing project the Supreme Court has contributed immensely by invoking various progressive principles of jurisprudence. All this together has made India's environmental jurisprudence amongst the most progressive in the community of nations.

The task of identifying gaps and proposing reforms expectedly would involve deliberate, careful and sensitive analysis of various factors, and would demand deeply democratic consultations with a range of constituencies across the length and breadth of this vast country, filled as it is with multiplicity of languages, geographies, ecologies and aspirations. Adequate time is of essence to interrogate such complex terrains, as is also the quality of the dialectic employed.

The High Powered Committee admittedly has not had the necessary time, which it was aware of right at the inception of its appointment. It would have been expected from men who have held high positions of power to negotiate with the Government a reasonable duration to address all the complexities involved, lay down the framework of engagements in a transparent manner, and then go about its task. The Committee has been content in rushing through this terrain, and produced a report that does have some ideas worth considering. But in the end, the recommendations of the Committee appear to be nothing more than a cacophony of different voices, in which the one who shouted loudest was heard, and millions who could not, or were not allowed to, were never heard. As a result, this is a Report that does not represent India's challenges in environmental governance.

Given that environmental and social justice are intricately linked to the notions of economic growth and progress, and that any expedient effort on the part of the Government could result in serious, and probably adverse, consequences, in the national interest it is best that the Government of India repeats this exercise with caution, care, sufficient time and deeply respectful of the democratic processes demanded in such an

exercise. A good example to how such an exercise may be undertaken is the *"Report of the Committee for Recommending Legislative Measures and Administrative Machinery for Ensuring Environmental Protection"* undertaken by the Department of Science and Technology, Government of India, in 1980.[32]

In the end, only an ecologically sound and socially just economy is sustainable.

32 The Chairman and Members of this Committee who were appointed by then Prime Minister of India, Mrs. Indira Gandhi, went around the country listening to various views, collecting information and also conducting field studies to appreciate the wide-ranging perceptions of environmental governance challenges, including by visiting five major ecological zones of the country: the Western Ghats, the West Coast, deserts of Rajasthan, Himalayan hill tracts, Central Indian Continental tract and irrigated agricultural tracts of Ahmednagar and Pune areas. In addition, "first-hand information was gathered in all these places by personal observation and through extensive discussions with the local people including fishermen, pastoralists, peasants and tribals, as well as with technical experts from government departments, universities and research institutes" (para 1.7 of the Report). Besides, the Committee also "benefited from a vast collection of documents describing the legislative measures and administrative machinery of other nations both developed and developing" (para 1.8 of the Report).