

## **PESA, the Forest Rights Act, and Tribal Rights in India**

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Commonly perceived as rights of local forest dwellers over forest products and forest land, forest rights have been a major area of concern as well as debate in India. In colonial and independent India, although a large tract of land would be recorded as “unclassed” forest in Government records, ownership was unclear, and because most of these forests were home to a large number of tribals, the land was acquired by the Forest Department without settling their rights over them. After Independence, supported by improper survey and settlement, large tracts of land were declared as “reserve forests,” meaning no rights either existed there or would exist later and all who either resided or claimed rights would be termed as encroachers.

A famous Bollywood song goes *Jungle mein more nacha kisne dekha*. In English this translates into “Who has seen the peacock dancing inside the forest?” Beginning with a line from a film song might seem to be a rather frivolous way to deal with a serious and important subject like tribal forest rights. But read between the lines and two very crucial aspects about forest management in India emerge. First, very few people know about what exactly is happening inside the forest. Secondly, it reinforces a nationally shared notion that no-one other than forest authorities has anything to do with forests. Expanded further, it also means that forest officials are only entitled to see the peacock dancing or hear a tiger growling.

Although somewhat of an exaggeration, the song offers much to reflect on about the age-old perception people have about forest management in India. Such notions and perceptions about the authoritative forest bureaucracy become believable when incidents occur like a tribal being beaten to death by two Jharkhand<sup>2</sup> foresters merely on suspicion that the man might have taken a log from the forest to construct his half-collapsed house. Justice in this case was instant—a life for a log—and that too on mere suspicion.

A glimpse into the colonial and postcolonial history of India would clearly reveal that forest as a natural resource was never meant to be used for the local forest dwellers. It was to be used as a means to perpetuate their subjugation instead. Forestry in colonial India was all about commercial exploitation and revenue and thus recognized no rights and concessions for forest dwellers, who were mostly tribals. There was no legislative framework to make forests available for meeting local livelihood needs and the colonial powers made no effort to hide their intention, i.e. forestry for commerce, especially timber. Forestry science was introduced by western colonial forces as a codified, printed, and formal curriculum to continue political domination that implied nonrecognition as well as opposition to the largely oral indigenous forest management traditions. This marked the beginning of a forest governance system that was alien, induced, and most importantly that excluded forest-dependent communities in the name of scientific forestry, public interest, national development, conservation, and industrial growth. The national governments in the postcolonial phase inherited the colonial world view that not only aimed at the use of developing country forests to boost western industrial development, but also belabored the nonexistent incompatibility between conservation and livelihoods.

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<sup>2</sup> A province located in eastern India.

The objective of this paper is to highlight a series of policy developments that influenced forest governance during pre- and postcolonial India. There is no denying that colonial forest administration was revenue-centric and exploitative, and thus recognized no rights and concessions for forest dwellers, especially tribals. To address the common domain, this paper also briefly traces the history of forest laws and policies in India (colonial and postcolonial) and their impacts on tribal people, with particular focus on the two recent landmark legislations, the Panchayat Extension to Scheduled Area Act (1996) and the Forest Rights Act (2006) promulgated to recognize rights over forests and forest lands.

## **Forest Rights in British India**

The British established a mode of forest governance that imposed restrictions on local forest-dwelling communities through a definition of forests as national property for colonial objectives, which tried to acquire control of forests for commerce and national development at the cost of local forest-based livelihoods. Although the Forest Administration in British India put stress on national development, the primary focus of forest governance was commerce with limitations on the rights and privileges of local communities. Such regulation of rights was reflected in the classification of forests during colonial times. As national property, forests were classified as conservation forests, commercial forests, minor forests, and pasture lands. The first two categories—as the names would suggest—were out of bounds for local forest-dependent communities. Minor forests were managed by *Panchayats* with a view to reducing the contact between subordinate forest officials and villagers. Pasture land, mostly grassland, was for grazing purposes.

During medieval India, forests were owned by local chiefs with access rights being awarded to local communities. Towards the beginning of the nineteenth century, the British wanted to undertake unhindered exploitation of timber, which required the Government to assert its ownership over forests and do away with the traditional systems of community forest management that existed in most parts of the country. This had nothing to do with conservation; it was a ploy to keep direct control over trees, timber, and forest routes. Teak was identified as a substitute for oak, already becoming depleted in England, to build ships for the Royal Navy and railway lines.<sup>3</sup> With this objective, the East India Company acquired royalty rights over teak in 1807.

