WHOSE FOREST IS IT AFTER ALL?

Ujal Kumar Mookherjee & Dr. Manjeri Subin Sunder Raj***

The decision of the Supreme Court in early 2019 on forest rights has once again brought to the fore the model of forest management and wildlife conservation that should be followed in India. Ever since the British came to India, forests, which earlier used to be governed as commons, were closed to the local stakeholders including forest dwelling tribes whose subsistence was intricately connected with the conservation of these forests. Commercial exploitation of these forests was the main aim of the colonial rulers and hardly changed even after independence.

Although the profiteering motive was somewhat replaced by conservationist motives through the enactment of statutes such as the Wildlife Protection Act, 1972, the model of conservation that was followed may be regarded as flawed. This model of conservation has been criticised as being essentially 'Western'.

Though the Forest Rights Act, 2006 forwarded a new approach towards forest management in India, the recent Supreme Court decision has diluted it to a great extent, which has been argued to be "elitist". To this, we can also consider how nature may be regarded as a "complex adaptive system" and how the creation of wilderness islands is actually a "flawed model" based on "inaccurate assumptions". An analysis of the same forms the premise of this Article.

* Assistant Professor of Law, Indian Institute of Legal Studies, Siliguri. The author can be reached at ujalkumar@nls.ac.in.

** Assistant Professor of Law, National Law School of India University, Bengaluru. The author can be reached at subin@nls.ac.in.

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INTRODUCTION

Forests, until the concretisation of the imperial rule in this country, were viewed as open resources that could be accessed by the local population for satisfying their daily requirements.[1] It was with the advent of the British rulers and their profiteering motives that forests were closed to the commoners and were converted into state property.[2] However, even then, it was said that the object was to ensure public benefit.[3] To secure colonial objectives, the Forest Act of 1865 was enacted. Traditional forest dwellers were denied any footing under the statute as it did not have any provision that recognised or provided for their protection. The Forest Act of 1927, yet again, had several other shortcomings and failed to recognise the earlier mentioned rights.

[1] For a detailed analysis of the history of forest law in India, *see* 2 FOREST RESEARCH INSTITUTE, ONE HUNDRED YEARS OF INDIAN FORESTRY (V.S. Rao et al eds., Forest Centenary Publications, 1961).

[2] This can partly be attributed to the fact that the British came to realise that the supply of wood, from the forests in India, for their Navy and the Empire, is limited. It was around this time that they started to develop a method of scientific forestry. *For more*, read about Connolly, Collector of Malabar at KERALA FOREST AND WILDLIFE DEPARTMENT, *About Us*, http://www.forest.kerala.gov.in/index.php/about-us/forest-dept-history (last visited May 17, 2019).

[3] *See* 9 MINISTRY OF AGRICULTURE AND IRRIGATION, REPORT OF THE NATIONAL COMMISSION ON AGRICULTURE (Delhi, 1976).

While these colonial legislations reeked of colonial objectives, independent India, for the first time, enacted its forest related legislation in 1980.[4] The central theme of this legislation was conservation. While this was a marked difference from the previous legislations, critics pointed out that the legislation retained colonial underpinnings in the model of conservation that it sought to promote.[5] The scheme of 'historical injustice' towards the traditional forest dwellers was still present. It was only when the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, of 2006 (hereinafter "FRA") came into force that a correction was brought about. The Act's objective stated thus:[6]

> "*An Act to recognise and vest the forest rights and occupation in forest land in forest dwelling Scheduled Tribes and other traditional forest dwellers who have been residing in such forests for generations.*"

This marked the first instance of the rights of traditional dwellers being accepted under forest law. Despite its criticisms, the statute marked progress towards a new direction which had, hitherto, been amiss from all the forest related legislations in the country.[7]

Public participation has emerged as one of the important elements forming the basis of the concept of good governance worldwide. Scholars like Ramachandra Guha and Madhav Gadgil have long been advocates of a more Indian-ised model of forest conservation in the country as opposed to the exclusionary 'Western' models of environmental conservation, which seeks to exclude human interventions and create wilderness islands to protect the environment.[8] This is quite evident from the fact that they criticised many an approach for not taking oriental philosophy into consideration. It can also be argued that the idea that humans must be excluded in order to protect wilderness is in itself a "*flawed model*" based on an "*inaccurate assumption*".[9]

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[4] The Forest (Conservation) Act, 1980, No. 69, Acts of Parliament, 1980.
[5] Nalin Ranjan Jena, *People, Wildlife and Wildlife Protection Act*, 29 ECON. & POL. WKLY. 2767, 2767 (Oct. 15, 1994).
[6] The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, No. 2, Acts of Parliament, 2007.
[7] Lovleen Bhullar, *The Indian Forest Rights Act 2006: A Critical Appraisal*, 4 LAW, ENV'T. & DEV. J. 20, 34 (2008).
[8] *See* Andrew Brennan & Yeuk-Sze Lo, *Environmental Ethics*, STAN. ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., 2016) https://plato.stanford.edu/entries/ethics-environmental/ (last visited May 17, 2020), for Guha's take on the concept of Deep Ecology and it being predominantly western in conceptualisation.
[9] Jan G. Laitos & Lauren Joseph Wolongevicz, *Why Environmental Laws Fail*, 39 WILLIAM & MARY ENVTL. L. & POL'Y REV. 1 (2014).

