



THE FOREST RIGHTS ACT 2006: HIGH ASPIRATIONS, LOW REALIZATION

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I Introduction

A LAW that has been the subject of decades of popular struggle and two years of heated press controversy, political outcry and mass mobilizations across India is not just another law. Encapsulated in this legislation is the struggle of India's most poverty-stricken population to establish control over India's forest lands and resources.

The Forest Rights Act received the assent of the President on 29.12.2006 and came into force on 31.12. 2007. The rules were finalised and published on 1.1.2008. This law is the first to acknowledge that scheduled tribes and other traditional forest dwellers (hereinafter forest dwellers) in India have been unjustly treated. The Act redresses this wrong by providing such people an opportunity to claim rights to:

- Hold and live in forest land under individual or common occupation prior to 13.12.2005.
- Titles to already cultivated/occupied forest lands considered as encroachments.
- Own, access, use and sell minor forest produce (non timber forest produce of plant origin including bamboo, brushwood, stumps, cane, tussar, cocoons, honey, wax, lac, tendu/kendu leaves, medicinal plants and herbs, roots, tubers and the like).
- Manage and protect forests as well as traditional knowledge.
- Receive developmental facilities such as health, education, communication and power.

The contours of the political process that will determine the question of control over forests are just emerging in India. The passage of the Forest Rights Act is a watershed in the struggle of the scheduled tribes and other forest dwellers to assert their rights.

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II The background

Forests have been the ancestral lands and the habitat for generations of forest dwellers. In fact, they are inseparable from the ecosystem, including wildlife, and cannot survive in isolation.

Prior to the British rule in India, use of forest area and forest produce was regulated by local customary practices. But after the advent of British rule, customary regulations were replaced with the Forest Act of 1865. This Act aimed at the “regulation of forest exploitation, management and preservation of forest resources.” This was replaced by a more comprehensive Indian Forest Act of 1878 which enhanced the government control over the forests. Finally, the Forest Act of 1927 prescribed the manner in which forest resources could be exposed to industrial and commercial exploitation. After independence, the National Forest Policy of 1952 declared that the claims of communities living in and around forests should not override national interests. The destruction of forests to make way for roads, irrigation and hydroelectric projects and industries was justified in the name of national interests.¹

Environment assumed a central role in India as a result of the first major international conference on environment, namely, the United Nations Conference on Human Environment held in Stockholm in 1972. Environmental goals were subsequently incorporated in all Five Year Plans and in the Wildlife (Protection) Act, 1972.²

The Wildlife (Protection) Act, 1972 was enacted to prevent hunting and to control trade in wildlife products. In 1976, the subject of ‘forests’ was transferred from the state list to the concurrent list by the Constitution (42nd Amendment) Act, enhancing the centre’s power over forests. Finally in 1980, the central government enacted the Forests (Conservation) Act to check further deforestation. It also prohibited the state government from allowing the use of any forestlands for non-forestry purposes without prior approval of the central government.³

In 1988, the National Forest Policy was formulated with the aim of conserving biological diversity to ensure environmental stability and maintain ecological balance.⁴ Section 4.6 of the policy highlighted the symbiotic relationship between tribals and forests and the need to involve tribal communities in the management of forests. The policy specified that

1. S. Shanthakumar, *Introduction to Environmental Law* 2007 (2nd ed. Wadhwa and Company, New Delhi.).

2. S. Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India* (2nd ed. Oxford University Press, New Delhi, 2001).

3. *Supra* note 1.

4. R.S. Ghate, *Forest Policy and Tribal Development: A Study off Maharashtra* (Concept Publishing House, New Delhi, 1992).



domestic requirements of firewood, fodder and minor forest produce should be the first priority of forest management.⁵ It also emphasized safeguarding the tribals' customary rights and closely involving them in the protection of forests.

However, the Land Acquisition Act, 1894 has continued to be the state's ultimate weapon to assert its pre-eminent domain in the name of "public interest". Moreover, protective legislation such as Panchayats (Extension to the Scheduled Areas) Act, 1996 (PESA), which give the rights of control of natural resources, including minor forest produce (MFP), to the respective local communities, has remained largely unimplemented or has been watered down by individual states, since land use is a state subject. States, in their attempts to invite investment, have been reluctant to uphold legislation such as PESA. This reluctance ensures that the collection and trade of most of the high value MFP is monopolized by the state forest departments

Thus, forest lands that were historically inhabited and used were annexed both under the *Raj* and the Indian state. Notwithstanding the injustice of these annexations, their impact during earlier times was moderated by the still-large tracts of untaken forests into which the displaced *adivasis*⁶ could retreat. But with accelerating takeovers of forests after independence, first, by axe and plough, and then by large industrial and commercial projects, fewer forests remained to shelter the beleaguered *adivasis*.

Insecurity of tenure and fear of eviction from these lands where they have lived and thrived for generations have made forest dwellers feel emotionally as well as physically alienated from forests and forest lands. All these factors have resulted in historical injustice to them and paved the way for the Forest Rights Act.

III Salient features of the Act

Forest rights

The Act in section 4 seeks to recognize and vest forest rights in scheduled tribes and other traditional forest dwellers. Forest rights, as defined in section 3, recognize the occupation of scheduled tribes and other traditional forest dwellers on forest land and their habitat, where they have been living for generations.