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<sup>3</sup> Oak was used for shipbuilding in England. During the nineteenth century, oak supply for shipbuilding declined heavily forcing the colonial government to look for alternatives in its colonies in the east. Burmese and Indian teak trees were identified as good substitutes and the East India Company was thus mandated to make laws for their extraction accordingly.

**Table 1: Timeline of Control Established**

Year	Controls and Rights Acquired	Remarks/Fall Out
1807	East India Company acquired royalty rights over teak	No locals allowed timber for domestic use. This meant prohibition of unauthorized teak felling and the Conservator becoming the sanctioning authority for teak felling and selling, more of an assumed power than lawfully given.
1846	Sanctioning authority over teak extended to all forests and forest produce	Prohibition of local use rights was supplemented by unrestricted extraction of timber from all forests.
1860	Company's sovereignty extended to the total area of forest land	As an aftermath of the Sepoy Mutiny in 1857, during which time forests and forest-dwelling communities provided the rebels with safe hiding places, Company administration prohibited and withdrew all access rights and privileges to fuel, fodder, and other local uses.
1864	Formation of the Imperial Forest Department	In order to legitimize authority with legal and administrative backing, the Imperial Forest Department was created in 1864 to consolidate Government control over forests and forestry was made a scientific operation, making it inaccessible to forest dwellers.
1865 1878 1927	Series of Forest Acts promulgated	In order to legitimize Government control through scientific operations, a series of legal instruments were passed in the form of Forest Acts.

The Acts referred to in Table 1 empowered the Government to declare its intention to notify any area as a reserved or protected forest, following which a "Forest Settlement Officer" supposedly would enquire into claims of rights (to land, forest produce, pasture, etc.). The colonial forest administration camouflaged timber extraction as conservation (thus curtailing livelihood rights) through classification of forests and prohibition of customary use rights. There was no settlement of rights and no space for meeting local needs. On the contrary, valuable trees were reserved and elaborate provisions were made for punitive action in the event of violation. The 1927 Act remains India's central forest legislation and with minor modifications is still operational in independent India.<sup>4</sup> Thus started deliberate Government intervention in forests and measures relating to scientific conservancy were promoted for legitimacy.

## **Forest Rights in Independent India**

With Independence, local forest-dependent people expected to get their rights back. But far from improving, the rights situation actually worsened. Although the policy-makers changed, the policies remained more or less the same. In 1948, during the process of accession of the Princely States after Independence, the consolidation of Government forests continued. The Government proclaimed the lands of ex-Princely States and *zamindars* (large landholders with some governmental responsibilities) as Reserve Forests but no effective steps for settlement of rights were taken. This inevitably sowed the seeds of the future forest land conflicts between the tribals, nontribals, and the Government.

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<sup>4</sup> According to the Act, the Government can constitute any forest land or wasteland which is the property of the Government or over which the Government has proprietary rights, as reserved forest, by issuing a notification to this effect. This Act enabled the colonial Government to declare more and more land as reserve forests, without ascertaining the rights of the tribals and other forest dwellers.

Forest governance in postcolonial India can be separated into three phases (Table 2).

**Table 2: Phases of Forest Governance in Independent India**

Phase	Time Frame	Developments/Remarks
Phase 1	1947–1970	This was the phase of commercial exploitation of forests for industrial development as well as for creating farmland for the large peasantry class.
Phase 2	1970–1988	This lasted till the commencement of the 1988 National Forest Policy; it was a phase of conservation with increased Government control. During this phase, forest conservation was made a directive principle, a fundamental duty in the Constitution, and brought to the Concurrent List for greater control of the Government. It was also the time when powerful legislative instruments like the Wildlife Protection Act and the Forest Conservation Act were put in place. This phase, like the previous one, had no space for forest dwellers and tribals in the protection and management of local forests.
Phase 3	1988 onwards	The third phase began with the introduction of the National Forest Policy in 1988, which not only made forest a local resource but also made the participation of local forest-protecting communities mandatory in the regeneration of degraded forests.

