

**DISARTICULATION OF INDIGENOUS PEOPLE:
*CAN THE JUDICIARY SAVIOUR THEM?***

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INTRODUCTION

India is the seventh largest country in the world but contains only 1.8% of the world's forests. Forests in India cover approximately 23% of the geographical area (see the map in the appendix 1)¹.

Out of India's population of one billion, 360 million live in or around the forest area, of which more than 75 million are tribal/indigenous peoples. The tribal populations represent some of the most marginalized and poorest peoples in India. Of India's 75 million or so, it is estimated that over 94% live on or near forestlands.

Despite such a large number, the Indian government's policies on tribal groups are seriously handicapped. This is due to countless reasons, primarily due to the centralization of forest management and a lack of recognition of indigenous peoples and their rights. The aggravation of mistrust in government policies by the concerned public is further fuelled by the fact that about 90% of India's 64 million hectares of forests is under state ownership, the rest being in community and private forests. Moreover, it is predominantly the country's tribal peoples' areas that have been declared as state owned 'forests'. Also, state control over the forestland is weak and there is considerable encroachment by individuals and communities other than the tribals/indigenous people in state-owned areas. The tribal peoples were there long before the state started encroaching on their lands and the condition of both the tribals and the forests then was far better than it is today. However, the laws enacted so far in India have largely ignored the forest dwellers and more particularly the tribals.

This did not take place in a wink of an eye. Rather, it was by and large, the consequences of series of flawed government-sponsored policies and the Apex Court's myopic decisions. The paper attempts to delve into the subtle nuances of the problems of tribals backing all the arguments with the cause of the pathetic scenario that is prevalent. After a brief overview of the forest laws in India and examination of how tribals have been encompassed in such laws and statutes, the authors will endeavour to throw light on the implications of the landmark case of *T.N. Godavarman Thirumulkpad v. the Union of India* (Supreme Court). The rulings of the case will then be explicated upon in order to elucidate the plight of the tribal people. Before this serious issue, an overview of the relevant statistics regarding the indigenous people and development policies the Ministry of Tribal Affairs has come up with. An insight into the UN declarations on Development Induced Displacement, which is the core of the tribal problems, is also provided.

The judgment that was supposed to do justice to the forest management principles and development policies as viewed by the Court has, in effect, defeated its own purpose blatantly. Coupled with few case studies, the paper shall explore the after effects, or rather, the aftermath of the rulings. An amicable solution and the possible steps needed to rectify the mistakes committed are then highlighted. Conclusion has taken its path on its own, targeting the selfishness of the bureaucrats and urging for relevant measures to be taken to free the tribes from the vicious circle they are trapped in. The paper gently hovers around *the thoughts too deep to be expressed, too strong to be suppressed*.

¹ Based on data obtained in 1997 by Indian Remote Sensing Organisation.

RESEARCH METHODOLOGY

The kind of research methodology employed for the purposes of this project is judicious admixture of primary and secondary types. The researchers have done an extensive as well as an intensive survey of literature dealing with the subject, and also tangentially hinging upon the perspectives of the eminent personalities in this field. The doctrinal part of research extended to various books written on the relevant issues, documentaries, journals, publications, govt. data and the like. The substantial portion of the material was procured from the libraries of WWF, WTI, MoEF, CCS, Ministry of Tribal Affairs, and the law Courts.

The matter available on the internet proved to be of immense worth, and was accordingly utilized for the said purpose. The websites of Ministry of tribal Affairs and related links were useful. An assortment of the views of various thinking minds over the globe established our own reasoning lines and raced our gray cells to pour down concrete ideas. NGOs like Kalpvriksh and its associates were also contacted. Supreme Court lawyers and their views helped us a lot in formulation of a multi-dimensional thought. The relevant seminar talks that were held in the capital, which solicited established personalities, were attended and an even perspective was condensed.

The issue of *Godavarman case* has not been explored much and little data seems to be available in this regard. However, the researchers toiled to produce a balanced summary of the whole scenario in their utmost capacity and surmised that the issue assumes a vital importance in the context of environment. The case studies were based on the survey conducted on the internet and visits to related links.

HUM LOG: THE TRIBES²

The Constitution of India does not define Scheduled Tribes as such. Article 366(25) refers to scheduled tribes as those communities who are scheduled in accordance with Article 342 of the Constitution. According to Article 342 of the Constitution, the Scheduled Tribes are the tribes or tribal communities or part of or groups within these tribes and tribal communities, which have been declared as such by the President through a public notification. The Scheduled Tribes account for 67.76 million of strength, representing 8.08 percent of the country's population³. *Scheduled Tribes are spread across the country mainly in forest and hilly regions.*

The essential characteristics of these communities are:-

- Primitive traits
- Geographical location
- Distinct culture
- Isolated from the mainstream community at large
- Economically backward.

As per 1991 census, 42.02 percent of the Scheduled Tribes populations are main workers of whom 54.50 percent are cultivators and 32.69 per cent agricultural laborers. Thus, about 87 percent of the main workers from these communities are engaged in primary sector activities. The literacy rate of Scheduled Tribes is around 29.60 percent, as against the national average of 52 percent. More than three-quarters of Scheduled Tribes women are illiterate. These disparities are compounded by higher dropout rates in formal education resulting in disproportionately low representation in higher education.

Not surprisingly, the cumulative effect has been that the proportion of Scheduled Tribes below the poverty line is substantially higher than the national average. 51.92 percent rural and 41.4 percent urban Scheduled Tribes were still living below the poverty line.⁴ The progress over the years on the literacy front may be seen from the following⁵:

| | 1961 | 1971 | 1981 | 1991 |
|--|------|------|------|------|
| Total literate population | 24 | 29.4 | 36.2 | 52.2 |
| Scheduled Tribes (STs) population | 8.5 | 11.3 | 16.3 | 29.6 |
| Total female population | 12.9 | 18.6 | 29.8 | 39.3 |
| Total Scheduled Tribes (STs) female population | 3.2 | 4.8 | 8.0 | 18.2 |

There are approximately two hundred million tribal people in the entire globe, which means, about 4% of the global population. They are found in many regions of the world and majority of them are the poorest amongst poor. According to 1981 census, the population of Scheduled Tribes in the country was 5.16 crores, consisting about 7.76% of total Indian population, which means one tribesman for every 13 Indians. Among tribes, there are so many communities. The major identified tribes in country number about the 428 scheduled

² Majority of the data collected is from Ministry of Tribal Affairs

³ As per the 1991 Census,

⁴ The estimate of poverty made by Planning Commission for the year 1993-94

⁵ All figures are in millions

tribes in India though the total number of tribal communities are reported to be 642 and several of them have become extinct or merged with other communities as the tendency for fusion and fission among tribal population is a continuous process. Thus, if the sub-tribes and state tribes will be taken into consideration, the number will be many more. These 428 communities speaking 106 different languages have been so far notified as the scheduled tribes in 19 states and 6 union territories. They have their own socio-cultural and economic milieu. In fact, the largest concentration of tribal people, anywhere in the world and except perhaps Africa is in India. About 50% of the tribal population of the country is concentrated in the states of Madhya Pradesh, Chhatisgarh, Jharkhand, Bihar and Orissa. Besides, there is a sizeable tribal population in Maharashtra, Gujarat, Rajasthan and West Bengal.(see Appendix 2)

Land Holdings of Tribal population⁶

- 1) Marginal and small holdings 62.42%
- 2) Semi-medium 20.59%
- 3) Medium 13.58%
- 4) Large Holdings 3.41%

Total 100.00

Demographical Changes

| Population in millions | | | |
|------------------------|------------------|------------------|--------|
| Census Years | Total population | Population of ST | S.T. % |
| 1951 | 361.1 | 19.1 | 5.29 |
| 1961 | 439.2 | 30.1 | 6.85 |
| 1971 | 548.2 | 38.0 | 6.93 |
| 1981 | 685.2 | 51.6 | 7.53 |
| 1991 | 846.3 | 67.8 | 8.10 |

SO WHAT DID THE GODFATHER SAY: The Fundamental Principles of Pt. Jawaharlal Nehru

The fundamental principles laid down by the first Prime Minister late Jawaharlal Nehru in this regard became the guiding force. These principles are:

- 1. Tribal people should develop along the lines of their own genus and we should avoid imposing any thing on them. We should try to encourage in every way, their own traditional arts and culture.
- 2. Tribal people’s rights in land forest should be respected.
- 3. We should try to train and build up a team of their own people to do the work of administration and development. Some technical personnel from outside will no doubt be needed especially in the beginning. But we should avoid introducing too many outsiders in to tribal territory and,
- 4. We should not over administer these areas or overwhelm them with a multiplicity of schemes. We should rather work through and not in rivalry to their own social and cultural institutions.

Little did he know, how in the future course of time, a mockery of all his principles will take the nation in a state of over 8 crore pair of eyes imploring for livelihood.

