

FINAL REPORT

**WATER-FOREST MANAGEMENT, LAW AND POLICY IN
UTTARANCHAL**

Issues, Constraints, Opportunities

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<p>Basti Benap <i>Gram Panchayat</i></p> <p><i>Gram Sabha</i></p> <p><i>Mandis</i> <i>Nap</i> <i>Panchayat</i> <i>Panchayati Raj Institutions:</i></p> <p><i>Panchayat Samiti</i></p> <p><i>Pradhan</i> <i>Sarpanch</i> <i>Sal assi</i> <i>Sinchai Samitis</i> <i>Soyam</i></p> <p><i>Tehsil</i> <i>Van Panchayat</i></p> <p><i>Van Samiti</i> <i>Zila Parishad</i></p>	<p>Habitation / Hamlet Umeasured Elected body of the village assembly and the lowest tier of local self-government operating at the village level. Collective of village adults and the general body of electors of a Gram Panchayat Wholesale Market Measured Local self-government system in rural areas The three tiers of the Local Self Government System operating at the village, block and district level. Comprises a group of Gram Panchayats and is Middle level tier of Panchayati Raj Institutions operating at the Block level President ,Head President of <i>Van Panchayat</i> Council 80th year according to Indian Calendar Irrigation Committee term used for revenue forest land in the princely State of Tehri Garhwal Administrative Unit within a district Democratic community forest management institution Forest Commitee Elected institution and highest tier of the Panchayati Raj Institutions at the District Level</p>
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WATER-FOREST MANAGEMENT, LAW AND POLICY IN UTTARANCHAL

Issues, Constraints, Opportunities

VIDEH UPADHYAY¹

Introduction: The Study

The Study aims at reviewing legal, policy and institutional provisions for the management of natural resources-water and forest in the State of Uttaranchal with a special focus on how the laws actually operate in the field. It provides an analysis of the implications of existing laws and policies for the scope and performance of various institutions at the local level to assess their effectiveness in propagating local-level resource management-water and forest separately and for integrated management. The analysis is built on past history of legal and policy initiatives for water and forest management in the State. Hopefully it can throw some light into constraining and facilitating factors to integrated water and forest resource management in the State. It finally aims at generating appropriate policy recommendations including suggestions for changes in the existing policy, legal and Institutional frameworks.

The Study first touches upon some conceptual and practical themes relating to Integrated Resource Management and law in the State of Uttaranchal. This is followed by detailed sections on the State Water and Forest law regime. Finally, conclusions and recommendations from the Study are presented.

I. INTEGRATED RESOURCE MANAGEMENT AND LAW IN UTTARANCHAL

A review of even the existing legal framework can suggest how management of natural resources in Uttaranchal requires an integral and 'holistic' perspective. The jurisdiction of Van Panchayats in the State and their control over forests is tied up to the extent of forest land that is made available to them and the institutions' control over forest and forest land has historically been a function of land settlement policies and laws. In fact land settlements and the rights of the people coming out of it has had a direct impact on the shaping of both the forest and the water rights. For example, the apprehension that conversion of 'Benap' (unmeasured) land to 'Nap'(measured) under the *Nayabad and Wasteland Grant Rules* would automatically lead to destruction of any rights of the government over water was a big reason behind the assertion of the property rights of State over water through the *Kumaoan Water Rules 1917*. Besides, even an existing law

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The Kumaon and Garhwal Water (Collection Retention and Distribution) Act 1975 regulating water and water resources has specific provisions that trees and vegetation in the catchment of the resources needs to be protected and that such areas could be demarcated as Protected Areas. More specifically, the idea of treating water together with land as demonstrated by *The Uttaranchal Bhoomi Evam Jal Sanrakshan Adhiniyam, 1963* suggests that the thinking of integrated water resource management existed even over four decades ago. At another level integration of conservation with livelihood needs are also suggested by more recent Rules like *The Uttaranchal Panchayati Forest Rules, 2001* which say that the Micro Plans prepared the Van Panchayats would give “due consideration to the requirement of the right holders and ensuring the ecological balance of the region.”² Remarkably, if one is just searching for the right words an ‘integral’ perspective to Resource Management can be seen in the Registers available with the Van Panchayats. The Resolutions passed in the recent past by these local forest management bodies has formulations in Hindi like “*Sookh Rahe Jal Sroto Ka Chayan aur Nirman*’(Identification and Rejuvenation of Drying Water Sources) and ‘*Bhoomi Sankrakshan Kriya or Vikas*’ (Land Protection and Development).

If local forest bodies can resolve like above, and undertake to do what it is resolves, then perhaps they don’t need to be educated on ‘Integrated Resource Management’. However, one feels that the reality is that most of such Resolutions, much like the Rules in the law books opening space for integrated management, remain on paper. A clear example can be that while we generally understand that ‘Protected Areas’ exist under The Wildlife (Protection) Act 1972 chances are that few know that there could be ‘Protected Areas’ under *The Kumaon and Garhwal Water (Collection Retention and Distribution) Act 1975*. This is simply because provisions like the one above have not been utilized and have remained on paper. The fact that even existing policy and legal opportunities for integrated resource management are not being utilized is one major problem area and this is true as much in the State of Uttaranchal as it is true for the rest of the country.

The Policy - Law Disconnect on Integrated Natural Resource Management

The second major problem area is that there is a law and policy disconnect on integrated resource management today. Policy documents and discourses in official reports speaking of the need and significance of integrated resource management are increasing by the day.³ It is true that Indian government policies have recently emphasized integrated resource management. In fact the Union Ministry of Water Resources had recently constituted a National Commission on Integrated Water Resources Management and a series of sub-groups constituted under the Commission examined plans and policies on all aspects of water management before giving final recommendations in their report in 1999. That Report has been followed by a series of other reports and vision documents emphasizing Integrated Water Resource Management. At another level and another context, the National Forest Policy 1988 is often used as a benchmark or an example of

² Rule 12 of The Uttaranchal Panchayati Forest Rules, 2001

³ See for example *Vision For Integrated Water Resources Development and Management*, Ministry of Water Resources, New Delhi, 2003. See also Theme Paper on *Integrated Water Resources Development and Management*, Indian Water Resources Society, 2002.

reconciling ecological values with livelihood needs. The Forest Policy indeed has laudable objectives but close to two decades since it came into being it has failed to inspire Amendments in law to reflect its spirit in the legal regime on forests be it the Indian Forest Act 1927, the Forest Conservation Act 1980, or the Wild Life (Protection) Act 1972. This policy-law disconnect is obvious in other areas too. This has meant that the hope the policy talk generates - that of legal and institutional reforms being underway to reflect the policy directions- is often not realized. Interactions with officials in Dehradun during the course of the study suggested that inter -departmental cooperation for integrated water and forest management is still difficult to achieve and unless there is a strong and decisive political will it is difficult to bring people from different departments on the same table. In this context the fact that unenforceable policy visions and statements abound since they do not get reflected in the enforceable legal regime present a worrying trend.

In the backdrop of the general points made above on Integrated Resource Management and Law in Uttaranchal a few conceptual assertions separately on *Integrated Water Resource Management* and *Integrated Forest Management* in Uttaranchal are presented below.

Integrated Water Resource Management and Draft State Water Policy

One of the objectives in the draft water policy for Uttaranchal lays down that the management of water resource in the State shall be done in an integrated and holistic manner rather than being managed in a compartmentalized approach. It is important for the policy to guide lawmakers on what this “integrated and holistic approach” involves to. As there has been little guidance in the Policy on this aspect a few words on what constitutes Integrated Water Resource Management are in order here.

Integrated Water Resource Management may be understood in three ways. Firstly, it may imply systematic consideration of the various dimensions of water, i.e., surface and ground waters in terms of quality and quantity. Secondly, it can mean addressing interactions between water, land and the environment with recognition that changes in any one of the resources may have consequences for the others. Finally, the broadest interpretation of the concept would mean approaching water management with reference to the interrelationship between water and land resources the social and economic development⁴. It is this third approach – which is most liberal and extensive and reconciles economic necessities with ecological imperatives - that has to be kept in mind while addressing the legal and institutional issues associated with Integrated Water Resource Management in the State. The draft policy gives no indication of whether and how this larger approach to integrated water resource management is to be adopted in the State.

Again the draft policy again rightly states that ‘Water resource development and management shall be planned for a hydrological unit as per the principle of integrated watershed management.’ To be sure in an integrated approach to water resource

⁴ For an elaboration of the concepts on Integrated Water Resource Management see *Integrated Water Management: International Experiences and Perspectives* by Mitchell, Bruce. (Ed.)

development, the development of water resources is just one amongst the other multifarious activities that include aspects of soil conservation, irrigation, agriculture, forestry, flood control, horticulture and animal husbandry. The approach of treating all these resources in isolation is discarded for an *integrated* approach, which takes all these resources together with specific geo-physical units of the area represented by well-defined watersheds.⁵ If the draft policy commits itself to this approach it needs to be appreciated. However it remains to be seen how this approach can be implemented and taken to the ground when the existing legal regime is based only on administrative boundaries and just doesn't recognize ecological/hydrological boundaries for water management.

Integrated Forest Management and Some Concerns

The problems relating to conservation and use of forest resources in developing countries like India are of a qualitatively different nature than those of developed countries. A very large number of people live near the forests – dependent on them are among the poorest with forest produce forming life support systems for them. In Uttaranchal whereas only about 10% of the mountain region area is officially under cultivation, the rural population actually uses about 60% of the total area for sustaining local livelihoods. Most of this non-cultivated land falls in 67% of the total area legally notified as forests.⁶ In this context whether the legal regime governing forest preservation and use in the State addresses the demand for forest resources to meet human needs and concern for their sustainability shall explored in some detail later.

It has been suggested above that the forest use question in Uttaranchal is ultimately a forest land use question which in turn is a function of land settlements. The control of reserve forest land, civil and soyam land, and Van Panchayat land has historically been vested with the Forest Department, The Revenue Department and Van Panchayats respectively. There has always been a felt need to streamline different regulations and approaches to forest management under various categories of land vested with different authorities. Experiences from recent history suggest that a comprehensive land use planning and management policy is fundamental to conservation and regeneration of forest areas in the State and these aspects are detailed further in later sections of the report.

Finally, it may also be suggested here that from the standpoint of Integrated Resource Management and especially for the need to reconcile ecological imperatives with human needs and economic demands, a focus while reviewing the forestry legal framework can be on the forest dependent communities living in and around the forests and protected

⁵ Accordingly, the central thrust of the watershed programme is enhancing productivity of land and water resources on the basis of scientifically defined watershed that connotes a geographical unit rather than an economic or administrative unit.

⁶ Ghildyal, M.C and A Banerjee, 1998, *Status of Participatory Management in Uttarkahand Himalayas*, Paper presented at regional workshop on Participatory Forest Management: Implications for Policy and Human Resource Development, Kunming, People's Republic of China.

areas.⁷ A useful classification for understanding the legal forest regime from the standpoint of integrated forest management is to see laws separately as (a) Laws on protection of forest resources, (b) Laws on use of forest resources and (c) Laws on regeneration of forest resources. This approach can help avoid the mistake of seeing the legal frame from a one-dimensional perspective. The above classification will be borne in mind while reviewing the forest laws regime in Uttaranchal.

II. THE UTTARANCHAL STATE WATER LAW REGIME

The National Law and Policy Context on Water

It is important to appreciate the existing and emerging national legal and policy contexts of water rights and management as they directly impact - and are now even shaping - the state legal regime. Accordingly the discussion below on the national context is carried out in four parts.

The Constitutional Mandate on Water Rights

The fundamental right to pollution free water has been judicially evolved and is part of the law of our land for close to two decades now. The higher courts after applying right to water largely for pollution prevention in an urban context for a long time, have lately felt the urge to take it further. Thus, the need for access to clean drinking water is being increasingly seen as a fundamental right. The Allahabad High Court in 1998 ruled that right to get water is part of right to life guaranteed by Article 21 of the constitution, while recognizing that large section of citizens of the city are being deprived of this right. Next year in the context of scarcity of potable water in Guwahati city, the High Court said that water, and clean water is essential for life and attracts provision of Article 21.⁸ . Later the Allahabad Court in separate verdicts in 2000 and 2001 again made clear that as no one can conceive survival without water, citizens are justified in demanding proper water supply and ensuring supply of water is a constitutional mandate.⁹ And again in 2003, the Andhra Pradesh High court reiterated this position saying that right to safe drinking water is a fundamental right and “can not be denied to citizens even on the ground of paucity of funds”¹⁰.

⁷ The officially designated Protected Areas (PAs) include over five hundred national parks and sanctuaries covering close to 5% of the land mass of the country. If the other forest areas are added to this, they cover 1/5th of the country's territorial area.

⁸ The High Court advised the Municipal Corporation in that case that “before making huge projects of hundreds of crores of rupees and approaching different bodies and governments including Japan, France and the World Bank, some genuine efforts should have been made by the government itself or the state government to mitigate the malady”

⁹ For both these verdicts see *Mukul Sharma v. Allahabad Nagar Nigam* (2000) All.LJ 3077 and *Diwan Singh v. SDM* (2000) All. LJ 273

¹⁰ See *Wasim Ahmad Khan v. Governemtn of Andhra Pradesh* 2002 (5) ALT 526 (DB)

However, notwithstanding the growing number of cases establishing the fundamental right, if one has a closer look on these verdicts the fault lines begin to surface. The apparent force of a fundamental right to drinking water to every citizen gets lost somewhere when it comes to operative portions of the pronouncements so much so that it would be safe to say that the Rights regime on Water is generally speaking a Right without Remedies regime.¹¹ Also invariably, in all the verdicts above the argument of paucity of financial resources has substantially curtailed the scope of the right. It is really open to question that when the existence of fundamental right is recognized should arguments based on insufficiency of resources be allowed to dilute it or not.¹² The Right to Water is specifically discussed in the context of the state of Uttaranchal in a later section of the report.

However, right to water needs to be separated from the 'bundle' of water rights. In addition to evolving the right to water, in the face of increasing competition for access to water the development of Water Rights regime has also become important. One of the central conflicts over water resources revolve around the question of the ownership, access and control over water¹³ and this aspect is also dealt in some detail in the specific context of Uttaranchal later. For the present a discussion on water rights in so far as they are crucial to participatory management of water resources is briefly carried out below.