### **Conservation Continuity in Independent India**

The development of legal instruments in the second phase was a response to forest and wildlife depletion in the first phase. These instruments were extremely conservationist in nature, did not differentiate between local and external use, stressed excessive Government control in the form of Eminent Domain, and restricted or did not recognize existing local use rights. The assumption was that forest had been destroyed by the forest dwellers/tribals and needed to be protected/conserved from them, although in reality mindless exploitation of the forest and its wildlife were the handiwork of the rich and the influential. Although the Forest Conservation Act restricted forest diversion for nonforest use, by prescribing prior permission and a high conversion rate, it in effect made such diversion possible. However for the rich, forest land diversion was easier whereas the poor forest-dwelling tribals were termed as “encroachers” and a direction for their eviction was issued by the Ministry of Environment and Forests (MoEF) through the May 2002 circular. This incapacitation of forest-dwelling tribals was aggravated by the establishment of the Protected Area Network, which meant further inviolable areas with no or negligible rights over forests and forest land by the tribals; it enabled the State to evict local forest dwellers without settling their bona fide rights to residence. It is unfortunate that even the recent amendment to the Wildlife Protection Act of 2002 (WLPA) has made no reference to the Panchayat Extension to Scheduled Area (PESA) Act (PESA) and has withdrawn continuance of rights even after the final notification of a protected area. A constant and consistent process was initiated to make the conservation legislations like WLPA and the Forest Conservation Act (FCA) more powerful than right-providing legislations like PESA, although the latter was an amendment to the Constitution.

One of the residual features of the colonial Government that survived even in the postIndependence period was its obsession with technocratic expertise and utter mistrust and complete rejection of people's power and knowledge as important inputs for achieving national development goals. Development policy making in India, unfortunately, positioned itself on the astounding premise that people did not know anything. The prevailing social and political culture, the legal rational bureaucracy, and—most dangerously—the nation as a whole were made to believe in and sustain such an exclusionary development design,

skillfully promoted by Government institutions. Curiously, almost all enabling- and right-conferring provisions were in the form of policies that had no legal sanction while the restrictive ones were in the form of Acts, which had legal backing. Besides, regulatory authorities and right-guaranteeing institutions mostly focused on commercial exploitation and conservation whereas the rights of local forest-dependent communities still remained an area of utter indifference.

## **Evolution and Implications Pro-Tribal Forest Legislations in India**

Since the primary intention of colonial laws was to take over lands and deny the rights of communities, the “settlement” process initiated during the late nineteenth and early twentieth centuries was hardly effective. Surveys were often incomplete or not done (82.9% of Madhya Pradesh’s forest blocks have not been surveyed to date, while in Orissa more than 40% of State forests are “deemed” reserved forests where no settlement of rights took place). Where the claims process did occur, the rights of socially weaker communities—particularly tribals—were rarely recorded. The problem became worse particularly after Independence, when the lands declared “forests” by the Princely States, the *zamindars*, and the private owners were transferred to the Forest Department through blanket notifications. In short, what the Government records called “forests” often included large areas of land that were not and never were forest at all. Moreover, those areas that were in fact forest included the traditional homelands of communities. As such consolidation of Government forests did not settle existing claims on land; all people, mostly tribals, who lived in these forests, were subsequently declared “encroachers,” as they did not have recognized rights and claims to their ancestral homelands.

## **Panchayats Extension to Schedule Areas Act, 1996**

During the 1990s, the Eminent Domain of the Government was challenged by activists and human rights movements. Rights of the tribals over local resources were considered sacrosanct and nonnegotiable and a move was initiated to secure Constitutional recognition for these rights. The sustained campaign led first to the 73<sup>rd</sup> Amendment of the Constitution to give recognition to decentralized governance in rural areas and then the constitution of the Bhuria Committee to look at tribal rights over resources through extension of the provisions of this Amendment to the Schedule V areas. Based on the recommendations of the committee, Parliament passed a separate legislation in 1996 as an annexure to the 73<sup>rd</sup> Amendment specifying special provisions for *Panchayats*<sup>5</sup> in Schedule V areas. Known as the Panchayats Extension to Schedule Areas<sup>6</sup> (PESA), 1996, it decentralized existing approaches to forest governance by bringing the *Gram Sabha*<sup>7</sup> center stage and recognized the traditional rights of tribals over “community resources”—meaning land, water, and forests. PESA was important not just because it provided for a wide range of rights and privileges, but also because it provided a principle as well as a basis for future law making concerning the tribals. According to the Central Government law, the states promulgated their own laws supposedly giving rights to tribals over local resources.

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<sup>5</sup> A *Panchayat* is a village council, at the bottom of the three tiers of local self-government in India.