THE GOOD EARTH: DEVELOPMENT INDUCED DISPLACEMENT

“Internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a

⁶ Orissa review, Feb-March 2005, *Tribal development in India – a study in human development* by Pillai Kulamani. Pg, 71-78

result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.” says Francis Deng⁷.

The case for arguing that development- induced displacement is clearly covered by the Principles is bolstered by Principle 6.2(c)⁸ which reads: *“The prohibition of arbitrary displacement includes displacement: [...] (c) In cases of large-scale development projects, which are not justified by compelling and overriding public interests [...]”*

The tribal population has been disproportionately affected: An estimated two per cent of the total Indian population has been displaced by development projects. Of these, 40 percent are tribals although they constitute only 8 percent of the total population, as per W. Courtland Robinson⁹.

Cernea's¹⁰ impoverishment risk and reconstruction model proposes, “The onset of impoverishment can be represented through a model of eight interlinked potential risks intrinsic to displacement.”¹¹ These are:

- *Landlessness.*
- *Joblessness.*
- *Homelessness.*
- *Marginalization* (Marginalization occurs when families lose economic power and spiral on a “downward mobility” path. Many individuals cannot use their earlier acquired skills at the new location; human capital is lost or rendered inactive or obsolete.)
- *Food Insecurity.*
- *Increased Morbidity and Mortality.*
- *Loss of Access to Common Property.*
- *Social Disintegration* (The fundamental feature of forced displacement is that it causes a profound unraveling of existing patterns of social organization. The cumulative effect is that the social fabric is torn apart¹². Others have suggested the addition of other risks such as the loss of access to public services, loss of access to schooling for school-age children, and the loss of civil rights or abuse of human rights.¹³)
- *Loss of Access to Community Services.*
- *Violation of Human Rights* (The impoverishment risk and reconstruction model already has been used to analyze several situations of internal displacement. Lakshman Mahapatra applied the model to India, where he estimates that as many as 25 million people have been displaced by development projects from 1947-1997.¹⁴)

⁷ Francis Deng is the UN Secretary General's Special Representative on Development Induced Displacement.

⁸ The UN Guiding Principles on Internal Displacement developed by Francis Deng. Op. Cit. 12

⁹ W. Courtland Robinson is a Research Associate at the Center for International Emergency, Disaster and Refugee Studies at the Johns Hopkins University Bloomberg. School of Public Health in Baltimore, Maryland.

¹⁰ Michael Cernea is a sociologist based at the World Bank who has researched development induced displacement and resettlement for two decades.

¹¹ Michael Cernea, 1996, “Bridging the Research Divide: Studying Development Oustees.” In Tim Allen (ed), *In Search of Cool Ground: War, Flight and Homecoming in Northeast Africa* (London: United Nations Research Institute for Social Development, Africa World Press and James Currey).

¹² Descriptions of the first seven risk factors are drawn from Michael Cernea, 2000, “Risks, Safeguards and Reconstruction.” The description of the eighth risk, social disintegration, is from Michael Cernea, 1996, *Public Policy Responses to Development-Induced Population Displacements* (Washington, DC: World Bank Reprint Series: Number 479).

¹³ Robert Muggah, 2000, “Through the Developmentalist's Looking Glass: Conflict-Induced Displacement and Involuntary Resettlement in Colombia.” In *Journal of Refugee Studies* 13(2): 133-164.

¹⁴ Lakshman K. Mahapatra, 1999, “Testing the Risks and Reconstruction Model on India's Resettlement

Cernea's impoverishment risk and reconstruction model offers a valuable tool for the assessment of the many risks inherent in development-induced displacement. Balakrishnan Rajagopal of the Massachusetts Institute of Technology has noted five "human rights challenges" that arise in relation to development-induced displacement:¹⁵

Right to Development and Self-Determination.

In 1986, the UN General Assembly adopted a Declaration on the Right to Development, which asserted the right of peoples to self-determination and "their inalienable right to full sovereignty over all their natural wealth and resources."¹⁶ In Rajagopal's interpretation, such language makes it "clear that local communities and individuals, not states, have the right to development."¹⁷

Right to Participation.

If self-determination is the right to say whether development is needed or not, participation rights begin to be relevant when development begins. The right to participation is based on various articles of the International Bill of Human Rights, which consists of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁸ More specifically, the 1991 International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries¹⁹ stipulates²⁰ that indigenous and tribal peoples shall participate in the formulation, implementation and evaluation of national and regional development plans that affect them.²¹

Right to Life and Livelihood.

When security forces take Action to move people forcibly or to quell civil dissent against development projects, this may constitute a direct threat to the right to life, which is protected in the UDHR²² and the ICCPR²³. The right to livelihood is threatened by the loss of home and the means to make a living when people are displaced from habitual residences and traditional homelands. The rights to own property and not to be arbitrarily deprived of this property as well as the right to work are spelled out in the UDHR²⁴.

Rights of Vulnerable Groups.

Growing evidence shows that, development projects disproportionately affect groups that are vulnerable to begin with, particularly indigenous groups and women. Human rights of vulnerable groups are protected generically in the International Bill of Human Rights. The ILO Convention 169 spells out protections for indigenous groups.

Right to Remedy.

Experiences." In Michael Cernea (ed) *The Economics of Involuntary Resettlement: Questions and Challenges* (Washington, DC: World Bank).

¹⁵ Balakrishnan Rajagopal, 2000, *Human Rights and Development* (World Commission on Dams, Thematic Review V.4, Working Paper). Although Rajagopal's discussion focuses on dams, the human rights challenges apply in other types of development-induced displacement.

¹⁶ UN General Assembly, 1996, *Declaration on the Right to Development* (A/RES/41/128).

¹⁷ Rajagopal, *Human Rights and Development*, p. 5.

¹⁸ Fact Sheet No. 2 (Rev.1), *The International Bill of Human Rights* (www.unhchr.ch).

¹⁹ ILO Convention 169

²⁰ Article 7

²¹ Cited in Sarah C. Aird, 2001, "China's Three Gorges: The Impact of Dam Construction on Emerging Human Rights," *Human Rights Brief* 24, Winter 2001.

²² Article 3

²³ Article 6

²⁴ Articles 17 and 23, respectively

The right to remedy is asserted in the UDHR²⁵ and in the ICCPR²⁶. As Rajagopal notes, "they need a quick and efficacious remedy that can halt on-going violations and prevent future ones. The right to remedy is therefore crucial...to all development projects."²⁷ Put more broadly, "A right without a remedy is no right at all."

There are more than 4850 indigenous communities in India, most of whom are hunters-gatherers, shifting cultivators, fisher folks, small peasants etc. they are mostly defenseless people who are at the same time socially oppressed and economically exploited. When they are displaced, they are so engrossed in fending for themselves that that they find it impossible to protect themselves and their culture.

Even though India has a large number of internally displaced persons, there is no legislation that specifically deals with them. The Judiciary is virtually handicapped in the matters of the internally displaced persons. The role of the various NGO's as well in protecting the legal rights of the displaced persons has not borne much fruit. Thus they remain legally deprived. Needless to mention, what would be the image of India in the mind of international community. The researchers, shall, later build up the argument from instances of aggravation of plight of tribals, how India stands far behind the ILO convention and international commitments to Human Rights and Displacement.

INDIAN FOREST LAW AND POLICY

In ancient India it was generally accepted that the rulers did not control forests and the communities living in the forest, because the forest was not seen as a source of revenue or commercialization. The effects of industrialization side by side with British rule in India in the 18th century brought about dramatic changes: the need to meet the growing demand for timber (associated with the railway boom of the late 1800s) and a growing dissatisfaction with the legal restrictions imposed by previous legislation, led to the institution of the Indian Forest Act in 1878, according to which the nation state was recognized as sole proprietor of classified forest lands. State forestlands were loosely defined as lands, which did not fall under 'continuous' cultivation or 'permanent' settlement. Traditional forest practices such as 'slash and burn' cultivation, rotational agriculture, grazing and gathering of forest resources were rejected as a basis for private property rights. Instead, according to a Forest Department resolution in 1890, previously defined rights of access and use were to be redefined by Government as 'privileges' for specific tribes, castes, villages and organizations. A new Indian Forest Act in 1927 incorporated few substantive changes over the 1878 Act, and remains the legislative basis for state forest management today.

After Independence, however, and according to the newly enacted Indian Constitution, forests were placed under the 'state list'. In 1976, the Indian Forest Act was added to the concurrent list of the Constitution of India, giving the Central Government and states shared responsibility and control over forest matters. Thereby the Government of India does have the power to legislate on forestry issues but only after consulting the states. The balance of power between central and state governments has remained a key issue in forest management ever since.

