Rights Against All Odds: How Sacrosanct is Tribal Forest Rights?

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Abstract

Since colonial times, in the name of conservation, the tribals or the original inhabitants have been asked to justify and prove their existence on their own land. This is part of a long conspiracy that has consistently alienated people from their homelands and livelihoods. For the colonial powers, forest was commerce, trees were timber and indigenous people were trespassers and encroachers. Furthermore, the indigenous people were regarded as the greatest threat to the expanding British colonialism designed to be achieved through legitimizing control over forests. Unfortunately, forest management has not been very different in post independent India – the laws and policies have been mostly the same only the policy makers have changed. The exploitation of national resources has continued in the name of national objective by systematically marginalizing tribals and other forest dwellers.

During consolidation of forests in the 1950s and with the coming up of the Forest Conservation Act (FCA) of 1980, a large area were recorded as forests without settling local rights. Many of these forests did not even physically exist and revenue lands supporting livelihoods were sealed off as forests. Moreover, the unclear demarcation of forest and revenue lands, the Supreme Court's definition of a forest were other crucial issues that went a long way in denying rights to the tribals and forest dwellers. The final blow was given by MoEF with its May 2002 circular to evict all `encroachers' immediately. In June 2004, the Government of India made a significant admission by holding that 'historical injustice' has been done to the tribal forest dwellers of the country, which needs to be immediately addressed by recognizing their traditional rights over forests and forestland. With changes and amendments, the Forest Rights Act was finally passed in December 2006 that promises to give up to 4 hectares of forestland to tribals and traditional forest dwellers basing on recommendations of the Gram Sabha.

Though landmark legislation by all means, apprehensions are raised whether the Act in its present form deliver what it was supposed to? Definition of 'forest dwellers', authority of the Gram Sabha, area where forest rights to be given, forest rights in the protected area, are still some of the contentious and unresolved issues. The other crucial issue that raises doubts about true implementation of the Forest Rights Act is the preeminence of Government machineries and complete absence of the forest dwelling scheduled tribes and the Civil Society Organisations. When the rights settlement process is crowded either by Forest Officers or by other Government agencies, it only remains to be seen how far the Act which is regarded as a revolutionary move in the history of land rights legislations in India yields desired results.

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Commonly perceived as rights of the local forest dwellers over the produces and the forestland, forest rights have been a major area of concern as well as debate in the post independent India. Both during colonial and independent India, though a large tract of land were recorded as 'unclassed' forests in government records, the ownership was unclear, and since most of these forests were home to a large number of tribals, the land was usurped without settling their rights over them. After independence, supported by improper survey and settlement, large tracts of land have been declared as Reserve Forests, meaning no rights either existed there or would exist herein after. Therefore, it is more than clear that though rights existed there and people were residing in and around forests, land was grabbed by the Government without settling rights, which has led to the eviction of the local forest dwellers and they have been termed as encroachers in their own land. This practice was followed as a rule.

There are thousands of cases of local inhabitants claiming that they were in occupation of notified forestlands prior to initiation of forest settlements under the Indian Forest Act. There are a number of cases of pattas/leases/grants said to be issued under proper authority but which has now become contentious issues between different departments, particularly the Forest and the Revenue. The problem is compounded by the fact that in many cases there is no clear demarcation of forest lands. In fact most of the disputes and claims relating to use and access to forests have lingered on and evaded resolution in the past because of the failure to demarcate precisely the extent of the forest. All of these require remedies and an approach aimed at only evicting the forest-dwellers is worsening the situation, not remedying it.

A famous Bollywood number goes thus '*Jungle mein more nacha kisne dekha'*. In English, it would mean'Who has seen the peacock dancing inside the forest?' Beginning with a line from a film song might seem to be a rather frivolous way to deal with a serious and important subject like tribal forest rights. But read between the lines and it would bring to the fore two very crucial aspects about forest management in India. First, very few have a clue as to what exactly is happening inside the forest. Secondly, it reinforces a nationally shared notion that no one other than forest authorities has anything to do with forests. Stretched further, it would also mean that forest officials are only entitled to see the peacock dancing or hear a tiger growling. Though a little exaggerated, the song offers a lot to reflect about the age-old perception people have about forest management in India. Such notions and perceptions about the authoritative forest bureaucracy turn into belief when incidents like a tribal being beaten to death by two Jharkhand[2] foresters merely on suspicious that the man might have taken a log from the forest to construct his half-fallen house. Justice was instant; 'a life for a log' and that too on mere suspicion.

A little peep into the ecological history of India would clearly reveal that forest as a natural resource was never meant to be used for the local forest dwellers. It was to be

[2] An eastern province of India.

used as a means to perpetuate to be their subjugation instead. Forestry in colonial India was all about commercial exploitation and revenue and thus recognized no rights and concessions for forest dwellers, who were mostly tribals. There existed no legislative framework that could make forests available for meeting local livelihood needs and the colonial powers made no effort to hide their intention, i.e., forestry for commerce, especially timber. Forestry science was introduced as a codified, printed and formal curriculum by them to continue political domination that implied non-recognition as well as opposition to the largely oral indigenous forest management traditions. This marked the beginning of a forest governance system that was alien, induced and most importantly excluded forest dependent communities in the name of scientific forestry, public interest, national development, conservation and industrial growth. The national governments in the post-colonial phase inherited the colonial worldview that not only aimed at the use of eastern forests to boost western industrial development, but also harped on the non-existing incompatibility between conservation and livelihoods. [3]

Forest Rights in British India

The British established a mode of forest governance that imposed restrictions on local forest dwelling communities through a definition of forests as national property meant to be used to achieve the colonial objectives, which tried to acquire control of forests for commerce and national development at the cost of local forest based livelihoods. Though Forest Administration in British India, as is known, stressed on national development, it was really meant to be used by the whole body of tax payers. [4] Thus primary focus of forest governance was commerce through limiting local rights and privileges. Such regulation of rights was reflected in the classification of forests during colonial times. As national property, forests were classified as conservation forests, commercial forests, minor forests and pasture lands. The first two categories - as the names would suggest - were out of bounds for the local forest dependent communities. Minor forests were managed by panchayats with a view to reducing the contact between subordinate forest officials and villagers. Pastureland, mostly grassland, was more for animals than human beings.