5. See, National Forest Policy, 1988 under the heading "Tribal people and Forests" (S. 4.6)

6. The word '*adivasi or adivasis*' in the light of the Forest Rights Act must be construed to be within the purview of the expression "*forest dwelling Scheduled Tribes*" or "*other traditional forest dwellers*" as defined in the Act in ss. 2(c) and 2(o) respectively.



The beneficiaries under the Act

The beneficiaries under the Act are “forest dwelling scheduled tribes” and “other traditional forest dwellers”. Members of the scheduled tribes who primarily reside in and depend on the forests or forest lands for their *bona fide* livelihood needs, including pastoralist communities of scheduled tribes, are “forest dwelling scheduled tribes.” “Other traditional forest dwellers” refers to people who have, for at least three generations (generation means a period of 25 years) prior to 13.12.2005, primarily resided in and depended on forest lands for their *bona fide* livelihood needs. While the scheduled tribes have rights vested in them by way of constitutional provisions, “other traditional forest dwellers” have rights conferred upon them only by virtue of this Act.

Duties of holders of forest rights

These have been provided in section 5 of chapter III of the Act: The holders of any forest right are empowered to:

- 1) protect the wildlife, forest and biodiversity;
- 2) ensure that adjoining catchment areas, water sources and other ecological sensitive areas are adequately protected;
- 3) ensure that their habitat is preserved from any form of destructive practices affecting their cultural and natural heritage;
- 4) ensure that the decisions taken in *gram sabhas* to regulate access to community forest resources and to stop any activity that adversely affects the wild animals, their habitat and biodiversity are complied with.

Creation of critical wildlife habitat

This has been provided in section 4(2) of chapter III, for the purpose of creating inviolate areas for wildlife conservation that may not subsequently be diverted by the state government or any other entity for other uses.

The procedure for vesting of forest rights

These have been provided in section 6, chapter IV of the Act which include *gram sabhas*, sub-divisional level committees, district level committees and state level monitoring committees.



Offences under the Act

Section 7 in chapter V of the Act provides that where any member or officer of an authority or committee contravenes any provision of this Act or any rule, he shall be deemed to be guilty of an offence under this Act and shall be punished with a fine which may extend up to one thousand rupees. However, if the contravention is proved to have been committed unknowingly or in the exercise of due diligence to prevent the commission of such offence, no penalty will apply.

Nodal agency

The central government ministry dealing with tribal affairs or any other officer or authority authorized by the central government in this behalf shall be the nodal agency for the implementation of this Act.

Power of central government

The central government is empowered to issue directions with regard to every authority referred to in chapter IV under section 12 and to make rules for carrying out the provisions of the Act under section 14.

IV Object of the Act

The objective of the Act is to:

- (i) Reinforce the rich conservation ethos that tribal communities have traditionally shown and resist any form of unsustainable or destructive practices;
- (ii) lay down a simple procedure for recognising and vesting forest rights in the scheduled tribes and other traditional forest dwellers so that their rights become legally enforceable through corrective measures in the formal recording system of the executive agencies;
- (iii) provide for adequate safeguards to avoid any further encroachment of forests and involve the democratic institutions at the grassroots level in the process of recognising and vesting forest rights;
- (iv) address the long-standing need of granting a secure and inalienable right to those communities whose right to life depends on forestland and resources. This will strengthen the entire conservation regime by giving a permanent stake to scheduled tribes and other traditional forest dwellers residing in the forests



for generations in symbiotic relationship with the forest ecosystem.

V An analysis and perspective

These are some of the questions that arise:

1. Has the state truly forgone the usual principle of 'eminent domain' (which means that the state owns all natural resources over which people have no proprietary rights) in the light of the Forest Rights Act of 2006?
2. Can the state be expected to change its policy towards forest dwellers after consistently overlooking their rights in all prior forest policies and laws and concentrating on isolating forests for commercial use and environmental conservation?
3. Should the Act be viewed with suspicion and distrust because political parties as well as the World Bank supported it? Should the Act be rejected as an underhand attempt to privatize India's forests?

Rights of forest dwellers

This Act aims to confer the right to livelihood upon the forest dwellers who have resided in and depended on forest or forest lands for their *bona fide* needs. Since forest dwellers depend on the forest for leaves, grazing animals, fruits, firewood, and medicinal herbs, rights over minor forest produce would sustain their livelihood. In the absence of a rights regime, these resources were often harvested unsustainably by private contractors under license from the forest department. In pursuance of this right to livelihood, there are other rights that the Act vests in the forest dwellers that secure individual or community tenure or both.

The intent here is not to take a comprehensive look at relevant case law but to delineate noticeable trends in how the case law has influenced the rights of forest dwelling populations prior to the coming into force of the Act. A cursory glance at some prominent court judgments suggests that forest dwellers' rights have sometimes been taken seriously by courts.