After 1947, in a post-independent India, commercial exploitation and degradation of India's forests increased dramatically. Indeed, the 1952 National Forest Policy set out guidelines that were, for the most part, directed towards the supply of cheap timber and non-timber

²⁵ Article 8

²⁶ Article 2

²⁷ Rajagopal, *Human Rights and Development*, p. 11.

forest products for state-sponsored industrialization and modernization. In 1980, with the passage of the Forest Conservation Act, the Central government reasserted some of its control over forest-based resources. The Act restricts the state government's power to de-reserve a forest, and it restricts the use of forestland for non-forestry purposes without the prior approval of the central government. Unilateral decisions from the centre have prevailed from then onwards. Only six centres were set up to monitor forests and conservation²⁸, which is obviously insufficient for effective regional implementation in a country the size of India. Thus, the Forest Conservation Act, 1980 has been problematic for a number of reasons, and has achieved little improvement in the 'conservation' of India's forests.

The National Forest Policy of 1988 envisaged people's involvement in the development and protection of forests *for the first time*. It stipulated that the requirements of people living in and near forests for fuel wood, fodder and small timber should be treated as the top priority, and forest communities should be motivated to identify themselves with the development and protection of forests from which they derive benefits. A primary task of all agencies responsible for forest management, including the forest development corporations, should be to engage tribal peoples closely in the protection, regeneration and development of forests, as well as to provide gainful employment to people living in and around the forests. However, it says nothing about restoring their ownership and control over their forest resources or the contradictory coercive provisions of conservation laws now governing them. Moreover, it has never been translated into law. It remains essentially a broad statement of government intent and does little in the way of specifying any legal rights or duties owed to forest communities - especially the tribal/indigenous peoples.

The following table gives a summary of the relevant laws.

Indian national forest law and policy from 1878 to 1988²⁹

| Year | Law | Relevant measures |
|------|---|---|
| 1878 | Indian Forest Act | State is sole proprietor of classified forest lands. |
| 1890 | Forest Dept Resolution | Previous rights of access and use redefined as 'privileges' for specific tribes, castes, villages and organizations |
| 1927 | Indian Forest Act | Few substantive changes over the 1878 Act. It remains the legislative basis for state forest management today. The Indian Government adopted the 1927 Act after it gained independence in 1947. |
| 1952 | National Forest Policy | Set out guidelines, which were, for the most part, directed towards the supply of cheap timber and non-timber forest products for state-sponsored industrialization and modernization. |
| 1976 | Indian Forest Act added to the concurrent list of the Constitution of India | Central government and states given shared control over forest matters. |
| 1980 | Forest Conservation Act | The central government reasserted some of its control over forest-based resources. The 1980 Act restricts the state government's power to de-reserve a forest, and it restricts the use of |

²⁸ As per the Act

²⁹ Paper on *An Assessment of the Implementation of the Indian Government's International Commitments on Traditional Forest-Related Knowledge from the Perspective of Indigenous Peoples* by Sukhendu Verma

| | | |
|------|----------------------------|--|
| | | forestland for non forestry purposes without the prior approval of the central government. |
| 1988 | The National Forest Policy | Envisaged people's involvement in the development and protection of forests <i>for the first time</i> . Never translated into law. |

The Government of India is not a signatory to the ILO Convention 169 and as such does not recognize indigenous peoples. It does recognise "Scheduled Tribes", but not all indigenous groups are scheduled. In theory there are some measures to protect the interests of Scheduled Tribes. The Constitution empowers the President of India and state governors to withhold any law considered detrimental to tribal/indigenous peoples' interests in Scheduled Areas. Schedules V and VI of the Indian Constitution give special privileges to the Scheduled Tribes and the Panchayats Act (Extension to the Scheduled Areas), 1996 (PESA) is also designed to offer some protection. However, in practice most of the laws restrict the rights of and control of forest communities. Specifically, the Indian Forest Act (IFA), Forest Conservation Act (FCA) and Wildlife Protection Act (WLPA) continue to be used to hound forest dwellers. An example is the *Godavarman case*.

The target of 33% forest cover also seems skewed. A target of '33% forest cover' (effectively equated with 'tree' cover) was included in India's 1952 forest policy on the ground that countries with high forest cover were more 'prosperous'. Yet in India today, the highest concentrations of poverty are in tribal-forest areas where forest dwelling communities have been deprived of their customary resource rights—their very means of survival—by declaring their ancestral lands as state forests. The FCA is designed to prevent the reduction of the current area of forest land so as to meet the 33% objective; permission for diverting forest land to other uses is conditional on 'compensatory' afforestation' of an equivalent area elsewhere. According to Madhu Sarin³⁰, isolated patches of 'compensatory afforestation' on other lands, however, do not make up in any ecologically meaningful way for the destruction of natural forests for other uses as they are parts of complex ecosystems and provide habitat for diverse flora and fauna. Together, the imposition on poorly-defined forest lands of the 33% forest cover objective, the FCA and the interim orders of the Supreme Court (governed by the first two policies) has compounded the injustice to tribal and other forest dwelling communities whose rights are yet to be settled. The 33% forest cover objective has also empowered forest departments to lay claims on additional community as well as cultivated lands to increase the present forest area, further alienating local communities instead of increasing their incentives for conservation.

There is a high degree of dissonance between tribal and conservation laws. Any government interventions in tribal areas need to be in harmony with the constitutional provisions and other policy directives for safeguarding the culture, resource rights and livelihoods of tribal communities and the governance of tribal areas. Most states with large tribal populations have enacted laws forbidding the transfer of private tribal lands to non-tribals, although these have been poorly enforced. However, in total dissonance with the constitutional protection for *adivasis*³¹, the IFA, FCA and Wildlife Protection Act (WLPA) continue to be

³⁰ Madhu Sarin has worked on participatory and sustainable forest management and gender justice and women's empowerment, combining grass roots work with advocacy for policy changes at the state and national levels. She has written extensively on urban, rural, environmental At present, she is a member of a committee set up by the Ministry of Environment and Forests, GOI, to propose measures for enhancing women's participation in the forestry sector.

³¹ The vernacular term for Indian indigenous groups.

used to hound them, even in Schedule V³² areas. The government itself has been the biggest violator of the spirit of the constitutional provisions through indiscriminate notification of customary tribal lands as state forests or protected areas, often without even settling their rights. The poor recognition of communal tenures in India (except in the Schedule VI areas) has decimated their economies and livelihood security.

JUDICIARY IN JUNGLES

Perhaps no judiciary in the world has devoted as much time, effort and innovativeness in protecting our forests as the Supreme Court of India has for the last eight years. In doing so it reinterpreted the Forest (Conservation) Act, 1980, created new institutions and structures and conferred additional powers on the existing ones. It has been a process of continuous involvement of the Apex Court in forest management assuming the nature of *continuing mandamus*.

The Herculean task of the Apex Court has been carried out through its intervention in the following two cases:

- The *T.N. Godavarman Thirumulpad v/s Union of India* and ors (Writ Petition 202 of 1995), concerning implementation of the Forest Conservation Act, 1980.³³
- The *Centre for Environmental Law (CEL) v/s Union of India* and ors. (Writ Petition 337 of 1995) concerning the issue of settlement of rights in National Parks and Sanctuaries and other issues under the Wild Life (Protection) Act, 1972.

These cases are being heard since then as part of what is known as the continuing mandamus, whereby Courts rather than passing final judgements, keep passing orders and directions with a view of monitoring the functioning of the executive. *"There is currently very little information about this case, its orders and how they effect the region. Any intervention first needs to begin with the awareness. The legal complexities need to be demystified, creating the space and possibility for simple but factual communication on the issue as well as public debates on concerns and solutions. These tasks though daunting are certainly achievable"*, say Ritwik Duta and Kanchi Kohli.³⁴

THE FOREST CASE: A CRITICAL APPRAISAL³⁵

In the nature of a continuing mandamus, the Supreme Court has been hearing a case (Writ Petition 202 of 1995, *T.N. Godavarman Thirumulpad vs. Union of India*) for the last ten years³⁶. This started off as a PIL by T.N. Godavarman, an ex-estate owner in Gudalur, Tamil Nadu, against illicit felling of timber from forests nurtured by his family for generations which have since been taken over by the government. Without delving in to a detailed factual backdrop of the case, we shall straightaway deal with the critical issues at hand.

The genesis of the *Godavarman* case was a result of series of non-responsiveness of the various state governments to the issue of forest conservation. The Writ petition filed by *Environmental Awareness Forum* (W.P. 171 of 1995) and the *T. N. Godavarman Thirumulpad* (W. P. 202 of 1995) on limited and restricted issue of forest conservation was

³² The Constitution of India provides for safeguarding the interests of tribal communities through declaring tribal majority areas under Schedules V & VI of the Constitution.

³³ We shall restrict our study to this case only.

³⁴ Ritwik Dutta is an advocate in the Supreme Court. Kanchi Kohli is based in New Delhi and a member of the Kalpavriksh Environmental Action Group. They jointly coordinate Forest Case Update, a newsletter service

³⁵ Dutta Ritwick, Bhupinder Yadav, 2005, *Supreme Court on Forest Conservation*, New Delhi, Universal Law Publishing House.