A slew of petitions were filed by several organisations dedicated to the conservation of wildlife in the country like 'Wildlife First', before the Supreme Court. On February 13, 2019,[10] the Supreme Court ordered the eviction of thousands of tribals from the forests whose claims under the FRA, could not be established.[11] This judgment has faced staunch criticism from several quarters of society, stemming from an apprehension that this might lead to the dilution of the FRA. This necessitates a critique of the judgment in light of the long ranging debate surrounding forest management in the country.

Aimed at critically analysing the Supreme Court judgment in light of the aforementioned issues, this Article, in Part I describes how forests were managed in India. Thereafter, Part II throws light on various principles of forest management, and the final part tries to chart a course for better and efficient management of Indian forests.

I. DECIPHERING FOREST LAWS

In this part, the authors have tried to identify how the laws and policies relating to forest management have transformed over time. This enquiry may be classified as historical. The aim is to gain familiarity with the legislations and policies related to forest management at various points of time in the country and to also identify those factors which have influenced these laws and policies. Through this process, we aim to identify the common thread that connects them. For the sake of convenience, the authors have chosen to classify the forest management laws and policies in India under the following three heads: (a) colonial motives; (b) conservationist motives; and (c) The Forest Rights Act, 2006.

A. Colonial Motives

Before the advent of the British rule in India, forests were common property resources – open in the point of access.[12] Local communities were free to draw upon the forest produce for their household purposes. It was only during the British rule in India, to satisfy the colonial profiteering motives, that some sort of control was sought to be exercised.

[10] Wildlife First v. Ministry of Environment and Forests, 2019 SCC OnLine SC 238.
[11] Manu Sebastian, *SC Orders Eviction Of Nearly 10 Lakh People Whose Claims As Forest Dwellers Were Rejected*, LIVE LAW (Feb. 21, 2019), https://www.livelaw.in/top-stories/sc-orders-eviction-forest-dwellers-tribes-whose-claims-under-forest-rights-act-stand-rejected-143060 (last visited May 17, 2020).
[12] FOREST RESEARCH INSTITUTE, *supra* note 1.

The timber requirement in Britain led the colonial power to take interest in the forests of India. In 1805, the Court of Directors received a despatch enquiring into the extent that the British Navy could rely on timber to be supplied from the Malabar region.[13] In 1806, the teak plantation in the Malabar region was reserved. The First Conservator of Forest was appointed in 1806.[14] However, due to not achieving the desired results, the post was abolished in 1822. The colonial government had managed to assert its authority over most of the valuable forests in the country through issuing regulations and proclamations until 1850. But as colonial 'hunger' for wood intensified, soon there was a need to establish sovereignty over not only forests with value, but over forests as a whole.

Dietrich Brandeis, a German forest officer who had earlier managed teak forests of Pegu was invited to advise the government on forest matters in 1862 and was made the first Inspector General of Forests in 1864. The first Forest Department was formed and soon the first legislation related to forests in India, the Forest Act of 1865 came into being. The Act aimed to establish imperial control over the forests to supply timber for railways.[15] Under this, the Governor-General in Council was empowered to subject any land covered with trees, brushwood, or jungle to the provisions of the Act. The Rules framed under the Act could regulate the way in which timber could be, *inter alia*, felled, or converted. It must be noted that the Act made no concrete effort to define what was meant by a 'forest'.

The Act of 1865, albeit seeking to establish state control over the forests,[16] contained certain provisions which were unsuited to the fulfilment of the objective. A conference of forest officers considered the issues with the law and found most of its provisions defective.[17] The Act of 1865 was found wanting on many counts. Brandis, with the help of Baden Powell, the then Inspector-General of Forests, set out to draft a new legislation. The new legislation provided for the creation of "*reserved forests*", "*protected forests*" and "*village forests*" with the Act of 1865 providing grounds for complete control over valuable forests. The Act also contained a procedure for the settlement of rights in reserved forests, wherein after a hearing before a Forest Settlement Officer, all valid rights

[13] E. P. STEBBING, THE FORESTS OF INDIA, 38, 62-63 (London, 1922).
[14] Captain Watson was appointed as the first Conservator of Forests on Nov. 10, 1806.
[15] Ramachandra Guha, *Forestry in British and Post-British India: A Historical Analysis*, 18 ECON. & POL. WKLY. 1940, 1940 no.45 (Nov 5 – 12, 1983).
[16] Dolly Arora, *From State Regulation to People's Participation: Case of Forest Management in India*, 29 ECON. & POL. WKLY. 691, 691 no.12 (Mar. 19, 2004).
[17] Guha, *supra* note 15.

of the right-holders could be extinguished by paying compensation or by transferring their exercise of the right to another block of forest.[18]

The Forest Act of 1927 repealed all previous legislations. The Preamble to the Act provided that it aimed to "*consolidate the law relating to forests, the transit of forest produce and the duty leviable on timber and other forest produce*."[19] Relying on the principle of *res nullis*, the British converted vast tracts of forest lands of the country into the property of the State.[20] Section 37(1) of the Act provided:[21]

> "*In any case under this Chapter in which the State Government considers that, in lieu of placing the forest or land under the control of a Forest-Officer, the same should be acquired for public purposes, the State Government may proceed to acquire it in the manner provided by the Land Acquisition Act, 1894*."

One glaring omission of the Act was that the term 'forest' was not defined. Section 3 of the Act empowered the government to constitute any forest or waste land which was the property of the government or over which the government had a proprietary right, or the whole or any part of the forest produce to which the government was entitled, as a reserved forest.[22]

Any forest land or waste land which was not a 'reserved forest' but over which the government had proprietary rights or any part of the forest produce to which the government was entitled to could be constituted into a 'protected forest'. In such forests, any tree or classes of trees could be declared as reserved from a particular date. Such forests or part thereof could be closed down for thirty years during which the rights of the stakeholders would remain suspended.