In the case of *Fatesang Gimba Vasava v. State of Gujarat*,⁷ the Gujarat High Court ruled that the Gujarat Forest Department's action to prevent the transport of bamboo for sale to *adivasis* at concessional rates was unwarranted. The court ruled that once bamboo had been converted to

7. AIR 1987 Guj 9.



bamboo chips it did not constitute a produce from nature and hence was not a violation of the Indian Forest Act, 1927.⁸ In both *Sri Manchegowda v. State of Karnataka*⁹ and *Lingappa Pochanna v. State of Maharashtra*,¹⁰ the Supreme Court ruled in favour of the protection of *adivasi* lands; in the former case it nullified private purchases of *adivasi* land and in the latter case it upheld state legislation aimed at restoring lands to *adivasis*. Moreover, there is the famous case of *Samatha v. State of Andhra Pradesh and others* (*Samatha* case).¹¹ In a prior case, *P Rami Reddy v. State of Andhra Pradesh*,¹² the Supreme Court had ruled that prohibitions against transfer of *adivasi* land to persons who were not *adivasis* were necessary given the poor economic status of *adivasis*. The Supreme Court in *Samatha* went further by saying that prohibited transferees included the government.¹³ Generally, *adivasi* rights are upheld when they are not in conflict with the “greater common good” or “sustainable development.”¹⁴

The Act clearly provides for rights to *in situ* rehabilitation and alternative land in case of illegal eviction or forced displacement provided under sections 3(1)(m) and 4(8). However, neither the Act nor its rules expressly provide any method by which this rehabilitation or compensation should be provided.

Only in the conditions to be satisfied for the creation of a critical wildlife habitat, in section 4(2(d)) is there any mention of resettlement or substitute land to be provided by the central government. In this provision the phrase “policy of the Central Government” can only be interpreted to correspond to the National Rehabilitation and Resettlement Policy of 2007 notified on 31.10.2007. This policy provides that the scheduled tribe families who are or were in possession of forest lands in the affected area prior to 13.12.2005 (sub clause (vii) of clause 6.4 of the 2007 policy) be included in the survey of the administrator for resettlement and rehabilitation. However, it does not guarantee land-for-land compensation to the displaced families as it is subject to availability of land. This provision contravenes the right of alternative land as vested in the forest dwellers. It is also unclear whether the central or the state government will be responsible for preparing a package for rehabilitation.

8. P Leelakrishnan, *Environmental Law Case Book* (Lexis Nexis, New Delhi, 2005).

9. AIR 1984 SC 1151.

10. AIR 1985 SC 389.

11. AIR 1997 SC 3297.

12. AIR 1988 SC 1626.

13. Ajit Menon, ‘Engaging with the Law on Adivasi Rights’ 42 (*Economic & Political Weekly* 2239-2242 (June 16, 2007)).

14. *Ibid.*



The Act recognizes a tribal community as a legal person eligible to claim forest rights; but section 4(6) of the Act, by treating the community in the same manner as an individual or a family and by stipulating that recognition of rights shall in no case exceed an area of four hectares, seems to have negated its positive intent. In north-east India in particular, and in many other parts of the country, community access, control and management of forest tracts go much beyond four hectares.¹⁵ The Act provides that “The holders of any forest right, [including] Gram Sabhas and village level institutions, are empowered to (a) protect the wildlife, forest and biodiversity; (b) ensure that adjoining catchment area, water sources and other ecological sensitive areas are adequately protected; (c) ensure that the habitat of forest dwelling scheduled tribes and other traditional forest dwellers is preserved from any form of destructive practices affecting their cultural and natural heritage; (d) ensure that the decision taken in the Gram Sabha to regulate access to community forest resources and stop any activity which adversely affect the wild animals, [their habitat] and biodiversity are complied with.”¹⁶

Though in the body of the Act the word ‘empowered’ to enforce the foregoing conditions has been used, the descriptive caption in the margin speaks of “duties of holders of forest rights”. What instruments of power have been made available to the holders of forest rights, to be able to ensure that the conditions indicated in this section have been actually enforced? What assistance has been provided so that the forest right holders can discharge their duty?¹⁷

Rights and conservation

Conservation of wildlife and forests has been a subject of concern. But doubts have been raised as to whether the conservation of wildlife and biodiversity can be achieved by turning the forests into the hands of the forest dwellers.

Rule 34 of the rules published on 19.6. 2007 provided that the Ministry of Environment and Forests may, within six months from the date of coming into force of the rules, and in consultation with the Ministry of Tribal Affairs, issue detailed guidelines regarding the nature of data to be collected, the process for collection, validation of the data, their interpretation, and so on in determining the critical wildlife habitat (CWH). These guidelines,

15. B.K. Roy Burman, 2008, “Ambiguities, Incongruities, Inadequacies in Scheduled Tribes and Other Technical Forest Dwellers (Recognition of Forest Rights) Act 2006: A Case For Constructive Engagement”, XLVI *Mainstream* 15 (March 29).

16. *Ibid.*

17. *Ibid.*



the draft suggested, should take into account the existing guidelines relating to documentation of biodiversity and wildlife and delineation of areas such as heritage sites and national parks. But the final rules leave it to the state to define CWH.¹⁸ This substantially waters down the concept of localization of functions.

There is also a lack of clarity on the management of CWHs. The Forest Rights Act give forest communities a right to claim forest patches under customary use for conservation and management, if these happen to fall within a CWH (or for that matter within any protected area declared under the Wildlife Protection Act), who exercises control over the area. What will be the precise relation between the relevant *gram sabhas* and the forest department? If no binding conservation duties have been assigned to forest-dwelling communities, how will they be held accountable? If the forest department does not assist communities in conserving their forests, how will they do so?

Moreover, to ensure that this measure is used in a judicious manner and for the conservation of wildlife, the following questions need to be raised as a method of 'checks and balances':

1. What is the scientific basis for reaching the conclusion that co-existence between people and wildlife is not a possibility, thus making relocation necessary?
2. Is the government providing people with a secure livelihood?
3. Has the government consulted with the *gram sabhas* of the area? Have they consented freely? Were they informed of everything in the rehabilitation package and the reasons why the area is being declared a CWH?