Water Rights for Participatory Management

The evolving water rights regime in the country needs to mature more. First, the fundamental right of access to clean water should lead to necessary changes in various legislations on canals, irrigation supplies, and water management so that they reflect the letter and spirit of the fundamental right. Besides, a comprehensive documentation of all the gamut of water rights, beyond the constitutional right, needs to be carried out at the local level if the judiciary and the legislatures are to eventually recognize that a range of water rights do exist in addition to just a constitutional right to water. Further it is notable that what has been recognised by the higher courts, as a fundamental right is a right to each individual and not to a group. This becomes an important point in the context of the fact that the recent initiative of the government have sought to vest powers to formal and informal village groups and associations,. The water rights regime needs to evolve conditions under which a group entity can become a right holder so that an entity like a legally constituted 'Village Water Supply Committee' can exercise such rights to its advantage. As we shall see later rights have begun to be vested with such associations on

¹¹ The frustration that comes with seeing the right together with its irrelevance in the lives that need them the most has prompted jurists like Chhatrapati Singh in the past to call Article 21 of the Constitution as an instrument of legal escapism, not legal activism.

¹² It is arguable that "The point here is not whether we have the resources to honour a right but whether we can shake the modest resource basket that we have to prioritize funding in areas that are more fundamental to our existence." See Upadhyay Videh, *Right to Live is Non-Negotiable*, Indian Express

¹³ This was one of the conclusion of a recent study in which the author was involved . For details of that study see *Legal Conflicts over Land, Forests and Water in India: A Review of Cases and Concepts*, Aga Khan Foundation, 2001

fulfillment of specific obligations. Apart from developing an understanding on the *external water rights* of the group, which it can use to its advantage against every one outside the group, there is a need for better appreciation for *internal water rights* laying down the right of the group member's viz.a.viz each. A more mature regime on group rights in the water management sector is critical to resolving of existing and potential conflicts surrounding the access and control of water resources. The discussion above needs to be kept in mind while looking into some of the state led initiatives on participatory management in Uttaranchal.

Recent Central Government Initiatives and Implications in Legal Policy

The 73rd Amendment of the Constitution has cast a Constitutional imperative on all the State Governments to come up with appropriate Panchayat Raj Act detailing meaningful democratic devolution of functions, functionaries and funds. Specifically, it empowers States to endow Panchayats with such powers and authority to enable them to function as institution of self-government and goes on to list Water Management, Minor Irrigation and Watershed Development as subjects under the jurisdiction of Panchayats.¹⁴ In pursuance of this mandate the Central government has come up with policy programmes. aimed at empowering Panchayats in water management. Some of these are briefly discussed below.

'Swajaldhara', Haryali and Some legal - Institutional Issues

A recently launched national-level Rural Water Supply scheme, "Swajal Dhara", has been extended to most of the states of the country including the State of Uttaranchal.¹⁵ As opposed to 50:50 (Centre to state) funding historically for such rural water supply projects, the new guidelines for the scheme proposed that the Centre funds projects suggested by Panchayats by 90% and remaining 10% be met by the Panchayat proposing the scheme. The institutional mechanism envisaged by the Scheme has a village level water supply committee as its cornerstone, which generates the demand for a specific water supply scheme and implements it. The legal status of such a village entity including whether it can be seen as a committee of Gram Sabha or Gram Panchayat is a useful area of enquiry. This questions is directly relevant to Uttaranchal as will be shown in a later section. Besides while the technical and administrative clearance of the projects proposed at the village level is to be granted by the Zila Parishad (ZP), here again there is a need to have a close eye on the equation that develops between the President ZP and the CEO. The powers need to be vested with the President ZP, because unlike the CEO who is an official functionary, the President ZP is an elected office, integral to the PRI mechanism and is required under the State laws to "exercise administrative supervision and control over the CEO". The Scheme also needs to think through as to how the existing Water Supply Committee of the ZP can be involved. Apart from the above, the fact that a nationwide scheme empowering Panchayats in water management would have no role assigned for the intermediate tier of PRI – the Panchayat Samitis at the Block level – could be potentially unsustainable in the long run.

¹⁴ See 11th Schedule of the Constitution of India.

¹⁵ This is an outcome of the SWAJAL Programme implemented in Uttarakhand and Bundelkhand with financial support from the World Bank.

Close on the heels of Swajaldhara a new nationwide water shed development programme named 'Haryali'.has also been launched ¹⁶ In light of the fact that the Haryali Guidelines are to be adopted nationwide including the State of Uttaranchal, a few words on the institutional mechanisms that it envisages for watershed management would be in order. The Guidelines issued in 2003 say that the "Projects will be implemented mainly through the Zila Parishad (ZPs)/District Rural Development Agencies (DRDAs). However, wherever it is expedient in the interest of the programme, the Projects can be implemented through any department of the State Government or an autonomous agency of the Central Government/State Government with the approval of the Department of Land Resources, Government of India."¹⁷ At the Village level however, the Gram Panchayats will execute the works under the guidance and control of the Gram Sabha.¹⁸ The Gram panchayat shall carry out the day-to-day activities of the Project and shall maintain a separate account for the Watershed Project and all receipts from the ZP/DRDA will be credited to this account. Further " the Gram Sabha will meet, at least twice a year to approve/improve the water shed development Plan, monitor and review its progress, approve the statement of accounts, form User Groups/Self-help Groups, resolve differences/disputes between different User Groups, Self-help Groups or amongst members of these groups, approve arrangements for collection of Public/Voluntary donations and contributions from the community and individual members, laid down procedures for due operations and maintenance of assets created and approve the activities that can be taken up with the money available in the water shed development Fund." Indeed there is a clear attempt to put all these works under the control of the Gram Sabha.

The above description shows clearly if local self-governance is one of the destinations envisaged by the 73rd Amendment, PRIs have been identified as *the* vehicle to perform the journey towards it and Swajaldhara and Haryali seem to respond to this mandate. However, there are increasingly water and forest users groups that also are being formed nationally. What compounds the problem is the fact that there is now a definite legal mandate emerging for the user groups like the Water Users Association (WUAs) and the Joint Forest Management Committees (JFMCs). If JFMCs are seen as giving effect to JFM, WUAs are operationalising PIM, both which in terms of their essential principles, now command almost universal appeal as national objectives, at least with the policy makers. Close observers especially in the water and forestry sector point out that user organizations may not fit well within the system of local governance and "linking them to Panchayats may undermine their independence and effectiveness."¹⁹ There is also however a growing agreement now that wherever parallel bodies exist they "must be mingled into an organic, symbiotic relationship with the PRI, at the appropriate level." For example, the above position was taken in a Round Table of State Ministers of

¹⁶ Launching the initiative the Prime Minister said that under Water Shed Management, villagers can take up many small works to conserve water for drinking, irrigation, fisheries & afforestation which, to him, would not only add to 'Haryali' to the rural landscape but also create new employment opportunities.

¹⁷ Note here that these new guidelines continue to use the formulation "ZP/DRDAs" even though the continuing support in policy for the DRDA runs counter to the spirit of the 73rd Amendment.

¹⁸ In States where there are Ward Sabhas (Palli Sabhas etc.) and the area to be treated is within that Ward, the Wards Sabha may perform the duties of the Gram Sabha

¹⁹ See Poffenberger, Mark, *Village Voices, Policy Choices*, Oxford University Press, 1996

Panchayati Raj in August 2004 where the Ministers-in-charge of Panchayati Raj and their representatives, agreed to recommend to their respective Governments, for joint acceptance by the Centre and the States this need for parallel bodies to merge into ‘a symbiotic relationship’ with the Panchayats.²⁰ This emerging equation between Panchayats and the Users Groups is useful to keep in mind while evaluating the State legal framework on water and forest management.

Landmarks in State Water Law in pre-Independence Period

The land settlements and the rights of the people coming out it have had a direct impact on the shaping of water rights. The following point illustrates this aspect clearly. Under the *Nayabad and Wasteland Grant Rules* as more and more grants of wastelands were given, the ‘Benap’ land was converted to ‘Nap’ and it was apprehended that this process would automatically lead to destruction of any rights of the government over water. This led the government to affirm its position which they did through the *Kumaoan Water Rules 1917* by laying down that “The beds and water of all rivers and natural streams and all lakes, natural ponds, and other collection of still water within the hill tracts of the Kumaoan division are the property and subject to the control of the state”²¹ These Rules also made clear that no water mill or irrigation channel shall be constructed or worked without the sanction of the collector. Further the Rules said that when the construction and working of a water mill is sanctioned the collector shall assess it for such rent as he may think fit.

The *Kumaoan Water Rules of 1930* modified the 1917 Rules and importantly the first of these Rules laid down that government will have no objection to the construction of new irrigation channels by any landholder but such channels must not reduce or otherwise be injurious to an existing right of the user of water belonging to any other party. Under these rules while all water mills were subject to rent all the ‘*Dharamgharats*’ were to remain free of rent.

It may also be mentioned here that the British government did not develop irrigation systems in the hills of present day Uttaranchal and thus not surprisingly an authoritative report pointed out in 1874 that “there are many parts of the district where land might be irrigated but in consequence of want of unanimity and the inability of anyone to advance the money nothing is done.”²² In fact the development of irrigation was left to the cultivators and not considered a responsibility of the government.²³ This also had obvious implications in the sense that irrigation and individual farmer rights and their formal recognition in the British period were not an area of any concern. On the other hand there arose a need to formally declare the State property right over water and irrigation sources and the Kumaon Water Rules 1917 and the 1930 rules were testimony of that. Surely,

²⁰ See the official website of the Union Ministry of Panchayat Raj for details.

²¹ Note to Rule 1 Kumaoan Water Rules 1917

²² Report of the Settlement of the Kumaoan District, 1874 by J O B Beckett.

²³ See *Dying Wisdom*, Centre for Science and Environment, 1997

developing specific rights of people in a local context is tougher than asserting sweeping rights for the Government across the State.!

The above brief review shows that while there was a definite assertion of state control over water there was no explicit formulation subjecting customary rights to, and by, statutory law. Strangely such an explicit formulation virtually taking out any legal space for customary rights were to come later in Independent India and not in the colonial times and this issue will be addressed in greater detail in the subsequent section.

Landmarks in State Water Law in post-Independence Period

It is important to note that both the 1917 and the 1930 Water Rules did not apply to the drinking water. Following independence the need to provide drinking water to the Uttarakhand hills assumed priority. The enactment of *Kumaoan and Uttarakhand Zamindari Abolition Act 1950* confirmed that ownership of a private well i.e a pond – *naula* or *nauli* vested in the owner of the land in which it was located. Rules framed under the Act established this by giving the right of transfer of the pond to the owner of the land “who will not be liable to be ejected and shall have the right to use the (site of the pond) for any purpose.” This was clear vesting of water rights for the landowners and in respect of water sources and water bodies falling within their lands. The Rules also made clear that “tanks, ponds ferries, water channels belonging to the state shall be managed by the Gram Sabha or any other local authority.” Thus the Act affirmed the ownership of a water source within one’s land and also provided modalities for managing any state owned water channel or pond through local authority.²⁴

On an another plane, and soon after the coming of the Zamindari Abolition Act, in 1954 the undivided state of Uttar Pradesh through a legislation demonstrated and recognized the importance of soil conservation research in order to conserve and improve the resources of the State.²⁵ However, a more comprehensive Act to consolidate the laws relating to conservation and improvement of soil and water resources was enacted only in 1963 and this was *The Uttaranchal Bhoomi Evam Jal Sanrakshan Adhiniyam, 1963*. The amended Act not only provided for soil but also for water conservation. For the purposes of this Act the administrative machinery constituted includes a Bhoomi Evam Jal Sanrakshan Board, the Zila Samiti and also the Bhoomi Sanrakshan Adhikari. On a resolution passed by The Zila Samiti, the Bhoomi Sanrakshan Adhikari is required to prepare a detailed soil and water conservation plan.²⁶ The said plan is required to be approved by the Zila Samiti. In case the authorities (e.g. Collector) are satisfied that for the purposes of executing the plan it is necessary that temporary possession of any land should be taken he may direct the Bhoomi Sanrakshan Adhikari to take temporary possession of such land for a period which should not exceed five years. The Act further prohibits any person to do any act on any land, which is prejudicial to the interest of soil and water conservation. The idea of treating water together with land suggests that the concept of integrated water resource management has been accepted over four decades

²⁴ See *Dying Wisdom*, Centre for Science and Environment, 1997

²⁵ The Uttar Pradesh Soil Conservation Act, 1954

²⁶ As per Section – 9 of the Act.

ago. The implementation of the Act including the existing and potential utilization of the institutional mechanism created under it is an aspect that deserves to be closely examined.

However it was the *Kumaon and Garhwal Water (Collection Retention and Distribution) Act 1975* that sought to redefine the water law framework for the State. The Act was passed to regulate and control in public interest the water resources in the mountain tracts of the Kumaon and Garhwal divisions and for this purpose “empowered the State government to regulate and control, by rules under the Act, the collection, retention and distribution of water and water resources.” While doing so quite astonishingly the Act also declared that “all the existing rights (whether customary or otherwise and whether vested in any individual or in village communities) of use of water, if any in the areas to which this Act extends, shall stand abolished.”²⁷ The validity and the rationale of this particular provision is discussed in detail in a later section.

The Act does have some provisions enabling conservation of water resources too. Thus, for example, it empowers the State government “to demarcate areas for protection of water resources and to declare the same as protected area”²⁸ It then specifically prohibits cutting of “trees, bushes, shrubs, or burn dried grass in any protected area without the permission in writing of the Sub –Divisional Officer.”²⁹ However these provisions has not been of much consequence simply because the Government has failed to demarcate any ‘protected area’ and this in turn has happened because no rules has been no rules made under the Act.

Indeed, despite a specific requirement of regulation of water and water resources by State “by rules under the Act” it is remarkable that no rules have been made under the Act for over three decades now. It is worth noting that the objective of the 1975 Act was to “regulate and control in the public interest the water resources....in order to ensure a rational distribution of water for the purpose of human and animal consumption, irrigation and industrial development”.³⁰ However in the absence of rules and operative provisions under the present Act the “rational distribution” including appropriate, even inter-Sectoral allocation of water that the preamble of the Act suggested is just not possible to achieve. While this has not happened, the Act in the Statute books stands today primarily as the single biggest power statement from the State of who controls the water and the water sources.

