Environmental Legislations in India– Some Concerns

Sanjay Upadhyay
Advocate Supreme Court of India and Managing Partner, Enviro Legal Defence Firm

June 2013
What is?

1. wild animal,
2. minor port,
3. biodiversity heritage site,
4. the distinction between a national park and a sanctuary,
5. Coastal Regulation Zone III,
6. scheduled animal,
7. forest,
8. critical wildlife habitat,
9. ecologically sensitive area,
10. the distinction of community reserve and conservation reserve
11. Public consultation
Some Basics

- Importance of terms and definitions,
- Hierarchy of instruments,
  - policy → strategy → action plan on one hand,
  - policy → Policy enabling Act which gives the skeleton,
  - the operational rules or enabling notifications which are statutory
  - followed by government orders, office memos, non-statutory notifications etc. that gives you the hierarchy of the instruments.
  - Court Orders!!! Court Judgments
What have we actually done? Act before the Policy?????

- Forest Act 1865, 1878, Forest Policy 1894
- Forest Act 1927; Forest Policy 1952
- Forest Policy 1988
- ??? Attempts to change forest act 1980, 1994, 2003..2012....no success
- EPA, 1986 ; National Environment Policy 2004
Some Basics (Cont’d)

- The nature of instrument,
  - if it is a policy, what is the consequence,
  - if it is a policy statement, what is the consequence,
  - if it is the Rule, what is the consequence,
  - if it is the regulation, what is the consequence,
  - if it is an order, what is the consequence;
  - if it is a statutory order, what is the consequence and so on.
SOME MISUNDERSTANDINGS OF BASIC LEGAL CONCEPTS

- RIGHTS/ PRIVILEGES/CONCESSIONS /FAVOURS e.g. Rajaji National Park;

- PERCEPTIONS/RECORDS e.g. about rts and privileges, claim forms as eviction notices under settlement of rights under the WLPA

- BOUNDARIES / JURISDICTION e.g. JFMC –EDC; Revenue and Forest land – NSS West Mangrove Forest and Uninhabited island as CRZ Category; Scheduled and non scheduled areas

- KNOWLEDGE/ APPLICABILTY OF LAW– e.g. IFA in PAs; Section 50 of WLPA regarding who could arrest; Diff b/w N.P. and Sanctuary/ RF/PF/VF/FV/Closed Area
SOME MISUNDERSTANDINGS OF BASIC LEGAL CONCEPTS

- CONFUSION OVER LEGAL CATEGORIES AND ADMINISTRATIVE (MANAGEMENT CATEGORIES) e.g. Elephant Reserve, Village forest-forest village; biosphere reserves

- JUDGMENTS/ORDERS/INTERIM ORDERS– Degree of Authority

- INTERPRETATION OF STATUTES– e.g. Shall/may; key words ..subject to …operation of other laws not barred; prospective ; retrospective effects; Repealing Clause....

- PROCEDURAL LAW CAPACITY BUILDING e.g. Haridwar Case
ENVIROMENTAL LAW?

- Traditional Understanding– That Protects and Conserves
- Alternative View– That affects environment
- Laws that use natural resources – 55%
- Laws used for acquiring Natural Resource– 33%
- Conservation oriented laws– 11%
- Regeneration Laws– 1%
- Inherent imbalance in those that use versus those which protects!!
ENVIRONMENTAL LAW

- Major Control over utilisation of natural Resource vests with State and Centre– Flows from the Constitution.– List II
- Land, Water, Minerals––– State Subjects.( Forest till ’76)
- Conservation Laws– Post 80’s phenomenon
Environmental Law

- Based on Two Legal Principles
  - Eminent Domain – use and acquisition laws
  - Criminal Liability/Command and Control
  - (Conservation and Protection Laws)
- Top Down – “Conflict Model”
- Need for a non adversarial “cooperative model”
- Judicial Activism – Article 48-A, 51-A (g)
- Plethora of laws: one example in the marine sector: 28 central laws; 17 international instruments and ten nodal ministries
REASONS FOR INEFFECTIVENESS

- Lack of Trained Legal Manpower
- Procedural Inadequacies
- Minimal Professional Agencies Back up
- Lack of good science
- Few special Courts/Tribunals
- Unrepresented /Minimally Represented Cases
- Least Priority
- Untrained Judges
Environment Laws and YOU

- Wildlife Act and Citizens Suit (Section 55 (c))
- Forest Conservation Act – Diversion/bonafide public utilities (Section 14, 16)
- Public Consultation and Role of SDM/Member Secretary –SPCB and Role of public!
Pollution Prevention and Role of citizens; Appellate Authorities under Air, Water Act
EPA and Section 19 complaints!
Nuisance versus Air Act and Water Act
Forest Rights Act and Role of SDM/SDO/ Collector /DFO and you.
Ensuring Consultation under PESA in Scheduled Areas
Institutions that you should know!