The *gram sabha* has been designated by the Act as the authority to determine the nature and extent of individual or community forest rights by receiving, consolidating and verifying claims within the limits of its local jurisdiction. The Act was supposed to be an instrument to conserve forests, wildlife and biodiversity.

Rule 24 of the rules published on 19.6.2007 states:

Duties of holders of forest rights, gram sabhas and village level institutions-

- (1) The village-level institution or the Gram Sabha may perform the duties falling under section 5 of the Act on behalf of holders of any forest right and shall be empowered to:

18. *Ibid.* Burman, *supra* note 15.



- (a) prepare a plan for the protection and management of community forest resources and such plans, norms, methods, procedures, may harmonize its prescriptions with those of relevant plans, such as, forest working plans, management plans of sanctuaries and national parks, biodiversity management plans, watershed management plans and eco-development plans;
- (b) prepare and adopt norms including institutional arrangements for the protection of, and regulation of access to and sustainable use of the community forest resource; and resources within it including biodiversity, forest, catchments areas, water sources and ecologically sensitive areas;
- (c) prepare norms for community wildlife management;
- (d) evolve procedures to protect, conserve, regenerate or manage the resource while protecting interests in forest rights of vulnerable groups and women, including deciding on allowing or denying access to outsiders and charging fees; and
- (e) evolve methods for monitoring and implementing such norms.

(2) The Gram Sabha may

- (a) request the assistance of the Forest Department or other local authorities for implementing its norms, and such authorities shall provide the requisite assistance;
- (b) take corrective actions as may be necessary, where there is violation of norms created by it in exercise of this right or direct the concerned authorities to proceed in accordance with law;
- (c) guide the functioning of Joint Forest Management Committee, Eco development Committee, Watershed Committee, Biodiversity Management Committee or any other such committees or institutions concerned with the management of forest resources.

(3) In case there is a conflict between a decision of a Gram Sabha and a user group in regard to exercise of rights under clause (i) of sub-section (1) of section 3 of the Act, the decision of the Gram Sabha shall prevail while ensuring that forest rights of vulnerable groups and women are not put to any disadvantage.

It seems clear that the draft rules intended to vest substantive legal and administrative responsibilities with grass-root level bodies to ensure that the tasks entrusted to the forest rights holders were implemented. But the rules as finally framed do not contain any of these provisions. Rule 4(e) of the finally adopted rules specifies that the *gram sabha* shall constitute a committee for the protection of wildlife, forest and biodiversity from among



its members, in order to carry out the provision of section 5 of the Act.

While the *gram sabha* is supposed to be provided with the necessary assistance by the authorities in the state, the rule is too vague to be of much help, particularly when the opposing forces are powerful and entrenched.

The constitutional validity of the Forest Rights Act has come to be challenged by a petition framed by several conservation groups, arguing that the Act could pose a grave threat to India's forests and wildlife¹⁹ by eroding the ecological integrity of the remaining forests in India.²⁰

The forest bench of the Supreme Court, comprising of K.G. Balakrishnan CJI and Arijit Pasayat and S.H. Kapadia JJ issued notice on 28.3.2006 to the centre, state and union territories after hearing *amicus curiae* Harish Salve on two petitions challenging the constitutional validity of the Forest Rights Act.

The first petition, filed by the Bombay Natural History Society,²¹ raised numerous questions on the implementation of the Act. The second petition filed by three wildlife organizations — Wildlife First, Nature Conservation Society and Tiger Research and Conservation Trust, contended that 'land' is a state subject and Parliament cannot distribute the same. The Supreme Court issued notices to the Union Ministry of Environment and Forests, the Ministry of Tribal Affairs and the cabinet secretary, among others.²²

Questions of law involved were:²³

1. Is the Act beyond the legislative competence of Parliament?
2. Does Parliament have the right to distribute land rights when land is a state subject?
3. Do natural heritage/ ecology/ biodiversity/ natural resources including forest land fall within the expression 'right to life and liberty' guaranteed under article 21?
4. Does the Forest Rights Act actually correct a historical injustice or does it rather perpetuate a situation in which the tribals are forced to live at a subsistence level?

19. "Notice to Centre, State on Forest Act", *The Hindu* 29.3.2008; "Apex Court notice to Centre on Forest Rights Act" *The Indian Express* 29.3.2008.

20. See, Ashish Kothari, 'Saving conservation laws from the conservationists' available at <http://infochangeindia.org/200804077019/Environment/Politics-of-Biodiversity/Saving-conservation-laws-from-the-conservationists.html>

21. *Bombay Natural History Socy. & Ors v. Union of India & Ors.*, W.P(C) No. 50/2008. Case Status- Last listed on 28/03/2008 and still pending.

22. *The Hindu & The Indian Express*, *supra* note 19.

23. *Ibid.*



Thus a declaration has been sought that the Act was beyond the legislative competence of Parliament and that the rights to be conferred on tribals and forest dwellers were *ultra vires*.

When Parliament legislated on the issue of forest land earlier, there was no opposition. The Forest Conservation Act, 1980 is credited by environmental groups as having been instrumental in slowing down the diversion of forest land for non forest purposes.²⁴ It states:

Notwithstanding anything contained in any other law for the time being in force in a state, no state government or other authority shall make, except with the prior approval of the central government, any order directing... that any forest land or any portion thereof may be used for any non-forest purpose.

