THE FOREST RIGHTS ACT, 2006: SETTLING LAND, UNSETTLING CONSERVATIONISTS

Antara Roy & Sroyon Mukherjee[*]

After more than a year of high-pitched campaigning by rival lobbies of forest conservationists and tribal rights activists, the Scheduled Tribes and Other Traditional Forest-Dwellers (Recognition of Forest Rights) Act, 2006 came into force on December 31, 2007. The Act aims to provide a framework which recognizes and vests forest rights in forest-dwelling tribes, and to foster a new forest conservation regime which actively seeks the participation of forest-dwelling communities in conservation efforts.

Tribals of India have been residing in forest land for generations, cultivating and collecting forest produce. However, their traditional rights have hitherto not been adequately recognized and recorded. The Act thus marks a radical departure from existing forest legislations.

The Act has been lauded and reviled in almost equal measure. Tribal rights activists perceive it as an instrument for correcting historical injustices. Environmentalists on the other hand project severe ecological fallouts. They see the law as a land distribution scheme which will lead to rampant deforestation. The discourse on this subject has, therefore, been predominantly adversarial in nature.

We do not see tribal welfare and forest conservation as either separate or opposing goals. Having discussed the corrective justice dimension of the Act, we have advanced rebuttals of the principal claims of the opponents of the Act. Finally, we have established that

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[*] 1st and 4th year students respectively at the W.B. National University of Juridical Sciences, Kolkata.

ownership rights over a certain property automatically create a certain incentive to protect that property.

I. INTRODUCTION

In an era where the buzzword is economic growth to the near-exclusion of all else, it is not very surprising that eco-friendly and sustainable development has taken a backseat.[1] However, there appears to be an increasing realisation of the apocalyptic prospect looming ahead if the current trend of indiscriminate and greedy consumption of natural resources continues unabated. This awareness is manifest in the increasing levels of environment-related protests and positive activity.[2] The significance and necessity of a structured strategy to protect the environment is evident, but such a strategy also has to account for the needs of the people, especially the very people who survive off forests, and have had a symbiotic relationship with these forests since time immemorial.

Amidst similar arguments and counter-arguments, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 [*hereinafter* 'the Forest Rights Act'], came into force on the 31 December 2007,[3] with the objective of recognizing and vesting the forest rights and occupation in forest land in forest dwelling Scheduled Tribes [*hereinafter* 'FDSTs'] and other traditional forest dwellers who have been residing in such forests for generations but whose rights have not so far been recorded.[4]

Part II of this paper deals with the historical background of the Forest Rights Act. In this context, we have discussed the situation prevailing in India, including both pre and post-independence legal mechanisms related to forests. The legislative background of the Act has then been discussed, followed by a summary of the principal provisions of the Act. Part III analyses the environmental and social arguments advanced by both the proponents and opponents of the Act. By taking up each argument individually, we have attempted to establish that the arguments in favour of the Act are stronger at every level. Part IV provides an

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[1] *See generally* Anand & Sen, *Human Development and Economic Sustainability* 28(12) World Development 2029 (2000); Sen, *Environment and Poverty: One World or Two?*, Text of valedictory address delivered at the International Conference on Energy, Environment, and Development: Analysing Opportunities for Reducing Poverty (16.12.2006) available at <http://www.teri.res.in/veola/pdf/Senspeech.pdf> (Last visited on 11.02.2008).

[2] *E.g.*, The Green-Belt Movement, The Live Earth Concert Series, *An Inconvenient Truth*, the Oscar-wining documentary on Al Gore's campaign to make the issue of global warming a recognised problem (Dir. Davis Guggenheim, 2006), and online environmental activism campaigns like OneWorld and Action Network.

[3] Ministry of Tribal Affairs, *Notification published in the Gazette of India, Extraordinary* (31.12.2007).

[4] Preamble, The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (2 of 2007) [*hereinafter* 'The Forest Rights Act'].

economic justification for conferring private ownership rights to tribals as the Act in question seeks to do. Part V summarises the key findings and concludes the paper.

II. A HISTORICAL INTRODUCTION TO THE FOREST RIGHTS ACT

A. HISTORY AND EVOLUTION OF FOREST LAWS IN INDIA

In the pre-British era, there appears to be no evidence of any codified forest laws or any State-intervention in the apparently community-based forest regimes. There is, however, ample evidence that forests and forest resources were highly valued, to the point of veneration.[5] The earliest use of forests in India by humans can be traced back to the Harappan and Mohenjo-Daro civilisations almost seven thousand years ago.[6] Archaeological evidence appears in the form of pottery, and seals had carvings of certain species of trees which were held in reverence.[7] During the Vedic period, trees were appreciated for their value, shade and medicinal properties, and in fact there is strong evidence that the linkages between deforestation and climatic changes were understood.[8] There is also evidence of the existence of a structured system of management of forests. This was done out of necessity: to protect forests and to promote forest-resource based industries. This pattern was followed in the Mauryan period and subsequently the Gupta period. The early Muslim period in India saw a continuance of a similar system because the rulers were keen hunters, and they needed large tracts of forest cover to pursue this activity, so the forest bionetwork was not really tampered with. But the later Mughal period saw the constant destruction of forests for timber and clearance of forest-land for agricultural purposes.[9]

The mid-nineteenth century saw the firm establishment of colonial roots in India. The British realised that forests were indeed a significant and exhaustible resource, and thus woke up to the need to conserve it.[10] The British knowledge of nature and forests was based on European experiences, and this knowledge was generalised and enforced on the Indian circumstances in a manner which viewed the ecological and physical landscape in isolation from the existing social realities.[11]

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[5] *See generally*, Upadhyaya, *Indian Botanical Folklore, in* TREE SYMBOL WORSHIP IN INDIA (SENGUPTA, ED.) 1 (1965); CROOK, INTRODUCTION TO THE POPULAR RELIGION AND FOLKLORE OF NORTHERN INDIA (1994).