<sup>6</sup> Scheduled areas are tribal-dominated areas put in Schedule V of the Indian Constitution.

<sup>7</sup> The *Gram Sabha* is a body consisting of persons registered in the electoral rolls of a village or a group of villages which elect a *Panchayat*. Each *Gram Sabha* shall be competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources, and the customary mode of dispute resolution.

It is almost a decade since PESA came into effect, but the obstacles in enforcing its provisions have remained largely unaddressed. Its avowed objective of power to the people has yet to take shape. The states are struggling to devise definitive procedures to define rights over forests and minor forest produce. Meanwhile, some states like Maharashtra, Gujarat, and Orissa, in an effort to perpetuate State control over forest resources, tried to dilute the provisions of PESA although they had no legal jurisdiction to do so (Saxena 2004). The Government of Orissa, for example, has circumscribed the provisions of PESA by adding a clause, "... consistent with the relevant laws in force," while incorporating the constitutional provision concerning the competence of the *Gram Sabha* to manage community resources and resolve disputes according to the customs and traditions of the people. This clearly implied that tribals could have rights over forests and minor forest produce, only if existing laws allowed it. Instead of changing State laws inconsistent with PESA, the Government of Orissa changed the provisions of the Act, thus negating the rights conferred on the community by the Constitution. The original objective of the Central Act was that state governments should change their laws according to central legislation. But the Government of Orissa, on the contrary, tampered with the central legislation to suit its own ends.

The Central Act talked about providing ownership rights over minor forest produce to the *Gram Sabha*. The MoEF constituted an expert committee to define ownership, which recommended that "ownership means revenue from sale of usufructory rights, i.e. the right to net revenue after retaining the administrative expenses of the department, and not right to control." The case of Andhra Pradesh is even more interesting. It gave ownership rights to the *Van Suraksha Samitis* (VSS, forest protection committees) with respect to all nonwood forest products (NWFPs) for which Girijan Cooperative Corporation (GCC) did not hold the monopoly rights. Similarly, there is no clarity on the issue of "community resource." The states have their own interpretations and legislations. While Orissa and Andhra Pradesh are silent about what constitutes community resource, Madhya Pradesh has defined it as land, water, and forest. This implies that the powers given by PESA to exercise rights over community resources are almost nonexistent in many states.

Although the Central Act leaves no room for doubt that reserve forests should be considered community resources under the purview of PESA, the official assumption is that reserve forests are out of the PESA domain. For instance, the NTFP Policy of 2000 in Orissa restricts the *Panchayat's* control over minor forest produce in reserve forests. It says that the *Gram Panchayats* shall not have any control over minor forest produce collected from the reserve forests whereas the PESA, in its spirit, sought to extend ownership of forests to any forest located in the vicinity of the village that the people had been traditionally accessing. The policy-makers knew very well that it would be foolish to create such a distinction because it was almost impossible to differentiate between produce collected from reserve forests and that from others. Nevertheless, they went ahead with putting in place the proviso that reserve forests cannot come under the purview of PESA because the relevant laws laid down that no rights can exist in the reserve forest area (Table 3).

**Table 3: Acts Challenging the Eminent Domain of the State**

<b>Panchayat Extension to Scheduled Area Act, 1996</b>	<b>The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006</b>
<p>The 73<sup>rd</sup> amendment to the Constitution and the subsequent enactment of PESA intended to ground decentralization in India, through the transfer of power to the <i>Gram Sabha</i> or the village assembly. With PESA, an effort was made to vest legislative powers in the <i>Gram Sabha</i>, to manage community resources, and to resolve disputes according to the customs and traditions of the people.</p> <p>This significant legislation was expected to have far reaching consequences in the social, economic, and cultural life of tribal people in Scheduled Areas. All the scheduled states were given one year to amend their respective Panchayat Acts to conform to the letter and spirit of PESA. Unfortunately, a handful has even ventured into adhering to the PESA provisions as regards tribal law making.</p>	<p>The Act has defined forest land as land of any description falling within any forest area and includes most types of forests. The law provides for recognition and vesting of forest rights to Scheduled Tribes in occupation of forest land prior to 13 December 2005 and to other traditional forest dwellers who are in occupation of forest land for at least three generations, i.e. 75 years, up to a maximum of 4 hectares. These rights are heritable but not alienable or transferable. Forest rights include among other things, right to hold and live in the forest land under individual or common occupation for habitation, self-cultivation for livelihood, etc. Besides, the Act recognizes the rights over “community forest resource” that it defines as customary common forest land within the traditional or customary boundaries of the village including protected areas. Moreover, one of the most crucial aspects of the Forest Rights Act is the realization of forest rights within a protected area through declaration and demarcation of the “critical wildlife habitat” (CWLH).</p>