The Act's challengers argue that the legislation impinges on the fundamental rights of all citizens to "natural heritage and ecology," thereby violating article 21 of the Constitution, but that no fundamental rights are impinged when diverting the same forest lands to 'development' projects, such as Vedanta's mining in Orissa, discussed below. This seems to reflect an elitist mindset on the part of the conservationists.²⁵ They continued to claim that the Act would destroy the forests when it is well known that the extent of land to be vested in tribal people is less than two per cent of India's forest land.

The Forest Rights Act was notified in January 2008 after a protracted battle between wildlife activists and state forest departments on the one hand and tribal activists on the other. For several months in 2008, the Gujarat Forest Department issued press notes stating that the Forest Rights Act is encouraging encroachments into the forest. Since the Forest Rights Act has come into force, the Gujarat Forest Department has been aggressively trying to deny tribal people their rights.²⁶

There have been a total of six high court petitions filed since the Act was notified.²⁷ 'Campaign for Survival and Dignity'²⁸ has condemned these petitions as deliberately distorting, obfuscating and confusing the issues in the Act. The petitioners paint this Act as a land distribution measure that will result in forest destruction, whereas the law is very clearly concerned with resources and rights that are already being exercised. No land is being

24. Kothari, *supra* note 20.

25. *Ibid*.

26. See, <http://www.indianexpress.com/news/govt-criticised-for-not-implementing-forest-rights-act/359911/>

27. Kothari, *supra* note 20.

28. Campaign for Survival and Dignity is a federation of forest dwellers and tribals organizations from eleven states.



distributed, and no one will receive rights to any land that they are not already cultivating as on 13.12.2005.²⁹

There are a number of cases where the protection of “pristine nature” resulted in limits placed on rights to use natural resources such as forests and fisheries. The *Doon Valley* and *Silent Valley* cases are notable examples. In such cases, the conservation of environment took precedence over development.³⁰

Rights and development

Time has shown that the rights of forest dwellers have always been in conflict with development, each struggling to outcompete the other.

A classic story of human rights violation and injustice is the experience of the Dongaria Kondhas with Vedanta, a British mining company. Vedanta Alumina, a subsidiary of Sterlite Industries, signed an agreement with the Orissa Government in October 2004 to mine bauxite in the Niyamgiri hills. This project trampled on the rights of the forest dwellers in the region as well as threatening them with arrest. It provides a good example of the linkages between the environment and human rights in the conflict between multinational corporations and communities across the country from Madhya Pradesh to Chattisgarh, from Bihar to Jharkhand, and from Andhra Pradesh to Karnataka. The acts of Vedanta are a prime illustration of ‘development aggression’.³¹

An appeal to the Supreme Court of India was filed to restore the rights of tribal people in the Niyamgiri Hills.³² The central empowered committee (CEC) found illegalities in the central government clearances to the Sterlite Industries’ bauxite mining project in the state and recommended that the Supreme Court deny diversion of forest lands for the project. The area allocated to the company forms part of a schedule V area as specified in the Constitution and accords protection to the *adivasi* people residing in these areas.³³ The Supreme Court’s ruling on 23.11.2007 delighted the tribal people as it barred Vedanta Resources from mining bauxite in the

29. *The Hindu & The Indian Express*, *supra* note 19.

30. Menon, *supra* note 13.

31. Geetanjoy Sahu, 2008, “Mining in the Niyamgiri Hills and Tribal Rights”, 43(15) *Economic & Political Weekly* 19-21 (April 12).

32. Biswajit Mohanty of Wildlife Society of Orissa, Prafulla Samantara and Academy of Mountain Environics have filed Application Nos. 564, 571 and 579, respectively before the CEC against the establishment of the project.

33. See, Central Empowered Committee Report (2005) in IA 1324 regarding the alumina refinery plant being set up by Vedanta Alumina at Lanjigarh in Kalahandi district, Orissa.



Niyamgiri hills. But the decision was a temporary reprieve as the court ordered the company's Indian unit, Sterlite Industries, to return with a new proposal for the project. The court also provided an escape clause for the mining giants by setting up a special purpose vehicle which would ensure compliance with environmental regulations. Once the requirements for employing the displaced persons and tribals and protecting wildlife are addressed, the companies can approach the court again for a go-ahead.³⁴

Another reality is the threat that emanates from encroachment onto the tribals' land, which was sparked by the building of a highway through their forest in the 1970s. The road brought settlers, poachers and loggers, who stole the tribe's game and exposed them to disease. In 1999 and 2006, the Jarawa suffered outbreaks of measles – a disease that has wiped out many tribes worldwide following contact with outsiders. There are also reports of sexual exploitation of Jarawa women. The Indian Supreme Court ordered the closure of the road through the Jarawa land in 2002, yet it remains open, and poaching and exploitation are posing increasingly serious dangers. In 2004 the authorities announced a radical new policy, stating that the Jarawa would be allowed to choose their own future, and that outside intervention in their lives would be kept to a minimum. However, news headings in the media do not give an assurance that the policy of minimum intervention is being adhered to.³⁵

In Jagatsinghpur (Orissa), the South Korean Steel company Pohang Steel Corporation (POSCO) is setting up a steel plant, iron ore mines and a private port. Subsidies have been given to POSCO. The development will displace tens of thousands of people. The POSCO Pratirodh Sangram Samiti and other organizations have blockaded the proposed steel plant site, preventing the police and the company from entering the area and taking their lands. But the company has responded with violence.³⁶ The Communist Party of India has expressed "deep concern" over the centre's continuing support for the POSCO project in Orissa, also because the plant seems to be in flagrant violation of the Forest Rights Act, 2006.³⁷ Tension has continued to surround the POSCO project site in Jagatsinghpur.³⁸ Tribal

34. Sahu, *supra* note 31.

35. "Traffic triples on highway that threatens Jarawa tribe" 21.1. 2008; "Leave the Jarawa alone,' tour operators told" 29.6.2007; "Andaman Islands defy Supreme Court on Jarawa" 7 .5.2007, available at <http://www.survival-international.org/tribes/jarawa>.