The year 1975 also saw the enactment of *The Uttaranchal Water Supply and Sewerage Act, 1975* which was an Act “to provide for the establishment of a corporation, authorities and organizations for the development and regulation of water supply and sewerage services”³¹. Accordingly, the Act provided for the constitution of the Uttaranchal Jal Nigam and then vested wide ranging powers and functions with the

²⁷ Section 3 of the 1975 Act.

²⁸ Section 4(1) (b) of the Act.

²⁹ Section 7 of the Act.

³⁰ As per the Preamble of the Act.

³¹ As per the Preamble of the Act.

Nigam. It also laid down that if local conditions so required the State Government could constitute a Jal Sansthan for any area that required improvement of water supply and sewerage services.³² Under the Act the state government could also give directions to ensure co-ordination between activities of Jal Sansthan with local bodies in the area. The Act also further clarifies that all local bodies shall render all help and assistance and furnish such information to the Jal Nigam or Jal Sansthan as it may require in discharging its functions under the Act.³³ The coordination and cooperation of Jal Nigam with the local bodies envisaged by the 1975 Act opens a legal space that can be usefully exploited for supply of water and for sewage and sewage disposal in a participatory manner.

Emerging Directions in Water Law And Policy

Rural Water Supply under 'Swajal' –Institutional Design, 73rd Amendment Imperative and some Questions

The Government of Uttaranchal began implementing an integrated rural water supply and environmental sanitation project with the World Bank assistance in 857 villages in 12 districts of the State. The project named 'Swajal' ran from 1996 to 2003 in its first phase and aimed at ushering in a *demand driven* and *people-oriented* water management regime. The Project involved a majority of single village schemes with a few joint schemes also taken up under it. It also involved selection of a Support Organization (SO) – an NGO to act as a social intermediary with the community. The SO mobilizes the community to form the Village Water and Sanitation Committee (VWSC) which is a democratically elected and representative village body consisting of seven to twelve members. The implementation phase of the projects is marked by the signing of the Implementation Phase Tripartite Agreement (IPTA) which is an agreement between the Project Monitoring Unit (PMU), SO and the VWSC and sets out the role and responsibilities of each of these parties. The information received from the Project Monitoring Unit (PMU) suggests that such IPTAs were signed in 162 villages in the first phase. The success of Swajal has been followed up with the launch of Swajal –II that aims at scaling up and replicating the initiatives under Swajal across the State. The institutional design under the project has been facilitated and mandated by the 73rd Constitutional Amendment that provides for decentralization and devolution of powers to rural local bodies –the Panchayat Raj Institutions - including on drinking water, health and hygiene in the communities.

In the light of the above mandate there are some significant Government Orders have been passed especially in the last two years detailing the roles and responsibilities of the Panchayati Raj Institutions in water management.

These are discussed below. perhaps two Government Orders passed on two successive days in August 2004 perhaps are the most important in terms of how the Panchayat Raj Institutions (PRIs) are being empowered under the Project. A detailed Government Order first laid down the functions, functionaries and funds available with all the three tiers of

³² See Section 18 of the Act.

³³ Section 35 and Section 93 of the Act.

the Panchayats.³⁴ This is a positive step and in the right direction because not only does the Government Order detail the administrative and executive functions that the Gram Panchayat, Panchayat Samiti and the Zila Panchayat are to perform, but aims at empowering these Panchayat with financial powers and then places the official functionaries of the Peyajal Nigam and the Jal Sansthan within the administrative control of the Panchayats.

However from a policy and legal standpoint there are a few issues that might need to be addressed in near future. We have made the point above in the national context of 'Sawajaldhara' that a nationwide scheme empowering Panchayats in water management have virtually no role assigned for the intermediate tier of PRIs – the Panchayat Samitis at the Block level and this could be potentially destabilizing in the long run. A close look at the Government Order in Uttaranchal also suggests that this continues to be an issue. The Panchayat Samiti under Swajal –II has a Monitoring, Inspection and 'Coordinating' role but it is really the VWSC under the Gram Panchayat that moots the water supply schemes and then the Zila Panchayat which gives the technical and financial clearance which are the at the business end of these Schemes. The transaction of financial resources is also only through them as they only handover the money from the Upper tier to the lower one. Having said that, both the Panchayat Samiti and the Gram Panchayat has been given the significant power of collection of water charges for the beneficiaries under the Government Order. However, this brings us to a larger issue with these Government Orders. The power of not only collecting but determining water charges has been given to the Panchayats through these Government Orders but they would also need Amendments to the existing laws. The elaborate provisions with the Panchayats are part of the Government Order regime but they are still not part of the legal framework. While the existing laws especially the two 1975 laws discussed above vest the State Government with substantive wide ranging powers relating to water management there has not been yet been an Amendment to these laws to reflect the institutional design and mandate of the new initiatives for rural water supply in the State. An Amendment has been adopted to give VWSC a legal status by making them as Sub committees of the Gram Panchayat under Section 29 of the Uttaranchal Panchayat Raj Act 1947. However, this is not enough unless the relevant Amendments are mooted under the specific water laws of the State. The Government Orders then need to be in pursuance of specific provisions in the existing laws. So long as that does not happen it would be fair to say that while the administrative framework has responded to the 73rd Amendment the legal framework has not.

There is one more issue that emerges from the Government Orders under the Swajal initiative. While the VWSC is being given the legal status of a committee of the Gram Panchayat one may also question could they be conceived as sub-committees of the Gram Sabha itself? Note that the Government Order specifically says that User Groups could be constituted under the schemes.³⁵ The need for 'user groups' arise as smaller 'entities' for beneficiaries for smaller schemes could be needed. But one may ask here: For single village schemes – and such schemes are in over whelming majority under 'Swajal'

³⁴ G.O No. 2121/TwenetyNine/04-2/2004 dtd. 17th August 2004.

³⁵ G.O No. 2121/TwenetyNine/04-2/2004.

programme – can't these 'user groups' be Gram Sabha Committees especially when one of the specific functions of the Gram Sabha under the Panchayat Raj Act is "identification of beneficiaries for the implementation of development schemes pertaining to the village."³⁶

Proposed new Ground Water Law and Participatory Management

It may also be noted here that the Government Order of August 18th 2004 specifically mentions that a new legislation on Ground Water Extraction, Control, Regulation and Recharge is on the anvil and should be brought into effect by the end of 2006.³⁷ This is also an important decision in the context of the fact that only few states in India have enacted specific groundwater legislation. This too has been done in restricted areas, for limited purposes and with minimal implementation. It is also clear that most State Ground Water Acts in India tend to include (a) Restriction of the depth of wells / bore wells / tube wells, and (b) Declaration of Ground Water conservation and protection zones, especially around sources of drinking water. The implementation of those provisions including all actions to be taken under these Acts generally rests with the District Collector with no role whatsoever for village or community level institutions.

However, the dominant thinking today is to make water management decentralized and participatory and the commitment of the Uttaranchal Government must be to surely respond to this thinking as far as ground water management is concerned. Perhaps the strongest reflection of this thinking from the Centre has come from a working Group on Legal, Institutional and Financing Aspects constituted by the Union Ministry of Water Resources. Their Report in late 1999 suggested that the best option is to introduce the participatory process in ground water management in which the role of the State could be that of a facilitator and the role of the user organisation/ Panchayats as an implementing and/or regulatory agency. In this context the Working Group specifically suggests that in 'dark' and 'over-exploited areas':

- The Gram Sabha as a whole may decide on ground water management; where villages are large, a Sabha could be formed for smaller areas.
- The use of ground water for irrigation and the sale of ground water should be approved by the village community.
- central and state ground water officials may be required to extend full cooperation, rendering technical service and advice to the village communities.

While firming up the Uttaranchal law on groundwater it is useful to keep the above suggestion especially as they have come from the Union Ministry of Water Resource itself.

Formal Irrigation Associations: Why and in What Form?

Notwithstanding the formal recognition of individual and community irrigators' rights in colonial times as pointed out in the section above, irrigation was mainly undertaken through *guhls* across Uttarakhand. In districts like Dehradun there are canals built by individuals, derived from hill torrents and from perennial streams and rivers. Traditional

³⁶ See Section 11(5)(b) of the Uttaranchal Panchayat Raj Act, 1947.

³⁷ This commitment is laid down in G.O No. 2120/Twenty Nine/04-2(22-Pey) 2004.

systems though not fitting the norms laid down by the State Irrigation Works of today were usually of smaller size with simple design but existed across the state. Thus it is not a surprise that even today out of the total culturable command area in the state as much as 80% is through minor irrigation source such as guhl, hauz, boring and tube wells pumpsets, artisans, hand pumps and diversions and weirs. A draft version of the State Water policy points out that traditional farmer managed irrigation systems numbering about 16000 are predominant in the state. The Minor Irrigation Department in the state also points that even in future there is little scope of major irrigation schemes in the state.³⁸ On the other hand minor irrigation has far greater scope in future in the state.

It was pointed out earlier that even though a major change was introduced in water rights in the 1975 legislation, the users were not affected in a majority of the cases where individual or community irrigation systems were already operative.³⁹ There have been irrigation associations in the form of *Sinchai Samitis* (irrigation committee) traditionally in the state and an example from Ladyura and Bayal Khalsa in Almora district has been suggested as one strong case in point. The water distribution in Ladyura Gram Sabha is carried out by a *Sinchai Samiti* with 10 members. It was registered in 1956. There was a mechanism to resolve disputes under which the irrigation committee members of two Gram Sabhas “sit together to discuss the matter, and try to tighten observance of the day-night water sharing arrangement”. There were also other farmer managed irrigation systems like the ‘*Hara System*’ whereby contour channels were constructed, operated and maintained by the contractors who entered into long term contracts with the farmers to provide irrigation water. More recently there efforts have been made by civil society organizations to create *Sinchai Samitis* to manage and distribute irrigation water amongst the village people. Interactions in the Minor Irrigation department in the state also suggest that systems which are being developed by the department are expected to be handed over to the ‘community organizations’. However, it is critical to ascertain what these organizations are going to be. These could be the village panchayats but historical experience suggests that the Gram Panchayat do not maintain the system and after a few years the system becomes defunct, until a new project is launched and funds obtained once again for renovation.⁴⁰ Irrigators’ associations are really needed to help farmers improve their systems and build capacities for organizing and running these associations. As mentioned above, this has been done in the past by viable *Sinchai Samitis* in the state. An opportunity is there now to get viable ‘farmers organizations’ formally recognized and constituted through a new thinking in the Minor Irrigation Department to involve the *water users* and the farmers in water management. In fact the Department is reporting to the Centre periodically on the progress it is making in promoting ‘Participatory Irrigation Management’ (PIM) in the state. However, there is a need for caution here. While the idea of involving the water users and the farmers themselves in Irrigation Management is right, there is a need to think through the institutional design carefully and take into account the ground realities of the state.

All the states in India that have adopted or are adopting PIM have come up with enabling legislations creating Water Users’ Associations (WUAs). However, these Associations

³⁸ Annual Report of the Minor Irrigation Department, 2004-05.

³⁹ *Dying Wisdom*, Centre for Science and Environment, 1997

⁴⁰ Thus is a point also made by Pande UC in *Dying Wisdom*, Centre for Science and Environment, 1997.

are formed typically around the State Government created Canal Systems across the state with the territorial jurisdiction of each of these WUAs being generally over thousand hectares. As opposed to this the situation in Uttarakhand suggests that the minor irrigation systems around which the Irrigation Associations could be formed would be for smaller areas and generally could fall within one Panchayat area. Thus Irrigation Associations could be formally constituted as committees of the Panchayat. If that is to be done one natural question arises: could there be then one water committee for drinking water and Irrigation within a Panchayat? One should think in terms of one entity because as these entities gets formed or exist at the village level one can see an obvious overlap of membership where the same persons in a village could be part of more than one entity. An emerging institutional regime at the village level with overlapping jurisdictions is bound to be a critical concern for all those having a stake in integrated natural resource management in Uttarakhand. For all these reasons even as the draft Water Policy commits the State to form Water Users Association there is a need to imaginatively think about the institutional design and the legal Status in the specific context of the State and not just replicate the model from other States.

The Draft State Water Policy: Some Fundamental Assertions Critically Examined

No State water policy that has been finalized as yet, but a policy is on the anvil and the draft version of it was made available to the Consultant. The draft policy contents deserve a close look as it sheds critical light on the way some of the issues are being thought about in the official circles. At first glance the draft bundles together a lot of high sounding principles but some of these could also be seen critically as general and vague formulations. Some fundamental assertions in the draft policy are critically examined below.

Water as a Basic Human Right: Its meaning for 4734 'Bastis'!

A vision statement in the draft policy declares that “Water is a basic human right. All individuals need to have access to water for attaining sustainable health and hygiene with ever improving quality of life.” While this could be seen as a generally held axiom, the assertion does not mean much if the State government does not commit itself decisively to making access to a minimum amount of water an integral part of the basic right. There are good reasons why the state government needs to have a more decisive approach.

The right to drinking water in India clearly suffers from the widespread phenomena of ‘low quality production (and overproduction) of human rights’.⁴¹ Let us ask ourselves: can the right to water meet the three conditions for a human right to be fundamental, universal and clearly specifiable? While the basic need for, and hence right to, water is *universally* accepted as *fundamental*, it really fails miserably to meet the test of specificity. It is simply because, to use the words of David Beetham, it has not been possible to specify a level below which the right to water can be said to be denied.

⁴¹ A phrase used by eminent jurist Upendra Baxi in *Future of Human Rights*, Oxford University Press, 2002.

All socio-economic rights which are subject to a regime of ‘progressive realization’ (as for example expressed recently in a Gauhati High Court’s direction of “improving the situation of water supply in phases”) can only be effective if minimum core obligation and standards are built in to them. Thus it is time to recognize that a certain quantity of water (Litres per capita daily-lpcd) is a most basic human need and should be seen as part of the fundamental right to water. Indeed the exercise of specifying what should be the minimum amount that should suffice for drinking water has been going on for a number of years now. For example, the Rajiv Gandhi National Drinking Water Mission was set up under the Ministry of Rural Areas and Employment way back in 1986 to provide safe drinking water to the ‘problem villages’ and to the rural population at the rate of 40 lpcd in the country. The point is that if these minimum requirements are not met, as indeed is the case in many parts of the state today, who should be held responsible? If this most fundamental need is not addressed, can it be enforced? The answer can be yes only if a minimum quantum of ‘lpcd’ is seen and understood as part of the fundamental right to drinking water.

