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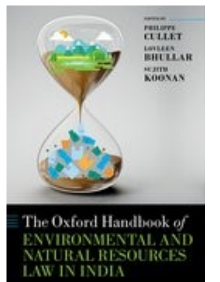

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CHAPTER

24 Forest Management and Conservation Regime

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Abstract

Forest conservation involves ensuring sustainability in use-priority areas, preservation in biodiversity-priority areas, and regulation of the conversion of forests to non-forests. But forests provide multiple benefits to multiple stakeholders at multiple scales, and hence trade-offs between these benefits result in tradeoffs between stakeholders. Forest governance therefore requires addressing questions relating to the use, preservation and conversion of forests while incorporating the interests of multiple stakeholders. This chapter describes how these questions were resolved under the statist forest governance regime that prevailed during the colonial and post-colonial epoch, till the passage of the Forest Rights Act, 2006. An overview of the basic legal framework is followed by a description of key variations, nuances, and shifts over time in each. An assessment of this governance regime is then presented in terms of the fairness of priorities chosen for forest management, including attention to customary rights and social justice, effectiveness, sustainability and transparency and accountability in functioning.

Keywords: Forest governance, sustainable use, forest diversion, customary rights, equity, social justice, transparency, accountability, colonial forestry

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Introduction: Forest Conservation and Management

'Forest conservation' is a broad concept, covering at least three dimensions: sustainable use of forests,[1] p. 466 preservation of wildlife or biodiversity (often implying lower levels ↳ of use), and the prevention or regulation of the conversion (both legally and illegally) of forests to non-forest land uses. Decisions about these three dimensions—whether to use, preserve or convert—are related to the different values or stakes that society may ascribe to having forests in the landscape—their direct tangible use benefits (such as timber, firewood or grazing), their indirect tangible benefits (such as soil conservation or carbon sequestration), and their intangible benefits (cultural value, recreational value, biodiversity value). Moreover, these benefits accrue to (or may be appropriated by) different stakeholders. This is especially the case in a country such as India, with a long history of millions of *Adivasis* and non-*Adivasis* residing in, dependent upon and culturally linked to forests and an enormously rich biota that has co-evolved with human presence over millennia,[2] and a more recent one of state interest in high-value products, or modern 'environmental' concern about the indirect and the intangible benefits. Forest 'management', which refers to specific actions relating to the protection and manipulation of the forest biota and landscape, may take many forms depending upon the benefits to be maximized. Forests may be managed to maximize timber production or a combination of firewood, grazing, and non-timber forest products, or prioritize the needs of wildlife, or (in the modern era) simply for carbon sequestration. In other words, forest management is shaped by the goals, processes, and institutions of forest conservation, which constitute forest governance. Forest conservation, however, must also engage with the process of conversion of forest land to other uses.

Any forest governance regime must, therefore, provide explicit or implicit answers to multiple questions relating to the three dimensions of conservation, that is, use, preservation, and conversion/non-conversion. These questions include: what constitutes sustainable use, conservation or conversion, whether and where to prioritize sustainable use versus conservation and where to permit conversion, who will manage the forest on a day-to-day basis given its spatial spread and complexity, through what process should decisions about assigning and changing priorities or about forest conversion be taken, and so on.[3] Furthermore, given the long history and ubiquitous presence of forest-dwelling or forest-dependent communities, one would naturally expect that they would have a formal role in the legal regime for forest conservation and management.

In India, however, the approach to the making of laws relating to all three dimensions of forest conservation falls into two epochs—a statist approach that began in 1865 under colonial rule and continued till 2006, and a new rights-based approach that has been pioneered by the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA). For the sake of compactness, the FRA is discussed separately in chapter 25, and the legal arrangements around wildlife conservation are discussed in chapter 26. This chapter will focus on the laws preceding the FRA that are premised on forest management and p. 467 conservation by the state and primarily focused ↳ on management for production and regulating conversion. The chapter begins with an overview of the basic legal framework for state management of forests that was set up by the colonial government starting in1865, then highlights important nuances, regional variations, and recent modifications in this framework before outlining the framework that emerged starting in 1980 for regulating forest conversion. Finally, an assessment of the socio-ecological outcomes produced by these management and regulatory frameworks is presented, which leads to insights into the kinds of changes that may be desirable.