[6] RANGACHARI & MUKHERJI, OLD ROOTS, NEW SHOOTS: A STUDY OF JOINT FOREST MANAGEMENT IN ANDHRA PRADESH 35 (2000).

[7] *Ibid*.

[8] SARAH JEWITT, EUROPE'S "OTHERS" 86 (1995).

[9] UPADHYAY & UPADHYAY, HANDBOOK ON ENVIRONMENTAL LAW [*hereinafter* 'Upadhyay'] Vol. I, at 21-22 (2002).

[10] See for example SMYTHIES, *India's Forest Wealth, in* INDIA OF TODAY, Vol. IV, p. 1, at 6-7 (1924).

[11] K. SIVARAMAKRISHNAN, MODERN FORESTS 76-79 (1999).

The colonial State found forest laws essential to establish firm State control over this very essential resource for defence as well as expansionist purposes, and for lumber, particularly Indian Teak, which was of immense value at the time.[12]

The first Indian Forest Act was passed in 1865. It was a hurriedly drafted Act that was intended to bring under State control certain tracts of land- as and when the State required. It made no provisions regarding rights of users.[13] This law was amended in 1878, by which the very nature of common property was changed, and forests were brought under direct State control. A categorisation was created which divided forests into three distinct categories, viz. reserve, protected and village forests. It allowed forest-produce produced in British India to be taxed by local governments, thus enabling the British government to earn revenue from the forests. Any rights people might have had over forests were seen as concessions that could be withdrawn at will.[14] In 1894, the British government declared its first Forest Policy Resolution, in which state control and commercialisation of forests again formed the dominant motif. The basic aim of this policy was apparently to conserve forests that were being fast depleted due to indiscriminate use. But what it in effect did, was increase and concretise State control over forests, which enabled it to further exploit forests and supplement State revenue.[15] An important legislation on forests during the colonial period was the Indian Forest Act of 1927, based on the Indian Forest Act of 1878, with a few exceptions. This 1927 Act tried to consolidate laws relating to a number of issues regarding forests and forest-produce.[16]

The period immediately following independence saw a spate of forest laws which made it abundantly clear that all interests were to be subservient to the national interest. The 1952 forest policy was apparently based on certain paramount needs of the country.[17] There was a need for balanced, systematic and complementary land use that would enable its maximum utilisation at least cost. There was also the need to increase afforestation to check soil erosion and expansion of the North-Western desert, and finally the necessity of continued

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[12] Upadhyay, *supra* note 9 at 22. *See generally* Guha, *The Prehistory of Community Forestry in India*, 6 ENVIRONMENTAL HISTORY 213 (2001); Guha & Gadgil, ***State Forestry and Social Conflict in British India*, 123 PAST AND PRESENT 141 (1989).**

[13] NEGI, HIMALAYAN FORESTS AND FORESTRY 246 (2002).

[14] Buchy, *The British colonial forest policy in South India, a maladapted policy?*, *in* LES SCIENCES HORS D'OCCIDENT AU 20ÈME SIÈCLE (WAAST, CHATELIN,, BONNEUIL, EDS.) 33 (1996).

[15] Sharad Kulkarni, *The Plight of the Tribal*, available at <http://www.india-seminar.com/2000/492/492%20s.%20kulkarni.htm> (Last visited on 04.02.2008).

[16] See Preamble, The Indian Forest Act, 1927 (16 of 1927).

[17] KANT & BERRY (EDS.), INSTITUTIONS, SUSTAINABILITY, AND NATURAL RESOURCES: INSTITUTIONS FOR SUSTAINABLE FOREST MANAGEMENT 99 (2005).

forest supplies for defence, communications and industrial purposes and to generate revenue for the government.[18] The thrust of the policy is clear from the following extract:

> "*Village communities in the neighborhood of a forest will naturally make greater use of its products for the satisfaction of their domestic and agricultural needs. Such use, however, should in no event be permitted at the cost of, national interests. The accident of village being situated close to a forest does not prejudice the right of the country as a whole to receive the benefits of a national asset.*"[19]

The extract, it may be noted, goes well beyond merely evincing the intention of not securing rights for people dependent on forests. It contains a clear statement of intent to prevent them from accessing such forests if need be.

In 1976, it was stated by the National Commission on Agriculture that the only reason forests existed was to continue production of wood for industrial purposes, and thus, it is imperative that priority be given to industrial development over individual and community needs.[20] With the 42nd amendment of the Constitution of India in the same year, forests were transferred from the State List under the 7th Schedule to the Concurrent list, bringing them within the purview of the Centre.[21]

The Forest Conservation Act was passed in 1980 and subsequently amended in 1988. This amendment was after the Forest Department was transferred from under the Ministry of Agriculture to the Ministry of Environment and Forests [*hereinafter* 'MoEF'], thus shifting the focus from revenue-earning to conservation. This Act aimed at conservation of forests and wildlife, and greater State control in Reserved Forests, and provided for penal measures in case of contravention of these provisions.[22] It also sought to ensure that encroachers of forest land for purposes of cultivation or other purposes were kept out at all costs.

