

## Judicial Fiats and Contemporary Enclosures

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### Abstract

This article examines the problematic processes in a case that has had few parallels in Indian judicial history. The apex court in *T. N. Godavarman* took upon the responsibility of deciding how forest resources in the country should be accessed and who is (or is not) to have such access. Purportedly done to protect the environment, through the 'clarification and fine-tuning' of national forest-laws, the case has seriously affected the life, livelihood, and habitat of millions of marginal groups. Recent trends demonstrate the wider trend of constitutional courts assuming the roles of adjudication, administration and legislation, all rolled into one, whereby they become problematic sites for creating a hierarchy of conflicting public interests, which claim constitutional validity from different vantage points. Thus, constitutional values of 'protection of environment' and 'justice — social, political and economic' 'are pitted against each other' where unelected courts take it upon themselves to define the legitimate precincts of the theoretical discourse of sustainable use / development; and importantly also implement it into 'everyday' 'reality, in the way it feels fit'. The article seeks to make sense of this contemporary process of forest governance.

**Keywords:** forest governance, judicial review, community rights, enclosures of commons, forest encroachment, community disentanglement, judicial transgression

DOI: 10.4103/0972-4923.65173

### INTRODUCTION

Significant historical work in the 1980s discursively examine the manner in which forest laws were introduced to monopolise rights over timber and other forest resources in colonial India.<sup>1</sup> This was done at the expense of the rights of communities over these lands, to maximise revenue and fuel militaristic<sup>2</sup> and other colonial projects<sup>3</sup>. Despite considerable resistance the post-colonial state continued such projects of industrialisation and revenue maximization at the expense of existing community rights.<sup>4</sup>

The past decade has seen considerable changes in the forest laws, mostly effectuated by judicial activism by the Supreme Court of India.<sup>5</sup> Characterised by many, as the most powerful Court in the world, for the nature and ambit of its powers of judicial review,<sup>6</sup> the Court has scripted these changes in peculiar manners. The case of *T.N. Godavarman Thirumalpad v. Union of India*<sup>7</sup> has had few parallels in the history of the Court, even by the expansive standard of India's 'pro-active' judiciary.

Initially filed in 1995 as a public interest petition by an ex-

plantation owner in the southern state of Tamil Nadu, who was distressed by the illicit felling of timber from forests nurtured for generations by his family that has since been taken over by the government, the Court extended the scope of this petition to forestlands in all parts of the country. Putatively to effectuate the state obligation to safeguard the country's forests<sup>8</sup>, in its first phase the Court froze all unlicensed wood-based industrial activity,<sup>9</sup> issued detailed directions for the sustainable use of forests and even created its own monitoring and implementation machinery<sup>10</sup>. Beginning December 1996, the Supreme Court started issuing sweeping directions to oversee the enforcement of various provisions of forest laws across the country, often transgressing and rewriting the statutory framework; by employing the public law device of continuous mandamus,<sup>11</sup> ingenious to a few constitutional jurisdictions in the world.

Recent trends in the case demonstrate how, when in certain cases, constitutional courts assume the roles of an adjudicator, administrator and a legislator, all rolled into one, they become the site for the hierarchisation of conflicting public interests, each of which has claims to constitutional validity from

varying vantage points. Thus, the Indian constitutional values of 'protection of environment' and 'justice—social, political and economic' are pitted against each other, where the courts take upon themselves to define the legitimate precincts of theoretical discourse of sustainable use / development; and importantly also to implement it into everyday reality, in the way it feels fit.

Identification of the impacts of such judicial fiats to democratic process needs a careful theoretical reflection—revisiting traditional doctrines of separation of powers; it also equally necessitates an endeavour to identify connections between governance through such judicial fiats and its potential effects on the human rights to life, livelihood and habitat of the millions of affected communities. The institutions and legal regimes created by this judicial activism would appear to adversely affect various fundamental human rights, and facilitate impoverishment and disempowerment of a significant number of communities, already pushed to the margins. This aspect unfurls itself as and when the Court takes upon the responsibility of deciding who can have access to forestlands and forest resources, and through what means; it is technically done through orders in the nature of interim directions emanating out of a number of 'public interest petitions' pending before the Court. Such moves have resulted in a flurry of protests from forest-based groups all over the country, when the concerned line departments have set out to implement these very same judicial fiats.<sup>12</sup> The process came in the limelight with both the Prime Minister and the Speaker of the fourteenth Lok Sabha, raising concerns about judicial transgression, specifically mentioning the case.<sup>13</sup>

The article seeks to further understand the growing role of judicial activism and the instrument of continuous mandamus, and its implications to democracy and the social and economic rights, through the vantage point of the Godavarman process. Imperative for this pursuit is an appropriate contextualisation of the moral and normative claim that legitimises the tradition of judicial activism and *public interest litigation* (PIL) in India. The subsequent section seeks to do this. The third section examines the legal and policy frameworks of forest governance in India, which existed in the early phases of the Godavarman process, and examines the legal spaces that exist for community access to forest resources. The fourth section traces the trajectory of the forest matters, by identifying and analysing orders and developments that are relevant for a democratic and sustainable access / use / ownership of forest resources.<sup>14</sup> The fifth section seeks to make sense of the Godavarman process for community rights, and democratization of governance in these areas, and contextualises the forest matters in the wider processes of judicialisation of politics in India.

### THE CORE NORMATIVE CLAIM OF JUDICIAL ACTIVISM IN INDIA

Much has been written in the last two decades, about the Indian experience and experiments with judicial activism and PIL<sup>15</sup>, and the attempt here is to contextualise these histories to seek

an appropriate location for the Godavarman process. The Habeas Corpus case<sup>16</sup> is usually ascribed as a certain *karmic* starting point in the judiciary's activist strand. In this account, the capitulation of the judiciary, by condoning the tyranny and authoritarianism of the political emergency, and its resultant erosion of public credibility, was to be therapeutically healed by the processes of atonement and self-legitimation through judicial activism.<sup>17</sup>

The court, in most accounts, took two fundamental steps: *first* a liberal interpretation of the fundamental rights chapter of the constitution, so as to maximise the rights of the marginalised and disadvantaged sections of the society.<sup>18</sup> *Second*, considerable relaxations of the technical rules of access and locus standi<sup>19</sup> were attempted in the late seventies to mid-eighties.<sup>20</sup> It is important to remember that the court's earlier decisions recognising the right to environment and the fundamental basis of the courts action in forest matters originates from this specific tradition of progressive expansion of the right to life, which furthers fundamental concerns of the poor and the socially / economically excluded sections of the society.<sup>21</sup> Thus, this wave of judicial activism in the realm of environment,<sup>22</sup> concentrates on the declaration of the right to a safe environment as a fundamental right.<sup>23</sup>

In the next stage the Court is seen filling the contours of this right to safe environment with various principles identified from international environmental law. Principles of inter-generational equity<sup>24</sup>, intra-generational equity and sustainable development<sup>25</sup> are recognised as fundamental to the judicially recognised constitutional right to environment. Furthermore, a number of enumerations like the precautionary principle<sup>26</sup> and the polluter pays principle<sup>27</sup> are recognised by the judiciary, independent of the legislative instruments. Thus, in most accounts, the Supreme Court, by the mid-nineties, had played a unique and commendable role in pushing the quality of jurisprudence and norm setting, primarily using the right to life discourse through the Writ and Epistolary Jurisdictions.<sup>28</sup>

It was roughly at this stage that the Court started pushing the traditional limits of mandamus jurisdiction, by developing the tool of continuous mandamus. In the celebrated Jain Hawala diaries case<sup>29</sup> the Court sought to tackle persistent inaction of investigative agencies that effectively shielded high functionaries of political parties<sup>30</sup>, through a constructive interpretation and development of a new writ called continuing / continuous mandamus: 'in view of the nature of these proceedings, wherein innovations in the procedure were required to be made from time to time to subserve the public interest, avoid any prejudice to the accused and to advance the cause of justice. The medium of continuous mandamus was a new tool forged because of the peculiar needs of the matter, there are ample powers to make orders which have the effect of law, mandating all authorities to act in accordance with the orders of this court, by issuing the necessary direction to fill the vacuum till such time the executive discharges its role.'<sup>31</sup> In this manner, the scope of the writ of mandamus, traditionally used to compel a public authority to do its legal duty, or not do what it was statutorily / legally forbidden to

do, was widened, to ensure effective investigation against high political functionaries.<sup>32</sup>

The judgment ushered in a catena of decisions where orders were granted in a routine manner, in realms that are traditionally viewed as outside the purview of the courts mandamus powers.<sup>33</sup> Failure of non-functioning of government hospitals in providing medical equipments;<sup>34</sup> preference of certain medical services over the other;<sup>35</sup> eradicating mosquito menace in a city;<sup>36</sup> and asking for education for children of commercial sex workers were instances in which courts gave favorable orders, asking the authorities to act in a certain manner. Also, the Court had entertained, and have continued to keep in its docks, petitions that seek to improve conditions of service of members of subordinate judicial services;<sup>37</sup> filling up vacancies of judges in various High Courts;<sup>38</sup> seeking a ban against judges taking up post-retirement jobs in government or entering politics;<sup>39</sup> raising questions of arrears in courts;<sup>40</sup> and even seeking orders to institute consumer courts<sup>41</sup>.