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24.1 Basic Legal Framework

The legal framework in India that enables state-led forest management is grounded in the colonial-era Indian Forest Act (IFA) of 1927 (built on its predecessor, the Forest Act, 1878[4] that laid the groundwork for colonial forestry in the country). The IFA continues to be in force in most states or has been copied with slight changes into eight state Forest Acts, namely, Andhra Pradesh, Assam, Jammu and Kashmir, Kerala, Karnataka, Orissa, Rajasthan, and Tamil Nadu. In brief, the IFA (and the state laws) (a) gives the state the legal authority to constitute three legal categories of forests (Reserved, Village and Protected), (b) declares certain valuable forest produce as state property, and (c) empowers the representatives of the state (forest officers) to regulate the use of and protect these forests (including their wildlife), and to manage, extract, and sell state-owned forest produce.

Reserved Forests (RFs) are fully controlled by the state, with trespass prohibited, while Protected Forests (PFs) are state-owned but with less strict regulation, so that entry into PFs does not require prior permission. Village Forests (VFs; carved out of RFs) would be RFs where managerial authority would be delegated to village councils (although VFs have almost never been notified). The IFA also empowers the state to notify privately held forested lands as Private Forests and thereby regulate their management. Supplementary laws passed after Independence primarily provided for (a) stricter regulation of Private Forests (various state Private Forest Acts) and (b) state ownership and regulation over certain valuable minor forest produce or non-timber forest produce.[5]

The IFA lists forest offences (actions prohibited in RFs—extendable to PFs) and vests very substantial powers with the forest officers, even more than those with policemen: power to arrest without warrant, power to release on a bond a person arrested, power to prevent commission of offence, power to try offences summarily, power to compound p. 468 ↳ offences, and at the same time power to issue a search warrant and power of a civil court to compel the attendance of witnesses, and so on.[6] Indeed, being a parallel police force, much of the training of foresters is focused on understanding the principles and practice of criminal law because they use it constantly in their policing of the forest.[7]

Regarding prevention/regulation of forest conversion, one may assume that illegal deforestation (clandestine conversion of state forests to non-forest uses) can theoretically be prevented by the state forest officers exercising the powers given to them in the IFA. But the question of legal deforestation (conversion of state forest by the exercise of the state's power to 'de-notify' forest land, which is concomitant with the power to notify it in the first place) is more complicated. During colonial rule, the process (often called 'dis-forestment') was negotiated between the Forest and the Revenue Administration. Post-Independence, this power to de-notify RFs/PFs vested with the state governments because forests were in the State List of the Constitution of India, 1950, and the states were rather liberal in granting such conversion, both for development projects like dams and for agriculture.[8]

The Forty-second Constitutional Amendment of 1976 moved forests to the Concurrent List of the Constitution, and this enabled the central government to pass the Forest (Conservation) Act of 1980 (FCA), which requires[9] that 'de-reservation' or 'diversion' of forest land to non-forest purposes or 'clearing of forest land natural tree growth' be done only after concurrence from the central government.[10] A Forest Advisory Committee is constituted by the Ministry of Environment, Forest and Climate Change (MoEFCC) for considering and making recommendations regarding all such proposals.[11] The FCA also introduced the concept of 'compensatory afforestation', stipulating that the permission to divert for non-forest uses would be contingent on equivalent areas being afforested to compensate the forest lost.[12]

A major modification to the scope of the FCA was made by the Supreme Court of India in its 1996 orders in the famous *TN Godavarman Thirumulpad v Union of India* case.[13] Noting that many physically forested lands had been left out of the FCA's p. 469 ↳ regulatory ambit because they had not been legally notified as either

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RF/PF/VF, etc., the Court extended the scope of the FCA to all lands, whether legally notified as forest or matching the 'dictionary definition' of forests. This has led to the creation of another category of forests ('deemed forests') where the land has not been legally notified as 'forest' under the categories defined in the IFA or state forest acts but fits the dictionary definition; hence, if it has to be diverted for non-forest uses, the FCA requirements would apply.