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

The Supreme Court of India in an important case held that the tribals have a definite right over the forests and any sort of forest diversion or eviction should have their informed consent. Following suit, in an affidavit to the Apex Court, in June 2004, the Government of India made a significant admission by holding that “historical injustice” had been done to the tribal forest dwellers of the country, which needed to be immediately addressed by recognizing their traditional rights over forests and forest land. What made this admission particularly crucial was its acceptance that colonial perspective on forest management had failed and alienated a large chunk of the forest dwellers, especially tribals from forests and forest-based livelihood options. Besides, it could not have come at a better time—just months after the eviction of about 168,000 families from over 150,000 hectares effected by the May 2002 Government order of eviction of forest encroachers. This led the Government of India to introduce the Scheduled Tribes (Recognition of Forest Rights) Bill, 2005 in Parliament on 13 December 2005. This legislation is now widely accepted and revered as a major step towards achieving social justice and a milestone in the tribal empowerment process (Table 3).

Pressure mounted on the Government by tribal bodies and supportive progressive forces to introduce structural changes in favor of the forest-dependent people resulting in constitution of the Joint Parliamentary Committee (JPC) to take a fresh look at the Bill and recommend measures to meet their demands. Considering the fact that tribals were served with eviction notices in May 2002 for being “encroachers” as they could not produce residential evidence in forests before 25 October 1980 according to the FCA 1980, the JPC recommended that the

cut-off date for the settlement of rights be extended to 13 December 2005, the date on which the Bill was first tabled in Parliament. It further recommended inclusion of nonscheduled tribe “traditional forest dwellers” living in the forest for three generations within its ambit. The recommendations also included the identification of the “critical wildlife habitat” by an independent and participatory scientific process, and relocation of the residents, if necessary, through mutually acceptable terms.

The JPC also recognized multiple land use for shifting cultivators and removed the land ceiling of 2.5 hectares for land rights. Besides, considering the heavy dependence of tribals and other forest dwellers on NWFPs, and the associated exploitation of these hapless people by intermediaries, it urged for ensuring a minimum support price for minor forest produce. Furthermore, the JPC made the *Gram Sabha* the final authority in the process of rights settlement. In matters relating to forest land diversion for nonforest use, consent of the *Gram Sabha* was made mandatory (Prasad 2007). Representation of the *panchayatiraj* institutions at all levels was also strongly recommended, the *Gram Sabha* being a core unit, in all matters relating to selection and identification in the rights settlement process. In recommending changes to the Bill, the JPC made PESA a reference point by bringing the *Gram Sabha* center stage.

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

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

Even after several months of the Act coming into force, there is a misconception amongst many that the Government will give/distribute 4 hectares of forest land afresh to tribals for homestead and cultivation. This, they think, will destroy the forests as anybody can acquire 4 hectares of forest land and obtain the desired recognition. The truth, however, is that an individual claiming forest rights has to produce sufficient proof not only in terms of documents to support his/her claim but also needs an endorsement from the *Gram/Palli Sabha* about such claims. Thereafter the Forest Rights Committee will initiate the process of determination of such rights. This claim will then be verified first by the subdivisional-level committee and then the district-level committee and can either be settled or refused. The



proviso about 4 hectares of forest land does not necessarily mean that all claimants will be provided with that amount of land. On the contrary, it should be interpreted to mean that no claimant will get more than 4 hectares.<sup>8</sup>

With the promulgation of the Act, the age-old debate “tigers or tribals” has been revived once again. There is a fear that the Act will wipe out the remaining big cats in the country. Therefore, one of the most contentious issues influencing the realization of forest rights within a protected area has been the declaration and demarcation of the “critical wildlife habitat” (CWLH), a crucial aspect of the Forest Rights Act.

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

This has kept conservationists and wildlife activists busy in trying to keep the provisions of the Act outside the national parks and sanctuaries, fearing that the law would damage forest and wildlife. The MoEF suggested that the people’s rights in the national parks and sanctuaries should not be vested till 8% of the forest land—covering the 650 plus national parks and sanctuaries—was declared as CWLH. Therefore, the Act will be implemented in its true spirit only after all the protected areas have been formally demarcated and designated as CWLH.