³⁶ The case came to be known as the Forest Case or the Godavarman Case.

extended by the Supreme Court on 2-9-1996, when the Court directed the issue of notice to chief secretaries of all the state government.³⁷ The Court in its order noted that "inspite of notices being issued to all the state government many of them have not entered appearances." The Court therefore directed the issue of fresh notice. Unfortunately, even this did not result in much response. The Court in its order dated 28-11-1996 observed that inspite of notice being served on all state governments, there was non representation of all state government the Court felt that the version of north eastern states in particular is necessary 'but no assistance to that effect was available to the Court on account of absence of any representation at that time on behalf of any of the seven north eastern states.' The Court emphasized the fact that "*It is necessary that effective representation on behalf of each of the seven north eastern states be ensured during the entire hearing of the matter.*" It, therefore directed the personal presence of the secretary dealing with forest and environment in each of the seven north eastern states including the secretaries of Sikkim, Kerala and Maharashtra during the hearing of this matter.

On the next date of hearing i.e. on 12-12-1996, the Supreme Court passed an interim order that was to be one of the most significant decisions of the Court on an environmental issue. The order of 12-12-1996 became the basis for the subsequent judicial involvement in forest conservation.

The order of 12-12-1996 clarified certain provisions of the Forest (Conservation) Act, 1980 and also extended the scope of the Act. The FCA was enacted in 1980 and subsequently amended in 1988. Section 2 of the Act forms the core and states that 'no state government or other authority shall make, except with the prior approval of the central government, any order directing:

1. that any reserved forest (within the meaning of the expression "reserved forest" in any law for the time being in force in that state) or any portion thereof, shall cease to be reserved;
2. that any forest land or any portion thereof may be used for any non-forest purpose;
3. that any forest land or any portion thereof may be assigned by way of lease or otherwise to any private person or to any authority, corporation, agency or any other organization not owned, managed or controlled by the government;
4. that any forest land or any portion thereof may be cleared of trees which have grown naturally in that land or portion, for the purpose of using it for reforestation;

Explanation- for the purpose of this section, "non-forest purpose" means the breaking up or clearing of any forest land or portion thereof for-

- a. the cultivation of tea, coffee, spices, rubber, palms, oil-bearing plants, horticultural crops or medicinal plants;
- b. any purpose other than reforestation;

but does not include any work relating or ancillary to conservation, development and management of forests and wildlife, namely the establishment of check-posts, fire lines, wireless communications and construction of fencing, bridges and culverts, dams, waterholes, trenchmarks, boundary marks, pipelines or other like purposes.

The Supreme Court observed in its order of 12-12-1996, that there is misconception in certain quarters about the true scope of the Act and the meaning of the word forest used therein. There is also misconception about the need of prior approval of the central government

³⁷ Other than states that were already made parties.

Dictionary Meaning Of Forests

The Court embarked upon a purposive interpretation of the Act, and held that the Act was enacted with a view to check further deforestation which ultimately results in ecological imbalances and therefore, the provisions made therein for forests conservation of forests must apply to all types of forests irrespective of the nature of ownership or classification. Most significantly, the Court held that:

- The word "forest" must be understood according to the dictionary meaning. The Court clarified that this description covers all statutorily recognized forest, whether designated as reserved, protected or otherwise for the purpose of section 2 (i) of the Act.
- The term forest land as occurring in section 2 will not only include "forest" as understood in the dictionary sense, but also any area recorded as forest in the government record irrespective of the ownership.
- The provisions enacted in the Act, for the conservation of forests must apply clearly to all forests so understood irrespective of the ownership of classification thereof.

Amongst other things, fundamental changes have been made on aspects such as compensatory afforestation, forest administration, working plans. New authorities, committees and agencies have been set up such as the Central Empowered Committee (CEC), the Compensatory Afforestation Management and Planning Agency among others. Although essentially concerning forest conservation, the case has immense social implications. It has and continues to deal with issues such as encroachment, access to Non-Timber Forest Produce and even developmental projects that have immense social and human rights aspects.

Since 1996, *Godavarman* has had made a long journey. Over hundreds of orders have been passed, innumerable *intervention applications (IAs)* filed and large number of clarifications as well as modifications of orders made.

To summarize, the Forest (Conservation) Act, enacted in 1980, was meant to stop the diversion of forestland for non-forest purpose and to stop further deforestation in the country. Although the Act was successful to the extent that the amount of land diverted for non-forest purpose showed a drastic decline, yet it provided for enough loopholes for forests to be cut down. The Supreme Court decision in the *T N Godavarman* case was landmark it made the Act applicable for the purpose for which it had been enacted.

State Governments were to constitute an expert committee to identify areas that are "forests", degraded lands, and plantations. In its order the Court made many specific recommendations such as that in the case of Himachal Pradesh and the hilly regions of UP and West Bengal that the ban will not affect felling in any private plantations comprising of trees which are not forests. Further the ban will not apply to permits granted to the rights holder for the bonafide personal use in Himachal Pradesh.

Specific Directions

The Court directed that in accordance with section 2 of the Act, "all ongoing activity within any forest in any state throughout the country, without the prior approval of the central government, must cease forthwith." Significantly, the felling of trees in all forests is to remain suspended except in accordance with working plans of the state government, as approved by the central government. Specific orders were passed for the north eastern states and specially for Tirap and Changlang in Arunachal Pradesh, Jammu and Kashmir, Himachal Pradesh and hill regions of Uttar Pradesh, Tamil Nadu.

Significantly, it was directed that this order will operate and be implemented notwithstanding any order at variance, made or which may be made by any government or any authority, tribunal or Court, including the High Court.³⁸ Thus began the engagement of the Supreme Court on a continuing basis with the issue of forest conservation. This case came to be known as the *Godavarman*³⁹ case or less commonly the forest conservation case⁴⁰. The prime focus of *Godavarman* was the effective implementation of the Forest (Conservation) Act, 1980. However, as the case progressed the Wildlife (Protection) Act 1972 and all state and local laws relevant for forest conservation also came within the purview of the *Godavarman* case.

AND JUSTICE FOR NONE!!⁴¹

The Court did a purposive interpretation of the FCA and held that the word 'forest' must not only be understood according to the dictionary meaning but also any area recorded as forest in the government record irrespective of ownership. This cropped some major discrepancies between real forests on the ground and the area declared as state (government's) 'forests'⁴². During the colonial period, while some forests were selectively reserved for commercial exploitation, large areas of the uncultivated commons (called 'wastes' because they did not yield land revenue) were declared state forests through blanket notifications. Rather than identifying forests, the objective was to assert state ownership over non-private lands.

Post-Independence, the *net* 'national' forest estate was further enlarged by 26 million hectares (m ha) between 1951 and 1988 (from 41 m ha to 67 m ha). This increase was achieved by declaring the non-private lands of ex-princely states (merged with the Union of India after Independence) and of *zamindars*⁴³ as state forests.⁴⁴ Again this was largely done through blanket notifications, without surveying their vegetation/ecological status (Uttaranchal and HP) or settling the rights of pre-existing occupants (Orissa and AP). Many of these lands are yet to be clearly demarcated on the ground and finally notified as forests under the Indian Forest Act (IFA). Consequently, even their legal status as state 'forests' is open to challenge.

Many of the above lands, although entered as 'forests' or 'wastelands' in official records, harboured, a wide diversity of communal property use and management systems by pre-existing communities, recognised by custom rather than formal law. These included shifting cultivators, hunter-gatherer pre-agricultural tribal communities, forest-based settled cultivators and nomadic pastoralists, as well as other communities with diverse livelihood systems. They also included tenant cultivators of *zamindars* and private forest owners, as well as village/community forests for *bona fide* local use. On the whole, these preexisting users and customary tenures are poorly recorded in official records. In many parts of India,

³⁸ This was further reiterated by order dated 4-3-1997

³⁹ Incidentally, the petitioner, T.N. Godavarman Thirumulpad has little to do with the subsequent developments in the case.

⁴⁰ Diwan and Rosencranz, *Environmental Law and Policy*, OUP, 2001

⁴¹ Majority of our study in this area is based on articles by Madhu Sarin.

⁴² Sarin, M, 2003. Paper forests versus real forests. In: *The Hindu Survey of the Environment*, Chennai.

⁴³ Zamindars were large landlords to whom the British had assigned the responsibility of collecting revenue from tenants.

⁴⁴ Saxena, NC. 1999. *Forest Policy in India*. WWF-India and IIED, New Delhi. Saxena, NC. 1995. *Forests, People and Profit, New Equations for Sustainability*. Centre for Sustainable Development and Natraj, Dehradun.

lands that have been under shifting cultivation for generations have been notified as forestlands⁴⁵.

In one stroke, notification of these lands as state 'forests' converted them from local livelihood resources into 'national forests'. Local management authority was simultaneously replaced by a uniform, centralised management system. Both processes seriously impoverished forest dwelling communities through severely curtailing their forest access for livelihoods, and converting many into 'encroachers' on their ancestral lands. This has left these predominantly tribal people vulnerable to forcible displacement without rehabilitation and to decades of rent seeking and exploitation by revenue and forestry staff.