A second major modification introduced by the Supreme Court in 2002[14] in the FCA process was based on the argument that compensatory afforestation, which created plantations on equivalent land, could never adequately compensate for the loss of natural forests. Therefore, the project proponent (who was seeking the diversion of forest land) must not only pay the cost of compensatory afforestation but also pay the 'Net Present Value' (NPV) of the forest diverted, which would be far higher, ranging between INR 580,000 and INR 920,000 per hectare. Furthermore, the Court ordered all these funds to be deposited into a central Compensatory Afforestation Fund (CAF) rather than being paid directly to the states.

In short, the broad legal framework for management is one of state ownership of the forest and all its produce and the granting of police powers to the Forest Departments to protect the forest and obtain revenue from forest products. For regulation of conversion, the police powers were to prevent illegal conversion of rich forests, while initially, legal conversion of poorer quality forests was permitted by the states and even encouraged. Since the 1980s, the procedure for conversion has involved the central government and required meeting several conditions including compensatory afforestation. With the Supreme Court's interventions, the applicability of the FCA has expanded, the cost of conversion has increased, and the process has become even more centralized.

24.2 Reading Between the Lines: Key Nuances, Shifts, and Assumptions in the Forest Management Framework

The above broad brush picture hides many of the complexities and regional variations that remain ingrained but are often hidden from a superficial perusal of the legal framework.

p. 470

a) Most of the landscape in the north-eastern states, dominated by Scheduled Tribe communities, is left out of the purview of the IFA,[15] as the states have special status under the Constitution,[16] and are also covered under the Sixth Schedule of the Constitution, giving their community institutions complete control over their lands, including the right to practice shifting cultivation which is banned in the rest of the country. These lands are administratively classified as 'unclassed forests' by the Forest Departments.

b) The IFA does not specify the physical condition of land that can be designated as RF or PF by the state: any land over which the government has proprietary rights can be declared RF/PF. In other words, RF/PF are legal classifications of land that vest the substantial powers over them provided in the IFA to Forest Officers (that is, to the Forest Department). So we see Himalayan glaciers or rocky outcrops in the Western Ghats, alpine or desert grasslands or even water bodies like urban lakes being designated as RFs/PFs.

c) Conversely, the IFA only empowers the state to notify lands as RFs and PFs, but the state may choose not to, and even in provinces directly administered by the British, many forested lands were left un-notified as a buffer for future expansion of agriculture.[17] Moreover, much of India was then under princely states, not directly administered by the colonial government, and each princely state had its own framework of forest law that only approximately matched the IFA and consciously left many forested areas for local use or agricultural expansion.[18] The Supreme Court's order in the *Godavarman* case mentioned above was explicitly aimed at bringing all such non-notified forested lands under the

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stricter regulation regime of the FCA. This required the identification of so-called ‘deemed forests’,[19] including the unclassed forests of north-eastern India and various categories of land under ‘revenue classifications’ such as *chhote jhaad ka jangal* in Central Province, *zudpi jangal* in Maharashtra, or the Assessed Waste Lands of South Canara. The *chhote jhaad ka jangal* had in fact become a terrain of dispute between ↳ the Revenue and Forest administration earlier, resulting in the Orange Areas of Madhya Pradesh and Chhattisgarh.[20]

d) On paper, the IFA provides for an elaborate process for ensuring that the declaration of land as RF/PF does not abridge any person’s or community’s prior rights. Sections 4–20 spell out steps for notifying a RF and section 29(3) for a PF. However, section 29(3) also provides an escape clause that allows land to be notified as PF ‘pending’ inquiry and record (or settlement) of such rights. Furthermore, the entire mindset of the colonial and post-colonial forest administration has been that the forest resources of the country always (historically) belonged to the government of the day. Being ‘super-abundant’, they were looked upon as ‘waste’ and used by villagers adjacent to the forests, but such use was only tolerated by the state and was never recognized as a ‘right’.[21] Therefore, in practice, in the declaration of RFs and PFs, very few rights were ever admitted and recorded, especially in good quality forests that were notified as RFs; most other customary use was treated as a ‘privilege’.[22] Even where extensive customary rights have been recognized in colonial law, such as the Chhota Nagpur Tenancy Act of 1908 where the *Mundari khuntikattidar* (effectively village headman) had the rights to manage the entire village lands as a trustee of the community, post-Independence notifications subsumed these lands under PFs.[23]