The Act hardly constituted a departure from the previous legislations since the underlying motive of the Act continued to be profiteering and the commercial exploitation of the forests. Forest conservation was never on the agenda.

The first National Forest Policy of independent India was released in 1952. But it had hardly any impact on the prevailing legislation relating to forests in India which continued in force for years

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[18] Guha, *supra* note 15.
[19] Rahul Banerjee, *Adivasis and Unjust Laws*, 42 ECON. & POL. WKLY. 4010, 4010 no.39 (Sep. 29 – Oct. 5, 2007).
[20] *Id.*
[21] The Indian Forest Act, No. 16 of 1927, INDIA CODE (1927), https://www.indiacode.nic.in/bitstream/123456789/2388 (last visited May 17, 2020).
[22] Banerjee, *supra* note 19.

after independence. The Policy distinctly highlighted the dependence of the newly independent state on the forest resources for reconstruction schemes and development of industries and communications. It classified forests into four categories: (i) protection forests which were to be preserved or created based on physical and climatic conditions; (ii) national forests to serve the needs of the State; (iii) village forests to provide for manure, cow-dung, and other agricultural requirements; and (iv) tree lands which, though outside the scope of ordinary forest management, were essential for the amelioration of the physical condition of the country.

The policy spoke about the predominance of the national interest over the rights of the village communities in clear terms. An overall analysis of the policy reveals the reminiscent colonial undertone: commercial exploitation of forests to serve the needs of the nation. It also reveals the "*forest versus human*" mode of conservation. However, conservation of forests for its inherent value was never the consideration of the policy makers.[23]

B. Conservationist Motives

Guha points out that four distinct interest groups have played a major role in influencing forest management policies in the country.[24] In India, it was only from 1970s that intellectuals and activists took up long-standing grievances of the forest dwelling communities. From 1864 to 1972, forest management strategies in the country were heavily biased in favour of commercial exploitation of forests.[25] However, with the enactment of the Wildlife (Protection) Act of 1972, a paradigmatic shift towards conservationism was noted.[26] This statute, along with amendments introduced in 1991, sought to create strictly protected parks and sanctuaries.

However, the model of conservation that was the basis of enacting the Act has been regarded by many as being flawed. As pointed out earlier, there is little scope for community-based conservation under the Act since the underlying assumption of the Act was that people and wildlife are antagonistic to each other.[27] Guha, emphasised the need for replacing "*Ecology versus People*" with

[23] George F. Taylor II, *The Forestry Agriculture Interface: Some Lessons Learned from Indian Forest Policy*, 60 THE COMMONWEALTH FORESTRY REV. 45, 48-49 no.1 (Mar. 1981).
[24] Guha, *supra* note 15, at 2192.
[25] *Id.* at 2193.
[26] *Id.*
[27] Krishnayan Sen, *Wildlife Protection: Scope of Community Participation in New Act*, 39 ECON. & POL. WKLY. 623, 623 no.7 (Feb. 14 – 20, 2004).

"*Ecology with the People*".[28] The Act of 1972, however, fails to recognise the symbiotic relationship that has existed amongst the people, forests, and wildlife living therein.[29] In his critique of Radical American Environmentalism, Guha argues that the setting aside of wilderness areas has resulted in the transfer of resources from the poor to the rich.[30] The Act, like its predecessors which impacted forest management to some extent, failed to protect the rights of the tribal populations, who for centuries were residing in the forests. Instead, it provided for the acquisition of their rights through the Land Acquisition Act, 1894, which, till it was in force, provided little or no scope for factoring in the opinion of local stakeholders.[31]

The Forest (Conservation) Act of 1980 was hardly a departure from the above mentioned trend. Despite containing "*conservation*" in its title, very little justice has been done to the term. All that the Act did was to take away the power remaining in the hands of the state government and vested the same in the central government. The Act has made it much more difficult to convert forest lands for non-forest uses without the clearance of the central government. The effect, as Guha points out, has been the consolidation of the territorial control of the Forest Department.[32]

Though the dominant theme of the Acts of 1972 and 1980 was primarily conservation, in terms of denial of rights of the forest dwelling population, it did not differ from any of the previous legislations or governmental policies.[33]

C. The Forest Rights Act, 2006

It was the National Forest Policy Resolution of 1988 which emphasised the primacy of maintaining environmental stability and ecological balance over the derivation of economic benefits.[34] It sought to balance conservation and the commercial exploitation of resources without abandoning local stakeholders' rights. The National Environment Policy of 2006, prepared to spell out a comprehensive policy for the protection of the environment in the country highlighted the need for applying the principles of good governance to the environment and to build mutually

[28] Guha, *supra* note 15.
[29] JENA, *supra* note 5, at 2767.
[30] Ramachandra Guha, *Radical American Environmentalism and Wilderness Preservation: A Third World Critique*, 11 ENV'TL. ETHICS 71, 72 no.1 (Spring 1989).
[31] JENA, *supra* note 5, at 2767-2768.
[32] Guha, *supra* note 30.
[33] JENA, *supra* note 5, at 2768.
[34] MINISTRY OF ENV'T & FORESTS, NATIONAL FOREST POLICY RESOLUTION (1988), https://www.vasundharaodisha.org/pdf/law&policies/National_Forest_Policy_1988.pdf (last visited May 17, 2020).