36. See, *Guide to the Forests Rights Act* by Campaign for Survival and Dignity

37. "CPI: why still back POSCO project?" *The Hindu* 23.5.2008. See <http://www.hinduonnet.com/thehindu/thscrip/print.pl?file=2008052355521200.htm&date=2008/05/23/&prd=th&>

38. 26 people were arrested on 22.6.2008 for allegedly killing an anti-land acquisition activist.



communities have pledged to intensify agitations against the 51,000 crore FDI project.³⁹ The special environment bench headed by K.G. Balakrishnan CJI allowed POSCO India Pvt. Ltd., to go ahead with its plans. With this order the Supreme Court also cleared a forest diversion proposal for the plant site, which requires 1253 hectares of forest land.⁴⁰

When *adivasi* rights are juxtaposed with development concerns, *adivasi* rights are often limited or redefined. This was demonstrated in the *Narmada* and the *Tehri* cases as well as in a host of similar cases related to power projects, mining and industrialization. Typically, the *adivasi* rights to their land are denied and redefined in terms of rights to resettlement and rehabilitation.⁴¹ No attempt has ever been made to secure the consent of those being adversely affected by these projects, to involve them in devising humane and appropriate strategies of rehabilitation or to make them a party to the projects' benefits. A large majority of the displaced have been *adivasis*, either because the only sites remaining for location of these large projects, such as Narmada, are in the *adivasi* hinterland, or because *adivasi* homelands such as Jharkhand are extremely bountiful in mineral resources.

VI Implementation and the bureaucracy⁴²

At every stage the initial aspirations for the Act seem to have been diluted to be politically accommodating to the MoEF, the state forest departments and the wildlife lobby. There were many provisions in the draft bill recommended by the joint parliamentary committee that were struck down by the bureaucrats at the last instance. The weak implementation can be inferred from ongoing primary research in three eastern states — West Bengal, Orissa and Andhra Pradesh.⁴³

39. Sandeep Mishra, "26 Posco supporters arrested" *The Times of India* 23.6.2008.

40. "SC green signal to Posco plant" *The Indian Express* 9.8.2008.

41. Menon, *supra* note 13.

42. "The Indian Forest Rights Act, 2006: Commoning Enclosures?" - This paper is based on ongoing research in India under the 'Institutions for Pro-Poor Growth' Research Programme Consortium, managed by Manchester University and funded by the Department for International Development, United Kingdom Government. This specific research project has been managed by Overseas Development Group, University of East Anglia.

43. **West Bengal**

The implementation process in West Bengal illustrates how the bureaucracy has already distorted the provisions of the Act by misinterpreting them. It is only due to the organized presence of movement groups in many forest villages that there is an ongoing effort to implement the Act as a people-centered process. It seems that



Since the coming into force of the Act, the government response has ranged from weak at best to outright denial.⁴⁴ Forest departments have continued to seek to control the forest estate and minimize local people's rights to forests. Where there has been action it has focused on an individual's rights. The issue of collective rights has not been broached. It is also reported that forms for claiming lands have not reached all the villages.

VII Centre-state relations and forest rights

The impact of various conservation related initiatives has largely been unhelpful in protecting communities and their basic livelihood and survival requirements. Worse, the contrasting regimes of political decentralization and wildlife/forest/biodiversity conservation have come into conflict through government pronouncements following judgments of the Indian Supreme Court (*T. N. Godavarman Thirumulkpad v. Union of India*,⁴⁵ has spawned dozens of forest-related judgements and orders in the last few years). The strong centralizing perspective is discernible from the content of these orders:

- The Supreme Court's involvement in forest conservation largely centers on the public interest litigation in the *Godavarman* case. In its order of 12.12.1996 the court 'suspended' the felling of trees in all forests except in accordance with the 23 working

awareness of the Act by tribals and also concrete details of the methods for clarifying their claims are lacking in the field where NGOs are not active. Presumably this is due to the scant presence of NGOs and the disinterest of political parties.

Orissa

Despite assurances given to tribals by civil servants, there has been no circulation of claim forms. Under rule 12(4) of the Act, the government must supply all the relevant documents to the people. Rule 13 lists the documents that are required for the granting of rights. The Orissa Forest Department has apparently sought to prevent households in protected areas from meeting to secure their rights.

Andhra Pradesh

Tribals in Andhra have been deprived of secure entitlements to cultivate forest land patches and to collectively control the forest. *Gram sabhas* have met at the *panchayat* level rather than hamlet level in violation of the Act's provision for hamlet level *grama sabhas* in scheduled areas. It seems evident in the state that the official implementation response is spasmodic rather than concerted. Increased awareness is not taking place and the sporadic formation of local forest rights committees has not been followed up by support for formalizing claims.

44. E.g. statements of the Forest Minister in West Bengal that the state did not need the Act, because there are already 'too many rights'.

45. Writ Petition 202 of 1995.



plans of the state governments which were approved by the central government. In the same order, the court observed that the word 'forest' must be understood according to the dictionary meaning.