e) In particular pockets, however, the colonial rulers had to compromise with the resistance, protest, and even rebellion by local communities to the takeover of their forests.[24] This resulted in a complex tapestry of localized ‘rights and privileges’ recognized under various state-specific laws on the forested landscape and which continue today under the ‘savings’ clauses of the new state forest acts. For instance, the *soppinabetta privileges* of the erstwhile North Canara district recognized by the erstwhile Bombay Presidency and in other districts by the erstwhile Mysore Princely State or the *kumki privileges* in South Canara district of Madras Province were recognized as far back as the 1890s and have been ‘saved’ at the time of the passing of the Karnataka Forest Act of 1963.[25] These privileges provide exclusive usufructuary control over forest patches to certain individuals or groups of individuals on the basis of their ownership of particular agricultural lands and have virtually become rights. In Central Province, *nistari* (usufruct) rights of ↳ firewood collection and grazing were extensively recognized, not only for villagers having forests inside their boundary (where they were codified in *nistar patraks* or registers) but even for distant villages. A major exception to state forestry was made in the Kumaon region of the erstwhile United Provinces, where, following multiple and sometimes violent protests,[26] the creation of *Van Panchayats* (village forest councils) was enabled,[27] and villagers were permitted to manage their forests themselves outside of the IFA.[28] None of these ‘deviations’ from the simple classification of RF/PF/VF/Private Forest is apparent when perusing any summary of forest law in India, but may become apparent when one scrutinizes the ‘forest manuals’ of individual states,[29] or other records on the ground.

f) The IFA does not spell out the objectives for which the RF/PF must be managed. The objective for the colonial state was clear: maximizing timber harvest and, indirectly, revenue generation, much of which was achieved by clear-felling multi-species natural forests and replacing them with single-species stands of teak or pine.[30] Sustaining timber yield was a secondary objective. Although again not mentioned in the statutes, the administrative requirement of managing harvest as per ‘Working Plans’, drawing upon principles of forestry developed in Europe, is assumed to ensure sustainability. The Supreme Court, concerned though it has been about forest conservation, only imposed the

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requirement that all felling of trees in forests must take place only under a Working Plan approved by the central government but did not explicitly impose any sustainability requirement.[31]

g) The National Forest Policy of 1988 (NFP88) sought to re-shuffle the priorities of state forest management, prioritizing 'maintaining environmental stability … and ecological balance', and declaring that the 'derivation of economic benefit must be subordinated to this aim'.[32] It also acknowledged the need to meet 'the requirements of … the rural and tribal populations'.[33] This had been preceded by a number of states (especially in the Himalayan and Western Ghats region) passing administrative orders prescribing a 'green felling ban', that is, no felling in natural forests. But felling continues there in forest plantations already created, and most central Indian states continue logging in natural forests. The NFP88, not having the status of a law, does not prevent such felling.

p. 473

h) ↳ The NFP88, however, also mooted the 'creation of massive people's movement' for the regeneration of degraded forest lands, and this was followed by a central government circular in 1990 to all states[34] asking them to initiate participatory or 'joint' forest management programmes (JFM). Officially, JFM exists today across almost all states but has neither received statutory status nor has it significantly altered the objectives of forestry or empowered villagers to manage forests for their own benefits.[35]

i) With the emergence of climate change as a major environmental issue, the role of forests as ecosystems as repositories of carbon and, therefore, afforestation as a process that can sequester additional amounts to mitigate climate change has gained attention, especially in international discourses.[36] The government of India committed in the 2015 Paris Agreement to sequester a significant additional amount of carbon dioxide through afforestation and forest improvement. This international commitment is almost equivalent to a statutorily set objective for the forest sector. The central government attempted to incorporate this objective in a revised National Forest Policy draft in 2018[37] but had to shelve the draft amidst many objections, including by its own Ministry of Tribal Affairs.[38] Nevertheless, carbon sequestration has become a major additional goal of state forestry in India, apart from biodiversity conservation (limited to protected areas) and timber/softwood production, as, for example, it shows up in projects supported by international donors//lenders in this sector.[39]

j) Furthermore, although the IFA does not mention a 'forest department' at all, the creation of an Imperial Forest Service in 1869, renamed the Indian Forest Service in 1920, laid the foundation for a separate cadre of officers to run the provincial forest departments. Although discontinued in 1932, the Indian Forest Service (IFS) was reinstated in 1966 and is considered an 'All India Service' under Article 312(1) of the Constitution. All senior positions in state/union territory Forest ↳ Departments are staffed by IFS officers, as are all senior forest-related positions in the central Ministry, and their training and socialization are meant to create an elite group that swears by the 150-year-old (colonial) legacy of 'scientific' state-controlled forestry.[40]