beneficial multi-stakeholder partnerships. The policy recognised that the disempowerment of traditional communities over forests since the commencement of formal forest laws have led to its degradation.[35] It spoke for the restoration of these entitlements through the Panchayati structure and framework provided under Part IX of the Indian Constitution.[36]

Decisions of the Supreme Court of India have played a crucial role. The Supreme Court, in *Banwasi Seva Ashram* v. *State of UP*,[37] in the exercise of its epistolary jurisdiction registered a writ petition based on a letter written to it by Banwasi Seva Ashram. The main contention of the petition was that the state government declared parts of the jungle lands of Dudhi and Robertsganj tehsils of Uttar Pradesh as 'reserved forests'. For years, the Adivasis living in these areas had access to forest produces like fruits, vegetables, fodder, flowers, timber etc. As these jungle lands were declared as 'reserved forests', forest officials started interfering with such usage, and criminal cases were registered against the Adivasis, and attempts to obstruct their free movement were made. Since certain villages were also brought under the protected area, the lands in and around the villages which the tribals had been cultivating, also saw increased interference from the forest officials. The Court gave a detailed set of guidelines as to how those claims were to be dealt with**.**

In *Samatha* v. *State of AP* (hereinafter "*Samatha*"),[38] the main issue was whether the government lands, forest lands, and tribal lands in Scheduled Areas could be transferred to non-tribals or private businesses. Interpreting the term "*persons*" to include the government as well, the Court held that such a transfer was impermissible. It was held that the government could not lease out lands which were in Scheduled Areas to non-tribals, in contravention of the Fifth Schedule of the Indian Constitution. The Court further spoke about the need for a policy decision to bring an enactment consistent throughout the whole country with respect to tribal lands that had minerals. It further opined that the executive was duty bound to protect the social, economic, and educational interests of the tribals when the state leased out the land in Scheduled Areas to non-tribals.

Thus, in such cases, the decisions of the Supreme Court have translated to correlative duties and obligations being placed upon the parties involved.

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[35] MINISTRY OF ENV'T & FORESTS, NATIONAL ENVIRONMENT POLICY 24 (2006), https://ibkp.dbtindia.gov.in/DBT_Content_Test/CMS/Guidelines/20190411103521431_National%20Environment%20Policy,%202006.pdf (last visited May 17, 2020).

[36] *Id.*

[37] Banwasi Seva Ashram v. State of Uttar Pradesh, AIR 1987 SC 374.

[38] Samatha v. State of Andhra Pradesh, AIR 1997 SC 3297.

In this background, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act was passed with its stated objective to correct "*historical injustice*" meted out to forest dwellers. The legislation seeks to redress this injustice by providing the forest dwellers an opportunity to claim the following rights:[39]

1. To hold and live in forest lands that have been under individual or common occupation prior to 13 December, 2005.
2. To claim titles to forest lands that have already been cultivated or occupied.
3. Management and protection of forests as well as traditional knowledge.
4. To receive facilities like health, education, communication, and power.

Some of the key features of this Act relating to the expansion of the classes of beneficiaries to include not only forest dwelling Scheduled Tribes, but also other traditional forest dwellers.[40] It grants the rights of ownership, access to collect, use and dispose of minor forest produce even in protected areas, to access biodiversity and the community right to intellectual property and traditional knowledge related to forest biodiversity and cultural diversity and the right to rehabilitation *in situ*.[41] Most significantly, the Act represents strong gravitation towards decentralisation through the involvement of the Gram Sabhas in the decision-making process.

The recommendations of the Joint Parliamentary Committee had envisaged community control over the determination of the nature and extent of rights and vested the Gram Sabhas with the sole authority to settle forest rights within its jurisdictional limits. However, the recommendations have been diluted to some extent with the involvement of the Panchayati Raj officials and forest department officials in the process.[42] The prevailing process requires the Gram Sabha to make a recommendation of the claim, which is then sent to the Sub-Divisional level authority. The next step is to send the claim to the District level authority which verifies the claim made. The District level authority consists exclusively of forest officials, including the officials of the forest department.[43] This process is significant as the Act provides for the creation of Critical

[39] Armin Rosencranz, *The Forest Rights Act 2006: High Aspirations, Low Realisation*, 50 J. OF INDIAN L. INST. 656, 656 no.4 (Oct., 2008).
[40] *Id.*
[41] Bhullar, *supra* note 7.
[42] *Id.*
[43] Editorial, *Who Is the Encroacher of Tribal Lands?*, 4 ECON. & POL. WKLY. 8, 9 no.1 (Mar. 2, 2019).

Wildlife Habitats which are inviolate areas to be determined on scientific and objective criteria so that any area critical for wildlife may be free from human interventions.

The Act has been criticised on many counts.[44] It has been alleged that many of the recommendations of the Joint Parliamentary Committee have been diluted under the final Act.[45] It has been argued that several provisions of the Act arose as a compromise between the tribal lobbyists and the wildlife protectionists which prevented the Act from achieving its stated objective.[46] Armin Rosencranz points out, that since the Act came into force, the governmental response has been between weak and outright denial.[47] Though the Act supersedes the previous legislations with regards to the recognition of rights, in other aspects, the previous legislations continue to hold the field. This inconsistency may be found by the conjoint reading of Sections 4 and 13 of the Act.[48]

Having said that, it cannot be denied that the Act provides a great thrust towards empowering the forest dwellers in this country. It is the reflection of an attempt to distribute powers with the local stakeholders being involved in the decision-making processes, thereby attempting to create a new democratic form of forest governance.[49] Despite the lacunae, the effective implementation of the Act can chalk a better way to deal with the issues that it seeks to address.