The National Forest Policy of 1988 marked a drastic departure from the earlier stand of strict conservation. For the first time, tribal and rural needs were taken into consideration, and recognition was given to the fact that the rights and concessions of the tribal people and others whose life depends on forests should

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[18] *See generally* Ministry of Food and Agriculture Resolution, *National Forest Policy* (1952), available at <http://forest.ap.nic.in/Forest%20Policy-1952.htm> (Last visited on 06.02.2008).

[19] *Ibid.* at ¶ 7.

[20] Government of India, Ministry of Agriculture, *Report of the National Commission on Agriculture, Part IX, Forestry* 32-33 (1976).

[21] Section 57, The Constitution (Forty-Second Amendment) Act, 1976.

[22] The Forest Conservation Act, 1980 (69 of 1980).

be fully protected. The principal aim was to ensure environmental stability and ecological balance between all life-forms.[23] This was limited by only one caveat, that the rights and concessions should always remain related to the carrying capacity of forests.[24]

The aim of this historical digression has been to show the gradual shift in the government's forest strategy, from a State-centric approach to a people-centric one. The Forest Rights Act, with which this paper is concerned, is a culmination of this change in perception and recognition of the rights of forest-dependent people.

B. THE GENESIS OF THE FOREST RIGHTS ACT

As discussed above, the National Forest Policy of 1988 made a move towards recognising the rights of the tribal people, who have always shared a symbiotic relationship with forests. To this end, the MoEF had issued a set of circulars in 1990 that were designed to help execute the necessary provisions.[25] Unfortunately, these guidelines remained only on paper, and were not translated into implementation.[26]

In 1995, the *Godavarman case*[27] came before the Supreme Court of India, through a PIL filed against the destruction of forests by influential commercial bodies and lobbies. Unfortunately, the outcome of this case was a set of Supreme Court orders that effectively constrained the rights of tribals. When the court forbade the union government to allow indiscriminate encroachments without its permission, it was erroneously interpreted as an eviction notice of the tribals by the MoEF, and this led to large scale eviction drives. Widespread protests led to re-affirmation on the part of the MoEF to follow the 1990 guidelines, but in spite of this, evictions continued.[28] Recognising the need to address this problem for once and for all, discussions started in the National Advisory Council over the latter part of 2004, which was followed by dialogues with the MoEF and tribal rights activists, in which the issue of 'encroachment' was discussed. It was decided that it was imperative that legislation be drafted for settlement of rights of tribal communities and forest-dwellers, along with verification of eligible encroachments. This was followed by a meeting with the Prime Minister who affirmed the need for such legislation and said this was to be treated with the utmost urgency.[29]

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[23] Government of India, Ministry of Environment and Forests, *National Forest Policy* (1988) available at <http://envfor.nic.in/divisions/fp/nfp.pdf> (Last visited on 06.02.2008).

[24] *Ibid.* at ¶ 4.3.4.1.

[25] Government of India, Ministry of Environment & Forests, *Circular No. 13-1/90-FP* (1990) dealing *inter alia* with *Regularisation of Encroachment, Review of Disputed Claims over Forest Land* and *Regularisation of Pattas and Leases*.

[26] JEAN DREZE, TRIBAL EVICTIONS FROM FOREST LANDS [*hereinafter* 'Dreze'] 2 (2005).

[27] *T.N. Godavarman Thirumulkpad* v. *Union of India*, AIR 1997 SC 1228.

[28] Dreze, *supra* note 26 at 4.

[29] *Ibid.* at 7.

A Ministry of Tribal Affairs was created in October 1999, which was to focus on ameliorating the condition of the tribal people in India.[30] The Ministry was assigned the task of preparing a draft of The Scheduled Tribes (Recognition of Forest Rights) Bill, which was placed before the Parliament in 2005. It came about in an environment of globalisation, liberalisation and rapid economic growth which gave multinational powerhouses easy access to, and control of natural resources, which in turn created havoc in the lives of tribals, who never really benefited from this 'growth'.[31]

After much debate and controversy, it was finally passed in 2006, making it a historic legislation, because for the first time the rights of forest-dwelling people were being recognised in Indian Forest Policy formulation.

C. THE BASIC PROVISIONS OF THE FOREST RIGHTS ACT

The Act seeks to recognise and confer forest rights to FDSTs and other traditional forest dwellers.[32] Such forest rights are defined in Section 3, and include rights to hold, occupy, and live in forest land, that is, rights of access to forest produce, rights to collect and use it, and any other traditional right that have been enjoyed by forest dwellers. However, the Government reserves the right, subject to the consent of the relevant *Gram Sabha*, to divert forest land for certain listed purposes.[33]

This Act also talks about duties of holders of forest rights, namely that of protecting wildlife and diversity, and other ecologically sensitive areas. Chapter IV sets out the procedure and authorities for vesting these rights. Of the authorities, the most important is the *Gram Sabha*. A *Gram Sabha* is a village assembly which consists of all persons registered in the electoral roll of that village or group of villages, and forms a strong base for decentralization of power. Under the Act, *Gram Sabhas* have the final word on whether the State can take away forest land for the purposes provided for in the Act, and determine the nature and extent of individual or community rights in areas they mark out. This part of the Act has been criticised because according to some authorities, the rights and duties of the *Gram Sabha* have been left indistinct and unclear, especially with regard to their jurisdiction, and no remedy has been prescribed for in instances where there is a conflict of opinions or interests of more than one *Gram Sabha*.[34] However, a detailed discussion of this issue falls beyond the scope of the paper. Chapter V

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[30] Official website of the Ministry of Tribal Affairs, Government of India, available at <http:/ /tribal.nic.in/index1.html> (Last visited on 10.02.2008).