During medieval India, the ownership of the forests was with the local chiefs with access rights to the local communities. Towards the beginning of the nineteenth century, the British wanted to undertake unhindered exploitation of timber, which required that the government assert its ownership over forests and do away with the traditional systems of community forest management that existed in most parts of the country. This had nothing to do with conservation; it was a ploy to keep trees, timber and forest routes

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[3] *The basic objective of this discussion is to bring into debate some apprehensions on the true nature of forest rights in India by putting in perspective the policy developments both during colonial and post colonial India, focusing at length on the two 'widely accepted' revolutionary resource rights legislations of the last one decade. It endeavours to analyse the strengths of the consultative processes and assesses the extent to which they translate the needs and aspirations of the people they intend to benefit before getting the legislative endorsement as law.*

[4] *The Old Forest Policy, Dr.Voelcker's Report on Improvement of Indian Agriculture, pp. 155-162 of F.D Code, 6th Edn, Circular No. 22-F, October 1894.*

under their direct control. Teak was identified as a rich substitute to oak, already getting depleted in England, to build the Royal Navy and Railways.[5] With this avowed objective, the East India Company acquired royalty rights over teak in 1807. This meant prohibition of unauthorized teak felling and the Conservator becoming the sanctioning authority for teak felling and selling, more of an assumed power than lawfully given. By 1846, such sanctioning authority over teak extended to all forests and forest produces and the Company's sovereignty extended to the total forestland by 1860. As an aftermath of the Sepoy Mutiny in 1857, during which forests and the forest dwelling communities provided the rebels with a safe hiding place, the Company administration prohibited and withdrew all access rights and privileges to fuel, fodder and other local uses. In order to legitimize authority with legal and administrative backing, the Imperial Forest Department was brought into being in 1864 to consolidate state control on forests and forestry was made a scientific operation making it inaccessible to the forest dwellers.

In order to legitimize it with law, a series of legal instruments were passed in the form of forest acts from 1865 to 1878 to 1927. These Acts empowered the government to declare its intention to notify any area as a reserved or protected forest, following which a "Forest Settlement Officer" supposedly would enquire into claims of rights (to land, forest produce, pasture, etc.). Legal instruments helped the colonial forest administration camouflage timber extraction as conservation thus curtailing and prohibiting customary use rights. The so appointed FSO was hardly helpful in settlement of rights and created no administrative space for meeting local needs. On the contrary, valuable trees were reserved and elaborate provisions were made for punitive actions. Thus started a purposive state intervention in forests and measures relating to scientific conservancy was promoted for legitimacy. Moreover, the 1927 Act remained India's central forest legislation and with minor modifications is still operational in independent India. [6]

Forest Rights in Independent India

With independence, local forest dependents expected to get their rights back. But far from improving, the rights situation actually worsened. Though the policy makers changed, the policies remained more or less the same. During the process of accession of the Princely States after independence, the activity of consolidation of government forests continued. Though the States proclaimed the lands of ex-princely states and zamindari lands as Reserve Forests, no effective steps for settlement of rights were taken. This inevitably sowed the seeds of the future forest land conflicts between the tribals, non-tribals and the state.

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[5] *Oak was used for shipbuilding in England. During the 19th century, Oak supply for shipbuilding went down heavily forcing the colonial government to look for alternatives in its colonies in the east. Burmese and Indian teak were identified as good substitutes and the East India Company was thus mandated to make laws accordingly.*

[6] *As per the Act, the Government can constitute any forest land or wasteland which is the property of the Government or over which the Government has proprietary rights, a reserved forest, by issuing a notification to this effect. This Act enabled the colonial Government to declare more and more land as reserve forests, without ascertaining the rights of the tribals and other forest dwellers.*

Forest governance in post-colonial India could be broken up into three phases. The first phase, which lasted from independence in 1947 till the early 70s, was the phase of commercial exploitation of forests for industrial development as well as for creating farmland for the large peasantry. The second, which lasted till the commencement of the 1988 National Forest Policy, was a phase of conservation with increased State control. During this phase, forest conservation was made a directive principle, a fundamental duty in the Constitution and brought to the Concurrent List for greater control of the national government. It was also the time when powerful legislative instruments like the Wildlife Protection Act, 1972 and the Forest Conservation Act, 1980 were put in place. This phase, like the previous one, had no space for forest dwellers and tribals in the protection and management of local forests. With the coming of the National Forest Policy in 1988 began the third phase, which not only made forest a local resource but also made the participation of local forest protecting communities mandatory in regeneration of degraded forests. But did it help?

Conservation continuity in Independent India

Development of legal instruments in the second phase was a response to forest and wildlife depletion in the first phase. These instruments were extremely conservationist in nature, which did not differentiate between local and external use, stressed on excessive state control in the form of *Eminent Domain*, restricted or did not recognize existing local use rights. The most dangerous assumption was, forest has been destroyed by the forest dwellers/tribals, therefore, it needed to be protected/conserved from them, though in reality mindless exploitation of the forest and its wildlife were the handiwork of the rich and the influential. Similarly the Forest Conservation Act restricted forest diversion for non forest use but by prescribing prior permission and a high conversion rate, it in effect, made such diversion possible for them. It is interesting to note that the law being what it was, for the rich with their money and influence forestland diversion was easier whereas the poor forest dwelling tribals were termed as 'encroachers' and a direction for their eviction was issued by the MoEF (Ministry of Environment and Forests) through the May 2002 circular. This incapacitation of forest dwelling tribals aggravated with the coming up of the Protected Area Network in the country, which meant more and more inviolate areas with no or negligible rights over forests and forestland by the tribals and enabled the state to evict local forest dwellers without settling their bonafide rights to residence.[7]

It would be worthwhile to mention that the WLP Act which was promulgated in 1972 has been amended twice in 1991 and 2002. The original Act said that once under section 18, the State declares its intention to constitute any area as a sanctuary and specifies