[44] Rosencranz, *supra* note 39.
[45] MINISTRY OF ENV'T & FORESTS, *supra* note 35.
[46] Rosencranz, *supra* note 39.
[47] MINISTRY OF ENV'T & FORESTS, *supra* note 35.
[48] MINISTRY OF ENV'T & FORESTS, *supra* note 35.
[49] *Id.*

II. GOOD GOVERNANCE OF INDIAN FORESTS: THE NEED FOR INVOLVING LOCAL STAKEHOLDERS IN FOREST CONSERVATION

After tracing the motives behind the development of the laws and policies relating to forest management, the authors will examine the various perspectives germane to the present system of forest management. This part attempts to offer an insight into the multi-dimensional nature of the debate surrounding forest management in India. The issues have been classified under the following four heads: (a) the constitutional mandate; (b) the good governance aspect; (c) socio-economic peculiarities; and (d) the environment protection aspect.

A. The Constitutional Mandate

Article 244(1) of the Constitution of India states that the provisions of the Fifth Schedule shall apply to the administration of Scheduled Areas and Scheduled Tribes in states other than Meghalaya, Mizoram, and Tripura.[50] The objective of the Fifth Schedule is to preserve the tribal population's autonomy and culture, ensure economic empowerment, fulfil their aspirations of social, economic, and political justice and fo peace and good governance in those areas.[51] In the landmark decision rendered by the Supreme Court in *Samatha*,[52] the Court observed that the clauses of the schedule and regulations framed thereunder must be interpreted harmoniously and as widely as necessary to elongate the constitutional objectives and the dignity of the person of the Scheduled Tribes. The Court stated thus:[53]

> "*Agriculture is the only source of livelihood for the Scheduled Tribes, apart from the collection and sale of minor forest produce to supplement their income. Land is their most important natural and valuable asset and an imperishable endowment from which the tribals derive their sustenance, social status, economic and social equality, permanent place of abode, work and living….the tribes too have a great emotional attachment to their lands.*"

[50] IND. CONST. art. 244, cl. 1.
[51] Orissa Mining Corporation Ltd. v. Ministry of Environment and Forests, (2013) 6 SCC 476.
[52] Samatha, *supra* note 38.
[53] *Id.* at ¶10.

Part IX of the Indian Constitution was added by the 73rd Amendment to the Constitution. Article 243B mandates the establishment of Panchayats at village, intermediate and district levels.[54] Article 243-M (4)(b) states that the Parliament may extend the application of Part IX to Scheduled Areas.[55]

The Panchayats (Extension to the Scheduled Areas) Act (hereinafter "PESA")[56] was enacted in 1996. It extended the application of Part IX to Scheduled Areas. Clause (d) of Section 4 states that every Gram Sabha shall be competent to safeguard and preserve the traditions, customs, cultural identity, and community resources of the people.[57]

Section 4(i) further stipulates that consultation with the Gram Sabha or the Panchayat at the appropriate level is mandatory before lands for developmental projects may be acquired.[58] Section 4(k) makes the recommendations of the Gram Sabha mandatory before the grant of license or mining lease for minor minerals in Scheduled Areas.[59] The FRA was enacted bearing all these in mind.[60]

In *Lafarge Umiam Pvt. Ltd. v. Union of India,*[61] the Supreme Court observed that public participation in the determination of forests is an important aspect since native and indigenous people are fully aware and have full knowledge regarding what constitutes conservation of forests and development.[62] The Court held that "*these natives and indigenous people know how to keep the balance between economic and environment sustainability.*"[63]

In *Orissa Mining Corporation Ltd. v. Ministry of Environment and Forests*,[64] the dispute pertained to the grant of final stage clearance for the establishment of the Alumina Refinery Project in Lanjigarh, Orissa. The Court held that what needs to be looked into is whether tribes like the Dongria Kondha, Kutia Kondha have any religious rights over the Niyam Giri (Niyam Raja) and that it has to be considered by the Gram Sabha. The Court issued a direction to the state of Orissa to place such matters before the Gram Sabha for their active consideration.

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[54] IND. CONST. art. 243(B).
[55] IND. CONST. art. 243-M, cl. 4(b).
[56] The Panchayats (Extension to the Scheduled Areas) Act, 1996, No. 40, Acts of Parliament, 1996.
[57] *Id*, § 4, cl. (d).
[58] *Id*, § 4, cl. (i).
[59] *Id*, § 4, cl. (k).
[60] Orissa Mining Corporation, *supra* note 51, at ¶48.
[61] Lafarge Umiam Pvt. Ltd. v. Union of India, AIR 2011 SC 2781.
[62] *Id.* at ¶11.
[63] *Id.* at ¶10.
[64] Orissa Mining Corporation, *supra* note 51.

B. The Good Governance Aspect

Ever since the World Bank started publishing its reports on 'good governance',[65] the concept has assumed immense significance. Despite being criticised as philistine, subsequent developments in this field have almost standardised certain parameters which constitute the measuring rod for governance in a country.[66] Public participation in governance is one such parameter. It is often urged that the local community's role in the management of natural resources is one of the key aspects of natural resource governance.