[31] Bela Bhatia, *Competing Concerns*, Vol. XL No. 47, ECONOMIC AND POLITICAL WEEKLY 4892 (November 19, 2005).

[32] Preamble, Section 4, The Forest Rights Act, *supra* note 4.

[33] *Ibid*, Section 3.

[34] Madhuri Krishnaswamy, *One Step Forward, Two Steps Back*, Vol. XL No. 47, ECONOMIC AND POLITICAL WEEKLY 4900-01 (November 19, 2005) [*hereinafter* Krishnaswamy].

deals with offences committed by any of the authorities or nodal agencies or committees set up under this Act, and the punishment therefore. Chapter VI, the final chapter, deals with other miscellaneous provisions, namely power of Central Government to issue directions and make rules for implementation of the Act, and the composition and functions of the authorities at various levels, and others such provisions.

III. THE SOCIAL AND ENVIRONMENTAL ARGUMENTS SURROUNDING THE ACT

A. HISTORICAL INJUSTICE

Tribals have been residing in forest land for generations, cultivating and collecting forest produce. There exists an intrinsic relationship between the FDSTs and the biological resources in India. They are inseparable from, and integral to the very survival and sustainability of the forest eco-systems. Neither can survive in isolation from the other.[35]

But in colonial times and even in Independent India, demarcation of forest area was made without taking into account their rights and livelihood considerations. The problems of these communities were further compounded after passing of the Forest (Conservation) Act, 1980 when even the development activities carried out by tribals in their habitations were termed as non-forestry activities. The tribals did not have any legal documents to show that they were the traditional owners of the land, and consequently, in the eyes of the State, they came to be seen as encroachers or illegal occupants. Many tribals were left without legal entitlement to the land which was rightfully theirs, simply because the land had been snatched away from their ancestors in many unjust ways.[36] They became people without identities, and encroachers on the very land which formed the basis of their livelihood. Constant displacement of these people for 'development' projects without any effective alternative rehabilitation or livelihood has left them with no choice but to scratch out a meagre living by any means necessary, thus leading to a possibility of unsustainable use of forest resources and subsequently possible destruction.[37]

In light of these considerations, there are undeniably strong legal and ethical grounds for protection of the land rights of *adivasis* and tribals. The enactment of the Forest Rights Act is seen as a step towards correcting the historical mistake perpetrated by the British and left uncorrected by successive Governments

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[35] *Statement of Objects and Reasons*, The Forest Rights Act, *supra* note 4.

[36] Forest Rights Bill, uncorrected parliament debate (Dec 15, 2006) [*hereinafter* 'Parliament debate'] available at <http://www.vanashakti.in/images/act/forest_rights_bill_parliament_debate.doc> (Last visited on 12.02.2008).

[37] Krishnaswamy, *supra* note 34.

since independence. The Forest Rights Act, it is hoped, will give to these tribals the legal right to own, collect, use and dispose of minor forest produce. This is expected to undo the historical injustice done to forest-dwelling Scheduled Tribes whose lives were thus far controlled by the whims of the forest department.[38]

In terms of economic progress, India has come a long way since Independence. It is now recognised as one of the foremost emerging economic superpowers in the world. The proponents of 'trickle-down' economics hold that these benefits should percolate to all strata of society. Another of the important objectives of the Forest Rights Act is therefore to ensure equitable sharing of both cots and benefits arising from the establishment and management of protected areas.[39]

B. ENVIRONMENTAL DEGRADATION

The opponents of the Forest Rights Act advance their argument at two levels. At the first stage, they seek to establish the environmental benefits that flow from forests. Indeed, this particular proposition is a truism, not liable to be disputed on any account.

It is indeed true that forests act as climatic shock-absorbers, mitigating the impact of the powerful monsoon rains, and letting the precipitation seep into the forest bed, soil, and underground aquifers. The risk of flash floods increases manifold in the absence of forests. Secondly, forests bind together rich top-soil. In the event of inadequate forest cover, this top-soil can be released as in the form of mud-slides and land-slides, causing widespread loss of life and property. Thirdly, of course, forests can play a huge part in helping reduce the levels of carbon dioxide in the atmosphere and thus play a major role in slowing down the greenhouse effect.[40]

It is the second limb of the argument, however, that calls for close scrutiny. Relying on the fact that forests are fundamental to the sustenance of the human race, conservationists proclaim that the Forest Rights Act entails damaging consequences for forests, and therefore goes against national interests.[41] The most significant of their objections is that tribal encroachments are the most

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[38] *Explained: Forest Rights Act,* The Indian Express, 3 January 2008

[39] Government of India, Planning Commission, *Report of the Task Force on Social and Economic Aspects of Conservation for the Environment and Forests Sector for the Eleventh Five Year Plan (2007-2012)* [*hereinafter* 'Five Year Plan'] *available* at < http://planningcommission.gov.in/aboutus/committee/wrkgrp11/tf11_socio.pdf> (Last visited on 12.02.2008).