Uttaranchal and Himachal Pradesh: Case Study⁴⁶

In 1893, all uncultivated common lands (unmeasured lands) in Uttaranchal under direct British rule were declared state-owned 'District Protected Forests' without any vegetation or ecological surveys being conducted. Large parts of this land could never support forests because they were above the tree line. Subsequently, parts of this land were notified as reserve forests. Much of the remaining land has been converted to other uses over the last 110 years. In its submission to the Supreme Court under an ongoing public interest litigation (the Godavarman case) in 1997, however, the then UP⁴⁷ government asserted that this land continued to be 'forest' to which the Forest Conservation Act, 1980 (FCA) applies.

Sweeping notifications issued in 1896, 1897 and 1952 similarly declared all government 'wastelands' in Himachal Pradesh (now covering 66% of the state's area) as protected forests, irrespective of their Actual use or vegetation cover. Over 55% of this 'forest' land is incapable of supporting tree cover because it is under alpine pastures, permanent snow or above the tree line⁴⁸. A forest sector review revealed that only about 22% of the state's total area could realistically be brought under tree cover⁴⁹, whereas the national forest policy prescribes that this should be 66% in the hills. In 1998, the state government issued a notification that "areas classified as 'gair mumkin' and 'charagah bila drakhtan' (grazing land without trees) in the revenue records" should be excluded from the wastelands declared as state forests by the 1952 notification (for which detailed surveys and settlements are yet to be completed in most districts). However, the Central Empowered Committee (CEC), set up to monitor implementation of Supreme Court orders under the Godavarman case, recently ruled that the state government's 1998 notification violated the FCA, thereby insisting that even village grazing lands without trees continue to be notified as state 'forests'.

⁴⁵ This is a grossly erroneous depiction of land use as these lands are *not* forest but *cultivated* lands, albeit under rotational rather than settled cultivation. It needs to be noted that the FAO does not include shifting cultivation lands in its assessments of forest cover in different countries, categorizing them as forest fallows instead. Shifting cultivation is an integral component of the lives, livelihoods and social organisation of tribal and indigenous communities and the rich cultural diversity and indigenous biodiversity knowledge associated with it. Transferring control over the management of these communal lands to forest departments in the North East represents a major violation of the rights enjoyed by indigenous communities in the region under Schedule VI of the Constitution. In other states, shifting cultivation lands have been declared reserve or protected forests, often treating the original cultivators as forest 'encroachers'.

⁴⁶ Case studies are based on article by Madhu Sarin in Gatekeeper Series 116, IIED, *Laws, Lore and Logjams: Critical Issues in Indian Forest conservation*, 2005

⁴⁷ In the year 2000 the mountainous area of the undivided state of Uttar Pradesh (UP) was made into the new state of Uttaranchal.

⁴⁸ Sharma, KC. 2000. *Report on Land Use Issues (draft)*, prepared for HP Forest Sector Review, mimeo, Shimla.

⁴⁹ IIED & HPFD, 2000. Himachal Pradesh Forest Sector Review, Shimla. IIED, London.

Because of the way 'forest lands' are defined in the FCA⁵⁰, after 1980 the state 'forests' of both HP and Uttaranchal suddenly increased by about one third (from 44% to 66%) in Forest Department (FD) records without any change in forest cover on the ground. Similar situations of poorly defined state forests exist in most other states.

Orissa: Case Study

Revenue land settlements carried out during the 1970s in Orissa did not survey hilly lands steeper than 10 degrees because of the expense involved. They were declared (including their unsurveyed villages and cultivated lands) as state owned forests or 'wastelands'. Yet these hilly lands are predominantly inhabited by the state's 7 million adivasis; 44% of Orissa's supposed 'forest land' is actually shifting cultivation land used by tribal communities whose ancestral rights have simply not been recognised. 55% of Orissa's supposed 'forest' area is under the jurisdiction of the revenue department, and in areas surveyed for revenue settlements this land is not recorded as 'forests'. Consequently, the revenue department has been using it for different purposes for 30-40 years. About 40% of even Reserve Forest is 'deemed' to be so without any survey or settlement⁵¹. The Courts have thrown out cases against 'encroachers' on forestland due to the lacking land titles, as the FD cannot produce notifications under section 20 or 29 of the IFA.

Andhra Pradesh : Case Study

In Andhra Pradesh, most Schedule V area land (meant to protect tribal rights) has been notified as state forest, doing the exact opposite. Official records note that 32,360 hectares of land in AP's 'reserve forests' was under cultivation by adivasis prior to enactment of the FCA in 1980. A 1987 government memo that required regularising adivasi rights over this land went unheeded for eight years. A 1995 memo, after the AP World Bank funded Forestry Project was initiated, directed that the 1987 memo be 'suppressed' and the adivasis' cultivated lands be brought under joint 'forest' management, effectively changing their legal status to state-owned 'forest' land. Among the Bank project's phase-I achievements, the FD proudly claims having 'retrieved' 37,000 ha of 'forest' land from 'encroachments' in the district of Vishakhapatnam alone⁵² clearly a cynical use of a 'participatory' programme to illegally convert still more of the adivasis' land into state 'forest.'

Maharashtra: Case Study

In a bizarre interpretation of the Court's interim order, the Maharashtra FD has pressurised the revenue administration to transfer all lands declared private forests under the Maharashtra Private Forests (Acquisition) Act, 1975 to the FD. Entries of private 'forests' in government records, however, bear little correlation with reality: the area in question is not forestland at all. In 1975 in four districts alone (Thane, Raigad, Ratnagiri and Sidhurg), over 303,000 ha of agricultural land holdings were declared 'private forest' without the

⁵⁰ The act does not require verification of whether notified forest lands actually have real forests on them. Neither does it ensure that natural forests, where these exist on government lands, are actually conserved. It simply freezes legal land use for roughly 22 percent of the country's land area to that on official records on the date of the FCA's enactment.

Originally, the FCA was applicable to forest lands notified as state forests after completing the procedure for settling rights under the Indian Forest act and to lands 'recorded as forest in government records'. Subsequently, a Supreme Court judgement ruled that the FCA was also applicable to lands for which only the preliminary intention of the government to notify them as state forest had been issued. *In its interim order under the Godavarman case in December 1996, the Supreme Court extended the purview of the FCA to all lands as per 'dictionary definition' of forests, irrespective of ownership.*

⁵¹ Das, M.C. and Associates, 1995. An Inventory and Assessment of Legal, Regulatory and Procedural Framework Governing Activities The Forest Department; An Appraisal of the Orissa Forestry Sector Development Programme – Volume II, Annexure E, Mimeo.

⁵² AP FD. 2004. *Notification, AP Community Forest Management Project, Resettlement Action Plan.* http://www.ap.nic.in/apforest/JFMC/CFM/PIP/02_SEA/05-RAP/R&RP-Index.htm

knowledge of the more than 100,000 (mostly tribal) cultivators. With one stroke of the pen, and without any verification on the ground, these lands were acquired and vested in the state. Following the Court's 1996 interim order, the process of removing the cultivators' names from the land records has begun. Ironically, many cultivators received titles to their lands under the post-Independence land reform legislation⁵³.

This ad hoc fashion of the processes of declaring huge territories as state owned forests not only include vast areas which never had any forests on them but also include tribal villages and their cultivated lands under both settled and shifting cultivation. There are also between 2500 to 3000 'forest villages' established by forest departments themselves for ensuring labour availability for forestry operations. Despite a Government of India policy decision, these have still not been converted into revenue villages. By no stretch of the imagination do any of these lands represent real forests. Yet on paper, they comprise government 'forests' and MoEF demands compensatory afforestation on an equal area of other land before converting these 'forests' into revenue villages. Given the low political standing of adivasis, many governments have not bothered to allocate the vast sums of money and land required for the purpose.

A further consequence of building up the forestry estate in this manner has been its contradictory reflection in official land records. Around the country there are a number of cases where *pattas*/ grants/ leases have been issued to people at various points of time by a proper authority of the Government (for instance, the Revenue Department). But the 'status' of these lands is under dispute between different departments (such as the Revenue Department and the Forest Department). Very often the lands have changed hands between various departments and the tiller of the land has not been consulted or informed. The forest department records many such people as 'encroachers'⁵⁴. One of the largest examples of this situation exists in M.P. and Chhattisgarh. 'Orange' areas left over after demarcation of good forests from common lands acquired after independence were to be transferred to the revenue department for distribution among the landless under the then government policy. The Revenue Department issued a large number of *pattas* to agricultural cooperative societies and others over the years but the land was never transferred from the Forest to the Revenue Department records. After enactment of the FCA granting of regular titles to such patta/lease holders was stopped. More recently, following the Supreme Court order that the FCA applies to any land entered as 'forest' in official records, the Forest Department was asked by a committee of foresters empowered by the Court to transfer all such lands to the FD. Heavy penalties were to be paid by the state government for permitting 'encroachments' on such land that may be regularized only after undertaking compensatory afforestation on alternative land made available for the purpose. A joint statement of MP's revenue and forest departments pointed out to the empowered committee that although shrubs and trees might have existed on these lands when official records were prepared several decades ago, now there was no such vegetation. The committee however directed⁵⁵ that all areas recorded as 'forests' in the government records should be handed over and mutated in favour of the forest department after removing all 'encroachments' within six months, which means uprooting several lakh poor cultivators settled on these lands.