- An order in 2000 prohibited the removal of any dead or decaying trees, grasses, driftwood, etc from any area comprising a national park or sanctuary. Any contrary order passed by any state government or other authorities would be stayed.⁴⁶ Though this order was related to a particular instance of surreptitious moves by a state government to resume timber felling inside parks and sanctuaries, the Central Ministry of Environment and Forests (MoEF), and the court-appointed central empowered committee (CEC) directed all state governments to negate all rights inside all such protected areas. Ignored completely in the orders of the Supreme Court and their interpretation by MoEF and CEC, is the fact that this would, in effect, divest 3.5 to 4 million people living inside these areas, or otherwise dependent on their resources, of all rights to resources. The ultimate effect would only be forcible displacement of these people who belong to the country's weakest indigenous communities. At no stage in the proceedings of the court, have the powers of the *panchayats* and other village institutions been referred to, much less respected.⁴⁷

However, with the coming of the Forest Rights Act and in pursuance of the principle of 'decentralization,'⁴⁸ which is an integral part of the National Environment Policy, 2006, the purview of the central government over its natural resources has been sidelined, leaving the state governments and the local *gram sabhas* to make the decisions.⁴⁹

With the *Godavarman* case, the Supreme Court has made itself the ultimate authority over forest issues, independent of the central and state governments. It has gone further by assuming a legislative role to micromanage forest-related issues. The court has empowered itself with the practice of "continuing mandamus", not envisaged by the Constitution

46. I.A. No.548 of 2000 in W.P. (c) No. 202 of 1995.

47. Milind Vani and Ashish Kothari, *Conservation and People's Livelihood Rights in India* (2007) Final report of a research project conducted under the UNESCO Small Grants Programme.

48. Decentralization means ceding or transfer of power from a central authority to state and local authorities, in order to empower public authorities having jurisdiction at the spatial level at which particular environmental issues are salient, to address these issues.

49. Madhu Ramnath, "Surviving the Forest Rights Act: Between Scylla and Charybdis" 43(9) *Economic & Political Weekly* 37-42 (March 1, 2008).



to act as an administrator of law and its own regulations.⁵⁰ It has created the quasi-executive structure, the CEC, which is at complete odds with the doctrine of separation of powers.⁵¹

VIII An insight into global perspective

The world is closing in on the last primitive tribes hidden in the planet's most remote reaches. This poses a dilemma for their would-be protectors: whether to leave them to their fate or to assimilate them into the larger world before they disappear. Neither course promises a happy ending. A reminder of their situation came recently with the publication of aerial photographs of a tribal encampment in Brazil near the border with Peru. Experts believe that the group was pushed out of Peruvian territory into Brazil by loggers sawing down their habitation. Anthropologists generally praise Brazil's efforts in recent years since the protection and continued survival of indigenous people and their way of life involves striking a careful balance between the ambitions of developers of resources and the best interests of the native population. Though the settlements are monitored from time to time, no attempt is supposed to be made to assimilate the people into the outside culture.⁵²

Survival International, based in London is the only international organization supporting the cause of struggling indigenous and tribal people worldwide. It works for tribal peoples' rights through education, advocacy and by offering a platform to the tribal people to address the world.⁵³ In the Indian context the organization has fought unwaveringly for the survival of the Jarawa tribe in the Andaman Islands and the Dongria Kondh living in the Niyamgiri Hills in Orissa.⁵⁴

In many countries, indigenous people have become a minority with little influence over policies that affect their lives. Their lands may be taken 'in the national interest' for dams, mines, conservation projects, and other schemes which promise 'development' but leave the land's true owners marginalized. In other cases, indigenous peoples are removed from their land, often forcibly, in order to integrate them into national society and bring them 'development'. This often happens when there are valuable

50. Armin Rosencranz, Edward Boenig and Brinda Dutta, "The Godavarman Case: The Indian Supreme Court's Breach of Constitutional Boundaries in Managing India's Forests" *Environmental Law Reporter* (Jan 2007).

51. Armin Rosencranz and Sharachandra Lele, "Supreme Court and India's Forests" 43(5) *Economic and Political Weekly* 11-14 (Feb 2, 2008).

52. John, Wilford, "Twilight for the forest people" *Times of India* 9.6.2008.

53. See <http://www.survival-international.org/about>.

54. See <http://www.survival-international.org/tribes>.



resources on or under the land. These policies are frequently born of a racism towards tribal communities that sees them as ‘backward’ and in need of being ‘brought into the modern world’. However, what is forgotten is that contact with outsiders has brought exposure to new diseases and changes to their livelihoods and practices that had maintained the health of the community.⁵⁵

An analysis of the evolution of environmental laws in US, Canada, Australia and New Zealand demonstrates that the developments in India are in no way commensurate with the developments in those countries. For example, American constitutional law has established that the native American tribes have full rights to common ancestral lands as well as entitlements to the benefits arising from the resources and the public use of such lands. In Canada, occupancy rights of the “first nations” over their common land has been established through various judicial directions and judgments. The constitutional rights of the native people are also affirmed in the Canadian Constitution of 1981. The Australian Aboriginal Land Rights (Northern territory) Act, 1976 and Pitjantjatjara Land Rights Act 1981 have also ensured native people’s entitlements to their ancestral lands.⁵⁶