Garett Hardin, in his influential paper "*Tragedy of the Commons*",[67] had highlighted that common property resources were inevitably destined for doom. He terms it a "*tragedy*" because the property that belongs to everyone belongs to no one and is treated as such. The centrality of his contention was that since common property resources were open in the point of access, every stakeholder would try to maximise the benefits out of the same, leading to a situation where the property itself was wasted. It was the same argument using which the traditional English commons were closed down years ago. The commons were treated as a black hole in the economy, until Elinor Ostrom, in her Nobel-prize winning work "*Governing the Commons*" was able to cast away the aspersions related to commons. Through her eight design principles, she was able to highlight how a common-pool of resources can be used to resolve problems related to overuse and overexploitation.[68]

Forest policy in India has been largely defined through distinct motives like deriving profits out of forests, serving national interests, conserving wildlife and environment, and protecting the interests of the forest dwellers. On careful analysis of the legislations since the inception of the colonial rule in the country, it can be seen that protecting the interests of the forest dwellers has always remained the agenda of least concern.

The FRA sought to address this issue. The Act however has received hostile reception ever since its inception. Many petitions have been filed in the Supreme Court challenging the validity of

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[65] UNIVERSITY COLLEGE OF LONDON, GOOD GOVERNANCE AND THE WORLD BANK (Vivian Collingwood ed.), https://www.ucl.ac.uk/dpu-projects/drivers_urb_change/urb_economy/pdf_glob_SAP/BWP_Governance_World%20Bank.pdf (last visited May 17, 2020).

[66] Ved. P. Nanda, *The Good Governance Concept Revisited*, 603 ANNALS OF AM. ACAD. POL. & SOC. SCI. 269, 274 (Jan. 2006).

[67] Garett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1243–48 no. 3859 (1968).

[68] Robert. D. Tollison, *Elinor Ostrom and the Commons*, 143 PUBLIC CHOICE no. 3 (Jun., 2010).

the Act. In particular, wildlife conservationists have challenged the Act on the ground that it endangers the wildlife in the country.

Armin Rosencranz, in this context, raises the fundamental question, "*what is the scientific basis for reaching the conclusion that co-existence between people and wildlife is not a possibility, thus making relocation necessary?*". [69] It may be argued that the forest dwelling tribes have hardly been the cause of degradation of the wildlife or the forests of the country. Bigger contributors have been the conversion of forests for agriculture, settlements, building infrastructure, commercial exploitation of trees (timber), extraction of fuelwood, and so on.[70]

The National Environment Policy of 2006 points out that earlier, community entitlements over forests were generally recognised and thus there were stronger reasons to use the forests sustainably. However, ever since the commencement of formal institutions and laws related to forests, these entitlements were done away with. This led to forests becoming open in terms of access, which led to a manifestation of a "*Tragedy of Commons*".[71] It may be argued that the assumption that the recognition of the rights of the forest dwelling tribes in forests is detrimental to the wildlife and the environment is a flawed assumption.

Micheal Haller, in his influential paper, elaborated on the idea of anti-commons. A "*tragedy*" of commons occurs when too many individuals have the privilege of using a scarce resource. A tragedy of anti-commons occurs when too many individuals have rights of exclusion in a scarce resource.[72] Excessive power in the hands of the forest department in the country creates a situation, wherein the de facto methods of forest management break down. Where resources are controlled by a complex and fragmented system of *de jure* rights, a kind of stalemate of management decisions occurs. It encourages the exploitation of the forest resources in an uncontrolled and informal manner, leading to the ultimate depletion of the resource.[73] Excessive regulation over forests and deprivation of the local stakeholders from forest lands may encourage a *de facto* regime of exploitation that may ultimately lead to the depletion of the resource.

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[69] Rosencranz, *supra* note 39.
[70] MINISTRY OF ENV'T & FORESTS, *supra* note 35.
[71] *Id.*
[72] Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets* 111 HARV. L. REV. 621, 677 no.3 (1998).
[73] Marena Brinkhurst, *In the Shadow of the Anticommons: The Paradox of Overlapping Exclusion Rights and Open Access Resource Degradation in India's Wastelands*, 44 J. ECON. ISSUES 139, 140 no.1 (Mar., 2010).

C. Socio-Economic Peculiarities

Ramachandra Guha has identified four actors in the debate regarding forest management in India: (i) wildlife conservationists; (ii) timber harvesters or industrialists; (iii) rural social activists; and (iv) scientific foresters.[74]

Regarding them as "*interest groups*", he points out that each of such groups has sought wider support from a sophisticated theory of resource use in which their specific interests have been presented as being in congruence with the societal interest.[75] The wildlife conservationists and social (or scientific) foresters, he says, advocate in favour of strict state control over forests while the industrialists are opportunistic in their advocacy. The rural activists, on the other hand, argue for a greater role to be given to the community for the management of forests.

Guha argues that the entire development of the forest management system in India has been based on the changing impact of the claims of each of the social groups. Guha credits these developments to the peculiar socio-economic circumstances of India.[76] India has a huge community of forest dwellers and Scheduled Tribes whose contributions have been critical to the maintenance of ecological balance. The forest dwelling tribes depend upon forests for their survival. Drawing from the arguments of Ostrom,[77] since conservation of forests is intricately related to the question of their sustenance, local stakeholders can contribute positively towards that end. In light of the commitment to securing social justice, an exclusionary model of forest conservation is an idea that does not fit into the socio-economic context of this country.