It may be worth noting here that the latest Annual report of the Peyajal Vibhag of the Uttaranchal Government concedes that there are as many as 4734 ‘Bastis’ habitations that are still uncovered i.e where drinking water has not been supplied.⁴² People in these 4734 ‘Bastis’ are citizens of country and they have a fundamental right to safe drinking water! The State government needs to confront head on what the fundamental right means for these people.

Raising the Ownership Question: Need and Validity

The draft State Water Policy also declares that “The ownership of water does not vest in an individual but in the State.” Both the validity and the use of such declarations in policy statements can be seriously questioned. Water is a common good and thus the word ‘ownership’ with the word ‘water’ just does not go together. A little explanation is in order here.

Traditionally water has been a resource with free access and the concept of property rights over it has not been developed. However with the increasing scarcity of water the need for a regulatory framework for the management of this resource was rightly felt. The crucial point to understand is that such a regulatory framework is easily built on the grant of user rights to the people over water and to the State enabling it ‘to regulate water and water sources in public interest’ as indeed the Kumaon and Garhwal Water (Collection Retention and Distribution) Act 1975 sought to do. But such a power of the State arises not because it owns water but because it holds the water and water sources in ‘public trust’. It is useful to know here that the Supreme Court of India also adopted the ‘Public Trust doctrine’ in relation to natural resources through a landmark verdict in 1997.⁴³

⁴² Karyapoorti Digdarshika, 2004-2005, Peyjal Vibhag, Uttaranchal Government.

⁴³ See *MC Mehta v. Kamal Nath* (1997) 1 SCC 388

Even in colonial times legislations like the North India Canal and Drainage Act 1873 and the Bombay Irrigation Act, *without talking about ownership*, asserted right of state to use and control water. It was clear then also that that the Government had the power to regulate, in public interest, the collection, retention and distribution of water of rivers and streams flowing in natural channels or in manually constructed works, provided that they do not thereby inflict injury on any other riparian owners and diminish the supply that they have traditionally utilized. Clearly the power of government for water management was contingent upon the fact that the traditional supplies of water should not be diminished. This duty of the state has since ‘*co-relatively*’ acquired the shape of a categorical fundamental right of every person against it today. This has been made possible by a very activist interpretation of the Constitution of India by the Supreme Court and the High Courts in the last two decades.

Given the fact that a well defined user rights regime is needed more than claims over ownership and given the fact that the ownership question invariably polarizes the state and the civil society, ownership rights over water are best not claimed either by the state or by any individual. In this context it is especially notable that the only place where the draft policy talks about ownership of water apart from the State ownership is ‘for private and community bodies...for attracting private investment’. Note the full formulation in the draft policy: “The government may confer water rights on private and community bodies to provide secure, defensible and enforceable ownership/usufructory rights to ground water and surface water for attracting private investment.”

Traditional Water Resources, the Customary Rights Question and the Arbitrary provision in the 1975 Act

The draft State Water Policy also asserts that “priority shall be given to identification and rejuvenation of traditional water resources like Naula, Dhara, Guls, Ponds, etc.”

Interactions with the Uttaranchal Jal Sansthan revealed that the Sansthan has mooted a statewide scheme for rejuvenation of these traditional water resources. It is also envisaged that under the Scheme the identification of these sources would be done through the Gram Sabha with the technical support of the district officials and the Gram Vikas department. Post rehabilitation recording of detailed descriptions of these sources would be done by, and will be available with, the Gram Sabha. It is believed that the National Rural Employment Guarantee Act 2006 could be utilised for mustering financial and labour resources to execute these Schemes. It may be suggested here that the state government can also submit proposals in this regard for financial resources from the centre under a new scheme launched in 2005 namely, “National Project for Repair, Renovation and Restoration of Water Bodies Directly Linked to Agriculture.” The scheme has been prepared to take up pilot projects in states for implementation by state governments for which the funds will be released by state. Criteria and issues to be considered by the State for accessing resources under the Scheme can be seen in Guidelines that have been finalized by the centre last year.⁴⁴

⁴⁴ See Guidelines on National Project for Repair, Renovation and Restoration of Water Bodies Directly Linked to Agriculture, Ministry of Water Resources, Government of India, April 2005.

However if the government is really serious on reviving traditional water bodies, it can not continue to work under a legal regime that fails to recognize customary water rights that were prevalent around the traditional water bodies. In fact the Kumaon and Garhwal Water (Collection, Retention and Distribution) Act 1975 has a drastic provision saying that “*On and from fifteenth day of July, 1975, all the existing rights (whether customary or otherwise and whether vested in any individual or in village communities) of use of water, if any in the areas to which this Act extends, shall stand abolished.*”⁴⁵ The very next section of the Act then empowers the State Government to regulate and control water and water resources and then more as a sop than anything else adds that while exercising its powers the State Government will “*give preference to the persons or village communities whose rights in respect of water has been abolished*” under the previous section.⁴⁶ It would be interesting to see whether the State Government has really accorded any preference to ‘*people with abolished rights*’ or not. In any event the two sections under the Act provide a classic example of how a right can be easily converted into a concession under the discretion of the State government. It may also be added here that the Section abolishing all existing rights as of a specified date is arbitrary, draconian and deserves to be taken off the statute books.

There are very good reasons in water jurisprudence that would suggest why the section is bad in law. Even over a century and quarter ago The Indian Easements Act 1882 legitimized customary rights of the people, and provided two rules for their recognition: by long use or prescription (Section 15) and by local customs. (Section 18).⁴⁷ But these rights are subject to the overriding provision of “any right of the Government to regulate the collection, retention and distribution of the water of rivers and streams flowing in natural channels, and of natural lakes and ponds, or of the water flowing, collected retained or distributed in or by any channel.”⁴⁸ Nevertheless the laws subsequent to the Easement Act slowly shifted emphasis on people’s water resources from being natural rights to proprietary or usufruct rights. While this has been a process that has been going on at one level nationally and for large part at subtle levels and indirect ways, Section 3 of the Kumaon and Garhwal Water (Collection, Retention and Distribution) Act 1975 is

⁴⁵ Section 3 of the 1975 Act.

⁴⁶ Section 4 of the 1975 Act.

⁴⁷ While laying down the exclusive right of the owner of an immovable property to enjoy his property, the Act explains through illustration (j) appended to Section 7 that this would include :

The right of every owner of land abutting on a natural stream, lake or pond to use and consume its water for drinking, household purpose and watering its cattle and sheep; and the right of every such owner to use and consume the water for irrigating such land, and for the purpose of any manufactory situate thereon , provided that he does not thereby cause material injury to other like owners.

⁴⁸ One of the first cases that examined these provisions was *Fischer Vs. Secretary of State*, which discussed the rights of the Government over natural sources of waters against those of the riparian owners. The court ruled that the Government had the power to regulate, in public interest, the collection, retention and distribution of water of rivers and streams flowing in natural channels or in manually constructed works, provided that they do not thereby inflict injury on any other riparian owners and diminish the supply that they have traditionally utilised.

breath-takingly brazen and explicit in carrying forward this process in Uttaranchal. The fact that no rules have been made under the Act explains that the operative regime coming out of the principle laid down by the Act is not in place. That would also suggest that the conflict (coming out of abolition of existing rights) that exists in the law books has not yet been reflected on the ground. That also partly explains why an unprecedented and sweeping provision has not been tested in the higher courts. But new policy directions suggest that an Amendment needs to be mooted to repeal the provision forthwith. Indeed the new and emerging policy vision of the State suggests that there would be an effort to revive traditional water resources. Such a revival deserves an enabling legal frame not a hindering one.

Water Conflicts Resolution Mechanism

The draft State Water Policy also says that for resolution of water conflicts which are likely to increase in future a conflict resolution mechanism shall be created at the district state level. It further says that all the departments concerned directly or indirectly with water, and representatives of Panchayat Raj Institutions will be part of the District Conflict Resolution Mechanism. Further an Appellate authority to the decisions for the District Forum will be created at the level of the State Government. It also makes clear that the purpose of the Water Conflict Resolution Forum is to seek amicable resolution of conflicts and obviate the need for conflicting interest groups to go to courts. The mechanism proposed provokes a series of issues. Conflict resolution mechanisms are provided under each of the separate existing laws. If the idea is to cut through the provisions in these laws and provide overarching conflict resolution bodies at the district and state levels, Amendments will be needed in the existing laws. Without appropriate legal back up it is difficult to visualize how these conflict resolving bodies can be established. Besides, there could also be other options. There could be separate Nyaya Panchayats for resolving these issues.⁴⁹ Other states in India are thinking of setting up Jal Lok Adalats using the mechanism of 'Lok Adalats' for resolving water conflicts. In any event the subject of devising appropriate conflict resolution mechanisms needs to be carefully thought out before accepting one model over every thing else.

III. THE UTTARANCHAL STATE FOREST LAW REGIME

The National Law and Policy Context on Forest

Although there have been policy announcements in pre-independent India⁵⁰ the development of Forest Policy in the post Independence period is crucial to understanding the present thinking on bio-diversity management. There have been three forest policy

⁴⁹ As suggested in 'Uttarakhand Lok Jal Niti Ka Masauda'

⁵⁰ See Forest Policy 1894

announcements in independent India; the Forest Policy of 1952; the policy pronouncement by the National Commission on Agriculture, 1976 (NCA) and the 1988 Forest Policy.

The National Forest Policy, 1988

However, the Forest Policy of 1988 (NFP) was a total paradigm shift vis-à-vis the earlier two policies. Unlike, the ‘use – oriented’ earlier policies, the present policy gives major emphasis to the ecological roles of forests, and envisages that the rights and concessions from forests are to be primarily for *bona-fide* use of communities living within and around the forest areas, especially tribals. Such communities are required to be motivated to protect and develop such forests from which they derive their benefits⁴⁴The NFP 1988 also stipulates that the rights and concessions relating to forest produce of tribal community and other poor living within and near forests must be fully protected. The domestic requirements of wood-fuel, fodder, minor forest produce and construction timber should be the first charge on forest produce. It is envisaged under the Policy that these and substitute materials shall be made available through appropriate means.⁴⁵ In the field of domestic energy, fuel wood needs to be substituted as far as practicable with alternative sources like biogas, solar energy, LPG, etc^{51,46} The NFP 1988 further stipulates that any diversion of forest land should be subject to most careful scrutiny by specialists and must take into consideration the social and environmental costs.

The shift in approach made by the Forest Policy is not just important by itself. Its value also lies in the example it sets because of the pro-people philosophy embodied in it. In many ways it is a landmark document. The Forest Policy can therefore also be used as a benchmark or an example of reconciling ecological values with basic human needs.

The Forestry Legal Regime: A Framework for Analysis

The Forest Policy indeed has laudable objectives, but close to two decades since it has come into being it has failed to inspire Amendments in law to reflect its spirit in the legal regime on forests, be it the Indian Forest Act 1927, the Forest Conservation Act 1980, or the Wild Life (Protection) Act 1972.

As suggested earlier in the report a useful classification while reviewing the forest legal regime is to see it in three parts as (a) Laws on protection of forest resources, (b) Laws on use of forest resources and (c) Laws on regeneration of forest resources. If the central laws are to be put into this frame the Wild Life (Protection) Act 1972, the Forest Conservation Act 1980 and The Biological Diversity Act 2002 could be put in the category (a) of Laws on protection of forest resources. Under this category itself one could put the conservation strategy of creating Biosphere Reserves (BRs) under the aegis of UNESCO. At present there are seven BRs nationally including Nanda Devi in Uttarakhand, although none of them is officially registered with UNESCO. It is pertinent to mention that Biosphere Reserves are not statutorily created and are administrative categories rather than legally protected zones. The BRs were set up

⁵¹ Section 4.3.5, Forest Policy

primarily for conserving and developing a knowledge base about the biodiversity of a region “with the emphasis that humans were an integral part of the ecosystem and the local communities should be involved actively in conservation programs”. As opposed to category (a) the Indian Forest Act 1927 could be seen as a law regulating use of forest resources. Finally, the laws on regeneration of forest resources (more precisely policies in this case) could encompass strategies such as Joint Forest Management and Ecodevelopment. As suggested earlier in the report the above approach of classifying laws can help avoid the mistake of seeing the legal frame from a one-dimensional perspective and is thus kept in mind while reviewing the forest legal regime in Uttaranchal.

Customary Forest Rights as Function of ‘Shifting’ Forest Lands

Ramachandra Guha has rightly pointed out that only through a close historical understanding of forest policy and law we might be in a position to ‘modify the theories based on the ideological presuppositions of colonial policy’. A brief look at the forest law and policy through the history of Uttarakhand can be therefore illuminating.

An 1824 description of the Uttar Pradesh Himalayan foothills forests shows the concern for forests degradation even that time: *Great devastations are generally made in these woods....unless some precautions are taken, the inhabited parts of Kumaon [Kumaon] will soon be wretchedly bare of wood.*⁵²

Such concerns were getting confirmed by sporadic observation of that time suggesting that excessive firewood removal for local use, lopping of trees for fodder, and overgrazing were already well entrenched activities even in the nineteenth century.⁵³ These conservation concerns and activities perceived to be against them are put in perspective with the realization that in protected or second class forests the forest resource exploitation was critical and here ‘local subsistence was a high priority’ In such areas there were detailed regulations unlike the Reserve Forest – “*regulations which villagers could tolerate as far as they could, evade wherever the risk was not too high and rebel against when survival seemed at stake.*”⁵⁴

⁵² Reginald Heber, *Narrative of a Journey through the Upper Provinces of India, from Calcutta to Bombay, 1824-25* as quoted by Flint EP in *Nature and the Orient: The Environmental History of South and South East Asia*, OUP, 1998.

⁵³ Voelcker, *Report on Improvement of Indian Agriculture*; W. Dudgeon ‘A Contribution to the Ecology of the Upper Gangetic Plain’, *Journal of the Indian Botanical Society*, 1 (1920), 296-324

⁵⁴ Tucker Richard, *Non-Timber Forest Products Policy in the Western Himalayas under British Rule* in *Nature and the Orient: The Environmental History of South and South East Asia*, OUP, 1998.

**PROGRESSIVE DIMINUTION OF VILLAGE RIGHTS IN THE FORESTS OF KUMAON IN
FOUR DISTINCT PHASES IN HISTORY**

Guha identifies four distinct phases representing the progressive diminution of village rights in the forests of Kumaon. These include-

(i) Between 1815 and 1878 when the state concentrated on the submontane Sal forests of the Bhabhar, while the forests of Kumaon proper were left untouched. The forest, around Naini Tal were demarcated in the 1850s and those around Ranikhet and Almora in 1873 and 1875 respectively.