The Act provided that the MoEF would deliver a set of guidelines for declaration of the CWLH within six months of the promulgation of the Act. But the guidelines were delayed as was the promulgation of the Act that was to happen through the framing of forest rights rules on 2 October 2007.<sup>9</sup> But much before the guidelines emerged, the State Forest Department was preparing action plans for prospective relocation from the protected areas. Such initiatives occurred in almost all states.

In this context, it is worthwhile to have a close look at the CWLH guidelines framed by the MoEF. The guidelines are only a reiteration of the MoEF’s stand on keeping people out of protected areas and nullifying the provisions of the law by diluting the preconditions for demarcation of the CWLH. They restrict local communities from consulting with the *Gram Sabha*, which again is not mandatory. Besides, the Government’s Expert Committee at the State level reserves the right to decide on the participation of a sociologist or a member of the *Gram Sabha*. It is interesting to note that people’s knowledge and information have been important sources of information during wildlife/tiger census. But the same knowledge is considered unscientific when it comes to demarcating CWLH.

The guidelines state that the resolution of the *Gram Sabha* would certify that in areas included within the proposed CWLH, the process of recognition and vesting of rights had been completed. This might turn out to be a contentious issue in the days to come as it is not very difficult for the Government to get such a resolution passed by the *Gram Sabha* through

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<sup>8</sup> Land thus provided to the claimant will be under the joint ownership of husband and wife and the land *patta* will be prepared accordingly. In case of a widow claimant, land will be provided in her name with *patta*. *Patta* is private land of tribals who have a Government record of ownership.

<sup>9</sup> The Forest Rights Rules, 2007 was finally notified on 1 January 2008.

coercion. The Government machinery in Orissa is quite adept at getting the *Gram Sabha* to toe the official line as proved by land acquisition in mining operations.

Moreover, there is deliberate misunderstanding leading to improper interpretation of the Act when it is assumed that the relocation of villages would start immediately after the Forest Department prepares the proposal to identify the critical tiger habitat (CTH).<sup>10</sup> In states like Kerala, Maharashtra, Karnataka, and Uttar Pradesh, such CTH demarcation proposals have been prepared and an estimate of people likely to be relocated prepared. The Act declares that CTH has to be understood as a process and not just a plan. The proposal has to be submitted to the Central Government and then the demarcation process will start with the involvement of the Expert Committee and the Ministry of Tribal Affairs. However according to the Act, the Forest Department, while preparing the proposal, should only mention the area and not the number of people likely to be relocated as it is only proposing the area which might change and the committee might even think that no relocation is necessary for the purpose.<sup>11</sup>

In Section 4 (5) of Chapter 3, the Act clearly mentions that no forest-dwelling scheduled tribes (FDST) or traditional forest dwellers shall be evicted or removed from forest land under their occupation till the recognition and verification process is complete. But contrary to what has been provided in law, eviction decisions are invariably taken well before the final notification of the CWLH. A case in point is the Uttar Pradesh Government's decision to create a special corridor in the Dudhwa National Park, Katamiaghat and Kishanpur sanctuaries, where 60% of the tigers found in the State live, for the free movement of tigers.

The Government has decided to evict villagers from these areas in installments. In the first phase, villages falling in the way of the special tiger corridor will be relocated. The State Government has issued eviction notices to 10 villages lying within these three forest areas. However, nothing has been mentioned about the provisions of resettlement as stated by the law: "the free, informed consent of the Gram Sabha in the areas concerned to the proposed resettlement and to the package has been obtained in writing." It further says, "no resettlement shall take place until facilities and land allocation at the resettlement location are complete as per the promised package."

One of the crucial threats to the proper implementation of the Act is the interpretational freedom of the Forest Department. Whether it is occupation on forest land or demarcation of CWLH or ownership over NWFPs, the Forest Department does what suits its interests best. One such example is ownership over NWFPs provided in PESA. Except for Orissa, no other state abides by this central provision. Therefore, realizing this interpretational freedom and the related problems, this Act once again defines and clarifies minor forest produce as all NWFPs of plant origin and bestows ownership rights on the *Gram Sabha*; but still in most states the Forest Department enjoys monopoly and does not allow tribals and other forest dwellers to sell NWFPs where the price is high. This implies the state governments reserve the right of not obeying the Central Act as well as even escaping unprimanded. Amidst all of its good work, the Ministry of Tribal Affairs (MoTA) should be careful about not allowing state bureaucracies to enjoy such extraconstitutional freedom.