Thus the use of continuous mandamus, originally sought to ensure that state agencies periodically reported back on the compliance of existing orders, especially in cases related to criminal investigation of corruption in high places, and orders to ensure that the rights of the arrested / under trials are complied with in police stations<sup>42</sup>, was slowly extended to more tenuous circumstances. Arising out of such aforementioned PILs that made palpable connections to a judicially widened conceptualisation of the right to life, judicial actions started transgressing from its traditional roles into executive and legislative governance realms.<sup>43</sup> However, such transgression into realms of policy is primarily defended by arguing that in the larger scheme of things, only such drastic measures can facilitate a social revolution 'to provide a decent standard of living to working people, and protect the interests of the weaker sections of the society'<sup>44</sup>.

### SPACES FOR COMMUNITY ACCESS TO FOREST RESOURCES IN THE LEGAL FRAMEWORK

For a fair appreciation of the impact of forest matters on the rights of forest communities (those who have sustained themselves on forest resources in a *traditional* and *sustainable* manner), understanding the connections between their progressive disentanglement and the relevant statutory frameworks, introduced by the colonial and post-colonial state, is important.<sup>45</sup> The forest governance mechanisms put in place by the British colonial regime, primarily through the Forest Acts of 1865, 1878, and 1927, as well as a host of other forest laws in the various presidencies, is often characterised as instrumental to this disentanglement. The colonial state, in these accounts, laid the foundation for an intensive exploitation of India's forests at the cost of communities which were dependent on these resources; classifications and 'fencing' of forests were statutorily done, with intensive extraction (for industrial and commercial reasons) of timber and other forest produce being the driving force of the regime.<sup>46</sup> Thus, substantial disentanglement of tribal and other forest groups was

pursued in colonial India using forest laws that monopolised rights over timber and other forest resources, where 'land was taken over as reserved [*sic*] forests dedicated to the supply of cheap timber to build teak ships, to lay down railways lines, to put up British cantonments and provide for the two world wars. Apart from mills to saw timber for urban housing and furniture, very little forest-based industry developed during the British rule' (Gadgil & Guha 1995: 21–44).

The thrust of the post-colonial Indian State continued to be the reinforcement of this near-monopoly of the state over forests and their use for revenue and commercial purposes, and the alienation of tribal and forest dweller groups from their traditional rights over forests and forest produce took on a new momentum. The first forest policy of 1952, for instance, firmly articulated and reiterated the thrust of the colonial Act of 1927, namely, facilitation and extraction of timber and other forest produce for industrial and commercial purposes. The organic continuity of forest policies of British colonial India with the policies of 'independent' India<sup>47</sup> was accompanied by an acceleration of the expropriation of large swathes of common lands, used by marginal groups of 'princely' India, by the Forest Department. While these histories of state assumption of common property resources of forest communities are well recorded elsewhere,<sup>48</sup> it is nevertheless important to highlight the extent and magnitude of the incursions:

Between 1951 and 1988, the colonial Indian Forest Act (IFA), 1927, was used to enlarge the 'national' forest estate by another 26 million hectares (from 41 to 67 mha). Based on unreliable article records, the non-private lands of ex-princely states and zamindars were declared as state forests, largely through blanket notifications, without surveying their vegetation / ecological status or recognising the rights of the pre-existing occupants and users, as required by law. Tribal areas, due to a poor recording of Adivasis' customary rights, bore the brunt of this 'statistisation' spree. Sixty per cent of the 'state' forests are today concentrated in 187 tribal districts, confined to only one-third of the country. This period, in hilly forested areas, threw millions of forest-dwellers into the clutches of the forest department, which today controls 23 per cent of the country's territory. Large numbers of the most vulnerable scheduled tribes (STs) were disenfranchised of their customary resource rights without even their knowledge and labelled 'encroachers' on their ancestral lands. That even 58 years after independence many of these areas are yet to be surveyed, and rights of their pre-existing occupants recognised, is a reflection of the poor state of the country's governance and the total unaccountability of the state to its most vulnerable citizens (Sarin 2005).

The enactment of the Forest Conservation Act (FCA) 1980, served to freeze this field situation, giving enormous powers to the Forest Department and the Central Government. The FCA, intended for checking large-scale appropriation of forestland for commercial purposes, mandates prior permission of the Central Government for diversion of forestland for any non-

forestry purpose. Resistance through popular struggles and civil society actions, inside and outside the realm of law, has run parallel to this attempt to centralise control and ownership of this vital resource (Sarin 2005).

The Indian Forest Policy statement of 1988, acknowledged the dissonance between statutory law and the rights of tribals and forest dwellers; and for the first time acknowledged the symbiotic relationship between tribals and forests. It also acknowledged that tribals and forest dwelling communities are dependant on forests for their survival and livelihood, and their rights need to be recognised. Furthermore, on the recommendation of the Commissioner for Scheduled Castes and Scheduled Tribes in his twenty-ninth report, the government converted this statement of intent into a concrete recognition of rights with a set of circulars on 18 September 1990<sup>49</sup>, approved by the Cabinet, relating to (a) *encroachments* on forestlands<sup>50</sup>, (b) review of disputed claims over forest land arising out of forest settlement<sup>51</sup>, (c) disputes regarding *pattas* / leases / grants involving forestlands<sup>52</sup> and (d) conversion of forest villages into revenue villages and settlement of other old habitations<sup>53</sup>.

Although these extremely important orders have been tardily implemented<sup>54</sup>, and their lack of statutory basis a convenient means to filibustering rare meaningful executive action, these legal spaces continued to be a reminder of the States' obligation to act. These national laws are supplemented by an intricate network of state level forest laws and revenue laws governing a host of issues such as extraction and trade in non-timber forest produce (NTFP), exercise of usufructory rights over forestlands, demarcation of jurisdictional boundaries between different departments, the role of panchayati raj (local self-government) institutions, as well as community forestry programmes like the Joint Forest Management Programme.<sup>55</sup> The Court's activism in forest matters needs to be contextualised within this statutory and policy framework; where, notwithstanding the overarching legal framework of state domination and resource extraction towards facilitating its own revenue maximisation, as also to cater to the demands of the industry, important constitutional and statutory spaces that recognise traditional rights of access to forest-resources for neighboring communities exist.

### IMPORTANT ASPECTS OF THE 'FOREST MATTERS'

The forest matters need to be examined from the aforementioned vantage point of the avowed legacy of pro-poor orientation of judicial activism. Thus, the intention to further the interests of the most marginalised and disadvantaged sections of the Indian society could be inferred as a putative touchstone in any judicial action, when rules of standings are relaxed and / or the construction of right to life is enlarged. Moreover, this judicial activity is to be seen within an existing statutory framework that recognises that the subsistence needs of forest communities have an important call on forest-resources in a democratic society;

notwithstanding the contemporary crisis of deforestation, primarily fuelled by intensive exploitation by the Forest Department, for industrial use.

As was mentioned earlier, in the initial phase of the Godavarman process, the Court operated largely within the existing legislative framework and issued directions for implementation of statutory duties, regarding control and management of forests. It cracked down on illegal wood-based industrial activity all over the country and sought to implement guidelines regarding the functioning of sawmills, plywood and veneer factories; presumably under the basis of the fundamental right to a secure environment, within the right to life discourse.

Beginning from December 1996, the Supreme Court broke the confines of the existing legislative framework, and had issued sweeping directions which have impacted the ownership, management and control of forests, forest land and forest produce. During this time the Court took upon itself the task of determining who can have access to the forest-resources, and through what means. As a result, a flood of interest groups has approached the Court to influence its policy. Today the case is arguably the largest ever to be litigated in India, not only in terms of sheer quantity (the number of pending / disposed Intervention Applications has crossed sixteen hundred) but also in the myriad issues the Court has taken on. This chapter focuses on only those aspects, which has an impact on community access to forest resources.