(ii) Between 1878 and 1893 when the forests were notified as reserved under the 1878 Act and several tracts in Almora and Garhwal districts were declared reserved or protected forests.

(iii) On 17 October 1893 all waste land not forming part of the measured area of villages i.e, all unmeasured land or of forests earlier reserved were declared to be the District Protected Forests under the Indian Forest Act 1878 although the necessary inquiry (vide Section 28) had not been made. On October 04, 1894 eight type of trees including deodar, chir and sal were reserved. Rules were then framed for regulating the lopping of trees for fuel and fodder and claims for timber and trade by villagers in any form of forest produce was prohibited. On 5 April 1903 the Kumaon District Protected Forests were divided into two classes (a) Closed Civil Forests which the state considered necessary for reproduction of protection and (b) Open Civil Forests, where villagers could exercise their rights subject to the rules prescribed in 1894.

(iv) All these cumulative incursions culminated in 1911 with the decision to carve extensive reserves out of the District Protected Forests. Forest settlements set up in the three districts between 1911 and 1917 resulted in the constitution of almost 3000 sq.km of Reserve Forest in the Kumaon division. Elaborate rules were framed for the exercise of rights specifying the number of cattle to be grazed and amount of timber and fuel wood allotted to each right holder. Villagers had to indent in advance for timber for construction of houses and for agricultural implements which could be supplied by the Divisional Forest Officer (DFO) from a notified list of species.

Source: Ramachandra Guha, Colonialism and Conflict in the Himalayan Forest, in Social Ecology, OIP 1998

The above Box suggests that through the four phases above the customary rights of the people were substantially eroded. A few more words on how this happened historically may be necessary here. In 1823 the colonial regime undertook the first land revenue settlement. This recorded customary village boundaries categorizing the land within them as cultivated '*naap*' (measured) and uncultivated '*benaap*' (unmeasured) lands. The '*Sal Assi*' boundaries in the erstwhile Kumaon, and unrecorded traditional boundaries in Tehri Garhwal, continued to be the basis of community forest management and inter-village boundary disputes over rights in the commons.⁵⁵ As pointed out in the Box above, in 1893 all un-measured waste lands in Kumaon were declared *District Protected Forests* under the control of the District Commissioners. This legally classified all village common lands as 'forests' irrespective of whether they had tree cover or not and converted them into state property. From 1910-17, the colonial government attempted to

⁵⁵ See Nanda N, 1999, *Forest for Whom? Destruction and Restoration in the UP Himalayas*, Har Anand Publications, New Delhi. The revenue settlement year of 1823 is the 80th year to the Hindu Calendar, hence the term *Sal Assi* which literally means 'Eighty year'.

tighten its control over forest resources by notifying over 7500 square kilometers of the commons as Reserve Forests. Following these sweeping declarations, ‘rebellions and incendiarism’ ensued, and this led to 4460 square kilometers being transferred back to the civil administration from the forest department. However, rights in these Class I reserves were given to “all *bonafide* residents of Kumaon” thereby converting common property resources defined by *sal assi* village boundaries into open access areas. Provision for Van Panchayats to exercise community control over legally constituted village forests demarcated from within the class I reserves and civil forests were made. The State however consolidated its control over the commercially valuable class II reserves. Through these processes by the early 20th century the uncultivated commons had been divided into three categories of forests: commercially valuable class II Reserves under the forest department and commercially less valuable class I reserves and *civil/soyam* forests under civil administration⁵⁶ The points made above are briefly summarized in the table below:

1823:	First land settlement, divided land into Nap and Benap- Sal Assi boundaries – comm. forest management over benap lands.
1893:	All benap lands converted to District Protected Forest under the District Commissioner.
1910:17	Attempt to covert 7500 km ² of village commons into RF –order reversed over 4460 km ² – over remaining 3000 km ² (Class I Reserves) rights for all bonafide kumaon residents
1931:	Forest Council Rules led to formation of Van Panchayats – manage village forests created out of Class I Reserves.+Civil forests.
1976:	New Forest Council Rules- restricted authority, autonomy and entitlements of Van Panchayats. New Van Panchayats could be formed only when Village boundaries-excluded class I Reserve Forest. Leading to degradation of Reserve Forests near villages.

The Forest Council Rules 1931 and 1976

Perhaps the most important instrument that the colonial administrators used to shape relations between the forest and the local people of Uttarakhand was the ***Forest Council Rules of 1931***. The provincial administration of the United Provinces issued these rules on the basis of the recommendations of the ‘*Kumaon Forest Grievance Committee*’ with the firm support of the revenue department. Forest Department officials came to accept these rules as a reasonable step only after some initial opposition, although the rules did give them an important advisory and supervisory role.⁵⁷ The Forest Council Rules 1931 contained provisions relating to formation of Van Panchayats, defined the limits within which the Van Panchyats were to govern forests including the relationship of Van Panchayats to provincial government and the powers that the Van Panchayats could exercise over the members and forests. Most importantly it enabled the village people to seek demarcation of specific forest areas for re-establishing management of forest communally even though it also has been seen restrictively forcing a remark that Van

⁵⁶ The Consultant derives this understanding from a very useful paper by Madhu Sarin. See Sarin Madhu, *From Right Holders to Beneficiaries: Community Forest Management, Van Panchayats and Village Forest Joint Management in Uttarakhand.*, 2001.

⁵⁷ Aggarwal Arun, *Environmentality: Technologies of Government and the Making of Subjects*, Oxford University Press 2006.

Panchayats “came into operation only after they were sanctioned individually for each village by the Divisional Commissioner who sat at Nainital”⁵⁸

The State government modified the Forest Council Rules comprehensively in 1976 aiming to regulate the internal functioning of the Council more strictly. *The Panchayat Forest Rules 1976* were seen as substantially cutting into Van Panchayats ‘authority, autonomy and entitlements’. A recent study rightly points out that three aspects of the 1976 Rules are worth emphasizing. First, the Revenue department exercised dominant control over the formation of the Van Panchayats and the term of office of the Panchayats governing committee. Secondly, the authority of the Van Panchayats was tightly circumscribed especially where potential conflicts between interests of the village people and that of the state interest existed. Finally, the forest department retained its commercial interest in the land that came under the Panchayats jurisdiction.⁵⁹ Significantly, the Rules restricted the area eligible for new Van Panchayat formation to that falling within the new village boundaries drawn under the revenue settlement of the early 1960s instead of the *sal assi* boundaries. As they excluded class –I reserve forest from village boundaries, this amounted to a steep reduction in the forest area available for Van Panchayat control. While the villagers continued to depend on these areas, they no longer permitted to manage them. This is a major reason for the degraded state of Reserved Forests near villages.⁶⁰

There were other process including nationalization of forest produce and the role of the higher courts impacting legal policy on forest amongst others that was playing a larger role in influencing both forest conservation and forest based livelihoods. A perceptive and succinct remark captures these processes: “The Van Panchayats have been divested of direct control over their own substantially reduced income with major restrictions on forest, particularly timber use. The Forest Conservation Act, the felling ban, monopoly control of the forest corporation on resin and even salvage timber, and controls over NTFP marketing has drastically reduced the livelihood and employment benefits from village forests.”⁶¹ Indeed it is in the backdrop of this not-so-happy recent history that there have a series of some more recent developments which are fraught with far reaching implications as far as the Van Panchayats and the forest of Uttarkhand are is concerned. These developments are discussed below.

⁵⁸ Aggarwal, Chetan, *Boundary and Property Rights in Uttarkahand Forests*, Wasteland News, New Delhi, Feb-April 1996

⁵⁹ See Aggarwal Arun, *Environmentality: Technologies of Government and the Making of Subjects*, Oxford University Press 2006.

⁶⁰ Saxena, N.C 1995, *Towards Sustainable Forestry in the U.P Hills*, CSD-LBS, Mussorie as quoted by Sarin, 2001, *Supra*.

⁶¹ Sarin Madhu, *From Right Holders to Beneficiaries: Community Forest Management, Van Panchayats and Village Forest Joint Management in Uttarakhand.*, 2001.

A New Era for Van Panchayats

Rapid formation of Van Panchayats

There has been a sudden spurt in recent times in the creation of Van Panchayats under the direction of Revenue Department. One study points out that the recent increase in the demarcation of remaining civil/soyam lands as village forest is evident from the data available from Nainital District. At the time of Independence the district had only 61 Van Panchayats. By 1995 another 138 had been constituted. By December 1999 Nainital technically became the first district in the country in which all its 495 villages, with at least some civil land had a legally demarcated forest. Astonishingly the area of these village forests in 148 (30%) villages is 10 hectares or less, and in 13 cases less than 1 ha!⁶² The fast rising numbers suggest that creation of the Van Panchayats is not through a demand driven process but a supply driven one and their reducing sizes puts a big question mark on their sustainability. An empirical study on this phenomenon can throw light on the impact of this trend on both conservation of forest and needs of the locals.

Introduction of Village Forest Joint Management Rules 1997

At one level the introduction of Joint Forest Management Rules can be seen as one empowering the Forest Department to help it regain technical and managerial authority that it had lost to the Revenue department eight decades ago. At another level it has enabled the Department to be the dominant partner (the other being the Van Panchayat) in the management of the Van Panchayat lands. The Rules made under Section 28 and Section 76 of the Indian Forest Act 1927 – by doing so the erstwhile Uttar Pradesh became one of the first States to provide a legal basis to the JFM scheme - provided that a Village Forest shall be managed jointly by a Village Forest Committee and nominated officers of the Forest Department on specific terms and conditions (specified in a format appended to the Rules). This Joint Management of Village Forests was “subject to the supervision, direction, control and concurrence of the Divisional Forest Officer.” The VJFM Rules 1997 use the generic term ‘village committee’ both for the Village Forest Committee to be constituted under the Panchayat Raj Act and the Van Panchayats and this has led to an increasing trend where Van Panchayat participating in JFM were being referred to as Village Forest Committees.

Main elements of the 1997 Rules:

- These rules for JFM in the state of U.P. provide for three tiered JFM committees for conservation and protection of forests. These include the committees at the village level, range level and divisional level. The scope of the Rules excludes the Panchayati Forest.
- The Range Committee for village forests in each range was to consist of a significant number of representatives from the Kshetra and the Gram Panchayat

⁶² Sarin Madhu, *From Right Holders to Beneficiaries: Community Forest Management, Van Panchayats and Village Forest Joint Management in Uttarakhand.*, 2001.

- with the Pramukh of the concerned Kshetra Panchayats as the ex-officio chairman. The Committee isto ensure that the Village Committees were discharging their duties and exercising their powers ‘properly, equitably and justly.’
- The management of village forests would be jointly done by village forest committees and nominated officers of the Forest Departments.⁶³ The rules also provide for a Panchayati forest to be governed under the JFM rules if the forest Panchayat so decides.
 - The village committee is required to prepare microplans, annual implementation plans, prevent destruction of trees, ensure that no encroachment takes place and further ensure the preservation of wildlife among other things.
 - The power vested with the village committee is that of a forest officer.
 - The funds are required to be arranged by the village committee from government and non-government organizations including contributions from the village community. However, the control over the same is in the hands of the DFO who releases funds in accordance with the order of the government.
 - The benefits accruing from the sale of forest produce, fees and permits etc. are fifty percent subject to a maximum of Rs. fifty thousand a year, after deducting the cost of investment.

State Forest Policy 2001

A new State forest policy was declared in 2001. The Policy gives primacy to the environmental stability and social balance while it puts economic benefits from the forest in a second category. It also says that extraction of Non Timber Forest Produces (NTFPs) shall be in accordance with sustainable practices while taking care that it allows the NTFPs to regenerate. Further, the task of extraction of forest produce has been vested with the Forest development Corporation (Van Vikas Nigam) The Policy also asserts that accountability for effective forest management rests with the forest department especially when, according to the Policy, Van Panchayats have been given powers and financial autonomy to manage local forest affairs. Other features of the policy include - prudent use of fuel wood and other forest produces, reconciling the need for forest resources with their availability and participation of the local people especially women in forest management. The policy statements in the State forest policy again reflect the spirit of integrated forest management. However, whether the laws respond to this spirit is another question and these state laws are discussed in some detail below.

The Uttarakhand Panchayati Forest Rules 2001

While the 1997 Rules did not repeal the Panchayat Forest Rules of 1976, *The Panchayat Forest Rules 2001* superseded the 1976 Rules. These Rules were made under section 28(2) and under Section 76 of the Indian Forest Act. They make clear that all the existing Panchayati Forests/Forest Panchayat constituted under the earlier Kumaon Panchayat

⁶³ Village forest committee means a committee constituted under sub-section (6) of section 29 of the Uttarakhand Panchayati Raj Act, 1947 for the purpose of these Rules;

Forests Rules or constituted under the Tehri Garhwal Rajya Prant Panchayat Vidhan No. 1, 1938 shall be deemed to have been duly constituted under these new 2001 Rules. In this light the provisions of the Rules become extremely important.

As per the Rules, 'Forest Panchayat' means a committee constituted for the management of a Panchayati Forest and "includes the Forest Panchayats existing on the date of the commencement of these rules, under any rules."⁶⁴ By this provision all the Van Panchayats under all lands in the State are brought within the purview of these Rules. 'Panchayati Forest' includes any area constituted as such and "shall have the same meaning as has been assigned to the phrase 'village forest' " under Section 28 of the Indian Forest Act. This is important because the 'village forest' under the Indian Forest Act as applied to Uttaranchal may be not only constituted out of reserve forest but also out of protected forest or any forest, which belongs to government forest.⁶⁵ Under the Rules 'Right Holder' means a 'Bhumidhar' or a lessee or a person who has been given rights to graze cattle, collect fodder, fuel and timber under Panchayati Forest. Such landless persons who have been residing in that village for long where Panchayat Van has been constituted are also included as 'Rightholders' under the Rules.