[40] *See generally* Thomas & Packham, Ecology of Woodlands and Forests (2007); Johnson & Lewis, Land Degradation: Creation and Destruction (2007); Pande, *Landslide Problems in Uttaranchal India: Iissues and Challenges* 15(2) Disaster Prevention and Management 247.

[41] Vanashakti, *Fallout from the Forest Rights Act* [*hereinafter* 'Fallout'] available at <http://www.vanashakti.in/the_fallout.htm> (Last visited on 12.02.2008).

important reason for degradation of forest-land. However, this particular contention is easily countered by data on rise of cultivable arable land.[42] In our opinion, the claim that conferment of forest rights to FDSTs will inevitably lead to deforestation is at best, specious and ill-considered, and at worst, malicious. In fact, it is not the tribals who are to be blamed for the countrywide destruction of forests, but rather the unscrupulous industrialists and forest contractors. Tribal people, who dwell in the forest and depend for their subsistence largely on forest produce, are actually the "most effective conservationists" of forests.[43] As we have discussed in Part IV of the present paper, there are sound economic reasons why this is so.

Furthermore, the Forest Rights Act does not in any way remove protection from forests. The existing laws will continue to apply.[44] Indeed, the Act makes conservation stronger by also giving communities the power to protect forests. By granting to the communities, the right to protect forests, the Act makes it possible for communities themselves to stop destruction of forests. Pertinently, this power is *in addition to*, not *instead of* the power that the Forest Department and other government agencies have.

Opponents of the Forest Rights Act also argue that animals living in the wild need extensive stretches of undisturbed habitat, and that any scheme which adopts the erroneous premise that these animals can 'co-exist peacefully' with huge populations of people is by definition mal-conceived.[45] However, such concerns were meticulously addressed in the Tiger Task Force Report.[46] Significantly, the report made no presumption at any level that wildlife would be required to cohabit the same space as humans. In fact, one of its primary concerns was the creation of "extensive stretches of undisturbed habitat".[47] Admittedly, some die-hard conservationists insist that the Act will have a negative impact on wildlife reserves because under the Act the tribals have been given a right to forest resources and this cannot be monitored carefully or easily.[48]

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[42] Mahesh Rangarajan, *Fire in the Forest*, Vol. XL No. 47, ECONOMIC AND POLITICAL WEEKLY 4888-90 (November 19, 2005).

[43] Parliament debate, *supra* note 34.

[44] Section 13, The Forest Rights Act, *supra* note 4.

[45] Vanashakti, *Response to the Campaign for Survival & Dignity* [*hereinafter* 'Vanashakti response'] available at < http://www.vanashakti.in/csd-response.htm> (Last visited on 12.02.2008).

[46] Government of India, Tiger Task Force, *Report: Joining the Dots* (2005) available at < http://envfor.nic.in/pt/TTF2005/pdf/full_report.pdf> (Last visited on 12.02.2008).

[47] *Ibid*.

[48] Mihir Shah, *First You Push Them In. Then You Throw Them Out*, Vol. XL No. 47, ECONOMIC AND POLITICAL WEEKLY 4896 (November 19, 2005).

However, this argument ignores that fact that these communities also have the potential to support wildlife conservation with their knowledge and experience.[49]

C. THE 'TRIBAL TRAP' ARGUMENT

There is a belief shared by many tribal communities across the nation, that any change that affects the interests of tribals, even one that is purportedly aimed at improving their condition, is perpetrated by a sovereign state that is motivated by selfish or extraneous considerations unrelated to tribal welfare, for example, foreign diplomatic exigencies, or the interests of powerful industrialist lobbies. In light of the historical treatment that tribals have received at the hands of the State, such a belief is not unfounded. Whereas the society is multicultural, with each community having its own unique culture, the law does not reflect this cultural diversity, instead incorporating and universalising the cultural standards of the dominant community alone.[50] The 'tribal trap' argument, in our opinion, seeks to exploit this very insecurity.

Opponents of the Forest Rights Act employ this argument to claim that tribals and other forest dwellers, instead of being given due opportunities for social and economic upliftment, are instead being trapped in a poverty-stricken existence as subsistence farmers, trying against all odds to eke out a living.[51] It is contended that tribals and forest dwellers, instead of being given access to progress and development, are being pushed back into forests, and unfairly being deprived of a chance to enjoy the fruits of India's economic progress. Opponents of the Forest Rights Act claim that the Act suffers from a romantic but unreal notion, namely, that the Indian tribal of today wants to live the same life of penury and deprivation that was lived by his ancestors.[52] It is claimed, therefore, that the Forest Rights Act is not a solution at all, but a continuation of the problem of tribal poverty and isolation.[53]

This claim is untenable for the simple reason that the Forest Rights Act does not, by any standards, compel tribals to live in the forests and eke out a primitive existence. The law is about the recognition of people's rights. Tribals and

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[49] M. D. Madhusudan, *Of Rights and Wrongs*, Vol. XL No. 47, Economic and political Weekly 4893-95 (November 19, 2005).

[50] Roger Cotterell, *Culture, Comparison, Community*, 2.2 International Journal of Law in Context 1 (2006).