p. 474

k) Finally, through gradual changes in 'service rules', this elite group also staffs all senior positions in institutions of teaching and research related to forestry, thereby controlling the production of formal knowledge on forests, heads the forest monitoring agency (the Forest Survey of India) thereby controlling the evaluation of outcomes, and heads the Compensatory Afforestation Fund Management and Planning Authority (CAMPA) committees that disburse funds to their own departments. IFS officers are often also appointed to key positions in central and state tribal welfare departments as they are seen as the only officers with field experience in tribal areas.

In short, there is some regional variation in the implementation of the basic legal framework of state forestry, with the northeast largely left out of its ambit. In areas with full state control, the objective of

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management for more than a century was exclusively timber and other product extraction; post-NFP88, some dilution of this focus is visible without any statutory redirection. There is local nuance and concession to local needs through the recognition of usufructuary rights (in pockets) and privileges (on a wider scale), but almost nowhere is there a recognition of villagers' customary rights to *manage* the forest as per their needs (the exception being *Van Panchayats*). Management decisions and concomitant police powers rest solely in the hands of state Forest Departments, run by officers of the IFS, whose authority has gradually expanded beyond management into policymaking, funding, and even other sectors. The next chapter will show that the FRA seeks to radically shift these arrangements, although with limited success in the fifteen years of its implementation.

24.3 Reading Between the Lines: Gaps and Shifts in the Framework Regulating Forest Conversion

The legal framework for regulating forest conversion also has many nuances and has gone through several shifts over time that are not apparent from a superficial perusal.

p. 475

a) The FCA contains no guidance on when a proposal to divert forests for non-forest use should be *rejected*. It only provides guidance on what procedures need to be completed for the proposal to be considered. The key step is the identification of land for compensatory afforestation and agreeing to pay the compensatory afforestation costs (and post-*Godavarman*, the NPV). The only substantive criterion is the suggestion that forests that fall within sanctuaries or national parks or are a habitat for threatened species of flora or fauna *might* not be diverted.[41] Attempts to define 'no-go' areas other than sanctuaries and national parks have not made headway. Since 2014, an administrative 'decision support system' has provided inputs for identifying 'inviolate' or high conservation' areas under an administrative order.[42]

b) As per the Forest (Conservation) Rules, 2022 (FC Rules), decisions regarding 'small' diversions (less than five hectares) and 'linear projects' (diversion of land for roads, railways, pipelines, and transmission lines) can be taken by a regional empowered committee. [Note: This chapter was written before the Forest (Conservation) Amendment Act 2023 was passed and so this Act and its implications are not discussed in this chapter.]

c) From an initial position requiring that compensatory afforestation be carried out close to the location where the forest is proposed to be cut down or at least in the same district to permitting it anywhere in that state, the FC Rules, 2022 permit 'Accredited Compensatory Afforestation' where land from anywhere in the country can be considered for compensatory afforestation for a particular project.

d) There has been a lengthy back and forth between the Supreme Court and the central and state governments on the question of the under-utilization and mis-utilization of compensatory afforestation funds, and the need for a proper mechanism to distribute these funds to the states and monitor their use.[43] The Court forced the setting up of a statutory authority to administer the CAF; the CAMPA bill was passed by the Lok Sabha (Lower House of Parliament) in 2008 but came into effect only in 2016 because of opposition in the Rajya Sabha (Upper House). The structures for deciding how to spend these funds are effectively in the hands of the forest bureaucracy, although the Supreme Court continues to want a say in how these funds are utilized.

e) In terms of who decides on forest diversion, the process laid down in the FCA is obviously centralized, technocratic, and state-dominated. The proposal is forwarded by the state government with comments from their Forest Department. The Forest Advisory Committee (FAC) consists overwhelmingly of technocrats (five bureaucrats[44] and three 'independent' experts from the fields of