As opposed to one -third of the residents proposing the formation of the Van Panchayats, under the 1976 Rules, under the new Rules one –fifth of the adult residents of the village can propose the formation of the Van Panchayat or this could also be done "on a resolution passed in the meeting of the concerned Kshetra Panchayat".⁶⁶ This for the first time opens a possibility where even if the local residents do not propose a Van Panchayat, such a proposal could be pushed through the Kshetra Panchayat. The implications of this provision would need to be ascertained. It is also noteworthy that prior to demarcation of a Panchayati Forest the Rules prescribe a procedure for inviting claims and objections by those affected by the proposed demarcation. The claims and objections are to be settled by a Sub-Divisional Magistrate and the Rules add that "he may accept the applications (with claims and objections) in whole or in part and may prescribe conditions on which the same shall be accepted."⁶⁷ Although the Rules do not say so, that it may be important for the Sub-Divisional Magistrate to keep in mind that he cannot insist on written applications only. It has been judicially held while adjudicating the scope of Section 7 of the Indian Forest Act pertaining to an inquiry by a Forest Settlement Officer that "The claims of the innocent and the illiterate person cannot be dismissed on the account of objections being not in writing."⁶⁸

It has also been made clear that only "Rights of users" would be granted in Panchayati Forests constituted from reserved forests and that such rights would extend to "only those persons whose rights are recorded in the list of rights within whose settlement boundary

⁶⁴ Rule 2(f) of The Uttaranchal Panchayati Forest Rules, 2001

⁶⁵ It is pertinent to mention that the scope of forming the village forests has been broadened under this Section (section 28) - through an Amendment in 1960 to the Indian Forest Act - by including all the categories of forests under the said Act.

⁶⁶ Rule 3 of The Uttaranchal Panchayati Forest Rules, 2001

⁶⁷ Rule 5 of The Uttaranchal Panchayati Forest Rules, 2001

⁶⁸ See U.P Legal Aid and Advise Board v. State of U.P, 1992 FLT 192

such forests lie.” Considering the fact that the Settlement process had its own inadequacies and limitations historically in the State, the provision under the rules could significantly curtail the number of people who could avail of the already limited rights of user. The positive aspect here is that the Rules add that “These rights will also be exercised by landless people who have been residing in that village for long, where Panchayati Forests have been constituted.”

Unlike the flexible provision on the number of members in the Van Panchayats under the 1931 and 1976 Rules, the 2001 Rules mandate that the Forest Panchayat shall consist of nine members. Out of these four seats including one for the members of SC or ST shall be reserved for women. A strong representation to the women in Van Panchayats can be said to be one of the high points of the 2001 Rules.

The Planning Provisions under the Rules are especially notable. The Divisional Forest Officer (DFO) shall prepare a ‘Composite Management Plan’ for all Panchayati Forest under his control for a period of five years and such a plan would be approved by the Conservator of Forests. The forest Panchayat is then obligated to prepare a Micro Plan for five years on the basis of guiding principles in the Composite Management Plan with the assistance of the Ranger of the forest department. The Micro Plan “would be placed before the general meeting of all the right holders for its approval before it is finally sanctioned by the DFO. The Rules add here that the Micro Plan would give “due consideration to the requirements of the right holders and ensuring the ecological balance of the region.”⁶⁹ In addition to the Plans above, the Van Panchayat is mandated under the Rules to prepare an Annual Implementation Plan with the help of a forester especially deputed by the State Government (‘Panchayat Van Vid’) on the basis of sanctioned Micro Plan and then get it approved by the Forest Ranger.⁷⁰ It is obvious from the provisions above that the Forest department has tightened its control for planning in a Van Panchayat at all levels. Besides the Rules provide for establishing a Panchayat Forest Fund for every Forest Panchayat which shall be managed by it under the over all control of the DFO. In addition the Forest Panchayat under the Rules are required to submit an Annual Report to the DFO on the work done the previous financial year who then will send a compiled report of his region to the Collector.⁷¹

Van Panchayats’ Legal Status: Gram Panchayat Committee OR Village Forest Management Committee?

One over all effect of the 2001 Rules is the fact that as opposed to an active involvement of the Gram Sabha or Gram Panchayat, the establishment, planning, supervision and control of the Van Panchayat is all through the Forest department. As opposed to the 1997 Rules that aimed at establishing a ‘village committee,’ and therein included the Village Forest Committee as a committee of the Gram Panchayat under the United Provinces Panchayat Raj Act and also sought to introduce Panchayats control through

⁶⁹ Rule 12 of The Uttaranchal Panchayati Forest Rules, 2001

⁷⁰ Rule 13 of The Uttaranchal Panchayati Forest Rules, 2001

⁷¹ Rule 24 of The Uttaranchal Panchayati Forest Rules, 2001

Range Committees, no such effort has been made under The Uttaranchal Panchayati Forest Rules, 2001.

Whether Van Panchayats should be seen as Committees of the Panchayat however is a larger question. Studies in the past have also pointed out that Van Panchayats were created as a subset of the Gram Panchayat wherein the Gram Panchayat responsibility was to look after the overall welfare and development of the village and the Van Panchayats role was to manage and protect of the forest. On this basis it is suggested that Van Panchayats can be given the status of subcommittees of Gram Panchayats so that it can also access funds available with the Panchayats for developmental activities under different schemes. In fact a close look at the United Provinces Panchayat Raj Act can show that the number of activities under specified subjects that are vested in the Gram Panchayat are related to the activities envisaged and performed by the Van Panchayats. These include –Wasteland development, fodder development and prevention of encroachment, land development and soil conservation, plantation in common lands promotion of minor forest produce development of fodder and fuel species, production of pasture lands, amongst others. It thus seems natural to say that Van Panchayats could be seen as separate subcommittee of the Gram Panchayat giving it this legal status under Section 29(6) of the United Provinces Panchayat Raj Act, 1947. That is precisely how village Committee is defined under the 1997 Joint Forest Management Rules. However, as pointed out above The Uttaranchal Panchayati Forest Rules, 2001 doesn't seem to agree to this approach.

A brief look at history may throw more pointers on the question above. The specific recommendation of the Kumaon Grievance Committee in the 1920s regarding the formation of Van Panchayats is notable:

“Future management of forests when excluded- these forests should as soon as possible be managed by a panchayat composed either of panches from adjacent villages or if each village so choose, a separate village panchayat can manage for itself that portion of the blocks as defined by the old revenue boundaries to be within its area of use”

Clearly for such forests the role of the Panchayats has been envisaged all along right from the formation under the 1930 Rules. However if these bodies are to be constituted in the forestlands then their institutional basis under the 1947 Act could be problematic. Indeed the possibility of that was left open by the Grievance Committee itself when it said:

“If in the future government is satisfied that the management of excluded forests have been successful it is suggested that government might consider the ultimate handing over of their Class one and Class II Reserves to district board for management”

In fact more recently people like Dr. R.S Tolia have pointed out that there is an endless potential for the extension of the Van Panchayats into the entire Class I Reserve , called Civil and Soyam forests under the control of the revenue department and of the forest department. Van Panchayats, if we need can be created out of the Class II reserves as well as out of old reserves. In fact one of the major recommendations of the Grievance Committee which created them was to extend the experiment to all Class II Reserves if it

proves successful. If Van Panchayats are to extend to all categories of forest its status under the United Provinces Panchayat Raj Act could pose problems as the Gram Panchayats jurisdiction extends generally only to the revenue lands. If this aspect is borne in mind then the fact that these Van Panchayats are constituted under Section 28 of the Indian Forest Act and are seen as committees managing 'village forest' under that provision seem to giving them a surer legal footing. Having said that what complicates the situation is that the Van Panchayats search for greater autonomy is better done through their status as committees of Gram Panchayats given the fact that existing Panchayat Forest Rules while giving the Van Panchayats legal status under the Indian Forest Act also ensures that they are in the overall control of the Forest Department. Thus whether Van Panchayats should be seen as Committees of the Panchayat or should remain Village Forest Management Committee with a legal status under the Indian Forest Act is clearly not an easy question but it is surely a question that needs maximum debate by all those concerned with forest management in the state.

Van Panchayats and their Many Problems: A Brief Review

Van Panchayats have limited territorial jurisdiction in the State. Out of 67% of area classified as forests, about 69% in reserve forests is exclusively under forest department's jurisdiction. The rest comprising of civil/soyam and Van Panchayats forests, respectively fall under the revenue department and Van Panchayat jurisdiction with the Forest Department responsible for technical supervision. While the forest in Garhwal is slightly more than double that in Kumaon, the area managed by Van Panchayats in Kumaon is nearly 80% more than that in Garhwal. Also notably, while some districts like Almora and Pithoragrh have about 30% of the total forest area under the territorial jurisdiction of the Van Panchayats, overall they cover only about one-eighth of the total forest area of the state.

Apart from limited territorial jurisdiction there are a host of other administrative and legal problems with the Van Panchayats today. The reasons behind the Van Panchayats not functioning efficiently include the fact that they have not been exactly in the priority list of the administration. It has been pointed out that the only fulltime officer for Van Panchayat is the Inspector who has to administer an area beyond his capacity. For example, in Almora district there are four Van Panchayat Inspectors who have to look after 1801 Van Panchayats.⁷² Other report point out that in Nainital district there are 211 Van Panchayats and only one inspector. Besides, the Van Panchayat Inspectors are appointed from among the revenue officials like Kanungos and Patwaris who are trained in revenue administration which has a different culture and working environment and they have no training in forestry. In addition, historically there has been dual control over Van Panchayats of the revenue and forest department with all administrative powers being vested in the revenue department and technical powers with the Forest department.

⁷² "I am supposed to inspect more than 200 Van Panchayats a year and traveling more than twenty days each month, how can anyone do that I ask you" – VP inspector , Almora 1993, as quoted in Aggarwal Arun, *Environmentality: Technologies of Government and the Making of Subjects*, Oxford University Press 2006.

Encroachments has also been a serious issue and it has been pointed out that in certain parts more than 25% of the Van Panchayat land has been infringed upon. Even while several cases of encroachments are pending in the Courts, including a few pending there for over ten years, the fact that Van Panchayats have been unable to evict these encroachments has meant that their authority has been progressively eroded. It has also been suggested in a study that the Van Panchayats are shackled by unnecessary restrictions whether it is local sale of surplus forest produce, commercial sale of trees, appointment of staff as per Rule 17 of the Panchayat Forest Rules 1976. They need greater autonomy for efficient functioning. There is also the recurrent issue of transparency in administration of their funds. Many of these Van Panchayats do not know how much money has been credited in their account. It has been pointed out that in Almora district alone the total capital account of the Van Panchayat was at one point of time 1.66 crores but they were hardly permitted withdrawal of Rs 3 lakh annually and this suggests that 'It is imperative that there should be transparency regarding funds and the Van Panchayats should be vested with sufficient authority for utilizing their money for community projects.'

Review of other Forest Laws

Indian Forest Act, 1927 as applicable to Uttaranchal

Section –3 of the Indian Forest Act in its application in the state of Utaranchal provides that the state government may constitute any forest land and waste land *or any other lands excluding the land comprised in any holding or grove or in any village abadi* and over which government has proprietary rights, as 'reserved forest' in the state.⁷³

Section 5 of the Indian Forest Act as amended by the state of U.P. prohibits (i) acquisition of any right, (ii) fresh clearing for cultivation or any other purpose, (iii) felling, girdling, burning, etc. of trees and (iv) removing any forest and trees, in or over the land comprised in the notification issued under Section 4 except in accordance with such rules as may be made by the State Government. Thus, it has been held by the Allahabad High Court that the Gaon Sabha cannot permit a person to cut and remove trees from the plots in question unless a rule is made by the State Government authorizing the Gram Sabha to do so⁷⁴.

An *Indian Forest (Uttaranchal Amendment) Act* was passed in 2001 that introduced some significant new features in the Indian Forest Act, 1927 as applicable to the state of Uttaranchal. The 2001 Amendment Act defined NTFP as the 'forest produce' under the 1927 Act. It made certain grave forest Offences non bail-able while making clear that forest offences committed under the Act could lead to imprisonment and/or imposition of fines. Besides, legal rights are accorded to the Divisional Forest Officer to deal with forest offences. The Forest Department has been strengthened through the Amendment

⁷³ The expression 'holding' has the same meaning as under the U.P. Tendency Act, 1939 and the expression 'Village Abadi' has the same meaning as assigned under the U.P. Village Abadi Act, 1947.

⁷⁴ See Layakat Ali Khan v. State of U.P. 1990 F.L.T. 215 (All.)

Act giving the powers to use force to remove encroachments and to remove things and crops forcibly, if needed. The Amendment Act thus has given strong powers to the Forest Department for policing the forests.

Forests and Need for Land Use Policy

The control of reserve forest land, civil and soyam land, and Van Panchayat land has historically been vested with the U.P. Forest Department, Revenue Department and Van Panchayats respectively. There is a need to streamline different regulations and approaches to forest management under various categories of land vested with different authorities. A fundamental pre-requisite of a proper land use policy is the classification of land into different categories based on the use to which such land can be put and the specific socio-economic priorities of the State. It is only pursuant to such a policy perspective, that laws concerning irrigation, mining, agriculture, industries and urban zoning have to strictly restrict the various activities to specified land areas⁷⁵. A nexus between inefficient land use and forest management can be seen in the over-use, and abuse of the provision that enables the State Government to denotify reserve forests and protected areas under the Indian Forest Act and the Wildlife Protection Act. The laying down of railway lines and irrigation canal or an ammunition dump within and along the corridor of Rajaji National Park in the past has been a mute testimony of this fact. Similarly, persistent violation of the Forest Conservation Act is also ultimately a manifestation of ineffective land use regulations. For example, historically the illegal mining and limestone quarrying in the ecologically sensitive Doon Valley has primarily been a result of the failure of the Mussorie- Dehradun Development Authority to come up with well thought out land use policy for the region.⁷⁶ These experiences are clear pointers to the fact that a comprehensive land use planning and management policy is fundamental to conservation and regeneration of forest areas in the State.

A notable aspect of the India Forest Act as amended and applied to Uttaranchal is the fact that unlike in other States 'Village Forest' may be constituted not only out of reserve forest but also out of protected forest or any forest, which belongs to government forest. The scope of forming the village forests has been broadened under this section (section 28) by including all the categories of forests under the said Act and this has far reaching implications as suggested above in an earlier section.

Several rules have been enacted under the Indian Forest Act as applied to Uttaranchal and their other laws that impact both use and conservation of forest in the State. Some of these are briefly described below.

⁷⁵ See in that context Biodiversity, Wildlife and Protected Area Management in India: A People Centered Approach by Nandan Nelivigi, Journal of the I.L.I., April-June 1995.

⁷⁶ This is clearly borne out of the facts of a litigation in the Supreme Court titled Supreme Court Monitoring Committee V. Mussorie-Dehradun Development Authority and reported in (1997) Supreme Court Cases, 605 and subsequent orders.