### Interpretative expansion of definition of 'forestland'

Foremost in this regard, is the benchmark judgment of 12 December 1996 where the term 'forestland' was re-defined for the purpose of section 2 of the FCA as follows:

The word 'forest' must be understood according to its dictionary meaning. This description covers all statutorily recognised forests, whether designated as reserved, protected or otherwise for the purpose of section 2 (i) of the Forest Conservation Act. The term 'forestland', occurring in section 2, will not only include 'forest' as understood in the dictionary sense, but also any area recorded as a forest in the Government record, irrespective of the ownership. The provisions enacted in the Forest Conservation Act, 1980, for the conservation of forests and the matters connected therewith must apply clearly to all forests so understood irrespective of the ownership or classification thereof.<sup>56</sup>

This definitional jugglery has seismic implications, as control of the land is transferred to the Forest Department, notwithstanding the differences in its nature of ownership or use. Thus, if in a government record a certain land is mentioned / described as a wooded area, which is common phraseology in various local languages for communally held grazing land, open access fallow land and other community land, such a construction brings these lands away from the control of the community to the Forest Department. The order, through a process of oversimplification and interpretative jugglery, has

not only re-written the law, but has also effectually declared substantial areas of community land as state property, in the name of protection of the environment. For instance, the government in the state of Madhya Pradesh, issued a circular in early 1997, in compliance with the Court order, stating that according to the dictionary meaning, the term forest meant such large areas where agriculture was not carried out, and which was covered with trees and shrubs. The circular further stated that 'taking a practical approach, in view of the judgement as well as the dictionary meaning of the term 'forest', areas measuring 10 hectares or more and having an average number of 200 trees per hectare, ought to be treated as forests'.<sup>57</sup> This has led to considerable distress, first due to, appropriation of residential and grazing lands of the marginal communities in the state, and second, legal uncertainty over the existing rights of tribals and forest dwellers over forests, such as, the rights of the patta holders in Orange Areas (undemarcated protected forests) in Madhya Pradesh and Chattisgarh, right to regularisation of land title of tribals and forest dwellers, rights over NTFP, *nistar* and other customary rights.<sup>58</sup>

### Impact of the creation of the central empowered committee

The Central Empowered Committee (CEC) is a unique public authority that has been virtually created under the orders of the apex court, to monitor and ensure the compliance of its orders concerning the subject matter of forests and wildlife and other related issues. CEC was the product of a situation where the Court was flooded with litigation on matters, the bulk and nature of which, it was not designed to handle. With hundreds of Interim Applications being filed in the apex court seeking directions of various natures, the Court in April 2002, ordered the central government to consider 'putting in place a national level authority which would have the technical expertise to deal with the problems which were at present handled by the High Courts in this Court, and dispose them off expeditiously, keeping in mind the principle of sustainable development'.<sup>59</sup> This authority was to be in the nature of a statutory authority, to be constituted under section 3(3) of the Environment (Protection) Act 1986, under the discretion of the Central government. Such an authority already existed at the state level for Arunachal Pradesh,<sup>60</sup> although early efforts, through a judicial process, to replicate this institution in other states were not very successful.<sup>61</sup> The objective of the Court was the institution of an authority that would not only assist and guide the Court in judicial matters that were within the purview of the Godavarman process, but also to ensure the implementation of the relevant orders of the Court. Impatient with the delay of the government in exercising governmental discretion, the Court went ahead and constituted the CEC at the national level on 9 May 2002<sup>62</sup>, by its own order. While the order is constitutionally suspect, this aspect was downplayed by emphasizing that such a Committee would operate, pending the constitution of the appropriate statutory agencies under the Environmental Protection Agency (EPA), by the government.

Importantly, the Court conceived it as 'a Committee for all forest areas in the whole of India, with powers to give directions, hear objections and take decisions so that there is no need to approach this Court from time to time'.<sup>63</sup> However, within a month the government notified the constitution of CEC,<sup>64</sup> notably it merely legalised what was already judicially constituted. Notably, while the notification quoted the relevant order of the Court in its preamble, it made no reference to the empowering statute. Given that the functions of the Committee included monitoring and implementation of the courts' orders, examination of the pending Intervention Applications (IAs) and so on, and placing its specific recommendations and quarterly reports before the Court, the CEC was substantially different from the agency envisaged under EPA. The Committee was also mandated to dispose applications moved by persons against any measure of authority in the implementation of FCA, *Indian Forest Act 1927* and *Wild Life (Protection) Act 1972*, in conformity with the relevant orders of the Court. In the exercise of its functions, the Committee also had extraordinary powers to establish its own procedure, outside the Civil Procedure Code, including powers of interrogation, inspection, summoning of documents and persons, and order field visits and public hearing.<sup>65</sup> Through a process originally initiated by a court's order, the CEC wields extraordinary powers to discharge judicial, administrative and policy-making roles, in the realm of forest governance, in the country.

The Committee was constituted for five years, and five members were appointed in their 'personal capacities', in consultation with the Amicus Curiae<sup>66</sup>; to be removed only through leave of the Court. At the end of 2007, the Court extended the tenure of the Committee for a further period of three years, with some changes in the composition of the members.<sup>67</sup> What is remarkable about this important public body (in both its versions) is that it is comprised wholly of foresters and conservationists, and in particular without representation from the other concerned ministries, such as the Ministry of Tribal Affairs, or the tribal or dalit movements.

The institution of CEC, in some ways, responded to an earlier critique that constitutional courts were adept at passing lofty judgements declaring the rights of large sections of underprivileged Indians, without taking into account if and how these declarations would be effectuated by the state machinery. Given the nature of its task where rights of millions of people across the country are affected, justifiable concerns about the ability of such a body to bridge the judicial-executive divide exist.

Given the unique aforesaid manner of its constitution, membership, powers and functions assigned directly by the Court<sup>68</sup>, concerns of accountability and transparency of such an exceptionally powerful body, has justifiably been raised.<sup>69</sup> Its control, having been given by bureaucrats from the forest ministry, the avowed purpose of implementation by the judiciary has turned into something far more fundamental. These concerns unravel themselves in the Committee's recommendation regarding what it calls forest encroachments; where, neither were efforts made to hear any representatives

from these interest groups nor were the recommendations / reports of the CEC made available in the public domain.<sup>70</sup> The growth of the Committee into a major driver of policy, can be seen in the manner in which reports of the Committee have shaped the policy in two important fields, namely, the issue of 'illegal encroachments' and the introduction of Net Present Value, both dealt with in subsequent sections.

### Discourse of encroachments and disentanglement of communities

The judicial process in the forest matters has been oblivious to the manner in which millions of tribals were disenfranchised from their customary rights to forest resources and related commons in 'independent' India, in the erstwhile princely states.<sup>71</sup> The manner in which the issue of forest encroachment has been constructed in the matter has not left any scope of inclusion for this reality. The entry point for this process has been a Writ petition in 1999, by three environmental groups who were concerned by the effect of indiscriminate deforestation, done in collusion with state agencies in the Andaman Nicobar islands, and its effects on *primitive* tribes in the islands, such as the Onges and Jarawas.<sup>72</sup> While the matter of removal of encroachments in these areas was raised by the applicants in their prayer, the initial focus was on destruction of forests and the looming extinction of these primitive tribes. The Court passed an order in January 2002, based on the recommendations of a court-appointed expert, that regularisation of encroachments on forestland, including for subsistence agriculture, shall be prohibited, and all such conversions after 1978 shall be removed in three months.<sup>73</sup> Further, such families using forestlands, dating even prior to 1978, were to be shifted to rehabilitation sites, including, through forcible eviction.

Myriad litigations have followed these directions, some challenging the failure of the administration to implement these directions<sup>74</sup>, others seeking their dilution.<sup>75</sup> Demonstrating the intricate complexities in the issue, even within a small group of islands, encompassing an array of competing interests, each legitimate in their own right, the courts approach in balancing them has been peculiar. The manner in which the needs and rights, of families using lands recorded as forests in subsistence agriculture, have been undermined by constructing and approaching the issue as encroachment is noteworthy.<sup>76</sup>

The equation of occupation and sustainable use of land for subsistence, with the crackdown on encroachment by commercial vested interest in the forest by the Court (done in an earlier phase), is problematic. For instance, earlier in 1998, the Court cracked down on encroachments by coffee plantations in the Thatkola Reserve Forest, Karnataka.<sup>77</sup> The Court ordered enquiries by a Commissioner of the Court, the Surveyor General of India<sup>78</sup> and the Empowered Committee, where plantation owners were given ample opportunities to be heard. Only after all the three reports confirmed the fact of encroachment, were directions for removal passed.<sup>79</sup> This cautious approach vis-à-vis powerful plantation owners may

be contrasted with the treatment of regularisation of *patta* holders, mostly tribal and other marginal groups living far below the poverty line, by the same Bench. Here, the Court on the first date of hearing itself barred the government from recognizing any right of the families, many who claimed that they had been living on these lands for decades.<sup>80</sup>

When the issue even in a territory as small as Andamans is so vexed, the Court appears to be hasty, oblivious and unmindful of the complexities and differences between commercial encroachments by vested interests, and recognition and regularisation of the legitimate use of land by tribal, dalit and other marginal groups in the entire country. Further, from the evidence available, there appears to be a lot more circumspection in dealing with entrenched interests as opposed to passing blanket orders related to economically marginal groups.

### Role of the Amicus and the tacit ethos of the Court

The issue of *encroachment* snowballed with the filing of IA 703 by the Amicus Curiae on 23 November 2001, who sought general directions to stop 'massive illegal encroachment of forestland all over the country'. The Court granted an interim order restraining the government from 'permitting regularisation of any encroachment'.<sup>81</sup> The CEC, after merely consulting the *Ministry of Environment and Forests* (MoEF) and state forest departments, recommended<sup>82</sup> that all further regularisation of encroachments in forestlands, in any form, including issue of *pattas*, ownership certificate, certificate of possession, lease, renewal of lease and so on, be strictly prohibited, except in cases where eligibility for regularisation exists under the 1990 guidelines; that the Preliminary Offence Report under the relevant Forest Act will be the basis to decide the date of encroachment; whether an area is a forest or not will be resolved on the basis of forest department records, and only in their absence will other relevant government records be relied on; and the chief secretaries of states made personally responsible for all ineligible encroachments were to be evicted forthwith.