[7] It was unfortunate that even the recent amendment to the Wildlife Protection Act of 2002 has made no reference to PESA and has withdrawn continuance of right even after the final notification of a protected area. There was a constant and consistent process initiated to make the conservation legislations like WLPA and FCA more powerful than rights providing legislations like the PESA, though the latter was an amendment to the Constitution.

the situation and limits of that area. Immediately after this declaration of intention, it is customary for the District Collector to initiate the process for the completion of the procedure under Section 19 to 25 of the said Act. This is a revenue process, which calls for enquiry about the existence, nature and extent of rights of any person within the limits of the sanctuary thus enabling the Govt to take cognizance of the actual and genuine rights existing inside the sanctuary. Besides, in case of a situation of eviction, compensation is adjudged on the basis of the claims of rights determined under this section. The Act also restricts further acquisition of rights within the limits of the protected area. Rights in the context of the WPA are considered as immovable rights or land rights, tribal's traditional rights over forests is not recognized as a right under law. This means that the communities might be allowed to stay within the limits of the protected area but they will not have any rights over the nearby forests. The rights, therefore, is rights over homestead land and agricultural field.

But the amended Act in1991 said that any protected area which has been declared after 1991 would be deemed as finally notified without assessment of rights. Further in 2002 amendment, the provision of continuance of rights with prior permission of the Chief Wildlife Warden given in the original Act was withdrawn. It is a constant and consistent process to throw people out of the protected areas in the name of conservation and management.

One of the residual features of the colonial State that survived even in the post-independence period was its obsession with techno-scientific expertise and utter mistrust and complete rejection of people's power and knowledge as important inputs for achieving national development goals. Development policy making in India, unfortunately, positioned itself on the astounding premise that people did not know anything. The prevailing social and political culture, the legal rational bureaucracy and - most dangerously - the nation as a whole were made to believe in and sustain such an exclusionary development design skillfully promoted by the State institutions. Curiously, almost all enabling and rights conferring provisions were in the form of policies that had no legal sanction while the restrictive ones were in the form of Acts, which had legal backing. Besides, regulatory authorities and the rights guaranteeing institutions mostly focused on commercial exploitation and conservation whereas the rights of local forest dependent communities still remained an area of utter indifference.

Evolution and implications of pro tribal forest legislations in Indi**a**

Since the primary intention of colonial laws was to take over lands and deny the rights of communities, the "settlement" processes initiated during the late 19th and early 20th century were hardly effective. Surveys were often incomplete or not done (82.9% of Madhya Pradesh's forest blocks have not been surveyed till date, while in Orissa more than 40% of state forests are "deemed" reserved forests where no settlement of rights took place). Where the claims process did occur, the rights of socially weaker communities – particularly tribals – were rarely recorded. The problem became worse particularly after Independence, when the lands declared "forests" by the Princely States, zamindars and private owners were transferred to the Forest Department through blanket notifications. These forests were put under the category of 'proposed

reserve forest', where rights settlement was decided to be done afterwards. Subsequently, these forests are slowly put under the reserve forest category without undertaking any rights settlement. In short, what government records show "forests" often included large areas of land that were not and never were forests at all. Moreover, those areas that were in fact forest included the traditional homelands of tribals have been declared as "encroachers".

Panchayats Extension to Schedule Areas, 1996

During the 90s, the *Eminent Domain* of the State was challenged by activists and human rights movements. Rights of the tribals over local resources were considered sacrosanct and non-negotiable and a move was initiated to secure Constitutional recognition for these rights. The sustained campaign led first to the 73rd Amendment of the Constitution to give recognition to decentralized governance in rural areas and then the constitution of Bhuria Committee to look at tribal rights over resources through extension of the provisions of this Amendment to the Schedule V areas. Based on the recommendations of the Committee, Parliament passed a separate legislation in 1996 as an annexure to the 73rd Amendment specifying special provisions for panchayats in Schedule V areas. Known as Panchayats Extension to Schedule Areas (PESA), 1996, it decentralized existing approaches to forest governance by bringing the Gram Sabha centre stage and recognizing the traditional rights of tribals over 'community resources' - meaning land, water and forests. PESA was important not just because it provided for a wide range of rights and privileges, but also because it provided a principle as well as a basis for future law making concerning the tribals. As per the Central law, the States promulgated their own laws supposedly giving rights to tribals over local resources.

It is more than a decade since PESA came into effect, but the obstacles in enforcing its provisions have remained largely unaddressed. Its avowed objective of power to the people still remains to take shape. The States are struggling to come out with definitive procedures to define rights over forests and minor forest produces. Meanwhile, some States like Maharastra, Gujurat, and Orissa, in an effort to perpetuate State control over forest resources, tried to dilute the provisions of PESA though they had no legal jurisdiction to do so.[8] The Government of Orissa, for example, has circumscribed the provisions of PESA by adding a clause, "…. consistent with the relevant laws in force", while incorporating the constitutional provision concerning the competence of Gram Sabha to manage community resources and resolve disputes as per the customs and traditions of the people. This clearly implied that tribals can have rights over forests and minor forest produces, only if existing laws allow. Instead of changing state laws inconsistent with PESA, the Government of Orissa changed the provisions of the Act, thus negating the rights conferred on the community by the Constitution. The original objective of the Central Act was that State Governments should change their laws as per the Central legislation. But the Government of Orissa, on the contrary, tampered with the Central legislation to suit its own convenience.

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[8] *Saxena, N.C, "Politics of Tribal Development: Analysis and Suggestions," p.7.*

The Central Act talked about providing ownership rights over minor forest produces to Gram Sabha. The MoEF constituted an expert committee to define ownership, which recommended that 'ownership means revenue from sale of usufructory rights, i.e., right to net revenue after retaining the administrative expenses of the department, and not right to control'. Similarly, there is no clarity on the issue of 'community resource'. The States have their own interpretations and legislations. While Orissa and Andhra Pradesh are silent about what constitutes community resource, Madhya Pradesh has defined it as land, water and forest. This implies that the powers given by PESA to exercise rights over community resources are almost non-existent in many states.