- Pollution Control Board—Water Act
- State Environment Impact Assessment Authority—EIA–EPA/State Environmental Appraisal Committee (SEAC)
- State Land Use Boards—???
- State Coastal Management Authority—CRZ–EPA
- NTCA–WLPA
- Wildlife Crime Control Bureau—WLPA
- State Biodiversity Board—BD Act
- State Medicinal Plants Board—?
- State Board of Wildlife Board—WLPA
How do you deal with choices?

- Sustaining traditional communities or
- Sustainability of resource for human needs or
- Protecting critical habitats serving ecological needs or
- Maintaining aesthetic standards for promoting tourism or
- Safeguarding vulnerable populations such as tribals, PVTGs
What is more important? (Cont’d)

- Creating defence and strategic installations for national security or
- Facilitating trade through augmentation of ports and harbour facilities in a developing economy for the billion plus or
- Harnessing rivers/tides/waves for energy security or
- Who decides? And How?
Infrastructure and Environmental Compliance – Some Examples of conflicts within

- Roads – The right of way (ROW) versus right to environment; Right to livelihood? (Highways)
- Recent debates on linear projects and environmental clearance!
- Infrastructure Development or land grabs? SEZ
  - e.g. Mundra Port? Mangroves, Fisherfolks and Shining Gujarat?
- MUTP – External Aid and Environment Assessment Safeguards?
Industry and Environment
( Forest)

- Leasing of forest lands—clearly two perspectives:
  - To lease or not to lease??
  - History suggests that many such lands were diverted, arrested in the eighties, again picking up pace due to infrastructure development processes,
- What is non negotiable?
- Leasing of wastelands?
- Numerous cases of
  - mining on forest lands,
  - scheduled areas alienation and
  - cultural appropriateness?– OMC case!
- CAMPA–NPV? Are these acceptable models?
Social Welfare legislation and Development?

- Is it mere rhetoric? eg. PESA
  - Provisions on all development works and the acceptability of Panchayats especially Gram Sabha? What is this Gram Sabha?
- Furore on Forest Rights Act?
  - What about guidelines and Circulars issued by FD on same issue and non action thereon?
  - Rights versus responsibility (power shift?)
- Are these instruments a panacea for tackling LWE?
Some More Concerns

- Decentralization:
  - Development and management of natural resources: The debate of specialized agencies (user agencies versus statutory institutions such as PRIs?)

- Centralization of resource and decentralization of management—A contradiction?

- External Aid versus Traditional Institutions
  - Are we integrating traditional conservation ethos with the modernity or is it one size fits all model?
Role of Courts

- Development (vs) Environment

- Role of Courts – A clear trend is emerging –
- Over zealous judicial action in micro management of environment issues especially on urban environment, forest and wildlife issues – not necessarily taking into account the impact on local communities. (Role of CEC??; cleaning the city, removal of slums, hawkers, demolitions of unauthorized colonies)

- For large infrastructure projects – A matter of Policy argument?? . Again not taking into account the impact on local communities – (Sardar Sarovar, interlinking of rivers, tehri, SEZ?)

- Futility of Follow up of court Orders?
IMPORTANT JURAL PRINCIPLES

- Right to Healthful Environment (Art-21)
- Right to Livelihood
- Polluter Pays Principle (PPP)
- Precautionary Principle (PP)
- However, Above Restricted to Appellate Jurisdiction of Courts
- Real Conflicts at the Local (Trial) Level
Different Geographical Contexts and Environmental Law

- Mountain context
- Coastal Context
- Island Context
- Desert Context
- Rivers
- North East – its another legal maze
  - Scheduled area vs special states
International Environmental Law: their relevance

- CITES
- CMS
- RAMSAR
- UNCLOS
- UNFCCC
- .......
- Country Systems Approach!
- Trade of Exotic Species!
- Climate Liability
- REDD+
THANK YOU
FOR YOUR PATIENCE!

sanjay@eldfindia.com
+9810298530

ELD Foundation website:
www.eldfindia.org