The matter of the Forest case came to a head with the Ministry of Environment and Forests (MoEF) issuing a directive on May 3, 2002 to summarily evict "all illegal encroachment of

⁵³ Lobo, B, 2002. Land Reforms: Turning the Clock Back, *Economic and Political Weekly*, Mumbai, February 9, 2002

⁵⁴ 'Resolution of Conflicts concerning forest lands – adoption of a frame by Government of India', Dr. B.D. Sharma, Commissioner, Schedule Castes and Scheduled Tribes, New Delhi, January 1991.

⁵⁵ In an order dated 29.1.2002

forestlands in various States/ Union Territories” before September 30, 2002, citing the Court’s concern over the matter. This order totally ignored a framework for resolution of disputes related to forestland between tribal people and the State, which had been worked out in 1990 by the Union Government, but lies unimplemented. A set of six circulars⁵⁶, issued on September 18, 1990, by MoEF itself clearly make a distinction between ‘encroachments’ on forestland, and ‘Disputed Claims over Forest Land arising out of Forest Settlement⁵⁷’ and ‘Disputes Regarding pattas/leases/grants involving forest land’. Due to the May 2002 circular only referring to ‘encroachments’ and overlooking disputed claims⁵⁸, it was feared that 10 million adivasis and other forest dependent communities would be displaced, threatening their very existence. Mr B D Sharma⁵⁹, pointed out that the MoEF order represented a violation of Article 338(9) of the Constitution. With the issue being brought to the notice of the Prime Minister and Parliament, MoEF was compelled to issue a clarification order that the framework for resolving disputed claims over forest lands remained in force. The most threatening development for impoverished tribal and other forest dwellers in the ongoing Court proceedings is the recent emphasis on evicting all ‘encroachers’ from forest lands. On 23.11.01, Harish Salve⁶⁰ filed IA 703 in the *Godavarma* case regarding encroachments. On 18.02.02, the SC directed the Chief Secretaries of Orissa, West Bengal, Karnataka, Tamil Nadu, Assam, Maharashtra, Madhya Pradesh, Chattisgarh and Kerala to file a reply to this IA in relation to the steps required to be taken by them to prevent further encroachment of forest land and to indicate the steps already taken to clear earlier encroachments.

The contention here is not that encroachment on forestlands by powerful vested interests is not a serious issue; it is, and must be dealt with. But the real forest destroyers are dishonest politicians, land mafias, industrial and urban encroachers, and of course ‘legalised’ destroyers in the name of development projects and mining. To label adivasi communities that have traditionally and customarily cultivated lands but do not have the title deeds to prove this as ‘encroachers’, and to club them in the same category as powerful vested interests who have indeed eaten up our forests, is an unjust and cruel step to take. The Court must be made aware of the distinction between these categories.

Tribal Rights, Livelihoods and Governance : The Centralization of Power

The delay by the central government in constituting a national level authority having technical expertise in dealing with problems that were, the, handled by the Supreme Court and High Courts, led the Court to constitute an authority called Central Empowerment

⁵⁶ Circular No. 13-1/90-FP of Government of India, Ministry of Environment & Forests, Department of Environment, Forests & Wildlife dated 18.9. 90 addressed to the Secretaries of Forest Departments of all States/ Union Territories. The six circulars under this were:

- 1) FP (1) Review of encroachments on forest land
- 2) FP (2) Review of disputed claims over forest land, arising out of forest settlement
- 3) FP (3) Disputes regarding pattas/ leases/ grants involving forest land
- 4) FP (4) Elimination of intermediaries and payment of fair wages to the labourers on forestry works
- 5) FP (5) Conversion of forest villages into revenue villages and settlement of other old habitations
- 6) FP (6) Payment of compensation for loss of life and property due to predation/ deprecation by wild animals

⁵⁷ ‘Forest settlement’ refers to the ‘settlement of rights’ process followed by the government when it acquired forest land and notified them under various categories. The process involves conducting an inquiry into the rights (habitation, agriculture, use of forest resources etc.) exercised by people in or over the forest being notified and documenting them. For certain categories of forests the process also involved extinguishing these rights after giving compensation.

⁵⁸ The MoEF order failed to distinguish between ‘unsettled claims’ and ‘encroachments’, inspite of this being acknowledged by the second circular (FP (2)) issued by the MoEF in 1990.

⁵⁹ Mr. B.D. Sharma is the former Commissioner for Scheduled Castes & Scheduled Tribes

⁶⁰ Harish Salve was the Solicitor General and Amicus Curiae in the case (*An Amicus Curiae* is a lawyer appointed by the judges to assist the Court in public interest in any particular case where they feel the need.)

Committee (CEC). The task assigned to it included the monitoring of the implementation of the orders, removal of encroachment, implementation of working plan, compensatory afforestation plantations and other conservation issues.⁶¹

This centralization of power over the country's forestlands was given to the hands of the same bureaucracy against whose mismanagement the original PIL was filed is the biggest irony. Relying primarily on advice of forest officers, and interpretations of only forestry legislation, the Court has looked at forests, rather trees, in isolation of the diversity of socio-economic, cultural and ecological contexts in which they exist. It has also given little consideration to the other laws applicable to the same areas. As the country's forest areas largely overlap with tribal areas, the implications of Court rulings for the tribals' constitutionally protected rights over their lands and local resources under Schedules V and VI of the Constitution have largely been subordinated to protecting trees or 'afforesting' cultivated lands with expensive plantations in the name of increasing 'forest' cover. This has seriously impacted millions of forest dwellers' customary as well as legal rights to forestlands and resources for their very survival. One indication of the importance of forestlands in people's lives is the fact that 800 interlocutory applications (IAs)⁶² have been filed in the case, ranging from the North East to the Andamans to Madhya Pradesh.

The Court orders and CEC recommendations fly in the face of decentralization of governance mandated by the 73rd Constitutional Amendment, and in particular the Provisions of the Extension of Panchayats to Scheduled Areas Act, 1996 (PESA) which empowers gram sabhas in Schedule V areas to manage their community resources in accordance with their traditions and customs. The Court's touching faith in 'scientific' forest management by forest departments in accordance with 'working' plans prepared by them is in total contravention to the spirit of PESA as well as the 1988 forest policy which requires that forests be managed for ecological and livelihood functions and not be 'worked' for generating revenue. Ninety per cent of the country's natural grassland ecosystems have been destroyed either due to being treated as 'blanks' needing 'afforestation' by forest departments or as 'wastelands' available for other uses by revenue departments. The constitutionally protected community rights to self-governance in accordance with their traditions and customs in Schedule V and VI areas do not find even a cursory mention in any of the Court's deliberations or the CEC's recommendations for evicting all encroachers.

On the contrary, the Empowered Committee and the Ministry of Environment and Forests appear to be targeting poor tribal families who are powerless to resist. In a completely one-sided manner, the Empowered Committee attributes encroachment to among other things, 'misuse of the SC/ST Atrocities Act, and the failure to provide forest officers on anti-encroachment drives with a strong police contingent and magistrate (necessary if firing is to be ordered).' Both these suggest the main target are tribals.

All 'forest lands', so defined, now need to be managed in accordance with working plans/schemes prepared by FDs and approved by the MoEF. This approach has given unfettered discretionary powers to forest officers and assumes 'forests' are areas divorced from any socioeconomic or cultural contexts and ignores existing tenurial arrangements for their management. This is leading to undue harassment and threatened eviction of people even with legal titles to land still 'recorded' as forest, and even the occasional illegal appropriation of private lands on the grounds of their being 'forests' as per dictionary

⁶¹ Dutta Ritwick, Yadav Bhupinder, Supreme Court on Forest Conservation, Universal Law Publishing Company, 2005. Pg. 15

⁶² An 'Interlocutory Application', referred to as 'IA' is an application for reliefs pending the final decision of a case

definition. In the north-east, households which earlier managed their private lands for timber production now have to seek FD permission for harvesting timber for sale, compelling many to clear their land of trees to grow alternative crops. Similarly, due to the overlapping classification of communal shifting cultivation lands as '*unclassed forests*' to which the FCA now applies, permission for diversion of such lands for other uses has to be sought from MoEF instead of the land owning communities. Bringing community lands with diverse tenurial status and livelihood functions under the FCA's purview due to their being 'recorded' using the term 'forest', has confused their management objectives, diluted or erased community rights, created jurisdictional conflicts between forest and revenue departments, *panchayats*⁶ and traditional community institutions, while being difficult to enforce. As pointed out by the Central Empowered Committee (CEC) itself in its recommendations to the Court on how to deal with 'encroachments' on 'forest' lands, "*In respect of deemed forest area, unclassed forest and areas recorded as forest in Government records, which are not legally constituted forests, the provisions under which an offence can be booked are not clear*"⁶³. The biggest beneficiary of the Court's interim orders has been the forest bureaucracy, which has been given more powers to control land and forest use. This is despite its widespread forest mismanagement in the past, which has led to degradation. It is also ironic given that *Godavarman* filed Public Interest Litigation against the bureaucracy because of mismanagement.