A number of state governments had filed affidavits before the Court in response to this report; also NGOs, people's organisations, and concerned individuals have filed a spate of Interlocutory Applications contesting the premises of the CEC, and seeking the vacation of the stay.<sup>83</sup> Although the Court has not taken any formal action effectuating the report, the subsequent actions of the Court show that the report coincides with the ethos of the Court. The Court has refused to make distinctions between encroachments by commercial and vested interest and legitimate claims of marginal groups, despite repeated pleas to vacate the stay by these groups, and has continued the interim stay for the last seven years.

The Forest Department also chose to project this order as a direction to enforce eviction of 'encroachments' on forestlands across the country, without due process of law. On 3 May 2002, it issued a circular to all the State Governments and Union Territories directing them to carry out a time bound summary

eviction of all encroachments not eligible for regularisation as per the 1990 guidelines; fixing the final date for this process as 30 September 2002. This was subsequently withdrawn in October 2002, after considerable public protest.<sup>84</sup>

### Emergence of a bulwark against community rights

A very significant development was the filing of IA No. 1126<sup>85</sup>, again by the Amicus Curiae. This application brought to the notice of the Court various orders passed by the Central Government, on the eve of the 2004 general elections, regarding rights of tribals and forest dwellers over forestland. The Amicus, *inter alia* challenged a circular of the Inspector General of Forests, directing appropriate agencies to take necessary steps to recognise the traditional rights of the tribals on forestlands, and incorporate them into state level law so as to ensure that 'these tribals can get unfettered legal rights over such lands' which shall be 'heritable but inalienable'.<sup>86</sup> The circular brought within its ambit all 'those tribal dwellers that are in continuous occupation of such forest land at least since 31 December 1993'. The orders also included a circular<sup>87</sup> granting approval to the State of Madhya Pradesh for the modification of legal status of 168,840.29 hectares of forest land regularised for inalienable use by families from socially and economically excluded groups; and a circular regarding diversion of forest land for a pilot project of relocation of tribals from forest areas in Tripura<sup>88</sup>. Taking into cognizance the potential connections between the popularity of the orders and the upcoming elections, the Court promptly ordered an interim stay of the implementation of the circulars and notifications.

However, the Court has refused to lift the stay or take further action on these orders since then. More importantly, the central government (formed by parties who were in opposition in the earlier house) filed an affidavit<sup>89</sup>, requesting a revocation of the stay on a number of grounds. The affidavit recognises that 'for most areas in India, especially the tribal areas, a record of rights did not exist, due to which rights of the tribals could not be settled during the process of consolidation of forests in the country. Therefore, the rural people, especially tribals who have been living in the forests since time immemorial, were deprived of their traditional rights and livelihood and consequently, these tribals have become encroachers in the eyes of the law.'<sup>90</sup> It acknowledged that during the post-independence process of the amalgamation of princely states, large areas were proclaimed as Reserved Forests 'without settlement of tribal rights as the records of rights never existed for tribals'.<sup>91</sup> It quotes extensively from the *National Forest Policy 1988* and its recognition of the 'symbiotic relationship between the tribal people and forests' and goes on to assert that 'the Central Government is committed to the recognition of the tribal rights in forest areas'. The affidavit points out the 'distinction between the guidelines of regularisation of encroachments and the settlement of disputed claims of tribals over forestlands.'

Only a few state governments have submitted proposals for regularisation of eligible encroachments, while there have

been no proposals for the settlement of disputed claims over forestlands. 'This has deprived the tribals of natural justice, as the Central Government's guidelines for regularisation of encroachment are different from the guidelines for settling disputed settlement claims.' The Affidavit asserts that the fresh guidelines do not relate to encroachers, but to remedy a serious historical injustice, and will also significantly lead to better forest conservation. It also asserted that the Central Government had taken a policy decision not to insist on Compensatory Afforestation or payment of Net Present Value in such cases because 'there is no felling of trees, no change of land use and also such conversions help in reducing the biotic pressure on forests.'

The affidavit is of tremendous significance because it makes important statements of policy of the Central Government on the issue of land rights of tribals and other forest dwellers. It also clearly asserts the role of the Executive to decide on matters of policy, based on the legislative framework designed by the Legislature, even in the face of disapproval from the Judiciary. This disapproval became increasingly apparent during the months of the Parliamentary introduction of the Tribal Rights Bill,<sup>92</sup> when IA 1126 had come up for hearing. It was important that the Court examined the matter of tribal rights over forests in its entirety, rather than through the narrow lens of protection of tree cover alone.

For this, the very least the Court should have done was to hear all the interested parties that are already before it, through their various affidavits (such as the different state governments) and subsisting IAs (such as the peoples movements, citizen collectives, NGOs and other activists). Only after grasping the full complexity of the range of issues involved, would the Court be equipped to take a decision on this issue, notwithstanding the vexed issue of whether the Court has the institutional competence, institutional effectiveness and constitutional mandate to do the same.

### Introduction and implication of net present value

The issue of payment of Net Present Value (NPV) is intricately connected to the recognition of peoples' rights over forest resources, specially because, in the aforementioned judicially shaped regime, even recognition of peoples' use of land and other resources, defined as non-forest use, can be allowed only after payment of NPV. Payment of NPV towards a compensatory afforestation fund has long been required under the existing statutory framework under FCA. Diversion for non-forest purpose by a user agency must be accompanied by payment to the state government, according to certain formulae, for compensatory afforestation, usually in an area upto double of the diverted land. However, it was becoming increasingly apparent that the actual implementation of these afforestation programmes was far from satisfactory. The Court *suo motu* took a statement of the Additional Solicitor General (ASG) on record, during the course of another hearing, which demonstrated the dismal performance by most of the states, in spending these monies received for compensatory

afforestation.<sup>93</sup> This statement was treated as an independent IA,<sup>94</sup> and notice was issued to the defaulting states, to clarify 'whether the present practice of the applicant depositing money with the State Government and requiring it to carry out the afforestation is satisfactory or not'<sup>95</sup>. The Court opined that the primary responsibility of ensuring reforestation should be of the individual user agency, and must go beyond mere payment; it should also ensure that the reforested area is maintained and the trees survive and reach full growth. Further, it mooted the idea of a post-permission annual environmental audit built into such grants of permission, and the discretion to cancel permission in the event of unsatisfactory performance in afforestation. However, the Court did not pursue this idea any further. After a year, the Court directed the MoEF to formulate a scheme that ensures that responsibility of compensatory afforestation lies with the user-agency, funds are set aside for the same in a separate agency and the State Governments merely make land available 'at the expense of the user agency or of the State Governments, as the State Governments may decide.'<sup>96</sup>

The CEC was also asked to submit its recommendations. This report<sup>97</sup> approved of recovery of NPV over and above the expenses of compensatory afforestation, at rates prevalent in two specific states. It also recommended that as a number of state forest departments were facing problems of delay and access to these funds, as it needed allocation by annual budgets, a separate 'Compensatory Afforestation Fund' be created and administered by a central authority, independent of the states, into which all these monies be deposited by the user agencies. Much against constitutional practice, but probably not surprising to anyone closely following the forest matters, CEC also recommended that the rules, procedures and composition of this body for management of the Compensatory Afforestation Fund be finalised by MoEF, with the *concurrence* of CEC.

This report was accepted in its entirety by the Court in October 2002, and directions in exact terms of the CEC recommendations were passed.<sup>98</sup> Consequently, Union of India was directed to frame rules for the purpose of constitution of a body to manage the compensatory afforestation fund, within eight weeks. Thereafter, MoEF issued several directions<sup>99</sup> effectually providing a procedural stamp, through notification, to the courts directions. MoEF in April 2004<sup>100</sup> constituted the Compensatory Afforestation Fund Management and Planning Authority (CAMPA), vesting it with the custodianship of the Compensatory Afforestation Fund, including its management, disbursement, monitoring and evaluation. The central and state level governing bodies of CAMPA are comprised wholly of officials from the forest departments, except for an eminent professional ecologist in the central body, and a representative of an eminent NGO at the state level. This notification was preceded by intense Court monitoring, where different draft rules were directed to be submitted to the Court and the Amicus for their perusal, and their comments duly incorporated.

Apart from the obvious constitutional problems of the court's role in directing the institution of agencies, the rules

and governance frameworks, in the manner it felt fit, to the last T, with no regard for the principle of separation of powers, and subverting the constitutional role for legislature, the courts directions also had adverse impacts for access of land-rights of tribals and other forest dwellers in India. This can perhaps best be demonstrated by referring to a much older order dated 22 September 2000<sup>101</sup> where the request of the State of Madhya Pradesh for permission to regularise occupations of lands previously categorised as forest land was considered. One of the conditions for permission was that the State Government carry out afforestation over equivalent land. The Court observed 'one cannot shut one's eyes to the fact that there would be encroachment thereafter.' It went on to say that experience has shown that whenever regularisation takes place subject to imposition of conditions, such as compensatory afforestation, while regularisation becomes effective, conditions remain unfulfilled.