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006

The Hon'ble Supreme Court of India in an important case had held that the tribals have a definite right over the forests and any sort of forest diversion or eviction should have their informed consent. Following suit, in an affidavit to the Apex Court, in June 2004, the Government of India made a significant admission by holding that 'historical injustice' has been done to the tribal forest dwellers of the country, which needs to be immediately addressed by recognizing their traditional rights over forests and forestland. What made this admission particularly crucial is its acceptance that colonial perspective on forest management has failed and alienated a large chunk of the forest dwellers, especially tribals from forests and forest based livelihoods. Besides, it could not have come in a better time than just months after the eviction of about 1.68 lakh families from over 1.5 lakh hectares effected by May 2002 Government order of eviction of forest encroachers. This led Government of India to introduce the Scheduled Tribes (Recognition of Forest Rights) Bill 2005 in the Parliament on 13th December 2005. This legislation is now widely accepted and revered as a major step towards achieving social justice and a milestone in the tribal empowerment process.

Pressure mounted on the Government by tribal bodies and supportive progressive forces to introduce structural changes in favour of the forest dependent people resulting in constitution of the Joint Parliamentary Committee (JPC) to give a fresh look at the Bill and recommend measures to meet their demands. Considering the fact that tribals were served with eviction notices in May 2002 for being 'encroacher' as they could not produce residential evidence in forests, before 25th October 1980 as per the FCA 1980, JPC recommended that the cut-off date for the settlement of rights be extended to 13th December 2005, the date on which the Bill was first tabled in the Parliament. It further recommended inclusion of non-Scheduled Tribe "traditional forest dwellers" living in the forest for three generations within its ambit. The recommendations also included the identification of the 'critical wildlife habitat' by an independent and participatory scientific process, and relocation of the residents, if necessary, through mutually acceptable terms. JPC also recognized multiple land use for shifting cultivators and removed the land ceiling of 2.5 hectares for land rights. Besides, considering the heavy dependence of tribals and other forest dwellers on NTFP, and the associated exploitation of these hapless creatures by the middlemen, it urged for ensuring minimum support price (MSP) for minor forest produces. Furthermore, JPC made Gram Sabha the final

authority in the process of rights settlement. In matters relating to forestland diversion for non forest use, consent of the Gram Sabha was made mandatory. [9] Representation of the panchyatiraj institutions at all levels was also strongly recommended, the Gram Sabha being a core unit, in all matters relating to selection and identification in the rights settlement process. In recommending changes to the Bill, JPC made PESA a reference point by bringing Gram Sabha centre stage.

Like most other progressive legislations, the JPC recommendations were hailed by one and all in the field as one of the most revolutionary contributions to tribal law making process in India, with the exception of the forest bureaucracy and the conservationists who regarded it as the 'death knell' on forests of the country. But the State probably had different motives and ideas. After these recommendations were introduced in the legislature and came out as law, the offspring had very little resemblance of its parentage. It raised serious doubts about its ability to undo the injustices it was supposed to address in the first place. The Bill which was hurriedly passed in December 2006 completely obliterated the pre-eminent position that was given to the Gram Sabha. PESA which formed the very basis of the JPC recommendations was ignored and quietly forgotten. The result was predominance of the limiting provisions over the enabling ones. The unhindered power and strength of the forest bureaucracy, conservationists, and the mining and industrial lobby were to large extent reinstated and reinforced.

Now the big question is, can the Act in its present form deliver what it was supposed to? There are more reasons to be pessimistic about it than otherwise. What now seems as 'historical conspiracy' has started with limiting the definition of 'forest dwellers' to people who reside in the forest and excluded all such who live in 'close proximity to forests'. Implying thereby that while rights were secured for people residing in the recorded forests, it excluded a large majority of tribals staying in unrecorded forest villages. [10] A quick look at the Orissa situation reveals an interesting but dangerous scenario. Orissa has the largest number of forest fringe villages in the country, i.e., about 29, 302, which is about 60% of the total number of villages of the state. The total forest area of these forest fringe villages is about 1.8 mha which is less than 33% of the total forest area of the state, i.e., about 5.8 mha. Since the condition ' in close proximity to the forest' was withdrawn in the final Act, the number of tribals or other forest dwellers who would be eligible for claiming land rights within a forest would be very small. The group of ministers who gave the final shape to the Act have been smart enough to exclude a

[9] *This provision was significant in the context of a great push by the MoEF to open up forests to the Corporate sector through the new Environment Impact Assessment Notification of September 2006. It is the MoEF which estimated that the number of development projects since 1980 to be 11, 282. A conservative estimate of the tribal displacement could be to the tune of 8.53 million, which is about 72 per cent of all displaced during this time. Besides, as per MoEF, about 5.75 lakh hectares of forest land, including dense forests, has been handed over for non-forestry purposes for mining, etc. (Archana Prasad, Survival at Stake, Frontline, 12 January 2007, pp 4-10).*

[10] *As per the MoEF, there are about 3000 recorded forests in the country, meaning that tribals and other forest dwellers outside these forests would be debarred from being the beneficiaries of the Act, (Archana Prasad, Survival at Stake, Frontline, 12 January 2007, pp 4-10)*

huge majority of tribals by putting a condition 'in the forest', which would eventually mean less than 5% of the deserving tribals getting the benefits of the Act. Though the draft rules for the Act prepared in June 2007 include people of 'in and around' forest as forest dwellers eligible to get the benefits of the Act, there are doubts if it would remain in tact, till the draft rules take a final shape.

Unfortunately the preeminence given to the Gram Sabha in matters of forest governance by JPC has been substantially reduced. It is now neither the final authority in settlement of rights nor its consent is mandatory in diversion of forest land for non-forest purposes. The authority has gone over to the sub-divisional committee. Representation of forest dwelling tribes in the Sub- Divisional Level Committee has been excluded from the Bill providing opportunity to the departmental officers to exercise their authority on the decisions. The Gram Sabha has no role when it comes to either demarcation of a protected area or in deciding the critical wildlife habitat. The Government reserves the right to decide the area, whether there would be eviction or not and Gram Sabha would only give its informed consent on the resettlement package. The Gram Sabha does not have the right to disagree. Besides, the role of Gram Sabha for determining the rights has been limited only to initiate the process of determining the rights.