The absence of recognised land rights has made displacement without any compensation a recurring experience for Orissa's adivasis. In the 1970s, for example, the Soil Conservation Department raised cashew plantations on 120,000 hectares of land after evicting its tribal cultivators. It then leased the plantations to private parties. Ironically, this was done under a scheme called 'Economic Rehabilitation of the Rural Poor'⁶⁴! By 1990 about 8.5 million tribals (about 12.6% of all tribals) had been displaced by mega projects and the declaration of national parks and wildlife sanctuaries⁶⁵. Although tribals constitute only 8% of the population, they comprised at least 55% of the total displaced. Particularly due to their land rights still not being settled in many areas, only 2.1 million of the displaced tribals were rehabilitated, and as many as 6.4 million left to fend for themselves.

NOW I SEE THE SUN⁶⁶: THE WAY OUT

Direct remedies would essentially include changes in the whole framework and amendments in the legislature. What will a common perception dictate? Well to cite a few.... exclude non-forestlands declared as 'forests'; to carry out surveys and settlements; no subsistence cultivators and settlers on unsurveyed lands should be treated as 'encroachers'; no lands 'recorded' as forests in government records should be brought under the purview of the FCA without verification; all conflicts related to forest lands, leases/ pattas etc. and conversion of all forest villages into revenue villages must be resolved through a transparent and open process; the government of India should recognize that there are indigenous peoples in India; the UN Principles and Guidelines for the protection of the Heritage of the Indigenous Peoples must also be adopted; the government should also recognize ownership of land occupied by the tribal/indigenous peoples....so on and so forth.

All these recommendations seem to strike the chord right in the middle, but there is a close misconnection between their implementation and approach when they refer to India. Changing laws is in itself a stupendous process, and even if it is amended, it still assumes a

⁶³ Pt 12 (v) of CEC recommendations for evicting encroachments

⁶⁴ Saxena, NC. 2001. Empowerment of Tribals Through Sustainable Natural Resource Management in Western Orissa. Report prepared for IFAD/DFID.

⁶⁵ According to the draft National Policy on Tribals prepared by the Ministry of Tribal Affairs in 2004,

⁶⁶ Famous lines from song of rock band Metallica

blurred silhouette to analyse. So, in a sense, if the definition of forests is to be reframed, the stretch of imagination may render the new definition even more flawed. Everything would then take refuge in conveyor belt attitude and would prove to be the short-term achievement rather than a real permanent breakthrough.

Indigenous or ethnic peoples inhabit nearly 20% of the planet, mainly on land where they have inhabited for thousands of years⁶⁷. Now, as the rights of indigenous people gain voice and ground, a sea change is taking place in conservation across the world. The word is *Community Forestry (CF)* or *Community based conservation*.

CF is a slow but definite shift from centralized and urban-based agencies to decentralized, site-specific and community based Activities. It firstly excludes conservation attempts by official and private agencies, which either have no participation of local people or have participation only in the form of labour; and secondly includes a whole range of situation in which communities are completely in control.⁶⁸

There are a variety of reasons as to why a worldwide shift to CF is taking place and why this model is suitable to India.⁶⁹

- In virtually all developing countries, local communities continue a day to day interaction with the areas sought to be conserved even if not *de jure*, there is a *de facto* use.
- Severe and violent conflicts took place in attempts of exclusion. In the mid 1980s, at least 21% of the protected areas had had clashes between people and forest officials.⁷⁰ After the case, situation has even worsened with the plight of tribal groups becoming even more pathetic.
- All over the world, including India, it is being realized that central agencies are simply not able to carry out the task of conservation. Public support thus becomes a necessity. Indeed, local people have the sense of possessiveness for the forests and they always come up to further the cause of conservation.
- Political support for the conservation is declining, especially where it is seen as a hindrance to poverty alleviation or to development aspirations, or where it hampers the Activities of powerful vested interests. (or else, why would the Court had to intervene, only to make matter worse, though)
- Researchers have shown that there can be many situations in which human activities and desirable levels of biodiversity can co-exist in perfect harmony.⁷¹
- Experience suggests that costs involved in conservation may go down once CF is in place, as community shares in responsibilities like patrolling, fire fighting and regenerative measures.
- Local communities hold in-depth knowledge and experience of wildlife and habitats, which can be invaluable in conservation efforts.
- The move towards CF is as much a matter of human rights and social justice as of necessity. It is both result of societal move towards democratic functioning, and a potential stimulant to such functioning.

⁶⁷ Kothari Ashish, Neena Singh, Saloni Suri, 1996, *People and Protected Areas : Towards Participatory Conservation in India*, New Delhi, Sage Publications India Pvt. Ltd. Pg.247

⁶⁸ Kothari Ashish, Neena Pathak, R V Anuradha, Bansuri Taneja, 1998, *Communities and Conservation: Natural Resource Management in South an Central Asia*. New Delhi, Sage Publications India Pvt. Ltd, Pg 25

⁶⁹ Kothari Ashish, Neena Pathak, R V Anuradha, Bansuri Taneja, 1998, *Communities and Conservation: Natural Resource Management in South an Central Asia*. New Delhi, Sage Publications India Pvt. Ltd, Pg 27

⁷⁰ Kothari et al. 1989

⁷¹ Op. Cit. 71

Many rural communities have been managing forested areas for centuries, but the concept of communities managing state forests in some sort of partnership with their government, is a relatively new approach⁷². There is growing evidence that local community-based entities are as good, and often better, managers of forests than federal, regional and local governments. In addition, biologists and protected area specialists are beginning to change perspectives on human interactions with nature, acknowledging that the traditional management practices of indigenous peoples can be positive for biodiversity conservation and ecosystem maintenance. This positive outcome is best gained by devolving control of forestland to communities⁷³.

SSSS

We present here the case studies of a few countries.

NEPAL

FECOFUN (Federation of Community Forestry Users) is a national federation of forest users, which advocates for community forestry user group rights, locally, nationally, and regionally. FECOFUN's membership stands at about 5 million people. This comprises rural-based farmers – men, women, old, and young – from almost all of Nepal's 75 districts. Since its establishment in 1995, FECOFUN has been instrumental in representing concerns of community forestry user groups in deliberations about policy formulations and forest futures. FECOFUN is an autonomous, non-partisan, socially inclusive, non-profit organization. It is Nepal's largest civil society organization.

It provides leadership and communication channels, which empower forest users to engage negotiations about forest use-rights and democratic decision-making processes at the local and national level. Community-based management of forests requires open and democratic deliberations among forestry sector stakeholders, including government, INGOs, NGOs, donors, politicians and forest users. As the main representative of community forest user groups, FECOFUN is a proactive advocate for community forestry policy and legislation. If forest users' rights are at risk or ignored, FECOFUN applies pressure – through lobbying, media campaigns, Court cases, demonstrations, and protest marches – in order to promote the interests and welfare of community forestry user groups.

Healthy and well-managed forests are contingent on the health and economic well being of local forest users. FECOFUN promotes income-generation and poverty alleviation, through the improved management, harvesting, and marketing of forest products

Major initiatives and activities:

- The Preparation and Revision of User Group Constitutions and Operational Plans
- Empowerment of Women and Disadvantaged Groups
- NTFP Development and Income Generation
- Advocacy
- Radio Program

ENGLAND

Community forestry is a revolutionary environmental regeneration idea that is sweeping the country. The Community Forests are radically changing landscapes and modern-day town and city life, screening urbanisation in a veil of trees and lush greenery, softening the hard edges of contemporary development and breathing new life into tired neglected land. England's twelve Community Forests are the product of an exciting partnership between the

⁷² New Agriculturist online

⁷³ Andy White and Alejandra Martin, Forest Trends, USA

Countryside Agency, the Forestry Commission, 58 local authorities and a host of other local and national organisations.

The Community Forest Partnerships work together to deliver a comprehensive package of urban, economic and social regeneration. This shared vision is creating high-quality environments for millions of people by diversifying land-use, revitalising derelict land, revitalising derelict landscapes, enhancing biodiversity and providing new opportunities for leisure, recreation, cultural Activity, education, healthy living and social and economic development.

The Community Forests all benefit from a dedicated team or organisation working with a variety of partnerships and delivery agencies to focus resources and harness skills and experience to achieve a wider strategic vision and create the most dramatic change to our urban landscapes since the Industrial Revolution

PUERTO RICO

The government of this Caribbean island is widely perceived to be doing nothing to protect the environment, especially its forests and other green areas. But people throughout Puerto Rico are taking matters into their own hands to create community forests of their own. Two of the most successful examples of these grassroots initiatives are the People's Forest and the Corretjer Forest.