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p. 476

'mining, civil ↳ engineering and development economics'),[45] so there is little chance of the socio-environmental impacts of forest conversion being taken into consideration, notwithstanding a prolonged tussle between the Supreme Court and the MoEFCC as to the composition of the FAC.[46]

f) The strongest challenge to this technocratic and centralized process came from the passing of the FRA in 2006, which, *inter alia,* recognizes access and management rights of forest-dwellers over forests. Consequently, the diversion of such forests to non-forestry uses would require either their consent or compensation of their rights. The first attempt to incorporate this requirement in the forest diversion process is a 2009 order.[47] Subsequently, in *Orissa Mining Corporation v MoEFCC*,[48] the Supreme Court confirmed the need for considering the opinions of affected forest-rights holders prior to deciding on any proposal for forest diversion. The FC Rules were therefore amended in 2014 and 2017 to incorporate the 2009 order, requiring that the process of recognition of forest rights be completed, and the informed consent (or otherwise) of the *Gram Sabha*s be sought. The MoEFCC tried to dilute this requirement in various ways, such as exempting 'linear projects' (railway lines, highways, transmission lines and pipelines) from this requirement of *Gram Sabha* consent, but this exemption was struck down by the High Court of Andhra Pradesh in 2019.[49] However, the FC Rules, 2022 have relegated the consent requirement itself to a footnote, with the process of FRA 'compliance' (not rights-holders' consent) to be carried out in parallel or even after forest clearance has been given.

In short, the process regulating forest conversion began as an attempt by the central government to regulate what seemed like an overly generous approach of state governments to forest conversion to non-forest uses. But over time, with economic growth taking the front seat, the central government itself has diluted these provisions to allow so-called 'development' projects to get forest clearance easily. We shall now assess the outcomes of this shifting framework for management and conservation.

p. 477

24.4 Assessing Outcomes of the Legal Framework for Forest Management and Regulating Conversion

To assess the effectiveness of any legal framework for forest conservation, it is necessary to spell out first the normative dimensions along which one would carry out such an assessment. Forests provide multiple benefits to multiple stakeholders at different physical and social distances from the forest, starting from historical forest-dwellers who benefit in many material and cultural ways from the forest, downstream beneficiaries of hydrological services, national beneficiaries of forest products, and national and global beneficiaries of biodiversity and carbon sequestration. Moreover, and perhaps most importantly, these benefits cannot be simultaneously maximized; trade-offs are inevitable.[50] For instance, logging the forest for timber to supply to the urban economy will reduce the availability of many non-timber forest products harvested by the local community and will also affect wildlife adversely, not to mention reducing the amount of carbon sequestered in the forest vegetation and soils. Logging may also open up the forest for invasion by exotic species such as *Lantana camara*, thereby jeopardizing the natural regeneration of the forest as assumed in a logging plan. Clear-felling natural forest and replacing it with single-species plantations of teak or pine or more exotic species such as eucalyptus or *Acacia auriculiformis* may generate high volumes of timber or softwood but decimates biodiversity and provides almost nothing of use to local communities. Alternatively, managing the forest to maximize the production of small timber, firewood, fodder, grazing availability, and other non-timber forest products would result in a forest that is significantly different from an 'old-growth' forest, with intermediate levels of biodiversity and limited availability of large timber. If the priority is wildlife conservation, then logging must be banned (as it is in India's protected areas), and local use may have to be modified.

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Therefore, to assess the 'effectiveness' of a forest conservation regime, one has first to know which of the competing objectives is forest conservation aimed at, that is, forest conservation 'for what?' and therefore 'for whom?'.[51] Note that the objectives may not be singular but a mix in which highest priority is given to different objectives in different locations. For instance, wildlife conservation may be prioritized in certain locations without implying complete displacement of local needs or communities. Moreover, land used for p. 478 forests also has opportunity costs, and therefore, a forest conservation regime ↳ must include mechanisms to determine when and where society may prefer to allow their conversion to non-forest uses.