Specific laws and Rules on 'Use' of forest Produce and Forest Management

The State of undivided Uttar Pradesh had earmarked two major forest products and then enacted laws to create a monopoly in the trade of purchase and distribution of “Tendu Patta” and “Resin”. This has been done in the interest of ‘public good’. Without going into the merits of the above-mentioned public good, let us briefly see the essential features of the two laws ‘nationalizing’ forest produce.

The Uttaranchal Tendu Patta (Vyapar Viniyaman) Adhiniyam, 1972 restricts the sale, purchase and transport of Tendu leaves to the state government or an authorised officer of the state government or an agent in respect of the unit in which the leaves have grown. The Act also defines the grower of Tendu leaves and includes the state government in respect of the RF and the PF, the Gaon Sabha and tenure holder on whose land such leaves are grown. The State Government is empowered to fix the price of the Tendu leaves and also register growers and manufacturers of bidis and exporter of Tendu leaves. The rules under the above Act prescribes the manner in which agents are appointed, the manner in which Tendu leaves would be collected, the authority who would issue transport permit etc.

The Uttaranchal Resin and Other Forest Produce (Regulation of Trade) Act, 1976: It was observed that the tapping and sale of Resin in the reserved, civil Panchayati and soyam forest was done by the Forest Department while the tapping and sale of Resin in the forests under local bodies, cantonments and ‘nap’ lands was being done by the owners. Due to excessive demand Resin was being black marketed and thus resulting in revenue loses to the State. This necessitated the enactment of the above Act. The regulation of Resin was done in a similar manner in which Tendu leaves are regulated. Detailed penal provisions have been provided for offences by persons or companies. The rules under this Act provide for the application for issue of permit, tapping of trees, registration of tappers etc. and the officers authorized to implement the Act. Studies have shown that the enactment above has had a substantial impact in terms of cutting down of revenues of the Van Panchayats.

Regulation of Medicinal Plants in Uttaranchal with special reference to Cooperative trading in Medicinal Plants:

For better regulation of conservation and use of medicinal plants the Centre had recently sought to administer the *Van Vanaspati Yojana* under the JFM Programme and had laid down that they have to be managed by registered societies headed by Divisional Forest Officers. In the context of the State of U.P there is a need to examine closely the aspect of management of medicinal plants and herbs under registered societies.

A careful examination of the Cooperatives technique is essential because of the fact that in Uttarakhand historically, collection and procurement of some of the Non Timber Forest Products (NTFP) has been undertaken through the cooperatives. Bhesaj Sangh comprising of village level cooperative societies in Uttarakhand has been responsible for regulation of collection and sale of medicinal plants besides the forest department. Since

1986, the State Government authorized Kumaon Mandal Vikas Nigam (KMVN), Nainital, also for the collection and sale of medicinal plants besides the Bhesaj Sangh.⁷⁷ This ended Bhesaj Sangh's monopoly in the Kumaon region though it continues to operate exclusively in the Garhwal region.⁷⁸

The Bhesaj Sangh/KMVN was basically created to save the collectors from the exploitation of the middlemen and traders and to ensure attractive prices to the collectors by the cooperatives. A look at how the Sangh operates is instructive. The Bhesaj Sangh appoints agents for organising collection and sale of medicinal plants. The agent deposits a certain amount as 'security money' and engages the locals for collection. After completion of the collection process the Sangh inspects the harvested material and issues the 'transit pass', which is also counter signed by the concerned DFO. However, some recent reports have highlighted that the Bhesaj Sangh has no check on what is collected and also the fact that money paid to the gatherers by the cooperative is much lower than the rate offered by the private traders.⁷⁹ The system of auctioning the rights for NTFPs and medicinal plants with very little control over the cooperative/Agents is liable to result in unsustainable harvesting practices. These are pointers to the fact that functional autonomy of the cooperatives has to go hand in hand with their responsibilities and accountability particularly towards the forest department.

On the 14th of August 2001 the Uttarnchal Medicinal Plants Board was constituted which has been mandated to carry out inter-departmental coordination at the state level for better regulation and management of medicinal plants. New Rules for regulation of medicinal plants in the State has also been passed and for collection, marketing and sale of medicinal plants three 'Mandis' have been set up in Rishikesh, Ramanagar and Tanakpur in the state. In addition to the above, several rules have been enacted under the Indian Forest Act as applied to Uttaranchal These ranges from rules regarding protected forests, transit of timber and other forest produce, collection and disposal of drift and stranded wood and timber to regulation and establishment of saw mills and grazing rules. The above said rules primarily regulate the use of the forest and focus more on 'production forestry' and they are briefly discussed below.

The U.P. Transit of Timber & Other Forest Produce Rules, 1978 under the Indian Forest Act regulates the transit of timber and other forest produce within the state of U.P. by means of passes. An official of the forest department or any person duly authorised under the above said rules may issue a transit pass (TP) for the movement of forest produce to any route and in accordance with any conditions that may be imposed. However, any forest produce that is removed for *bonafide* consumption in exercise of a privilege granted by the state or through a right recognised under this Act does not require a transit pass. Similarly no T.P. is required for a contracting agency which is managed by the forest department as such movement is regulated by the contractual agreement deed

⁷⁷ As per NotificationNo. 542/28-1.86(6)/83 dtd.17.3.86.

⁷⁸ See Jain, Ashok K; 2000. Regulation of Collection, Transit and Trade of Medicinal Plants and Other Non-Timber Forest Produce in India-A Compendium.TRAFFIC –India/WWF-India, New Delhi.

⁷⁹ For example a detailed critical comment on the cooperative is available in *Down To Earth*, January 31,2001, Centre of Science and Environment.

between the contractor and forest department. Further, the state government may exempt certain forest produce from the operation of these rules (Rule 3) It is pertinent to mention that the exemption of TP to contractors as well as to such forest produce not covered under the rules have resulted in several illicit timber and forest produce being transported⁸⁰. Unclear guidelines and non-uniform transit rules (in other state) have resulted in immense loss of biodiversity to the state.

Rule 26 clearly prohibits the conversion of timber within the precincts of reserved, protected or unclassified forests under the forest department. It specifically prohibits the establishment of saw pit within sixteen kilometers of the limits of the forest mentioned above.⁸¹ A transit pass is also required for transit of timber and other forest produce by water. (Rule 26). Under Section 45 of The Indian Forest Act, 1927 certain kinds of timber which includes drift and standard timber are deemed to be the property of the Government and may be collected in such areas as directed by the State Government. The State of Uttaranchal has a special provision, under Chapter-VIII-A of the amended Indian Forest Act that regulates the manufacture of preparation of articles based on forest produce.

The Uttaranchal Establishment & Regulation of Saw Mills Rules, 1978 enacted under the above said Chapter-VIII-A provides that no person would establish or operate any saw mill or machinery for converting or cutting timber and wood without a license from the concerned Divisional Forest Officer (Rule 3). It has been clarified by the Allahabad High Court that these Rules in no way interferes with the freedom of trade or business as contemplated under Article 19(1) of the Constitution.⁸² Details of application, conditions of grant of licenses, the validity, renewal revocation etc. are provided under the above said rules.

Specific laws and Rules on Conservation of Forest Resources

The Uttaranchal Wildlife Protection Rules, 1974 made under Section 64 of The Wild Life (Protection) Act 1972 constitutes the State Wildlife Advisory Board and also prescribes the manner in which license or hunting etc. may be given. While the 1991 amendment to the 1972 Act prohibited hunting altogether provisions relating to game hunting in the above said rules exist and they would be 'infructuous' and against the Act. The rules also prescribe the form of the proclamation notification, form of claim, entry fees etc. They also provide for the form of declaration of animal article the manner in which certificate of ownership may be granted and the process of taxidermy may be carried out. It is recommended that the Wildlife Protection Rules be amended in accordance with the 1991 amendment and more recently 2003 Amendment of the 1972 Act. This will help in clarifying the doubts that may persist regarding game hunting, trade and commerce in

⁸⁰ In respect of resin and resin products, the provisions of the Uttar Pradesh Resin and Other Forest Produce (Regulation of Trade) Act, 1976 and the rules framed thereunder, shall apply.

⁸¹ It is also provided that no machinery or plant shall be erected without the previous sanction, in writing, of a forest officer who is not of a lower rank than a Divisional Forest Officer. These rules however, do not apply to ordinary operations of domestic carpentry or other similar work done on a small scale.

⁸² Shri Baleshwar Singh and ors vs State of U.P and ors 1991 All. L.J. 529

scheduled animals and other restrictions imposed by the Amended Act in its application to Uttaranchal.

Uttaranchal Private Forests Act, 1948 was enacted immediately after independence to check the denudation of tree growth in ‘private forests’ due to extensive over felling as a consequence of high prices of fuel.⁸³ The preamble to the Act provides that this Act was enacted for the conservation of private forests and groves and for the afforestation of wastelands in the State. The objectives of the Act include conservation of forest for providing fuel and fodder resources, prevention of erosion, the interest of future generations and also the need to develop private forests as national assets. The Act says that the owner of such Private Forests has the option to manage such forest in accordance with a working plan approved by a Forest Officer and in case the owner fails or refuses to manage the forest in accordance with the working plan the management of forest would be done by the Forest Officer in lieu of profits for such management. The above Act also provides for plantation of trees on wasteland. Although, the Act aims at conserving private forest which is not the property of the government the forest department can exercise control over such forest by means of approved working plans as well as restriction on rights to cut, collect or remove timber even for domestic or agricultural needs. The Act further, provides that in the public interest any private area or forest whether notified or not may be vested in the state government after following a due procedure (Section 16 to 25). The extinguishment of right of a right holder is determined after consideration of the fact that the grant of those rights would affect the preservation of the forest (Section 24). The Uttaranchal Private Forests Act is quite unique as compared to other forest-related laws as it defines the right holder as well as wasteland and working plan.⁸⁴ *The U.P. Private Forest Rules, 1950* enacted under the U.P. Private Forest Act, prescribes a manner in which notified area of private forest may be managed. It also seeks to regulate the quantity of timber of forest produce that may be permitted to be taken by right holders. For the purposes of these rules the conservator of forest may declare the notified area or forest or any part thereof as “plantation” or “regeneration area” or “fodder reserves”. In such areas as described above all the rights of the landlord and the right holder is suspended for the period of closure.⁸⁵

U.P. Protected Forest Rules, 1960 is applicable to areas that are declared as protected forest in the State and under it no person is allowed to cut, saw any tree or forest produce in protected forests. Further, the clearing and breaking of land for cultivation for creating

⁸³ Private Forests exclude (a) any land which is vested in the government.
 (b) any land in respect of which notifications and orders issued under the Indian Forests Act, 1927, are in force.
 (c) any land where the Kumaun Forest Panchayat Rules apply.

⁸⁴ “Right-holder” means a person who has by custom a right of cutting or collecting in, and removing from, a forest timber, fuel and other forest produce for his domestic and agricultural purposes and of pasturing his cattle in a forest.

“wasteland” means any land which the State Government may, by notification, declare to be a wasteland for the purposes of this Act; “working plan” means a written scheme for the management and treatment of a forest

⁸⁵ The period of closure can not exceed twenty years at a time.

any temporary or permanent structure, cutting of grass pasturing of cattle or burning of any fire near such protected forests is prohibited unless the Forest Officer permits to do so. Further, there are rules that regulate the regulation and collection of drift and stranded wood.

The Rules Regulating the Grazing of Cattle in the Land Management Circle, Uttar Pradesh 1954: The State of U.P. had also formulated rules regulating the grazing of cattle in the reserved forest of the land management circle and to other forests or lands that Conservator of Forest, Land Management Circle, Uttar Pradesh may direct⁸⁶. Under the said Grazing rules areas that are open to grazing have been earmarked. Further, grazing is prohibited in certain blocks in accordance with the working plans of the said area. The rules also provide for grant of permit for grass cutting and the conditions on felling or lopping of any tree. The concerned DFO is required to publish at his office the area open to grazing in each block, according to the schemes of grazing regulation for the time being in force.

The Uttaranchal Forest Corporation Act, 1974 provides of the establishment of a corporation for better preservation, supervision and development of forest including better exploitation of forest produce within the State . The Corporation has a Chairman and five other members appointed by the Government besides at most three other non-official members having experience in preservation and development of forest⁸⁷. The Act empowers the Corporation to undertake removal and disposal of trees and exploitation of forest resources entrusted to it by the State Government. The Corporation is also required to prepare projects and under take research programs in forestry within the State. Notably, the Corporation can also incur expenditure and grant loans and advances to any person performing the functions of the Corporation under this Act⁸⁸. Much like the provisions for Jal Nigam, every local body is mandated by the Act to extend full support to the Corporation furnishing all the requisite information including examination of records, maps, plans and other documents relevant to the local area⁸⁹.

The Uttaranchal Protection of Trees in Rural and Hill Areas Act, 1976 provided for the regulation of felling of trees and replanting of trees in rural and hill areas of the State of undivided Uttar Pradesh. However it is made clear that the Act does not apply to the trees situated in Reserve and Protected Forests and in forests or forest land in respect of which a notification by the State Government under the Indian Forest Act, 1927. Further, the Act does not apply to trees situated in Urban Areas which means an area included within the limits of a Nagar Mahapalika, Municipal Board, Notified Area Committee, Town Area Committee, Cantonment Board or of a Development Authority. Under the Act every person is prohibited from felling any tree standing on any land whether included in a holding or not except on grant of permission, following an enquiry, by the competent

⁸⁶ For details of this notification on Grazing Rules of Forest Blocks See Forest Department Notification No. 23/XIV dated October 13, 1954.

⁸⁷ For the Establishment, Composition and other aspects of the membership of the Corporation See Section 3-13. of the Act.

⁸⁸ See Section 14-15.