The Court was of the view that: 'it will be more appropriate that the accompanying conditionalities imposed in relation to regularisations are required to be fulfilled first before any regularisation is granted. The result of this would be that the regularisation would be deferred, but the fulfillment of the conditions ensuring inter alia compensatory afforestation would be ensured.'<sup>102</sup> Although this order relates to earlier compensatory afforestation mechanisms, effectively it would mean that NPV is payable in advance, prior to regularisation and settlement of land rights, in accordance with the 1990 guidelines. Such an interpretation has been effectuated in the later orders.<sup>103</sup> This is a matter of great concern since it acts as a huge disincentive to state governments to undertake the process of regularisation and settlement, a process already hit by bureaucratic boulders.

Given the histories of the illegitimate disentanglement of tribal and other community rights in the country, it is peculiar that the Court demands payment of NPV in such cases. The need to differentiate between commercial diversion of forest land and non-commercial diversion of the so-called forest land, where the issue of recognition of existing rights is ignored by the Court. The MoEF and various state governments have argued before the Court that no NPV should be payable while regularising landrights of tribals and forest dwellers, since their occupation pre-dates the legal notification of the land as a forest.<sup>104</sup> The Court, in a familiar script, has kept the issue in abeyance by not taking the relevant applications on board, and refusing to lift the interim stays in the relevant applications to allow regularisations without payment of NPV.

#### **FURTHER ENCLOSURES OF THE COMMONS: MAKING SENSE OF THE FOREST MATTERS**

The orders in forest matters, purportedly working towards an effective realisation of the fundamental right to environment, has been constructed in a manner in direct conflict with the rights of forest communities. Such rights are supported by international law as well as constitutional and statutory rights previously recognised by the Court itself. The Court,



in its earlier role as a defender of the rights of tribal and other marginalised groups, in the eighties and early nineties, intervened in the *Banwasi Seva Ashram versus State of Uttar Pradesh*<sup>105</sup>. It directed the state government, during the impugned constitution of a reserved forest, which was depriving tribals of their customary rights to forests and agricultural lands, to take into account these traditional rights.<sup>106</sup>

Similar has been the approach of J. Ahmadi, in *Pradeep Kishen versus Union of India*,<sup>107</sup> and J. Manohar, in *Animal and Environmental Legal Defence Fund versus Union of India*,<sup>108</sup> where the statutorily recognised traditional rights of tribals and neighboring communities in reserve forests and protected areas, were respected. Recognising the importance of statutory spaces that require that traditional rights are recognised / settled before forests are reserved, the Court emphasised that 'whereas every effort should be made to preserve the fragile ecology of the forest, the rights of the tribals formerly living in the area, to keep body and soul together, must also receive consideration and every effort should be made to ensure that tribals, when resettled, are in a position to earn their livelihood'.<sup>109</sup>

This stance of the Court, prior to the drastic changes in Godavarman, was in conformity with the international principles of indigenous peoples rights,<sup>110</sup> as expressed in various international covenants, conventions<sup>111</sup> and tribunal decisions. Elaborations of Art. 27 of the ICCPR<sup>112</sup>, and also Article 30 of the Convention on the Right of the Child (since the latter contains almost identical language as the former), embody a manifestation of the general norm of international law of the right to the integrity of indigenous peoples.<sup>113</sup> The Committee on Economic, Social and Cultural Rights highlighted state party obligations to recognise and respect indigenous peoples' land and resource rights under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), emphasizing the direct connection between *aboriginal* economic marginalisation and the ongoing dispossession from their lands; and recommended the state party to 'take concrete and urgent steps to restore and respect aboriginal lands and resource-bases, adequate to achieve a sustainable aboriginal economy and culture'.<sup>114</sup>

Also, the UN Committee on the Elimination of All Forms of Racial Discrimination contextualised the general obligation of state parties in this regard as a duty to 'recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or otherwise used without their free and informed consent, to take steps to return these lands and territories'.<sup>115</sup> Thus international law requires that indigenous peoples' ownership and other rights to their lands, territories and resources, traditionally owned or otherwise occupied and used, be legally recognised, respected and guaranteed. The earlier approach of the Court was in line with these important international human rights principles. However, the approach in the Godavarman process is qualitatively different, where in a supposed attempt to further

concerns of the environment, the Court through judicial fiat has disintegrated these communities of their legitimate statutorily recognised rights.

### The Courts' notion of environmentalism

The Court appears to be transfixed in an understanding of environmental protection, where environmental concerns are seen as the preserve of rich and middle classes and a problem of protecting these resources from indiscriminate exploitation by the poor. Second, the basis of the courts' construction of the right to safe and secure environment is erroneous, and is already adequately problematised. Significant theorisations by environmental economists (see for instance Martinez-Alier 2003; Leff 1995) and political ecologists<sup>116</sup>, drawing on strong environmental movements emanating in some of the poorest countries of the world, and among the poorest sections of these societies, have significantly problematised such earlier notions of environmentalisms. Examining indigenous peoples movements in the Chiapas, various parts of South America, the fisherfolk movements in South East Asia, the Chipko struggle and peasant movements questioning the socioeconomic-environmental effectiveness of mega dams in India, these theorisations have effectively demonstrated the interest of the poorer neighboring communities to use these resources sustainably, given their low energy lifestyle as well as lack of alternate sources of livelihoods.

Also, strengthening such participation in protection of natural resources against market forces and demands of a resource intensive lifestyle of the global north is an effective way of protecting the environment and sustainably using these resources. Ample evidence demonstrates the failure of fencing models in many parts of the world, pointing towards the need to involve neighboring communities in meaningful ways; recognizing their subsistence needs and re-nurturing relationships of trusteeship. Thus in India, it was the force of the prevailing political and public pressure that ushered the Forest Policy 1988 followed by the 1990 circulars, to address the livelihood concerns of forest communities, while seeking to balance the conservation-oriented slant under the FCA. The Forest Policy made it clear that the domestic requirements of fuel-wood, fodder, minor forest produce and construction timber should be the first charge in forest resources of the country. Likewise, the 1990 circulars were inspired by the need for recognising the usufructory rights of the neighboring communities. Such nuanced understandings of the situation are conspicuous by their absence in the courts approach here. It is these same concerns that are involved in the making of the Tribal Rights Act 2006.<sup>117</sup>

### Further enclosures and covert discrimination by the Court

While there is a legitimate concern of massive environmental degradation due to loss of forest cover, the world over<sup>118</sup>, the judicial process ignores certain important realities behind

this. First, the process unfairly and unequally puts a burden on the poorer communities that are dependent on the forest in a sustainable manner. Second, it is the market-intensive and resource-intensive use by affluent sections, that drives deforestation, and it is unfair and inequitable to put their burden on forest communities.

Not only has the Court sought to obliterate the various customary and other rights recognised under the existing legal framework, but the effect of the judicial process has also been a further enclosure of common lands, hitherto not statutorily considered as forests, through an expansive definition of forests, which are not envisaged in the statute.<sup>119</sup> Furthermore, it is important to note that the enclosure of these lands, although done in the name of environmental protection, effectuates something more insidious. Such lands newly defined as forestlands, and made inaccessible to forest communities in the name of conservation, are in effect exclusively made accessible to market forces, through payment of NPV.<sup>120</sup> Increase of NPV, although not prohibitive for highly profitable commercial ventures, deter cash-strapped state governments from regularising / recognising community rights over these lands. Attributions to the 'enclosure' are not only demonstrable from the effects of this judicial process, but also from subtleties in the process itself. Thus, for instance, we see a qualitative difference in the opportunities given to plantation owners to state their cases, and the quasi-summary processes of sweeping *interim* orders, affecting the rights of millions of forest-communities.<sup>121</sup>

The Godavarman process has, in a number of ways, ushered a qualitatively new dimension in Indian politics. A reputed public interest lawyer quipped about the shift of priorities of the country's courts from the *roaring eighties* (in its concern for the poor and marginalised) to becoming a facilitator of neoliberal economic policies, through subversion of statutory rights and policies—ironically in the name of the rule of law.<sup>122</sup> How would the polity respond to this increasing regressive judicialisation of Indian politics is a harbinger for development of contemporary constitutionalisms.

The ubiquitous control of the apex court in Indian constitutional governance appears to be approaching a slow crescendo, as can be seen in the Godavarman process. Although effects of forest matters have until recently gone unnoticed in the public domain, a vigorous debate about implications of 'governance by mandamus'<sup>123</sup> to popular democracy has increased in recent times. For instance, concerned by the courts invalidating affirmative actions toward socially and economically backward classes in private institutions of higher education last year, the Parliament intervened to amend the constitution.<sup>124</sup>

The forest matter also brings to focus fundamental issues of judicial review in constitutional democracies, especially in cases that have a multifaceted character of socioeconomic rights. The words of Khanna, J. ring almost prophetic:

When other agencies or wings of the State overstep their limits, the aggrieved parties can always approach

the courts and seek redress against such transgression. When, however, the courts themselves are guilty of such transgression, to which forum would the aggrieved parties appeal? If *mankind* while passing through the successive stages of political consciousness has done away with despotism of kings and dictators, it would be puerile to expect it to put up with despotism of judicial wing of the State (Khanna 1985).