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<sup>10</sup> Equivalent to CWLH under the Wildlife Protection Act 1972 (amended in 2002).

<sup>11</sup> Slightly before the Act became operational on 1 January 2008, around December 2007, in almost all tiger reserves, CTH had been demarcated and notified.

## **Controlling Through Definition and Classification**

In the last couple of decades, debates around forest rights have focused basically on two areas: definition and classification of forests and the nature and extent of departmental control over different types of forests. Although classification is indicative of designated control, there are still some areas where community control is more than visible strictly from a conservation and sustainable dependence point of view. During British India, a good number of people resided on parcels of land where ownership was unclear. As discussed earlier, the situation was even worse after Independence due to inadequate and improper survey and settlement. The Government continued declaring reserve forests without settling the rights of the people who dwelt there. There are thousands of cases of local inhabitants claiming that they were in occupation of notified forest lands prior to initiation of forest settlements under the Indian Forest Act. There are various cases of *pattas*/leases/grants said to be issued under proper authority but which have now become contentious issues between different departments, particularly the Forest and the Revenue Departments. The problem is compounded by the fact that in many cases there is no clear demarcation of forest lands. In fact most of the disputes and claims relating to use and access to forests have lingered on and evaded resolution in the past because of the failure to demarcate precisely the extent of the forest.

Frequent changes in the definition and classification of forests have not helped in determining and settling forest rights. Different laws, policies, and orders defined and classified forests differently. Read between the lines—all the definitions and classifications have specific control regimes attached to them. For example, forest was first defined in the Indian Forest Act, 1865 as “land covered with trees, brushwood and jungle,” because its purpose was timber extraction. In 1996 the Supreme Court, as part of the interim judgement on the Godavarman case, defined forests as an extensive area covered by trees and bushes with no agriculture.

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

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

## **Global and External at the Cost of Local**

A quick look into the current management approaches reveals some startling trends with regard to community rights over forest resources. On the one hand, the limitations of the so-called progressive legal framework are getting slowly exposed. On the other, there are equally disturbing developments like changing definition of forests, forest diversion becoming easier with the preeminent role of the mining lobby,<sup>12</sup> large-scale plantation projects taken up to create carbon sinks in natural forests<sup>13</sup> with no or negligible local access rights, gradual withdrawal of the State machinery from the forest-based livelihood sector, especially NWFPs, and the missionary zeal exhibited to renew the industrial-commercial approach to forest management further marginalizing local users and putting a major question mark on their continued dependence on forests.

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

The strict conservation orientation of the plantation projects implemented to create carbon sinks<sup>14</sup> in the protected forests, to a large extent, has limited local access rights. The only right that is recognized is the right over NWFPs. The approach of such projects is to remove potential threats of deforestation, and manage forest areas so as to minimize human impact. Interestingly, carbon payments would be supposedly used to develop local income sources, outside protected forests. In other words, it is an endeavor to shift the livelihood focus from forests to other nonfarm sources, and conserve forests exclusively for carbon sinks so as to create carbon credits for payments that states could use in infrastructure development.

Closely observed, these developments would reveal a very interesting, although disturbing, trend. Now, with the aforementioned developments taking place, the major land mass of the country is expected to come under the purview of plantation projects. On the one hand, the

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<sup>12</sup> In May 2007 a forest policy review process by the State identified that since Orissa is rich in minerals with 70% of the country's coal production coming from the forest areas of Orissa, for harvesting minerals, forests have to be sacrificed, and compensatory afforestation undertaken.

<sup>13</sup> Overseas donor projects like the Orissa Forestry Sector Development Project (OFSDP) supported by the Japan Bank for International Cooperation (JBIC) and being implemented in Orissa, is one such example. Besides, public and private sector investment is also invited under the public-private partnership for plantations within natural forests.

<sup>14</sup> Global forest governance discourse has not only expanded the definition of forests, but also has caused a shift from its usual mercantile logic that puts a premium on timber—its quality and volume. Concerns about climate change, disruption of the global carbon cycle, carbon stocks, and emission and rates of sequestration have, besides adding a new dimension to forest management, also transformed forests from a local to a global resource. A new form of economic activity has spawned in the era of global warming, i.e. buying and selling of environmental services (read carbon trade). Carbon sinks are created through conserving existing forests and taking up tree-planting projects to remove greenhouse gases.