[51] Vanashakti, *Petition to the President of India, the Prime Minister and to all Members of Parliament* [*hereinafter* 'Vanashakti petition'] available at < http://envfor.nic.in/pt/TTF2005/pdf/full_report.pdf> (Last visited on 12.02.2008).

[52] Fallout, *supra* note 38.

[53] Vanashakti response, *supra* note 41.

forest dwellers are left with perfect liberty to make informed decisions about their own lives and livelihood.[54] The Act empowers them additionally by recognising their entitlement to land that is rightfully theirs.

D. ORGANISED LAND GRABBING

More concerning is the prospect that commercial interests and rich non-tribals will successfully stake claim to the land that the Forest Rights Act seeks to vest in the tribals. Those who oppose the Act vociferously protest that forests are being gifted away in the guise of private property, and that the Act is, in effect, nothing more than an "organised land grab"[55]. It is also alleged that given the regrettable deficiency of authentic records of rights and holdings, it is highly possible, indeed, natural, that poor people will stake claims to more land than they actually occupied. The three-step procedure for recording rights is criticised as being open to large-scale misuse. Furthermore, it is asserted that Section 3(1) of the Act is a mechanism to facilitate regularisation of recent encroachments.[56]

Critics attribute these alleged shortcomings not merely to sloppy drafting or lack of foresight. They instead go a step further and claim that while the Act was envisaged with the noble intention of aiding the upliftment of the Scheduled Tribes, it has subsequently been "hijacked by politicians and vested interest groups"[57] who intend to manipulate the Act to unscrupulously fill their coffers or buttress their vote banks.

The only constructive suggestion that apparently emerges is that, rather than introducing new legislation that "create[s] a bigger wrong to try and right an existing wrong",[58] measures should be taken to ensure that the Government implements the existing legislations, presumably by expediting and completing satisfactorily the process of enquiry and settlement of rights.

However, this argument is inherently flawed to the extent that it accuses the more transparent and accountable framework set up by the Forest Rights Act as being open to manipulation, while promoting a forest settlement process where a single officer makes all decisions about land claims with no appeal whatsoever, and which, as long and painful experience has shown, is open to the worst excesses of injustice.

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[54] Campaign for Survival and Dignity, *Response to Vanashakti on Campaign's Open Letter* available at < http://forestrightsact.awardspace.com/updates/update_07.11.07.htm> (Last visited on 12.02.2008).

[55] Vanashakti petition, *supra* note 45.

[56] Vanashakti response, *supra* note 41.

[57] *Ibid.*

[58] *Ibid.*

The Vedanta mines case offers a startling example of how the present forest laws can be manipulated to ride roughshod over tribal rights. For generations, indigenous tribal groups have inhabited the forests of Niyamgiri mountain in Kalahandi District, Orissa, India. However, Sterlite Industries (India) Limited, an Indian subsidiary of the UK mining and metals company, Vedanta Resources, is in the process of obtaining environmental clearance to set up a combined bauxite mining and alumina refinery in this area.[59] Villagers claim to have been displaced from their homes, forcefully and without compensation. More pertinently in the present context, official studies have suggested that this the proposed operations are likely to lead to massive deforestation on the slopes, the destruction of protected local ecosystems rich in biodiversity, and the disruption of key water sources.[60]

In every case where projects have wrought environmental damage, the loudest protests have always come from the people whose habitats are affected. In these confrontations, their major weakness has traditionally been their lack of rights. The Forest Rights Act will, hopefully, go some way towards addressing this situation.

As far as the allegations of executive abuse are concerned, it is an undeniable fact that any legislation is open to misuse; the question is the degree of safeguards that are built into the legislation to guard against such possible misuse. The authors submit that the *Gram Sabha* constituted under this Act is far less prone to misuse than the authorities that have hitherto enjoyed discretionary powers under the existing acts. The reasoning behind this assertion will be evident from a cursory comparison of the procedure for functioning of the *Gram Sabha* laid down in the Forest Rights Act, with the scant procedural safeguards provided in prior forest-related legislation – a comparison that is enlightening, but unfortunately, beyond the scope of the present paper.

IV. AN ECONOMIC ARGUMENT FOR PRIVATE RIGHTS

A. IMPORTANCE OF LOCAL INVOLVEMENT

Despite a growing awareness among scholars and practitioners that the actions of local people play a major role in determining the success or failure of

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[59] ActionAid, *Vedanta Cares? Busting the Myths about Vedanta's Operation in Lanjigarh, India* (2007) available at < http://www.actionaid.org.uk/doc_lib/vedanta_report.pdf > (Last visited on 12.02.2008).

[60] Wildlife Institute of India, *Studies on Impact on Forests of Proposed Lanjigarh Bauxite Mining on Biodiversity including Wildlife and its Habitat* (2006) available at < http://www.freewebs.com/epgorissa/WII%20Report%20on%20Niyamgiri.pdf> (Last visited on 12.02.2008).

natural resource management schemes,[61] analyses of forest exploitation often suffer from a besetting vice: they ignore linkages to the local level.

Yet the role of people at the local level is, and has always been, crucial. It is only recently being recognised that local communities live with forests, are primary users of forest products, and create rules that significantly affect forest condition, and that their inclusion in forestry management schemes is therefore essential.[62] This need is exacerbated by the fact that national governments rarely possess the necessary personnel or financial resources to enforce their laws adequately, leading to rampant corruption in the forest bureaucracy.