This is easily contrastable with the words of Pasayat, J. in a recent judgment in the Godavarman case: 'Disobedience of this courts' order strikes at the very root of the rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. Hence, it is not only the third pillar, but also the central pillar of the democratic State.' (sic).<sup>125</sup>

The Godavarman process demonstrates that contemporary judicialisation of politics cannot be characterised merely in terms of the defence of fundamental rights. The task of the courts to defend and sometimes effectuate fundamental rights of citizens is normatively and politically defensible within a liberal framework.<sup>126</sup> However, arguments, at least equally convincing, that question the institutional effectiveness, institutional competency and institutional legitimacy of the instrument of judicial review have been forwarded by its detractors (Waldron 1999, 2002, 2003; Bichel 1986; Kreimer 1997).

Stepping aside from this constitutional law conundrum regarding the desirability and appropriate ambit of judicial review in India, the implications of the Godavarman process to the democratic praxis that ought to underpin the governance of forest areas in India, appear to need further examination.

## Notes

1. This paper is based on an LLM Dissertation submitted at the School of Oriental and African Studies at University of London. Parts of the paper—especially Section IV—benefited from the preparation of a civil society report in 2004 (see n.14 below), co-authored by me and Ms. Shomona Khanna; it also benefited from presentations at 'In Defense of Ancestral Domains' Land rights conference in Penang, Malaysia, December 2006, and the Inter-disciplinary conference on 'Nature, Power, Knowledge' in Uppsala in August 2008. This article is finalised based on the paper presented at this conference. The author would like to thank the subject editors, and two anonymous referees for their valuable comments. Regarding, monopolization of forest resources through law, see for instance Gadgil & Guha 1992. See also n. 3 and 4 below.
2. For a classical account of the links between British colonial expansion and global deforestation see Albion 1926: Until the later decades of the 19th century, the Raj carried out a *fierce onslaught* on the subcontinents' forests. With oak forests vanishing in England, a permanent supply of durable timber was required for the Royal Navy as 'the safety of the empire depended on its wooden walls'. c.f. Gadgil & Guha 1992: 118.
3. Guha 2006 identifies the building of the railway network as 'the crucial watershed in the history of Indian forestry'.
4. See Martinez-Alier & Guha 1997: 4–16. Also, for an account of the continuation of emphasis on industrialised extraction to the detriment of forest communities in India, between the First Forest Policy 1952 and Fifth Forest Policy 1988, see, Gadgil & Guha 1995: 21–44; Thayyil 2006; and n. 46 below.

5. India has a unitary judiciary, with Supreme Court at the apex, High Courts for almost every state, and district courts and subordinate courts below them. Both the Supreme Court and High Courts wield a combination of constitutional, appellate and original jurisdictions. They possess writ jurisdictions over questions of fundamental rights; the Supreme Court also has the authority to issue advisory opinions.
  6. The warrant for judicial review for the apex court comes from a combined reading of Articles 13 (prohibiting the State from infringing fundamental rights conferred by the constitution, and declaring any such breach as void), 32 (confers any person the right to move the Court for enforcement of the guaranteed fundamental rights) and 142 (empowers the Court to pass *such order as is necessary for doing complete justice in any cause or matter*) of the Constitution of 1950.
  7. Writ Petition (Civil) (PIL) 202/ 1995: popularly called as forest matters, initially by lawyers involved in the cases, and later even by significant sections of the print and electronic media. Since the process is a *continuous mandamus* the judgments and orders are numerous, while the reported judgments will be cited in the standard form, the unreported orders will be specified as such, and would cited by date and the relevant Interim Applications (IAs). See p. 7 below for continuous mandamus.
  8. Article 48A of the Constitution, requires the State to endeavour to protect and improve the environment and safeguard the forests and wildlife of the country.
  9. Order dated 4.3.1997. Further, Order dated 30.10.2002 prohibited all state governments from issuing fresh licences without the prior *permission* of the Court appointed Committee.
  10. See P. 272, section on 'Impact of creation of the central empowered committee'.
  11. The Writ of Mandamus is used to seek an order from an appropriate judicial authority to compel a public body to do its legal duty. For more on the development of the tool of continuous mandamus by the apex court, see P. 269, last paragraph.
  12. *Endangered symbiosis: Evictions and India's forest communities*, Report of the Jan Sunwai (Public Hearing), July 19–20, 2003.
  13. See the Speech of the Speaker of the Lok Sabha (Upper House) dated 26.04.2007 <http://speakerloksabha.nic.in/speech/SpeechDetails.asp?SpeechId=212>, accessed on 29.04.2007. Also, <http://www.indianexpress.com/printerFriendly/29401.html>, accessed on 29.04.2007.
  14. A number of important orders are unreported. The researcher was involved in a process of collecting these from the Court registry, various lawyers' offices, and various other sources. This paper significantly benefits from this exercise that culminated in a Report in 2005—Thayyil & Khanna 2005.
  15. Perhaps the most comprehensive work on the Indian PIL process is Sathe 2002. Two important articles—Baxi 1982; Baxi 2000—mark the dawn and twilight of the heydays of the PIL process. An indicative list of important accounts of the process would include: Bhagwati 1987; Agarwala 1987; Hingorani 1981; Banerjee *et al.* 2002. Useful comparative research exist in some abundance including Cunningham 1987; Craig & Deshpande 1989; Hassan & Azfar 2004.
  16. *Assistant District Magistrate, Jabalpur v. Shivakant Shukla*, (1976) 2 SCC 521; where the Court ignominiously overruled nine High Courts, and upheld illegal detentions by the emergency government, through executive order, of hundreds of political dissenters.
  17. 'Post-emergency judicial activism was probably inspired by the Court's realisation that its elitist social image would not make it strong enough to withstand the future onslaught of a powerful political establishment'. Sathe: 173.
  18. See a host of cases: starting from *Maneka Gandhi v. Union of India*, AIR 1978 SC 597, where a constitutional due process clause was judicially inserted; in contra-distinction to the constitutional text that stipulates a narrow protection of mere 'procedure established by the law'. This position in Maneka also diverged from the opinion of the constituent assembly; as also from earlier Supreme Court judgments including the landmark decisions in *A.K.Gopalan v. Union of India*, AIR 1950 SC 27 and *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295.
- The decision in Maneka had radical implications for the fundamental rights jurisprudence in the country, and paved the way for the liberal interpretation of the meaning and ambit of various significant ancillary rights, namely, *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 545, where the constitutional and normative connection between the rights to life and livelihood was recognised, *Francis Coraline Mullin v. Administrator Union Territory of Delhi*, (1981) 1 SCC 608, 618, where Justice Bhagwati famously enunciated on constitutional construction '... constitutional interpretation must be constructed, not in a narrow and constricted sense, but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the constitutional provision does not get atrophied or fossilised but remains flexible enough to meet the newly emerging problems and challenges, applies with greater force in relation to a fundamental right enacted by the Constitution'. At a later stage, roughly between late eighties to late nineties, the Court commendably expanded the right to life to include a number of important human rights including the right to health in *Vincent v. Union of India*, AIR 1987 SC 990 and in *C.E.R.C. v. Union of India*, AIR 1995 SC 927; the right to education in a catena of cases including *Mohini Jain v. State of Karnataka*, AIR 1992 SC 1858 and *Unnikrishnan v. State of Andhra Pradesh*, (1993) 1 SCC 645.
19. *Locus standi* or Standing refers to the procedural requirement that a person approaching a Court against an alleged 'illegality' has to demonstrate sufficient connection between the said illegality and specific harm to the person's interest.
  20. This included entertainment of letters as Writ petitions under an epistolary jurisdiction: for instance in the celebrated case of *Sunil Batra v. Delhi Administration* AIR 1980 SC 1579, where a letter scribbled by a prison inmate drawing its attention to the unbearable physical torture by prison authorities of a fellow prisoner and smuggled to a sitting judge was treated as a Writ Petition; as also *suo motu* judicial action (on its own motion) in public interest in *Dr. Upendra Baxi v. State of Uttar Pradesh*, 1981 (3) SCALE 1137 and *Sheela Barse v. Union of India*, AIR 1983 SC 378. The constitutional bench decision in *S.P. Gupta v. Union of India*, AIR 1982 SC 149, postulated the principle that 'any member of the public having sufficient interest may move the Court for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty etc'.
  21. See for instance, Ramanathan 2002: 349–361.
  22. This first wave of environmental activism, in turn is the product of the earlier wave of judicial activism, namely, the aforementioned expansion of the substance of the right to life starting from Maneka. See n. 18 above. However, in the realm of fundamental right to safe environment, courts, in addition, used the constitutional provisions of fundamental duty of every citizen and the fundamental obligation of the state to protect and improve the environment [as inserted in the constitution by the *Forty second Constitutional Amendment, 1976*, in a chapter different from Part III], as additional bolsters to its reasoning.
  23. See for instance *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*, AIR 1987 SC 395 at 363.
  24. *M. C. Mehta v. Union of India*, AIR 1988 SC 1037.
  25. *Virendra Gaur v. State of Haryana*, (1995) 2 SCC 577.
  26. *Vellore Citizens Welfare Forum v. Union of India*, AIR 1996 SC 2715. Whereby the government and statutory authorities must anticipate, prevent and attack causes of environmental degradation. Till then, the principle of prevention was the only prevalent norm within the nascent statutory law on environment in the country.
  27. *Dahanu Taluka Environment Protection Group v. Bombay SESC Ltd.*, (1991) 2 SCC 539 and *M.C.Mehta v. Union of India*, (1991) 2 SCC 353. See also: *Indian Council for Enviro-Legal Action v. Union of India*, 1996 AIR SCW 1069, *M.C.Mehta v. Union of India*, (1998) 6 SCC 63, *M.C.Mehta v. Union of India*, (1998) 4 SCC 589, *Satish Chander Shukla, (Dr.) v. State of U.P.* (1992) Supp (2) SCC 94 and *C.E.R.C. v. Union of India*, A.I.R. 1995 SC 922.
  28. Ramanathan 2002: 349–361.