Guha emphasises the need for a more participatory model of forest management in which environmental protection can be harmonised with the ends of social justice. "*Ecology with people*", he argues, should replace the focus of "*Ecology versus the People*".[78] The setting aside of wilderness areas stems from the assumption of a dichotomy between the maintenance of biotic integrity and human needs. Guha argues that placing greater emphasis on the creation of wilderness areas is harmful when the Third World is concerned because of a long settled agrarian population that has played a

[74] Guha, *supra* note 29.
[75] *Id.*
[76] *Id.*
[77] ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (New York, Cambridge Press, 1990).
[78] Guha, *supra* note 29.

critical role in maintaining a fine relation with nature.[79] The setting aside of wilderness areas deprives the forest dwelling populations of their livelihood, thereby pushing them into the vicious circle of poverty and results in the direct transfer of resources from the poor to the rich.[80]

D. The Environment Protection Aspect

The Indian model of forest conservation must involve local stakeholders since having witnessed both the gifts and wrath of nature, they are in a better position to appreciate the needs of nature and the need to protect it. Atavism and prettification do little to protect the environment. Laitos and Wolongevicz in their influential work titled "*Why Environmental Laws Fail*", argue that one of the reasons for the failure of the laws designed to protect the environment worldwide is the overreliance on an "*unrealistic model for nature*". As per such a model, nature is perceived simply as closely integrated, self- regulating and a complex system that functions best when it is left alone and human interventions are done away with. They argue that nature is a "*complex adaptive system*".[81] Ecosystems do not exist in a state of equilibrium, rather, they are governed by various processes which, through their mutual interactions form subsystems within the larger ecosystem. Humans do play a role in the working of the ecosystem, and the creation of isolation islands in the name of conservation is a "*flawed model*" and operates on an "*inaccurate assumption of conservation*".[82]

III. THE SUPREME COURT'S DECISION: A CRITICAL ANALYSIS

Challenging the validity of the FRA, a slew of petitions were filed before the Supreme Court, mainly from the wildlife conservationist lobby. While hearing one such matter filed by Wildlife First and other organisations such as the Nature Conservation Society and Tiger Research and Conservation Trust, a three judge bench of the Supreme Court headed by Arun Kumar Mishra J., ordered the eviction of almost 2 million forest dwellers whose claims under the FRA were rejected.[83] The Court asked for affidavits from individual states seeking a response on the number of rejected claims under the FRA that had taken place in various states and if those, whose claims had been rejected, have been evicted. Upon perusing the affidavits, the Supreme Court ordered the eviction of those whose claims under the FRA had been rejected. It also asked the Forest Survey of India to

[79] Sen, *supra* note 26.
[80] *Id.*
[81] LAITOS & WOLONGEVICZ, *supra* note 9, at 1.
[82] *Id.*
[83] Wildlife First, *supra* note 10.

conduct a satellite survey and to place on record the encroachment positions in these states before and after the evictions. The order of the Supreme Court saw a huge wave of protests throughout the country, mainly against the government. It was alleged that the Ministry of Tribal Affairs (hereinafter "MoTA") had made no concerted efforts to defend the Act or the rights of the dwellers before the Supreme Court.[84] Following the MoTA's review petition, the implementation of the order has currently been stayed.[85]

It is important in this regard to consider the process of determining the claims under the FRA. Before the FRA was enacted, the Bill was referred to a Joint Parliamentary Committee (hereinafter "JPC"). The recommendations of the JPC were passionately contested in both the Houses leading to its reference to a group of ministers to resolve the conflict. The FRA, 2006 came into force in this background. The Act was criticised for having failed to integrate livelihood and conservation concerns, and also for diluting the recommendations of the JPC.[86]

One such area was the process of the determination of the rights under the FRA. The recommendations of the JPC envisaged a form of community control by vesting the Gram Sabha with the sole authority for determination and settlement of forest rights. This would have been a reversal in the practice that had been followed in the country ever since the inception of the British Raj. The Forest Department, whom Guha regards as the "*fourth group in the forestry debate*", has managed to retain most of its powers amidst the tug-of-war between the wildlife conservationists, industrialists, rural social activists and the social foresters who were the major influences in how forest management law and policy in India was shaped.[87]

However, under the FRA, the process of determination of rights is a threefold phenomenon. The Gram Sabhas have been authorised to initiate the process by making recommendations,[88] but the real decision is made by the Sub-Divisional committees.[89] Any person aggrieved with any such determination of the Gram Sabha may prefer a petition to the Sub Divisional Level Committee.

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[84] V. Venkatesan, *In Fear of Eviction*, FRONTLINE (Mar. 29, 2019), https://frontline.thehindu.com/the-nation/article26509725.ece (last visited on May 17, 2019).
[85] Ishan Kukreti & Priya Ranjan Sahu, *Forest Rights Act: Who is the Encroacher and Who is Encroached Upon*, DOWN TO EARTH (Mar. 20, 2019), https://www.downtoearth.org.in/coverage/forests/forest-rights-act-who-is-the-encroacher-and-who-is-encroached-upon-63585 (last visited May 17, 2020).
[86] Bhullar, *supra* note 7.
[87] Guha, *supra* note 30.
[88] FRA, *supra* note 6, at §6(1).
[89] Bhullar, *supra* note 7.

Curiously, the list of 'aggrieved persons' includes state agencies.[90]An appeal from the Sub-Divisional Committees may also be preferred to the District Level Committees whose decision shall be the final.[91] Importantly, the Sub-Divisional and the District Level Committees shall include forest and revenue officials beside members of the Panchayati Raj institutions. Hence, the forest department retains a fair share of control under the scheme of the Act.

The MoTA issued a guideline in 2012 regarding the implementation of the FRA to all the states and Union Territories. It recognised some of the problems with the implementation of the Act. Some of the issues were that the Gram Sabha meetings were all convened at the Panchayat levels resulting in the exclusion of smaller habitations not formally part of any village. Furthermore, forest dwellers' unhindered rights over the minor forest produce were not being recognised; other community rights were not being recognised; harassment and the eviction of the forest dwellers took place without the settlement of their forest rights; claims were being rejected due to the insistence on certain types of evidence.