The earlier 'core area' within the protected area now has a new name, i.e., the 'critical wildlife habitat'. Earlier, a core area was a management concept without any legal backing whereas the critical wildlife habitat is legal provision as per the Act. Earlier, most of these core areas in the sanctuaries used to get converted into a national park to make it out of bound for the local communities, in order to avoid continuance of rights in a sanctuary. A closer look would reveal that critical wildlife habitat is nothing but a new name for core areas with legal sanctity. Like the core area, the determination of critical wildlife habitat being a scientific process will also be decided as per the MoEF guideline. Furthermore, issues relating to activities causing 'irreversible damage to forests' or decision on the possibility of coexistence, and the decision to relocate is now vested with the Forest Department.[11] Like the amended Wildlife Protection Act of 2002, the above process makes no mention of the specific rights of Gram Sabhas in a scheduled area.

Moreover, the State is now not bound by law to prescribe minimum support price for minor forest produces, which JPC had suggested. This would mean leaving the poor tribal primary collectors at the mercy of the middlemen once again. A strong lobby was working against this from the time the recommendation was put for debate in the public domain. Since the provisions of this Act will not prevail over the other Acts, the limitations imposed by the WL Act in terms of collection of NTFP from the protected areas would still prevail. Besides, since this Act will be in addition and not in derogation of other laws made from time to time, there is hardly any possibility of having any significant improvement in the existing tribal rights situation.

[11] *It is not to be misunderstood that the members of the Expert Committee that will work on all issues relating to the protected areas will be nominated by the Government including the local representations.*

In this context, it would be interesting to note the response of some very senior forest officials across the country on the rights given to Gram Sabha over NTFP. The Act defines minor forest produces (MFP) as all NTFP of plant origin including bamboo, Tendu leaves, etc. The rule says the rights would be given over all MFP regardless of whether they are nationalized or previously restricted or prohibited and all items provided in State Acts and rules, etc. The response that most sections of the forest bureaucracy is preparing now is, first of all in States where the procurement and trade is going on smoothly and effectively, this rule should not be applied, which might destabilize the market and have negative impact on collection price. Secondly, it is almost impossible to create a new structure that would be efficient too.

With all its limitations, the Forest Rights Act is still a landmark legislation in the history of tribal law making in India. But the fear has been that history is replete with examples of progressive Bills and Committee Reports turning out to look pretty ordinary after they have undergone through the legislative process. The two most crucial rather frustrating aspects of the process of the making of the Forest Rights Act is, complete non-acceptance of PESA as a basis for law making and relegating it to being just another legislation at par with the WLPA, FCA etc. This will imply that the restrictions provided in these legislations will continue and override the FR Act, whenever required. Therefore, the objective for which this Act was visualized and conceived still remains unfulfilled and will remain so until the FR Act is appropriately recast.

The Forest Rights Act in ground

As provided by law, the Gram Sabha (Palli Sabha) is the competent authority to initiate the process of determining the nature and extent of forest rights of individuals/community. The Gram Panchayat by convening the Gram Sabha shall form the Forest Rights Committee with members not less than 10 and not exceeding 15 with a 2/3rd members present. In order that justice is done to the real beneficiaries of the marginalized communities, it is prescribed that the FRC will have 1/3rd of its members from the scheduled tribes and not less than 1/3rd of its members shall be women. In order to bring women into centre stage, it is further provided that where there are no STs, at least 1/3rd of such members shall be women.

The Gram Sabha in Orissa takes place at the Palli Sabha (revenue village) level and at the moment, forest and unsurveyed villages are left out. Though the law is very particular about giving rights to only those who reside 'in the forest', it is being agreed that the officials would not be very strict about the condition and would look at the genuineness of the claim.

Unresolved critical issues in realization of forest rights

- The term 'forest dweller' has not been defined in the Act.
- There is an apprehension within the other forest dwellers those who are displaced several times because of different development projects that they might not get the

benefit of the Act as proving residence for 3 generations in the present village might be difficult, though not impossible and the Act takes cognizance of such eventualities.

- Non-functional Gram Sabhas, and ignorance and limited skills of panchayat functionaries about the law may make them pass resolution in favour of those not deserving the benefits.
- Predominance of Government officers in both the two appellate committees (sub-divisional level committee and district level committee) may dilute the authority and freedom of the tribal leaders who may even go unheard.
- Difficulty in collecting caste certificate by the beneficiaries – nobody knows who is going to issue the caste certificate.
- It is becoming increasingly difficult to organize palli sabha in the revenue village.
- For the formation of the Forest Rights Committee, 2/3rd members present is a high order.
- Instances are there where the forest department is quickly taking up plantation activities in the forest land which was earlier being cultivated by the tribals and other forest dwellers so that people cannot prove occupation.
- Prospective beneficiaries want forest rights to be alienable and mortgage-able but expect protection under the Orissa Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Regulation, 1956.
- Recognition and vesting of rights in case of a man having more than one wife.
- Processes to draw the traditional boundaries in the forest villages.
- If 'community forest resources' fall within the CWLH. Can customary law override the Act?

The common misconception amongst many about the Act is that Government will give fresh 4 ha of forestland to tribals for cultivation. Therefore, the common conclusion about the law is that forest will be destroyed and anybody can acquire 4 ha and get recognition. Whereas the truth is that an individual claiming forest rights has to produce sufficient proof to support his/her claim and the Forest Rights Committee will accordingly initiate the process of determination of rights. This claim will then be verified by the sub-divisional level committee and the district level committee and claim can be settled or refused. The specification of 4 ha of forest land does not necessarily mean that all claimants will be provided exactly with that amount. On the contrary, it should be interpreted like no claimant will get more than 4 ha. [12]

The implementation of the Act is encountering veered oppositions mostly from the forest bureaucracy. There are a number of instances where the Forest Department has started undertaking plantation activities in the forestlands presently under occupation of the forest dwelling STs and other forest dwellers. Since as per the provisions of the Act, tribals and other forest dwellers would be given forestland up to 4 ha, such plantation activities in the land that these communities have been cultivating since long is creating confusion and apprehension within the communities of not getting what they have been legally entitled to. A case in point is Apadabhata and Nuamalpada village of Nangalbord panchayat in Sinapalli range of Khariar forest division in Orissa where about 95 families have been cultivating in a patch of 150 acres of village forest area, which is mostly