29. *Vineet Narrain v. Union of India* (1996) 2 SCC 199.
30. Reddy 2002: 333-347.
31. See n. 30 above.
32. See also: *Union of India v. Sushil Kumar Modi*, (1997) 4 SCC 771, where the Court similarly monitored investigation of charges against high political functionaries.
33. However, the roots of continuous mandamus in India run far deeper than this decision. Prof. Baxi, as early as 1985, identified *creeping jurisdiction*, 'where the courts sought to make long term improvements to public administration by keeping cases pending and issuing interim directions and orders', as one of the distinctive and innovative features of the Indian judicial activism - Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India, *Third World Legal Stud* 107, c.f., Thiruvengadam 2007: 25.
34. *PUCL, Delhi v. Union of India*, AIR 1997 Del. 395.
35. *Rakesh Chandra v. State of Bihar*, AIR 1989 SC 348, *S.R.Kapoor v. Union of India*, AIR 1990 SC 752.
36. *Thomas v. State of Kerala*, AIR 1997 Ker. 152.
37. *All India Judges Association v. Union of India*, (1998) 2 SCC 204.
38. *Subash Sharma v. Union of India*, (1991) Supp. (1) SCC 574.
39. *Nixon M Joseph v. Union of India*, AIR 1998 Ker. 385.
40. *Common Cause v. Union of India*, (1996) 4 SCC 33, (1996) 6 SCC 775.
41. *Common Cause v. Union of India*, (1992) 1 SCC 707.
42. *D.K. Basu v. State of West Bengal*, (1997) 6 SCC 642.
43. The remarks of the Supreme Court apropos the much debated reservation policy in *Indra Sawhney v. Union of India*, AIR 1993 SC 477, is relevant to the Indian judiciary's approach to examination of policy matters: 'reservation in public services either by legislative or executive action is neither a matter of policy nor a political issue. The higher courts in this country are constitutionally obliged to exercise the power of judicial review in every matter which is constitutional in nature or has potential of constitutional repercussions.'
44. For instance see Reddy 2002: 333-347. See also Austin 1966: 164, for conceptions that the judiciary is an arm of a social revolution to uphold substantive equality.
45. Processes of disentanglement of land and related rights, traditionally held by tribal and other forest groups in India have followed broadly three strands, correlated and often inter-twined, firstly through confiscation and/or acquisition by the state in the name of nation building—be it in the 'developmental' projects or military installations and establishments; acquisition by non-tribals through various market mechanisms—spurious or otherwise; and *thirdly* confiscation and/or acquisition by the state in the name of environment/ conservation/ forest reservation. See n. 4 above.
46. Three classes of such forests, namely, 'Reserved Forests' (consisting of compact and valuable areas, well connected to towns, which would lend themselves to sustained exploitation—where existing community rights were sought to be extinguished through a process of permanent settlement), Protected Forests (where total state control for resource-extraction were tempered by existing rights and privileges, that was to be recorded) and importantly village forests (where local governments could assign rights over any forests to the village communities). Broadly, while there was a total usurpation of rights with little settlement/ recognition in the first two categories, the third stayed as an ornament in the statute book. There is a wealth of historical literature on this aspect. See n. 1, 2 and 4 above. For a recent source see Majumdar 2006.
47. See for instance, Guha 1983. The continuity between colonial and post-colonial forest policy is provided by two official documents: the post-war scheme enumerated by the then IGF in 1941, and the national forest policy of 1952. The 1952 statement affirms that the 1894 policy 'constitutes the basis for the forest policy of India up to this day', while its 'fundamental concepts... still hold good'. Apart from the populist rhetoric in which it is couched, this policy shares with its predecessor certain other important features:
  - (1) There is an explicit assertion of state monopoly right at the expense of the forest communities. This exclusion is legitimised in the name of the "national interest", so as to ensure that the "country as a whole (sic)" is not deprived of a "national asset" by the mere "accident of a village being situated close to a forest".
  - (2) As in the 1894 statement, there is an enumeration of objectives without any examination of how far these aims could be conflicting, both at the local and national levels. Thus the main prongs of the policy were identified as six-fold, via, the need for (a) balanced and complementary land use, (b) checking denudation, (c) afforestation (d) increased supplies of fuel, grazing, and small timber to the agriculturist, (e) the sustained supply of timber and other forest produce required for defence, communications, and industry, and finally, (f) the need for the realisation of maximum annual revenue in perpetuity consistent with objectives (a) to (e). Yet there is no awareness of whether objective (f) .....The unquestioning acceptance of colonial norms, especially with regard to the usurpation of state monopoly right, has characterised post-colonial policy to this day. As late as in 1978, the then IGF could blandly state: The year 1855 was a memorable year in the history of Indian forestry. For, in that year, Lord Dalhousie, the then Governor General of India, enumerated for the first time an outline of a permanent programme of forest administration. His proclamation laid down the ruling principle of management of 'state forest', namely, that timber standing on a state forest was state property to which individuals [or communities — RG] had no rights or claims.' Pp. 1892-1893.
48. For more see Singh 1986; Sharma 2003. Also, see n. 2, 3 and 4 above.
49. For our purposes only these four guidelines are relevant. The Government had however, issued two other guidelines in this set, which related to payment of wages to forest workers, and compensation for loss of life due to predation of wild animals.
50. No.13-1/90/-FP (1), providing for regularization of encroachments pre-dating 25.10.1980, the coming into force of FCA.
51. No.13-1/90/-FP (2), providing for settlement of disputed claims over reserve forests where the Settlement of Rights has been faulty or has not been done.
52. No.13-1/90/-FP (3), relating to those grants etc. which could not be renewed or have become 'illegal' due to the enactment of the FCA.
53. No.13-1/90/-FP (5), relating to the settlement of old habitations and dwelling sites, as well as de-reservation of forest land for conversion of forest villages into revenue villages.
54. Reasons include lack of sustained and organised political pressure and an abysmal lack of awareness about the existence of these orders at the local level, both among tribals and forest dwellers, as well as among the foresters and revenue officials.
55. The enactment of the *Panchayats Extension to Scheduled Areas Act* 1997 (PESA) has been an important step towards empowerment of local communities in tribal areas with respect to their natural resources. Subsequently, a number of state governments, especially those having sizeable tribal populations, have made amendments to state level *Panchayati Raj* legislations in purported compliance with the directions of PESA. These laws give powers to communities, through the Gram Sabhas (village councils), to manage and control their natural resources, including forests and forest produce. See for a critique of the practicalities and pitfalls of empowering Gram Sabhas for effective forest governance: Ramnath 2008, 37– 42, 39.
56. (1997) 2 SCC 267 at para 4.
57. C.f. Judgment dated 10/04/2006 in IA No.989.
58. See n. 48 above.
59. 2003 SCALE (PIL) 103
60. c.f., 1998 SCALE (PIL) 260.
61. See Orders from 1998-2001 in 1998 SCALE (PIL) 279, 2001(4) SCALE 107, 2001(4) SCALE 228.
62. 2002(5) SCALE 6
63. Order dated 12.8.2002, unreported.
64. Notification dated 8.6.2002 bearing File no. 1-1/CEC/ SC/ 2002. It is