Rule 13 of the Scheduled Tribes and other Traditional Forest Dwellers Rules, 2007, contains a list of evidence for the determination of forest rights.[92] Rule 13(3) lays down that the Gram Sabha, the Sub-Divisional Level Committee and the District Level Committee shall consider more than one of the evidence mentioned in the process of the determination of forest rights.[93] In order to remedy these lacunae, the MoTA issued guidelines. It was specifically mentioned in the guidelines that the Sub-Divisional Level Committee or the District Level Committee should not reject any claim which has been recommended by the Gram Sabha.[94] It provided that no claim that is accompanied by two forms of evidence specified in Rule 13 should be rejected without giving any reasons in writing for the same.[95] Also, they should not insist upon the production of any particular form of evidence. It was clarified that fine receipts, encroachers lists, primary offence reports rooted in prior official

[90] Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2007, pt. II sec. 3, Rule 6(g) (Jan. 1, 2007).
[91] FRA, *supra* note 6, at §6(5).
[92] Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2007, pt. II sec. 3 (Jan. 1, 2007).
[93] MINISTRY OF TRIBAL AFFAIRS, FOREST RIGHTS ACT, 2006: ACT, RULES AND GUIDELINES 38, https://tribal.nic.in/FRA/data/FRARulesBook.pdf (last visited May 17, 2020).
[94] *Id.* at 38, point (g).
[95] *Id.*

exercises would not be the sole basis for rejection of the claim.[96] It was also clarified that the usage of technology can only be supplementary evidence and cannot replace other forms of evidence supplied by the claimant.[97] The guidelines further went on to clarify that Section 4(5) of the Act, which prevents the removal of any person from occupation until the claim recognition process is complete, is absolute.[98]

The country has seen many instances of the eviction of tribals in order to hand over the natural resources of the country to the land-hungry corporates, which has led to the degradation of the natural resources of the country for private benefits, quite contrary to the constitutional scheme of the country.[99]As per data, ever since the law was enacted, 4.22 million applications for settlement rights have been filed and out of this 1.94 million have been rejected.[100]

In their petition seeking a stay of the order, the Centre's counsel highlighted that there was not a single speaking order for the rejection of the claims of the tribals, and hence none of the forest dwellers could avail the appellate facilities as they were completely unaware about the grounds of rejection.[101] The bench further asked the states to respond to the accusation of high rates of rejections, non-communication of such orders, lack of reasoning, and rejection on frivolous and extraneous grounds. Additionally, the data provided by the state governments were the cumulative data for rejection on all three levels, even where there was a right to appeal against the decisions. Even the Centre acknowledged that the rejection of claims in areas affected by left-wing extremism was made on frivolous grounds.[102]

Considering this, one can locate an undercurrent that shifts the blame of environmental degradation squarely on the shoulders of the forest dwelling populations. The rationale that forests can only be conserved by denying rights or by evicting the forest dwellers, is based on a false elitist notion, completely ignoring the fact that India's forest cover is healthy in areas where forest dwellers

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[96] *See* MINISTRY OF TRIBAL AFFAIRS, GUIDELINES ON THE IMPLEMENTATION OF THE SCHEDULED TRIBES AND OTHER TRADITIONAL FOREST DWELLERS (RECOGNITION OF FOREST RIGHTS) ACT, 2006, No. 23011/32/2010-FRA Vol. II, https://tribal.nic.in/FRA/data/Guidelines.pdf (last visited May 17, 2020).
[97] *Id.*
[98] *Id.*
[99] ROSENCRANZ, *supra* note 39, at 656-677.
[100] Kukreti & Sahu, *supra* note 80.
[101] Venkatesan, *supra* note 79.
[102] *Id.*

inhabit. It also ignores the livelihood concerns of these populations, who, if evicted, will have nothing to rely upon for their sustenance.

CONCLUSION

The dilution of the FRA poses a great danger to the country. For long, traditional dwellers have been treated as 'encroachers', despite the fact that they have been taking care of the forest and its produce. Profiteering motives and a faulty idea of conservation have for long been instrumental in denying them their rights. The FRA, with its objectives, for the first time brought the concerns of these communities to the centre-stage and sought to address the same. This revolutionary legislation, true to its aim – correcting a historical injustice, has been able to do wonders and provides the forest dwellers their rightful claims.

However, this might be to no avail. As a result of the Supreme Court's decision, the argument for the creation of conservation islands is gaining traction. While there have been a lot of calls, around the globe, to create islands of conservation, the method is not foolproof. This model is unsuitable for countries like India where the role of the tribal population has been highly critical for the conservation of nature. Historical proximity to nature puts them in a better position to appreciate nature's needs. Their traditional knowledge must be used as a resource in the conservation of nature. As their sustenance depends upon the conservation of the resource, they must be involved in conservation processes rather than bureaucrats, who have long been detached from nature.

Depriving them of natural resources is also against the constitutional scheme that advocates the equitable use of the resources in favour of the least well-off. The faulty implementation of the Act has in itself imperilled the lives of these communities, and the eviction of such a huge number of forest dwelling population poses a greater threat for them. A lot depends on how the issue unfolds in the times to come.

The effect of the decision is the dilution of the FRA which is largely unwarranted given the socio-economic conditions of the country. It raises a poignant question for all of us to ponder – *Whose Forest Is It After All?*