[12] Land thus provided to the claimant will be under joint ownership of husband and wife and the land patta will be prepared accordingly with joint ownership. In case of a widow claimant, lnad will be provided in her name with desired patta.

without vegetation. Earlier these families were booked under forest encroachment cases by the forest department. In 2008, plantation activities under the nursery development programme was undertaken by the local forest department on this traditionally cultivated forestlands, though the hidden agenda was to prove at the sub-divisional level and district level committees that the forest land in question has long been under plantation by the FD and was not under occupation by local communities for cultivation. Fierce opposition, however, from the villagers forced the Divisional Forest Officer to intervene and assured the villagers that no such plantation would take place till the forest rights determination process is complete.

Tiger vs Tribals

This Act among other things has brought once again into fore an age old debate 'whether tigers or tribals'. The exclusivity in conservation has been stressed and at the same time there is a fear that the Act will wipe out some of the last big cats in the country. Therefore, one of the most contentious issues influencing the realization of forest rights within a protected area has been the declaration and demarcation of the '**critical wildlife habitat'** (CWLH), a crucial aspect of the Forest Rights Act.

As per the provisions of the Act, under section 4 of chapter 3, 'the forest rights recognized under the Act in critical wildlife habitats of national parks and sanctuaries may subsequently be modified and resettled, provided that no forest rights holders shall be resettled or have their rights in any manner affected for the purpose of creating inviolate areas for wildlife conservation'. This first of all implies that the provision of forest land is recognized, therefore, possible even within a CWLH, unless the government and the experts feel that such rights might come in the way of making the area an inviolate area for wildlife conservation. Therefore, as per the Act, 'relocation is possible only when it is established that co-existence is not possible and if the local communities give their informed consent'.

This has kept the conservationists and the wildlife activists busy working tooth and nail to keep the provisions of the Act outside the national parks and sanctuaries fearing that the law would damage forest and wildlife. The MoEF suggested that people's rights in the national parks and sanctuaries should not be vested till 8% of the forest land – covering the 600 plus national parks and sanctuaries – was declared as critical wildlife habitat. Therefore, the Act in its true spirit will only be implemented after all the protected areas have formally demarcated and declared the CWLH.

The Act provided that the MoEF would be coming out with a guideline for declaration of the CWLH within six months of the promulgation of the law. It was delayed so is the promulgation that was to happen through declaration of the forest rights rules on 2nd October 2007.[13] But much before the guidelines came the State Forest Department were active in preparing action plans for prospective relocation from the protected

[13] The Forest Rights Rules, 2007 finally was notified on the 1st January 2008.

areas. Such initiatives went on in almost all states. A case in point is the proposed Sunabeda Tiger Reserve in Orissa has been discussed for readers' reference.

Move for relocation before demarcation of CWLH in Sunabeda Tiger Reserve

The Forest Rights Act states in no uncertain terms, that all evictions have to be stopped until the recognition and verification process for claiming the rights over forestland are completed. Contrary to what has been mentioned in the Act, the State Forest Departments have begun widespread evictions across the country even before demarcating the critical wildlife habitats. Such over- night evictions and relocation proposals could be out of fear of the lengthy process prescribed in the Rules for of declaration of CWH. Sunabeda Tiger Reserve of Orissa has witnessed an effort to hurriedly evict local tribals and forest dwellers even before the draft rules for the Act are framed. There are around 5 revenue villages and 15 encroached villages in the core area and 28 revenue villages and 32 encroached villages in the buffer area. In April 2007, the district administration of Nuapada started a process to relocate about 380 families of 17 villages in two phases from the proposed Sunabeda Tiger Reserve area. In a meeting during the same time organized by the concerned DFO in Sunabeda Gram Panchayat in which about 50 people participated, signatures were taken from them as consent for their relocation[1]. The villagers inside the sanctuary revealed that the government had declared a rehabilitation package of 10 decimal for homestead, 1.5 lakhs cash, 2.5 irrigated or 5 acre non- irrigated land. Apart from this, there are other attractive packages like temporary sheds of Rs. 10000 for each household etc.

Though didn't materialise, the move to relocate people before demarcating the Critical Wildlife Habitat is a complete violation of the Scheduled Tribes and other Traditional Forest dwellers (Recognition of Forest Rights) Act, 2006. Chapter III, Section 4 sub-section 5 of the Act clearly states that "save as otherwise provided, no member of the forest dwelling Schedule Tribe or other traditional forest dweller shall be evicted or removed from the forest land under his occupation till the recognition and verification procedure is complete."

The process has also brought up several crucial questions like who decided the rehabilitation package; how concerned Gram Sabha is involved in the whole process, what portion of the population has given consent for displacement, what is the status of the area where relocation is proposed, if it is within a village then whether consent from the concerned Gram Sabha has been obtained. There are specific punitive measures when a citizen violates the law, what when the Government does that? [3]

The incidents in Sunabeda took place after the Act was passed and before the draft Rules were put forth in the public domain for comments. The Forest Rights Rules 2007, it has been stated that "the Central Government in the Ministry of Environment and Forests, may, within six months of 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, and its interpretation, role of Expert Committee, the process of consultations among others in

determining the Critical Wildlife Habitat". Now, if the MoEF does not frame the guidelines within six months of the Rules coming into force, this would mean that the people in the Protected Areas would continue to suffer under the threat of getting evicted at any time, indefinitely.

Study conducted by RCDC, 2007

In this context, it would be worthwhile to have a close look at the CWLH guidelines provided by the MoEF. The guidelines is only a reiteration of MoEF's stand on keeping people out of the protected areas and nullify the provisions of the law by diluting the preconditions for demarcation of the CWLH. The guideline restricts the participation of the local communities to consultation with the Gram Sabha, which again is not mandatory. Besides, at the State level Expert Committee, the government reserves the right to decide on the participation of the sociologist or that of the member of a Gram Sabha. It is interesting to note that people's knowledge and information has been one of the important information sources during wildlife/tiger census. But the same knowledge is found to be not-so-scientific when it comes to demarcating CWLH.