⁸⁹ See Section 27

authority appointed by the State Government under the Act.⁹⁰ Besides, imprisonment of any person felling or removing any tree in contravention of the Act is also provided and the forest officers / police officers (not below the rank of Forest Ranger and Sub-Inspector respectively) have been given powers to arrest offenders without warrant.⁹¹

IV. CONCLUSIONS AND RECOMENDATIONS

In a workshop held at Dehradun to discuss some of the findings of the present paper it was suggested that there was a need to carry out detailed field level investigations and consultations with all stakeholders to arrive at definitive conclusions on the nature and impact of policy and legal regimes in the state. That point is well taken but it does not take away from the critical need for a better appreciation of existing and proposed law and policy instruments. There is need to understand the legal spaces that exists for integrated water and forest management while evaluating the opportunities and constraints that they throw up. The present paper has sought to highlight some of these and the major conclusions and recommendations emerging from this evaluation are presented below:

On Integrated Resource Management and Law in Uttaranchal

- While the legal regime in the State has generally and historically not responded to the integrated resource management there are examples from specific State laws and rules opening potential legal opportunities for integrated management.
- The fact that even existing policy and legal spaces for integrated resource management are not getting utilized is one major problem area and this is true as much in the State of Uttaranchal as it is true for the rest of the country. The second major problem area is that there is a law and policy disconnect on integrated resource management today.
- Interactions with officials in Dehradun during the course of the study suggested that inter -departmental cooperation for integrated water and forest management is still difficult to achieve and unless there is a strong and decisive political will it is difficult to bring people from different departments on the same table. In this context the fact that unenforceable policy visions and statements abound while the

⁹⁰ See Sections 3-5 of the Act. For the procedure to obtain permission to fell or remove trees See Section 6 of the Act. Besides, every person permitted to fell, cut or remove or dispose of any tree is bound by the Act to plant and tend two trees in place of every tree so cut or removed.

⁹¹ See Section 10-15 of the Act. In addition, such Forest Officers/ Police Officers have been empowered to seize- on their reasonable beliefs- the wood and wood products of the trees that have been felled, removed or cut in contravention of the Act.

same doesn't get reflected in enforceable legal regime is an indication of weak governments, unsure of their abilities to mobilize public support.

- The draft State Water Policy gives no indication of whether and how the larger and liberal approach to integrated water resource management - systematic consideration of surface and ground waters both in terms of quality and quantity, addressing interactions between water, land and the environment and reconciling economic necessities with ecological imperatives - is to be adopted in the State.
- The Draft Water Policy commits itself to a 'Watershed approach' and this needs to be appreciated. However, it remains to be seen how this approach can be implemented and taken to the ground when the existing legal regime is based only on administrative boundaries and just does not recognize ecological/hydrological boundaries for water management.
- Land settlements and the rights of the people coming out it have had a direct impact on the shaping of both the forests and water rights. Experiences from recent history suggest that a comprehensive land use planning and management policy is fundamental to conservation and regeneration of forest areas in the State and thus an integrated approach to forest management is a critical need today.

On The National Law and Policy Context on Water

- It is important to appreciate the existing and emerging national legal context of water rights and management as they directly impact - and is now even shaping - the state legal regime.
- The higher courts after applying right to water largely for pollution prevention in an urban context for a long time, have of late established access to clean drinking water as a fundamental right. However, the apparent force of a fundamental right to drinking water to every citizen gets lost somewhere when it comes to operative portions of the pronouncements so much so that it would be safe to say that the Rights to water regime is generally speaking a 'rights without remedies' regime.
- The water rights regime in the country and in Uttaranchal needs to mature more. The fundamental right of access to clean water should lead to necessary changes in various legislations on canals, irrigation supplies, and water management. A comprehensive documentation of all the gamut of water rights, beyond the constitutional right, needs to be carried out and the water rights regime needs to evolve conditions under a group entity can become a right holder.
- While national programme initiatives like Swajaldhara and Haryali seem to respond to the Constitutional mandate of empowering Panchayats in water management there are increasingly water and forest users groups –backed by law - that are also being formed. This emerging equation between Panchayats and the

Users Groups nationally is useful to keep in mind while evaluating the State legal framework on water and forest management.

On The Uttaranchal State Water Law Regime

- The land settlements and the rights of the people coming out of them have had a direct impact inon the shaping forest and water rights
- Irrigation and individual farmer rights and their formal recognition in the British period were not an area of any concern. On the other hand there arose a need to formally declare the State property right over water and irrigation sources through the Kumaon Water Rules 1917 and the 1930 rules.
- Despite the assertion of state control over water there were no explicit formulation subjecting customary rights to, and by, statutory law. Strangely such an explicit formulation virtually taking out any legal space for customary rights came later in Independent India and not in the colonial times.
- The willingness to treat water together with soil conservation, as exemplified by the *The Uttaranchal Bhoomi Evam Jal Sanrakshan Adhiniyam, 1963* suggests that the thinking of integrated water resource management existed at least even over four decades ago. The implementation of the Act including the existing and potential utilization of the institutional mechanism created under it is an aspect that deserves to be closely examined.
- The *Kumaon and Garhwal Water (Collection Retention and Distribution) Act 1975* sought to redefine the water law framework for the State. However, the Act ended up creating a regime more in principle and less in operation. Despite a specific requirement of regulation of water and water resources by State “by rules under the Act” it is remarkable that no rules have been made under the Act for over three decades now. In the absence of rules and operative provisions under the present Act the “rational distribution” including appropriate, even inter-Sectoral allocation of water that the preamble of the Act suggested is just not possible to achieve.
- The coordination and cooperation of Jal Nigam with the local bodies envisaged by the *The Uttaranchal Water Supply and Sewerage Act, 1975* opens a legal space that can be usefully exploited for supply of water and for sewage and sewage disposal in a participatory manner.

On Emerging Directions in Water Law and Policy

- ‘Swajal’ responds well to the Constitutional mandate under the 73rd Amendment and under the Programme there are some significant Government Orders that have been passed especially in the last two years detailing the role and responsibilities of Panchayati Raj Institutions in water management.

- A detailed Government Order has laid down the functions, functionaries and funds available with all the three tiers of the Panchayats. This is a positive step and in the right direction.
- The Panchayat Samiti under Swajal –II has a Monitoring, Inspection and ‘Coordinating’ role but it is the Village Water Supply Committee(VWSC) under the Gram Panchayat that moots the water supply schemes and then the Zila Panchayat which gives the technical and financial clearance which are the at the business end of these Schemes.
- The elaborate provisions with the Panchayats are part of the Government Order regime but they are still not part of the legal framework. While there has been an Amendment mooted to give VWSC a legal status as sub-committees of the Gram Panchayat under the Uttaranchal Panchayat Raj Act 1947, this may not be enough unless the relevant Amendments are mooted under the specific water laws of the State. The Government Orders then need to be in pursuance of specific provisions in the existing laws.
- While the VWSC is being given the legal status of committee of the Gram Panchayat one may also question could they be conceived as sub-committees of the Gram Sabha itself especially for small single village schemes?
- The dominant thinking today is to make ground water management decentralized and participatory and the commitment of the Uttaranchal Government must aim at responding to this thinking through a new legislation on ‘Ground Water Extraction, Control, Regulation and Recharge’ which is on the anvil and could be brought into effect by the end of the year 2006.
- Interactions in the Minor Irrigation department in the State have suggested that Systems which are being developed by the department are expected to be handed over to the ‘community organizations’. While the idea of involving the water users and the farmers themselves in Irrigation Management is right, there is need to think through the institutional design carefully and take into account the ground realities of the State.
- Irrigation Associations could be formally constituted as committees of the Panchayat. If that is to be done one natural question arises: could there be then one water committee for drinking water and Irrigation within a Panchayat? Further still, could there be one ‘Natural Resource Management Committee’ for decentralized management of land, forest and water issues? One should think in terms of one entity because an institutional regime at the village level with overlapping jurisdictions may not be desirable from the perspective of integrated water and forest management.

- Interactions with the Uttaranchal Jal Sansthan revealed that the Sansthan has mooted a statewide scheme for rejuvenation of traditional water structures. While the government is thinking of utilizing the National Rural Employment Guarantee Act for mustering financial and labour resources to execute these Schemes the state government can also submit proposals in this regard for financial resources from the centre under a new scheme launched in 2005 namely, “National Project for Repair, Renovation and Restoration of Water Bodies Directly Linked to Agriculture.”

On Fundamental Assertions of the Draft State Water Policy

- While the draft policy declares that “Water is a basic human right” the assertion would not mean much if the State government does not commit itself decisively to making access to minimum amount of water an integral part of the basic right. It is time to recognize that a certain quantity of water (litres per capita per daily-l/pcd) is a most basic human need and should be seen as part of the fundamental right to water.
- The Peyajal Vibhag of the Uttaranchal Government concedes that there are as many as 4734 ‘Bastis’ that are still uncovered, i.e, where drinking water has not been supplied. People in these 4734 ‘Bastis’ are citizens of country and they have an existing and enforceable fundamental right to safe drinking water! The State government needs to confront head on what the fundamental right means for these people.
- The draft State Water Policy also declares that “The ownership of water does not vest in an individual but in the State.” Both the validity and the use of such declarations in policy statements can be seriously questioned.
- Given the fact that a well defined user rights regime is needed more than claims over ownership and given the fact that the ownership question invariably polarizes the state and the civil society, ownership rights over water are best not claimed either by the state or by any individual. It should be settled that State holds water in trust and as a Trustee.
- The new and emerging policy vision of the State suggests that there would be an effort to revive traditional water resources. Such a revival deserves an enabling legal frame not a hindering one. The provision under Kumaon and Garhwal Water (Collection, Retention and Distribution) Act 1975 saying that “*On and from fifteenth day of July, 1975, all the existing rights (whether customary or otherwise and whether vested in any individual or in village communities) of use of water, if any in the areas to which this Act extends, shall stand abolished.*” is arbitrary, draconian and deserves to be taken off the statute books.
- Without appropriate legal back up it is difficult to visualize how overarching District and State Level Conflict Resolution Forums proposed by the draft water

policy can be established. In any event the subject of devising appropriate conflict resolution mechanisms needs to be carefully thought out before accepting one model over every thing else.

On the National Law and Policy Context on Forest

- The National Forest Policy of 1988 (NFP) was a total paradigm shift vis-à-vis the earlier two national policies. Unlike, the ‘use – oriented’ earlier policies, the present policy gives major emphasis on the ecological roles of forests, and envisages that the rights and concessions from forests are to be primarily for *bona-fide* use of communities living within and around the forest areas.
- A useful classification while understanding the legal regime on forest from the standpoint of integrated forest management is to see laws separately as (a) Laws on protection of forest resources, (b) Laws on use of forest resources and (c) Laws on regeneration of forest resources. This approach can help avoid the mistake of seeing the legal frame from a one-dimensional perspective.

On The State Forest Law Regime and On the New Era for Van Panchayats

- The fast rising numbers suggest that creation of the Van Panchayats is not through a demand driven process but a supply driven one and their reducing sizes puts a big question mark on their sustainability. An empirical study on this phenomenon can throw light on the impact of this trend on both conservation of forest and livelihoods of the locals.
- The introduction of Joint Forest Management Rules have been seen as one empowering the forest department to help it regain technical and managerial authority that it had lost to the Revenue department eight decades ago at one level while at another it has enabled the department to be the dominant partner (the other being the Van Panchayat) in the management of the Van Panchayat lands.
- As per *The Uttaranchal Panchayati Forest Rules, 2001*, ‘Forest Panchayat’ means a committee constituted for the management of a Panchayati Forest and “includes the Forest Panchayats existing on the date of the commencement of these rules, under any rules.” By this provision all the Van Panchayats under all lands in the State are brought within the purview of these Rules. In this light the provisions of the Rules becomes extremely important.
- Under the 2001 Rules one –fifth of the adult residents of the village can propose the formation of the Van Panchayat or this could also be done “on the resolution passed in the meeting of the concerned Kshetra Panchayat”. This for the first time opens a possibility where even if the local residents do not propose a Van Panchayat such proposal could be mooted through the Kshetra Panchayat. The implications of this provision would need to be ascertained.

- It may be important for the Sub-Divisional Magistrate to keep in mind that he cannot insist only on written applications for inviting claims and objections before demarcation of a Panchayati Forest under the 2001 Rules and this has been settled by judicial verdicts.
- Under the 2001 Rules Forest Panchayat shall consist of nine members and out of these four seats including one for the members of SC or ST shall be reserved for women. A strong representation to the women in Van Panchayats can be said to be one of the high points of the 2001 Rules.
- A review of the provisions under the *The Uttaranchal Panchayati Forest Rules, 2001* shows that the Forest department has tightened its control for planning in a Van Panchayat at all levels.
- One over all effect of the 2001 Rules is the fact that as opposed to an active involvement of the Gram Sabha or Gram Panchayat, the establishment, planning, supervision and control of the Van Panchayat is all through the Forest department.
- As opposed to the 1997 Rules that aimed at establishing 'village committee' and therein included Village Forest Committee as a committee of the Gram Panchayat and also sought to introduce Panchayats control through 'Range Committees', no such effort has been made under The Uttaranchal Panchayati Forest Rules, 2001.
- Whether Van Panchayats should be seen as Committees of the Panchayat or should remain Village Forest Management Committee with a legal status under the Indian Forest Act is not an easy question but it is surely a question that needs maximum debate by all those concerned with forest management in the State.
- If Van Panchayats are to extend to all categories of forest its status as Panchayat Committee could pose problems as the Gram Panchayats jurisdiction extends generally only to the revenue lands. In this light the fact that these Van Panchayats are constituted under Section 28 of the Indian Forest Act and are seen as committees managing 'village forest' under that provision seems to giving them a surer legal footing. But....
- ...Van Panchayats search for greater autonomy is better done through their status as committee of the Gram Panchayat given the fact that existing Panchayat Forest Rules while giving them legal status under the Indian Forest Act also ensures that they are in the overall control of the Forest Department.
- The exemption of Transit Pass to contractors as well as to such forest produce not covered under the *U.P. Transit of Timber & Other Forest Produce Rules, 1978* have resulted in several illicit timber and forest produce being transported. Unclear guidelines and non-uniform transit rules (in other states) has historically contributed to the loss of biodiversity to the state.

- Specific laws have been enacted by the State to create a monopoly in the trade of purchase and distribution of “Tendu Patta” and “Resin”. This has been done in the interest of ‘public good’. This includes *Tendu Patta (Vyapar Viniyaman) Adhiniyam, 1972* and *the Resin and Other Forest Produce (Regulation of Trade) Act, 1976*. Studies have shown that 1976 enactment has had a substantial impact in terms of cutting down of revenues of the Van Panchayats.
- The system of auctioning the rights for NTFPs and medicinal plants with very little control over the cooperative/Agents is liable to result in unsustainable harvesting practices. These are pointers to the fact that functional autonomy of the cooperatives has to go hand in hand with their responsibilities and accountability particularly towards the forest department.