- interesting that this notification is issued and signed by Mr. Jiwrajika, who is also the Member Secretary of the CEC and has named himself in the notification.
65. Rules and Procedures of CEC, Notification no. 1-1/CEC/2002-03 dated 14.06.2002
  66. Literally translated as “friend of the court”, Amicus refers to someone, not a party to a case, who either volunteers or is requested by a Court to offer information or assistance to the Court in deciding a matter before it, on a point of law or some other aspect of the case. The information may be a legal opinion in the form of a brief, a testimony that has not been solicited by any of the parties, or a learned treatise on a matter that bears on the case.
  67. See Orders dated December 14, 2007 and February 21, 2008.
  68. Order in IA 295 dated 9.5.2002.
  69. See for instance Dhavan 2007: ‘Can a case concerning forests go on for years—with decision-making shared with an amicus and a Supreme Court created committee that holds hearings with pride and prejudice as if it were a consultative wing of the Supreme Court....Public Interest Litigation was a wonderful tool to help the poor and the disadvantaged and to explore public causes. But how far will the court go? Today, it is acting as the Ministry of Forests in the Godavarman case. No electricity line, school, project can be built in India without the Supreme Court’s permission and its dreaded self-appointed committee which is a law unto itself ...’
  70. See n. 15 above.
  71. See n. 47 above.
  72. These organisations had initially approached the Calcutta High Court bench at Port Blair, and upon its advice approached the Supreme Court.
  73. Vide order dated 7.5.2002 in IA no 502, unreported.
  74. Such as IA 1024 filed by SANE, BNHS, and Kalpavriksh.
  75. See for instance IA No. 918 filed by the A&N Administration pleading impossibility in implementation of this and many other directions passed by the Court; and *Local Borns’ Association and ors. v. The Chief Secy, Andaman & Nicobar Islands and ors.*, SLP (C) No. 18030 of 2003.
  76. See also CEC Recommendations in SLP (Civil) No. 18030 of 2003 dated 18.3.2004: ‘removal of encroachers should be implemented forthwith’, and ‘rehabilitation even in pre-1978 cases should be considered only on the basis of *available* non forest land.’
  77. (2000) 10 SCC 494.
  78. Vide unreported order dated 7.5.1999. See 2002 (9) SCALE 81 for the report of encroachment by the Surveyor General.
  79. In the same order, while passing directions in a separate IA filed by persons from Gujarat who had been directed to remove their encroachments by the Range Officer, the Court granted then two weeks time to respond to the show cause notice. Para 9 of the unreported order cited above in n. 78.
  80. IA no. 418, Vide order dated 7.5.1999, unreported. ‘In the meantime, no pattas with regard to any forest land shall be granted nor shall any encroachment be regularised.’ ‘No further information on this IA is available, even in an inspection of Court records. However, it is possible that some of the affected *patta*-holders could have filed IAs subsequently, which were taken on board by unreported order dated 2.8.1999’. n. 16 above.
  81. Vide order dated 23.11.2001, unreported.
  82. Recommendations of the Central Empowered Committee in IA no. 703.
  83. Including IAs 829, 899, 841, 927, 928, 969, 970 and 1134.
  84. For more, see n. 13 above.
  85. Filed in Court on 23.2.2004 by the Amicus Curiae.
  86. No. 2-1/2003-FC (Pt), dated 5.2.2004.
  87. Dated 7.10.2003.
  88. Dated 6.2.2004.
  89. Dated 21st July 2004
  90. Affidavit of the MoEF in IA 1126, @ para 7.
  91. At para 8 of the affidavit cited above in n. 90.
  92. The substance and process of the enactment, has its own stories to tell, which concerns of time and space constraints this paper from dwelling upon. In short, the Act legislated upon the spirit of the 1990 Orders as well as the orders stayed through IA 1126. A lively debate had ensued in relation with the enactment of the legislation. For more, see Ramnath 2008; Hebbar 2005; Sahu 2006; Rangarajan 2005; Madhusudan 2005; Munshi 2005; Shah 2005; Krishnaswamy 2005; and Bhatia 2005.
  93. 2003 SCALE (PIL) 104.
  94. IA No. 566.
  95. Unreported order dated 8.9.2000.
  96. Unreported order dated 23.11.2001, in IA 566.
  97. There is some confusion about the date of the report. Sanctuary (2003). *Saving India’s Forests and Wildlife*. Mumbai: Sanctuary) states that the report is dated 13.8.2002, while the Court orders refer to the report as dated September 2002. However, there is no contradiction regarding the contents of the said report.
  98. 2002 (9) SCALE 81, The Court observed that since none of the State Governments had filed any objection to the CEC’s report, it was presumed that they are not opposed to it- para 33.
  99. Letters dated 17/18 Sept. 2003 and 19/22 Sept. 2003, F.No.5-1/98-FC (Pt II), among others.
  100. In exercise of the powers conferred by sub-section (3) of section 3 of the *Environment Protection Act 1986*.
  101. IA 424, c.f., n. 93, p. 23.
  102. See p.23 of the application cited above in n. 90.
  103. See n. 55 above.
  104. For instance, in the affidavits filed by the Union of India and the State of Tripura in IA 703.
  105. AIR 1987 SC 374. Also see *Ambica Quarry Works v. State of Gujarat & Ors.*, (1987) 1 SCC 213.
  106. See also: *World Wide Fund for Nature v. Union of India*, 1994 (54) Del.L.J. 286, for a similar ruling by the Delhi High Court, regarding constitution of Protected Areas.
  107. AIR 1996 SC 2040.
  108. AIR 1997 SC 1071.
  109. See n. 108 above.
  110. In most parts, the definition of ‘indigenous’ has been woefully inadequate to include complex experiences from South Asia. For a detailed discussion on this point, see- Thornberry, P. 1998. ‘Indigenous Peoples and Minorities: Reflections on definition and description’. in *Aspiring to be* (ed.s B.K. Royburman and B.G. Verghese) CHRI, New Delhi, India, Pp.53- 71. However, the discourse of indigenous people’s rights is intrinsically connected to issues of tribal and other marginalised communities in India. See the definition of tribal adopted in the *Summary of Resolutions of Workshop on Indigenous and Tribal peoples in India*, UN Doc. E/CN.4 Sub.2/AC 4/1994/4/Add.1.6. These include relative geographical isolation of the community, reliance on forest, ancestral land and water bodies within the territory of the community for food and other basic necessities, a distinctive culture which is community oriented and given primacy to nature, absence of a caste system and lack of food taboos.
  111. *ILO Convention No. 169 on Indigenous and Tribal peoples, 1989*, requires national governments to effectuate the rights of effective participation in national decision making processes, to decide their own developmental priorities and right to traditional lands. See *Narmada Bachao Andolan v. Union of India*, AIR 2000 SC 3751, for the rejection of the argument that this convention is part of customary international law.
  112. Rights protected include right to land and resources, subsistence and participation rights. See *Bernard Ominayak, Chief of Lubicon LakeBand v. Canada*, Report of the Human Rights Committee, 45 U.N. GAOR Supp. (No. 43), UN Doc. A/45/40, Vol. 2 (1990), at 1. See also *Kitok v.*

- Sweden, Report of the Human Rights Committee, 43 U.N. GAOR Supp. (No. 40), UN Doc. A/43/40; *Lovelace v. Canada*, No. 24/ 1977) Report of the Human Rights Committee, 45 U.N. GAOR Supp. (No. 40), UN Doc. A/36/40, (1981). *A Lanman et al. v. Finland*, (Communication No. 671/ 1995), U.N. Doc. CCPR/C/58/D671/1995; and General Comment No. 23 (50) (Art. 27), adopted by the HRC at its 1314th meeting (50th Session), 6th April 1994. U.N. Doc. CCPR/C/21/Rev.1/Add.5. In July 2000, the HRC added that Article 27 requires that 'necessary steps should be taken to restore and protect the titles and interests of indigenous persons in their native lands...' and 'securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering) and protection of sites of religious or cultural significance for such minorities ... must be protected under Article 27' see concluding observations of the Human Rights Committee: Australia., 28/08/2000, p. 8, CCPR/CO/69/ AUS (concluding observations / comments), para. 8.
113. Human Rights Committee, General Comment No. 24, Issues relating to reservations made upon ratification or accession to the covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant: 8, 04/ 11/94 (1994), para 8. See also Anaya 1991: 1, 15; Prott 1988: 93.
114. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada., 10/12/1998. p.18, E/C12/1/Add.31, Paras 18, 43.
115. U.N. Committee on the Elimination of All Forms of Racial Discrimination, General Recommendation XXIII (51) Concerning Indigenous Peoples, adopted at the Committees' 1235<sup>th</sup> meeting, 18 August 1997. U.N. Doc. CERD/C/51/Misc.13/Rev.4. While this GR is not binding, it is a significant elaboration of norms and corresponding state obligations under the Convention. c.f., Thornberry 2002: 217-218.
116. See n. 4 above; see also Rocheleau *et. al.* 1996.
117. See n. 93 above. Notwithstanding all its deep imperfections, the legislature sought to push this democratizing agenda, and negate the effect of the courts' orders.
118. For an excellent treatment of the issue, see Humphreys 2006.
119. For more about the implications of the definitional jugglery on the neighboring communities, see P. 271, section on 'Interpretative expansion of definition of forestland'.
120. For more details, see P. 274, section on 'Introduction and implication of Net present value'.
121. For such a comparison, see the treatment of the court in its crackdown on encroachments by coffee plantations in the Tatkola reserve forest, on P. 273, section on 'Discourse of encroachments and disentanglement of communities', paragraph 3.
122. Bhushan 2006, describing how the courts have become less responsive to concerns and legitimate rights of slum dwellers and dam ousted communities. See also Bhushan 2004; Bhushan 2009.
123. Polemically and derisively termed by some judicial restrainists, Sanajaoba 2002: 416.
124. See *P.A. Inamdar and Others v. State of Maharashtra*, AIR 2005 SC 3226; (2004) 8 SCC 139. See also *Industries Relocation case, M.C.Mehta v. Union of India* (1999) 2 SCC 92, and the *Vehicular Pollutions case, M.C.Mehta v. Union of India*, AIR 1998 SC 2340, AIR 1999 SC 291. The parallels to Godavarman are many: in both cases, the Court has linked urban planning and pollution, to the right to health and environment and has ordered the selective relocation of urban slums, largely small scale industrial locations, as well as prohibit use of three wheelers. The court, while undertaking such policy decisions, has disproportionately and adversely affected poorer sections of Delhi.
125. Order dated 10.5.2006.
126. Famously charecterised in a liberal framework by Berlin (1969).
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