Besides, the guidelines say that the resolution of the Gram Sabha would certify that in areas included within the proposed CWLH, the process of recognition and vesting of rights had been completed. This might turn out to be a contentious issue in days to come as for the government getting such resolutions from the Gram Sabha through force and coercion is not very difficult. Government machineries are more than used to such process in Orissa in getting the consent of Gram Sabha as regards mining operation.

Moreover, deliberate inadequate understanding leading to improper interpretation of the Act when it is assumed that the relocation of villages would start immediately after the forest department prepares the proposal to identify the critical tiger habitat CTH).[14] In states like Kerala, Maharastra, Karnataka and Uttar Pradesh, such CTH demarcation proposals have been prepared and an estimate of people likely to be relocated has also been prepared. Now as per the Act, CTH has to be understood as a process and not just a plan. The proposal has to be submitted to the Central Government and then the demarcation process will start with the involvement of the expert committee and the Tribal Welfare Ministry. Whereas as per the Act, the forest department while preparing the proposal should only mention the area and not the number of people likely to be relocated as they are only proposing the area which might change and the committee might even think that no relocation for the purpose is necessary.

The Act under section 4 (4) in chapter 3 clearly mentions that no FDST or traditional forest dweller shall be evicted or removed from forest land under his occupation till the recognition and verification process is complete. Contrary to what has been given in law, eviction decisions are being taken much before the final notification of the CWLH. There are several such cases, a case in point is the Uttar Pradesh government's decision to create special corridors in the Dudhwa National Park, Katamiaghat and

[14] Equivalent to CWLH under the Wildlife Protection Act 1972 (amended in 2002).

Kishanpur sanctuaries for the free movement of tigers where 60% of the tigers found in the state inhabit. The government has decided to evict villagers from these areas in installments. In the first phase, villages falling in the way of the special tiger corridors would be relocated. The state government has issued eviction notices to 10 villages lying within these three forest areas. However, nothing has been mentioned about provisions of resettlement since the law says, 'the free informed consent of the Gram Sabha in the areas concerned to the proposed resettlement and to the package has been obtained in writing'. Besides, it further says,' no resettlement shall take place until facilities and land allocation at the resettlement location are complete as per the promised package'.

Controlling Through Definition and Classification

Forest rights have always been a contentious issue as it would mean loss of control, authority, revenue and profit for a wide range of people. In the last couple of decades, debates around forest rights have focused basically on two areas: definition and classification of forests and the nature and extent of departmental control over different types of forests. Though classification is indicative of designated control, there are still some areas where community control is more than visible strictly from a conservation and sustainable dependence point of view. Though a large tract of land was recorded as 'unclassed' forests in government records both during the colonial and post colonial times, the ownership was unclear. Since most of these forests were home to a large number of tribals, the land was usurped by the State without settling their rights over them. [15] After independence, supported by improper survey and settlement, large tracts of land have been declared as Reserve Forests, meaning no rights either existed there or would exist in future. This meant that though rights existed and people were residing in and around forests, their land was grabbed by the state and national governments without settling their rights, terming them as encroachers in their own land and leading to their eviction.

There are thousands of cases of local inhabitants claiming that they were in occupation of notified forestlands prior to initiation of forest settlements under the Indian Forest Act. There are a number of cases of pattas/leases/grants said to be issued under proper authority but have now become contentious issues between different departments, particularly the Forest Department and the Revenue Department. The problem is compounded by the fact that in many cases, there is no clear demarcation of forest lands. In fact, most of the disputes and claims relating to use of and access to forests have fallen flat because even the Forest Department is also not able to clearly identify a Government forest.

Besides, frequent changes in the definition and classification of forests have not helped in determining and settling forest rights. Different laws, policies and orders defined and classified forests differently. Read between the lines, all the definitions and

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[15] Hereinafter Forests, Down to Earth, Centre for Science and Environment, New Delhi, June 15, 2007, and p.38.

classifications have specific control regimes attached to them. For example, forest was first defined in the Indian Forest Act 1865 as ‘land covered with trees, brushwood and jungle’, since its purpose was timber extraction. In 1996 the Hon’ble Supreme Court, as part of the interim judgment on the Godavarman case, defined forests as an extensive area covered by trees and bushes with no agriculture.

As recently as in 2007, MoEF has proposed a definition that says forest is “an area under Government control notified or recorded as forest under any Act, for conservation and management of ecological and biological resources”. If the proposed definition becomes operative, then it is expected to put private forest lands out of the purview of forest laws and may come in conflict with the 1996 verdict of the Hon’ble Supreme Court. Through this definition, an effort is being made to address the limitations on afforestation on forestland and also restrictions on cutting and transport of trees mandated by the Indian Forest Act 1927 and the Forest Conservation Act 1980. This definition is bound to have enormous implications for the Corporate actors, especially those active in the plantation sector. With private forest areas taken out of the purview of forest laws, large tracts of revenue land would now have forest species on them, timber from which can be safely harvested without attracting any forest law. It is now becoming increasingly clear why MoEF, in the recent past, has exhibited such missionary zeal in considering proposals to place large areas of forestland in the hands of industries for afforestation.

With this definition, diversion of a patch of land legally defined as forest can be possible. What an irony! The MoEF, which so faithfully carried out the Supreme Court order as regards not giving land to the tribals and even termed them as ‘encroachers’ in their own homes instead, is now ready – even eager - to take on the same mighty institution in favour of the Corporate houses. The same MoEF never bothered when the Supreme Court banned collection of minor forest produces from within the protected areas. It even went a step ahead and amended the Wildlife Protection Act as per the Supreme Court order. One more example of what money and influence can do in this country and what the voiceless and powerless are destined to endure!