State Forest Departments will use bilateral donor funding for plantation in forest lands; on the other, the private sector, armed with a new definition of forest, will go in for large-scale plantation activities with deceptive use of jargon like “public–private partnership.” In the process, they will occupy and usurp a major portion of the revenue land, especially from the cultivable wasteland category. As discussed, the locals will have no access rights in the plantation forests not to mention any such rights in the private plantation areas. The states, as well as the corporate sector, are expected to earn a fortune in the process through selling of carbon credits as well as through timber trade.

If a major chunk of the revenue land of the said category is leased out to the corporate sector for taking up plantation projects, this is definitely going to have a serious repercussion on the process of land distribution to the landless under different Government schemes. Because of the huge revenue gain for the Government, revenue lands, which could have otherwise been settled in favor of the landless, will now go to the private sector. Besides, with large-scale industrialization, the Government also has to find land, especially of the nonforest category, for industries to take up Compensatory Afforestation,<sup>15</sup> where locals will have no access rights. Besides, in matters of forest land being given to industries for compensatory afforestation, no rights assessment is done before such forest land is transferred. It is assumed that all rights are settled in a forest land area. There are instances in Keonjhar District in Orissa, India, where shifting cultivation areas have been given for compensatory afforestation. The forest-dependent communities are losers both ways. On the one hand, their livelihood options are closed within the protected forests; on the other, they have no entitlement over cultivable wasteland either. Such processes are expected to create a situation where the landless will remain so indefinitely.

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<sup>15</sup> The local forest dwellers have neither any say in matters of forest diversion nor the compensation that is received under Net Present Value (NPV) for such diversion of forest land for nonforest purposes nor in its utilization. The irony is, the local communities protect the forest, somebody else cuts it, and somebody else receives the compensation. According to the MoEF order of April 2004, money received towards NPV shall be used for natural regeneration, forest management, protection, infrastructure development, wildlife protection, and management. There is no mention of creating or compensating livelihoods for the local communities which the forest diversion has deprived them of. The fund distribution mechanism is based on the erroneous assumption that the losses due to forest diversion are more national than local.

As if all this was not enough, the hapless tribal now has to contend with the gradual closing of the NWFP option—his last remaining source for some cash income. Under the misleading pretext of falling international prices and procurement of certain commonly traded NWFPs, state governments are now increasingly trying to wriggle out of their responsibility to manage, monitor, and promote collection and trade of NWFPs. Rather than acknowledge the fact that the drop in procurement and prices of NWFPs is a result of their own policies and inaction and find ways to reverse the trend, they have chosen to place primary gatherers completely at the mercy of ruthless market forces. Their decision to curtail their involvement in the NWFP sector is based purely on calculations of profit and loss and is a complete abrogation of their welfare obligations.<sup>16</sup>

In the continued harangue over national objectives and global needs, the question of the livelihood security of the forest dwellers has been given quiet burial—as if they belong to another planet. As we have seen, forests in India have always been valued for revenue profit, conservation, and as a genetic reservoir. They have never really been perceived or managed as a livelihood recourse. The fact that sustainable development of forests is possible with the harmonious blending of local, national, and global needs has never been acknowledged in the country. In what can be called the mother of all ironies, the Government, through its policies and actions, first pushes the forest dwellers into utter penury and then starts poverty alleviation programs for them.

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<sup>16</sup> PESA initiated and later the FRA clarified a clear ownership framework for NWFPs. With PESA the problem was separate from Orissa, no other state came out with a policy/circular giving ownership rights to the *Panchayat*. The earlier systems of long-term lease and state monopoly continued in most forested states in central India. This differing and at times contradictory operational framework created a set of problems relating to price, transport, transit, etc. The central PESA law enables ownership whereas there is no corresponding administrative procedure or set up to carry out central provisions. Therefore, there is a mix of control and a free market trade scenario existing in a huge contiguous forest area in central India that hamper trade and livelihoods. Besides, forest being a matter belonging to the concurrent list, the central laws should prevail over state laws and administration. This, however, continues postPESA and even with the promulgation of FRA being nine months old. Besides, it is still not very clear if legal interventions can actually be initiated in respective high courts if PESA and FRA provisions on deregulation are violated.