The People's Forest, in the mountain town of Adjuntas, is run by Casa Pueblo, a grassroots organisation born of the successful struggle against strip mining that lasted from the 1960s to the early 1990s. After a citizens' pressure campaign, more than 700 acres of the area slated for the mining was declared a state forest in 1996. Now called the People's Forest, it is run by Casa Pueblo in a one-of-kind arrangement with the Puerto Rico Natural Resources Department. The facilities include hiking paths, recreational areas designed by Adjuntas schoolchildren and a natural auditorium carved out of the side of a mountain. The forest also boasts an agro-forestry project where children and adults plant trees, including rare, endangered and forgotten species, as well as fruit trees.

Northeast of Adjuntas is the rural town of Ciales, home to a community forest named after one of Puerto Rico's most renowned poets: Juan Antonio Corretjer, who died in 1985. The Forest is located at one of the most picturesque areas of the Encantado River, one of Corretjer's favourite sources of solace and inspiration. Towards the end of his life the poet voiced concern about the destruction of Ciales' forests and their replacement by pesticide-intensive monoculture plantations. In the 1980s, coffee grower Tato Rodríguez, a friend of Corretjer, began having second thoughts about using pesticides. Rodríguez felt that bird populations dwindled because of deforestation and chemical use and even the butterfly and lizards died because of insecticides. Guided by Corretjer's poetry as well as by concepts of ecological agriculture and environmental protection, Rodríguez and volunteers of the Casa Corretjer Cultural Center founded the 160-acre Corretjer Forest. The area is an abandoned, weed-infested coffee farm that is being slowly cleared and repopulated with trees mentioned in Corretjer's poems, as well as numerous endemic species. The custodians of the Forest want to steer clear of the tree plantation model, and aim instead to create a complex, healthy and productive ecosystem that will provide jobs and food, and serve as a resource for eco-tourism. Since starting the reforestation project and ending pesticide use in the Corretjer, long-gone birds and insect pollinators have started to return.

SWEDEN

The Swedish forest commons have survived for more than one hundred years; no deforestation has been observed and the total amount of biomass is increasing. The forests are regarded by experts as well managed both in terms of efficiency and with regard to the preservation of biodiversity.

Compared with other types of ownership the commons have a very special organization. The base consists of 25 000 shareholders with property rights in the forests. This is a medieval pattern of ownership that seems to survive; moreover, it seems to be quite prosperous within the realm of modern society with its highly competitive forest industries. Three main explanations are discussed: the commons' conscious attempts to reduce transaction costs, their general inventiveness in adjusting to changed circumstances, and their acclimatization to the logic of the negotiated economy characterized by fuzzy borders between different sectors.

With the launch today of the Vilhelmina Model Forest (VMF) in northern Sweden's Västerbotten county, Sweden has become the first country in Europe to adopt the model forest approach -- a unique and innovative forum that tackles a wide variety of SFM (sustainable forest management) issues. The model forest approach to SFM was pioneered by Canada in the early 1990s and has since expanded to South America, the Russian Far East and Asia.

The VMF has become the first of a planned network of model forests within the Barents Region, an interconnected geographical area covering 755 600 km² that encompasses the northern parts of Sweden, Norway, Finland and Russia.

As large-scale geographic areas that focus on the environmental and the socio-economic values of the forest, model forests emphasize the formation of partnerships in which stakeholders have opportunities to participate in developing local solutions to their SFM and land use issues. As members of an international network of some 30 model forests, they can draw on the knowledge and experiences of others facing similar SFM challenges.

EPILOGUE

The link between environmental issues and human rights is rarely appreciated. Yet the fact is that environmental damage is often worst in countries and in areas with human rights abuse. Law and policy relating to environmental protection has to meet two distinct yet interrelated objectives. The first is to ensure the conservation and protecting the environment and the second is safeguarding the genuine interest of disarticulated indigenous people in the ambits of their rights. In order to meet the above twin requirements law and policies have to gear themselves to develop mechanisms that prove to be instrumental in gaining '*grounds*' literally as well as figuratively when tribes are the foci.

The Government rarely takes International Environmental Conventions seriously. Very little debate takes place and no proper preparation for the meetings is held. Unfortunately, India has till date not meaningfully participated in the drafting of the existing international laws or set the international agendas for which protocols are required.

Amidst the hue and cry, the best possible solution to the problem dealt with in the paper is Community Forestry. People's involvement in the forests along with a partnership with continuous monitoring agencies in a tailored approach is bound to adjust the dynamics of the conflict. Apart from the subsistence and economic benefits to the communities, the kind of forest management proposed shall, in the course of time, essentially improve upon the

issue of forest conservation. Community forestry is not a panacea, but in most of the cases, and especially in Indian context, it appears to be necessary from the point of view of conservation as well as social justice. What is required is a diversified, farsighted, concrete and persevered approach in order to behold a country of blooming flowers sprawling everywhere spreading fragrance of social justice. After all, Robert Frost referred to a forest when he said:

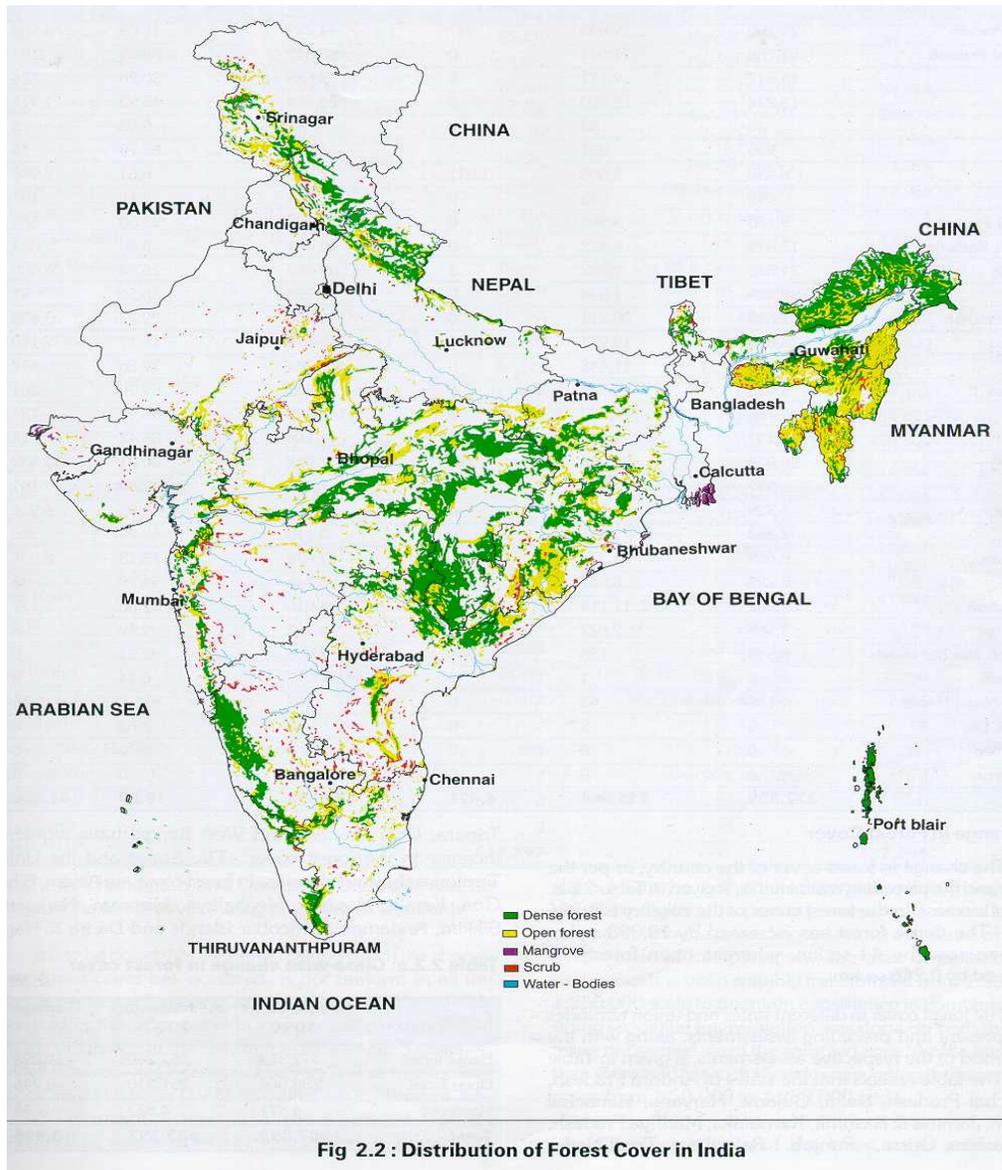
*The woods are lovely, dark and deep,
And I have promises to keep,
And miles to go before I sleep
And miles to go before I sleep.*

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APPENDIX 1



APPENDIX 2