Global and external at the cost of local

Besides, a quick look into the current management approaches reveals some startling trends with regard to community rights over forest resources. On one hand, the limitations of the so-called progressive legal framework are getting slowly exposed. On the other, there are equally disturbing developments like changing definition of forests, forest diversion becoming easier with the pre-eminent role of the mining lobby [16], large scale plantation projects taken up to create carbon sinks in natural forests with no or negligible local access rights, gradual withdrawal of the State machinery from the forest based livelihood sector, especially NTFP, and the missionary zeal exhibited to renew

[16] *In May 2007, a forest policy review process by the State identified that since Govt of Orissa is rich in minerals with 60% of the country’s coal production coming from the forest areas of Orissa, for harvesting minerals, forests have to be sacrificed, and compensatory afforestation undertaken.*

the industrial-commercial approach to forest management further marginalizing local users and putting a big question mark on their continued dependence on forests.

As discussed in the previous sections, the colonial legislations had no pretensions whatsoever to protect and promote local access rights. Therefore, forest management was expected to adopt a welfare approach in independent India. But somehow, it did not turn out to be so. On the contrary, when it came to transferring rights to the local forest dependent communities, laws, Acts and Supreme Court orders were brought in the way to obstruct such transfer. Even when no such legal and judicial hurdles were there, bureaucratic apathy, inactivity and reluctance combined to obstruct their effective implementation. Needless to say that in both the situations, the forest dwellers, mostly tribals, continued to remain at the receiving end. But the process of the marginalization of forest dwellers does not end with Acts and polices alone, Government sponsored programmes and projects faithfully reflect the dominant worldview of creating more space for the private players, implying penury for the perennially marginalized ‘public’, i.e., the forest dwelling tribals. In order to substantiate the current argument, it may be relevant to focus on some such programmes and approaches.

The strict conservation orientation of the plantation projects implemented to create carbon sinks [17] in the protected forests, to a large extent, has limited local access rights. The only right that is recognized is the right over selected NTFP. The approach of such projects is to remove potential threats of deforestation, and manage forest areas so as to minimize human impact. Interestingly, carbon payments would be supposedly used to develop local income sources, outside protected forests. In other words, it is an endeavour to shift the livelihood focus from forests to other non farm sources, and conserve forests exclusively for carbon sinks so as to create carbon credits for payments that States could use in infrastructure development.

Closely observed, these developments would reveal a very interesting, though disturbing, trend. Now, with the above mentioned developments taking place, the major land mass of the country is expected to come under the purview of plantation projects, which is a welcome initiative as regards the macro-climatic scenario but no so as regards realization of local forest rights. On one hand, the State Forest Departments will use bilateral donor funding for plantation in the forestlands; on the other, the private sector, armed with a new definition of forest, would go in for large scale plantation activities with deceptive use of jargons like ‘public private partnership’. In the process, they would occupy and usurp a major portion of the revenue land, especially from the cultivable wasteland category. As discussed, the locals will have no access rights in the plantation forests not to speak of any such rights in the private plantation areas. The

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[17] *Global forest governance discourse has not only expanded the definition of forests, but also has caused a shift from its usual mercantile logic that puts a premium on timber - its quality and volume. Concerns about climate change, disruption of global carbon cycle, carbon stocks and emission and rates of sequestration have, besides adding a new dimension to forest management, also transformed forests from a local to a global resource. A new form of economic activity has spawned in the era of global warming, i.e., buying and selling of environmental services (read carbon trade). Carbon sinks are created through conserving existing forests and taking up tree planting projects to remove greenhouse gases.*

States, as well as the Corporates, are expected to earn a fortune in the process through selling carbon credits as well as through timber trade.

If a major chunk of the revenue land of the said category is leased out to the Corporates for taking up plantation projects, it is definitely going to have a serious repercussion on the process of land distribution to the landless under different Government schemes. Because of the huge revenue gain for the State, revenue lands, which could have otherwise been settled in favour of the landless, would now go to the private sector. Besides, with large scale industrialization, Government also has to find land, especially of the non-forest category, for the industries to take up Compensatory Afforestation [18], where locals will have no access rights. Besides, in matters of land being given to the industries for compensatory afforestation, no rights assessment is done before such land is transferred. It is assumed that all rights are settled in a forestland. There are instances in Keonjhar district in Orissa, India, where shifting cultivation areas have been given for compensatory afforestation. The forest dependent communities are losers both ways. On one hand, their livelihood options are closed within the protected forests; on the other, they have no entitlement over cultivable wastelands either. Such processes are expected to create a situation where the landless would remain so for God knows how many years, decades, centuries…

As if all this was not enough, the hapless tribal now also has to contend with the gradual closing of NTFP option - his last remaining for some cash income. Under the misleading pretext of the falling international prices and procurement of certain commonly traded NTFPs, state governments are now increasingly trying to wriggle out of their responsibility to manage, monitor and promote collection and trade of NTFPs. Rather than acknowledge the fact that the drop in procurement and prices of NTFPs is a result of their own polices and inaction and find ways to reverse the trend, they have chosen to place primary gatherers completely at the mercy of ruthless market forces. Their decision to curtail their involvement in the NTFP sector is based purely on calculations of profit and loss and is a complete abrogation of their welfare obligations.

In the continued harangue over national objectives and global needs, the question of the livelihood security of the forest dwellers has been given quiet burial-as if they belong to another planet. As we have seen, forests in India have always been valued for revenue profit, conservation and as a genetic reservoir. They have never really been perceived or managed as livelihood recourse. The fact that sustainable development of

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[18] *The local forest dwellers have neither any say in matters of forest diversion nor the compensation that is received under Net Present Value (NPV) for such diversion of forestland for non forest purposes nor in its utilization. The irony is, the local communities protect the forest, somebody else cuts it and somebody else receives the compensation. As per the MoEF order of April 2004, money received towards NPV shall be used for natural regeneration, forest management, protection, infrastructure development, wildlife protection and management, etc. There is no mention of creating or compensating livelihoods for the local communities which the forest* diversion has deprived them of. The fund distribution mechanism is based on the erroneous assumption that the losses due to forest diversion are more national than local.

forests is possible with the harmonious blending of local, national & global needs has never been acknowledged in the country.

In what can be called the mother of all ironies, the Government, through its policies and actions, first pushes the forest-dwellers into utter penury and then starts poverty alleviation programmes for them!

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