The Eleventh Five Year Plan, in tune with this school of thought, undertakes to secure full and effective participation, by 2008, of indigenous and local communities, in full respect of their rights, and also the recognition of their responsibilities in the management of existing, and the establishment and management of new, protected areas.[63]

There is no question that these objectives are laudable in themselves. However, tribals have thus far been living in a state of uncertainty, under the constant threat of eviction. Their entire lives have been a "legal twilight zone".[64] They must therefore be instilled with the confidence that the rights to those benefits are secure and cannot be arbitrarily revoked or nullified.[65] This is precisely what the Forest Rights Act seeks to do. In this part, the authors will attempt to show that if the Act successfully fulfils this particular objective, it will lead to an economically efficient outcome.

B. TYPES OF GOODS

The differences between public and private types of goods do not exist merely at the semantic or theoretical level. The differences can critically affect the distribution of a forest's benefits and, ultimately, the overall condition of forest land itself. An erroneous understanding of the types of goods involved in a given resource system can lead to the design of inappropriate property rights

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[61] *See generally* ARNOLD, MANAGING FORESTS AS COMMON PROPERTY (1998); ASCHER, COMMUNITIES AND SUSTAINABLE FORESTRY IN DEVELOPING COUNTRIES (1995); BERKES & FOLKE (EDS.), LINKING SOCIAL AND ECOLOGICAL SYSTEMS: MANAGEMENT PRACTICES AND SOCIAL MECHANISMS FOR BUILDING RESILIENCE (1998); Gibson & Marks, *Transforming Rural Hunters into Conservationists: An Assessment of Community-Based Wildlife Management Programs in Africa* 23(6) WORLD DEVELOPMENT 941; HECHT & COCKBURN, THE FATE OF THE FOREST: DEVELOPERS, DESTROYERS AND DEFENDERS OF THE AMAZON (1990).

[62] *See generally* ARNOLD, COMMUNITY FORESTRY: TEN YEARS IN REVIEW (1992)

[63] Five Year Plan, *supra* note 36.

[64] Campaign for Survival and Dignity, *Open Letter to Vanashakti on Forest Rights Act* available at < http://forestrightsact.awardspace.com/updates/open%20letter%20to%20vanashakti%20final.rtf> (Last visited on 11.02.2008).

[65] Upadhyay, *supra* note 9 at 54.

arrangements, and these can in turn can create the incentive for grievous depletion rather than sustainable use.[66] Clarifying the differences and similarities between types of goods, property rights and owners is therefore an essential first step towards understanding the interaction between people and forests.

Samuelson defined public goods (or, in his terminology, "collective consumption goods") as: "*[goods] which all enjoy in common in the sense that each individual's consumption of such a good leads to no subtractions from any other individual's consumption of that good.*"[67] This is the property that current economic terminology terms *Non-rivalness*. In addition, a pure public good exhibits a second property: *Non-excludability*, that is, the impossibility of excluding any individuals from consuming the good. The opposite of a public good is a *private good*, which possesses neither of these properties. Pure public goods are therefore *non-excludable* and *non-rival*, while private goods are both *excludable* and *rival*.[68]

The dichotomy of pure public goods and private goods has remained the focus of discussion about types of goods ever since. However, it is impossible to correctly address the issue of forest rights with a simplistic theoretical foundation that extends only to the two basic kinds of goods: public goods and private goods. A more sophisticated analysis must include the other two types of goods that are created by this two-by-two typology: *club goods* (which are *excludable* but *non-rival*) and *common-pool goods* (which are *non-excludable* but *rival*).

It is especially regrettable that common-pool goods, which are difficult to produce and easy to deplete, have been often overlooked in scholarly research, since it turns out that most important environmental and natural resources on this planet are common-pool goods. They are as *rival* as private goods, but because it is difficult to control or restrict access to them (the *excludability* dimension), it is very difficult to restrict the rate at which they are consumed.[69]

While forests as a natural resource are obviously prone to depletion, the size of many forests, and the inevitable complications involved in monitoring the use of the forest and balancing one use against another, make exclusion or restrictions on access intrinsically problematic. It is therefore appropriate to think of forests as a complex of many commodities *with attributes of both common-pool and public goods*.[70]

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[66] Gibson, McKean & Ostrom, *Explaining Deforestation: The Role of Local Institutions in* People and Forests (Gibson, McKean & Ostrom, eds.) [*hereinafter* Gibson, McKean & Ostrom] 1, 5 (2000).

[67] Samuelson, *The Pure Theory of Public Expenditure 36(4) Review of Economics and Statistics 387-389 (1954).*

[68] *See generally* Ferguson and Gould, Microeconomic Theory (1989); Henderson and Quandt, Microeconomic Theory (1971).

[69] Gibson, McKean & Ostrom, *supra* note 60 at 6.

[70] *Ibid.* at 7.