India ratified the Indigenous and Tribal Populations Convention, 1957, a convention concerning the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries on 29.9.1958. A subsequent revision to the convention in 1989 still awaits India’s ratification. The revised convention adopts new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards. It recognises the aspirations of these people to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the states in which they live.⁵⁷

IX Requirement of complementary reforms

There are a large number of inconsistencies between the new Act and pre-existing administration policy at the national and state levels which need to be resolved. The Act supersedes previous laws as far as recognition of rights is concerned, but it is ambiguous about the role of existing laws in *regulating the exercise* of those rights. Section 4 of the Act dealing

55. See ‘Progress can kill: how imposed development destroys the health of tribal peoples’, a ground-breaking report available at <http://www.survival-international.org/campaigns/progresscankill>

56. Sahu, *supra* note 31.

57. See <http://www.ilo.org/ilolex/english/convdisp2.htm> .



with the recognition of rights begins with the words:

[N]otwithstanding anything contained in any other law for the time being in force ... The central government hereby recognises and vests forest rights.

Thus, rights have to be recognized irrespective of the Indian Forest Act, the Forest Conservation Act, the Wildlife Protection Act and so on. However, section 13 confuses the picture by saying that:

Save as otherwise provided in this Act and the PESA, the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

Hence there must be subsidiary reforms to support the implementation of the Act.

X Giving teeth to legislation

The Act conveys a strong message, particularly in its preamble, which refers to “the historical injustice done to the forest dwelling Scheduled Tribes and other traditional forest dwellers.” The following suggestions, if implemented, would strengthen the Act and help to serve the purpose for which it has been enacted:

1. Time limits must be imposed on the process for establishing forest rights at both the *gram sabha* and district levels. The rules need to be much clearer about the on-ground relationship between *gram sabhas*, rights holders and government agencies in the fulfilment of management and conservation functions. Government officials need to specify what precise authority, powers and responsibilities *gram sabhas* have to implement the conservation functions specified in sections 3 (1) (i) and 5 of the Act.
2. It is also vital to recognize that a uniform approach to implementation will not work. What is needed is a site-specific process of implementation that takes into account the ecological, cultural, legal and administrative diversity across the country. In some north-eastern states, more attention may be needed to deal with possible conflicts between older *Adivasi* residents and more recent *Adivasi* or *non-Adivasi* settlers; in the Western Ghats, the issue of *non-Adivasi* forest-dependent communities may be most relevant; officials and communities in eastern-central India must ensure that industrial interests do not misuse the process; in central and western India, the complexities of nomadic populations would need focus.



3. Civil society groups must keep a lookout for and raise alarm bells regarding any damage arising from the Act, especially from its misuse. They must maintain a constant vigil against the machinations of the bureaucracy and the forest department, their cronies in the timber mafia, and large industrial and business groups involved in forest-based corporate ventures, including mining.⁵⁸
4. It is imperative that both the government and the NGO sector develop methods to make the vesting of forest rights fair, just and consistent with the will of the people.⁵⁹
5. Simultaneously, tribal people and forest dwellers need to be made aware of their rights and duties under the Act.⁶⁰ Most of the tribal people of the central India belt are non-literate, especially in legal affairs. Often they do not speak the state language imposed upon them. They would need sensitive translators who can listen and interpret their claims, a challenging task that must be supported and fulfilled by the state.⁶¹
6. The extinction of tigers from Sariska and Kailadevi reserves has shown that government agencies and wildlife conservationists do not always succeed in conserving wildlife.⁶² It is time now to strengthen community-based conservation, starting with more effective community participation at all stages of preparation and implementation; improved monitoring; adaptive management; and an institutional framework that engages with a broad set of civil society stakeholders.⁶³

Ultimately, the Forest Rights Act's implementation must contain a process for stocktaking and bringing in corrective measures, especially since India has no experience with such transformative legislation.

XI Conclusion

The Forest Rights Act 2006 is a substantial measure towards empowering tribal people and displacing their unrest and tension with

58. Venkitesh Ramakrishnan, "Hope & Fear" 25(4) *Frontline* (Feb 16-29, 2008) See <http://www.thehindu.com/thehindu/fline/fl2504/stories/20080229500100400.htm>.

59. Ramnath, *supra* note 49.

60. *Ibid.*

61. *Ibid.*

62. M.D. Madhusudan, "Of Rights and Wrongs" 40(47) *Economic & Political Weekly* 4893-4895 (Nov 19, 2005).

63. Chetan Kumar, "Whither 'Community- Based' Conservation?" 41(52) *Economic & Political Weekly* 5313-5320 (Dec 30, 2006).



fairness and equity. The failure to retain key provisions articulated in the draft rules as published on 19.6.2007 has undermined the Act. Also, the judiciary has thus far failed to interpret the Act. Thus, the Act has polarized not only the media but also other concerned members of society.

The Act is an attempt to redistribute power between communities and the state, and seeks to create a new democratic system of forest governance. The Act seeks to reconcile the social justice claims of forest dwellers with the nation's goal of preserving forests and wildlife. The state governments have begun to implement the *Forest Rights Act* with delay and reluctance. The recent disposition of the Orissa Government towards Sterlite Industries India Ltd. has violated the Forest Rights Act. The state government has not taken the local communities, specifically tribal communities, into consideration.

Nonetheless, there has been a slow movement towards accommodating the sometimes conflicting needs of conservationists, the state and tribal rights' activists. If, over the next few years, all stakeholders work together to empower and rehabilitate tribal people and their communities while still preserving India's forests and wildlife, the goals of the Act will have been achieved.