C. THE TRANSITION OF FORESTS FROM COMMON PROPERTY REGIMES TO STATE-OWNED RESOURCE

Common property regimes, used by communities to manage forests and other resources for long-term benefit, were once widespread around the globe.[71] Some may have died a natural death as communities adapted to technological and economic change and opted for other arrangements. But in India, the case seems to be that they were legislated out of existence. This was done through a two fold process: (a) by simply leaving out common property in the initial attempts to formalise and codify property rights to forests, and (b) later, by the government itself in a massive nationalisation of forests.[72]

The principal justification for the elimination of community ownership of forests was that state ownership would offer enhanced efficiency in resource use and greater long-term protection of the resource. However, a survey of global economic literature reveals that in many instances around the world, the arrangements that emerged to replace common-property regimes were in fact ineffective at promoting sustainable resource management.[73] Where the people who have the physical opportunity to use certain resources lose their traditional rights to these resources, they also lose any incentive they might have had in the past to manage the resources in such a way as to maximise long-term benefit. As rational actors, they compete with each other "in a race to extract as much short term benefit from the resource as possible."[74] Equally importantly, insecurity of land tenure inevitably deters the poor from long-term investment on their land resources. Any doubt in the minds of the local inhabitants about their land rights or the recording of these rights acts as a disincentive from investing their labour and meagre capital resources on their lands.[75] Instances are therefore common where the transfer of property rights from traditional user groups to others eliminates incentives for investment, monitoring and restrained use, thus

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[71] McKean, *Common Property: What is it, What is it Good for, and What Makes it Work? in* PEOPLE AND FORESTS (GIBSON, MCKEAN & OSTROM, EDS.) [*hereinafter* McKean] 27, 34 (2000).

[72] *Ibid*.

[73] *See e.g.* Berkes, *Success and Failure in Marine Coastal Fisheries of Turkey in* MAKING THE COMMONS WORK: THEORY, PRACTICE, AND POLICY (BROMLEY *ET AL*, EDS.) 161 (1992); BLOMQUIST, DIVIDING THE WATERS: GOVERNING GROUNDWATER IN SOUTHERN CALIFORNIA (1992); McKean, *Management of Traditional Common Lands (Iriaichi) in Japan in* MAKING THE COMMONS WORK: THEORY, PRACTICE, AND POLICY (BROMLEY *ET AL*, EDS.) 63 (1992);

[74] McKean, *supra* note 65 at 35.

[75] *See generally* CHAMBERS, SAXENA & SHAH, TO THE HANDS OF THE POOR: WATER AND TREES (1989).

exacerbating the very inefficiencies and resource depletion that were sought to be prevented.[76] India offers an acute case of this sequence being played out in response to the nationalisation of common-property forests.

D. PRIVATE PROPERTY RIGHTS AND THE FOREST RIGHTS ACT

Policymakers have lately awoken to the importance of property rights in affecting environmental outcomes. They are currently in the process of engineering radical changes in property rights arrangements in transitional economies. The objective of this exercise is to increase efficiency, to enhance the incentives for investment, and most crucially in the case of environmental resources, to create the incentive for resource protection and sustainable management.[77]

Private property rights are those "that are clearly specified (not vague), secure (not subject to whimsical confiscation), and exclusive to the owner of the rights."[78] Vague, tenuous, or nonexclusive rights are not fully private. Private property arrangements are, in most circumstances, regarded as the most desirable form of property, because they can encourage protection and investment in the goods to which they attach.[79] It is also believed that they promote long time horizons and responsible stewardship of resources.[80] The benefits that accrue from such a transition are hard to deny, unless of course one questions the fundamental premise that wasting human effort or natural resources is unjustifiable. The Forest Rights Act, on the same lines, seeks to address the inefficiencies wrought by nationalisation by conferring private property rights to FDSTs.

V. CONCLUSION

As is the case for any nascent Act, there are loopholes in the Forest Rights Act that remain to be plugged. Ironically, tribals themselves have expressed discontentment with certain provisions of the Act, alleging that the government has reduced the scope of the law to retain its powers over forests and their resources. However, since the present paper is primarily concerned with issues of conservation, these issues fall outside its scope. There also are requirements that have to be met at the level of implementation if the rights that the Act seeks to

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[76] Agrawal, *Rules, Rule Making and Rule Breaking: Examining the Fit between Rule Systems and Resource Use in* RULES, GAMES, AND COMMON POOL RESOURCES (OSTROM, GARDNER & WALKER, EDS.) 267 (1994); McKean, *Success on the Commons: A Comparative Examination of Institutions for Common Property Resource Management* 4(3) JOURNAL OF THEORETICAL POLITICS 247 (1992); NETTING, BALANCING ON AN ALP (1981); Ostrom, *An Agenda for the Study of Institutions in* 48 PUBLIC CHOICE 3 (1986); THOMSON, A FRAMEWORK FOR ANALYZING INSTITUTIONAL INCENTIVES IN COMMUNAL FORESTRY (1992).

[77] McKean, *supra* note 65 at 28.

[78] Gibson, McKean & Ostrom, *supra* note 60 at 5.

[79] *Ibid.* at 6.

[80] McKean, *supra* note 65 at 30.

confer are to be crystallised not only in letter but also in spirit. In relation to the concerns voiced by conservationists, though, and in light of the arguments discussed above, the authors hope to have amply established that the dire predictions of environmental disaster are largely unfounded. The economic argument is especially convincing, as it turns the deforestation argument on its head, postulating that resources will in fact be conserved and utilised more efficiently if the tribals enjoy private rights. Hence, we submit that if the allocation of private property rights occurs in the optimal manner, tribal welfare and forest conservation will be seen as complementary goals, and not opposing goals as the polemic surrounding the Forest Rights Act would seem to suggest.