The *effectiveness* of a legal regime will then refer to the extent to which particular priorities are achieved. The regime will also have to be assessed in terms of *sustainability*, that is, whether it promotes the continued availability of the prioritized benefits over time—whether timber, grazing or carbon. But, the setting of the priorities themselves involves considerations of *fairness* in the distribution of benefits across stakeholders. It would also include considerations of *customary rights*—whose rights? And who came first?—and also of *social justice*—which stakeholder is socio-economically the weakest and therefore more deserving of benefits? Clearly, in the Indian context, fairness from all perspectives (custom, social justice, and even aggregate social welfare) would mean that the interests and rights of the forest-dwellers, who have been historically living in and been materially dependent upon and culturally attached to the forests, ought to be given priority in most places. Finally, from the perspective of governance in a democratic country, the legal framework must be assessed in terms of the balance of discretionary power and *accountability* that it strikes, the *decentralization* it achieves in management, and the extent of *public voice* it provides in decisions regarding conversion.[52]

From this multidimensional point of view, the flaws in India's legal framework set up for state forest management and conservation are glaringly obvious.

a) **Premise of state ownership and control and consequent historical injustices**: The entire framework of 'state' ownership and management originated in the colonial interest in appropriating forest resources for colonial purposes, which after Independence was simply replaced by the goal of meeting 'national needs'.[53] This meant exclusion of local users from prime forests and at best 'tolerance' towards them in other forests. But given the ubiquity of forest-dwelling populations, their customary practices and their needs, this also meant the suppression of all shifting cultivation across mainland[54] India, extinguishment of customary rights to access forests and to collect of forest produce in most places and limiting them to paltry 'privileges', and criminalization of any attempts to satisfy needs beyond these privileges. The de-recognition of customary tenures led not only to the local community not being able to meet its needs, but also their alienation from the responsibility of protecting and sustainably managing forests. The founding concept of 'state ownership' of forested land, rooted in the idea of a vast unpopulated wasteland or pristine forest, thus guarantees enormous structural injustice—one of the major 'historical injustices' flagged in the FRA.

p. 479

b) ↳ **Extra layers of injustice**: A further dimension of historical injustice was added in the creation of 'Forest Villages',[55] where itinerant *Adivasis* were forcibly settled,[56] and they were forced to carry out free labour for the Forest Department in 'return for' the right to cultivate some land, which continues to be designated as 'forest land'. Even today, all rural development schemes and programmes in such Forest Villages are implemented only through the Forest Department.[57] Till the passing of the FRA in 2006, only one state (Maharashtra) had abolished Forest Villages and even post-2006, the process has barely begun in three states (Chhattisgarh, Odisha, West Bengal). Non-recognition of cultivated lands and habitation due to the peremptory declaration of land as RF/PF without adequate enquiry and rights settlement (even as prescribed by the IFA) has been another widespread form of historical injustice which the FRA attempts to redress (see the next chapter).

c) **Absence of legally mandated substantive goals**: The legal framework, even post-Independence,

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remains focused on establishing or perpetuating state control and provides almost no substantive goals or criteria for how forests should be managed. It does not statutorily require the conservation of *natural* forests. The colonial focus on timber extraction, therefore, remained till well into the 1980s and continues in many parts of the country even today. Even sustainable harvest is not a statutory requirement. The National Forest Policy of 1952 first articulated the need to ensure sustainable harvests and suggested using Working Plans to ensure this. The procedural requirement, now made virtually statutory by the Supreme Court, is that felling be done as per an approved Working Plan, which assumes that Working Plans ensure sustainability. In the absence of independent scrutiny (for reasons outlined above) of the science behind and the actual implementation of Working Plans, the assumption remains untested, but the evidence available suggests otherwise.[58] Moreover, the conversion of natural forests to single-species plantations—which has taken place on a large scale in the country—does not come under the sustainable harvest criterion: it is a question of priorities regarding what kind of benefits to maximize from a 'forest'. Thus, historical clear-felling and conversion of natural forests to plantations across the country, continued logging of natural forests in many parts, continued adherence to outdated methods of estimating sustainable yield without field verification,[59] and repetition of the same format and 'resource inventory' approach in the National Working Plan Code p. 480 ↳ of 2014,[60] without explicitly debating and deriving different prescriptions for different objectives, have ensured that neither the productivity nor the biodiversity of the country's forests have been sustained.

d) **Decentralization**: Meeting the needs of local communities was never a priority in the legal framework; therefore, assessing effectiveness vis-à-vis this objective is pointless. The important thing to note is that in a country of this size with a very large forest-dwelling and forest-dependent population and a long history of customary tenure, the idea of decentralizing day-to-day management—in even part of the landscape—into the hands of the local community was never taken up seriously, despite the Village Forest chapter in the IFA. The Madras Presidency experimented at a small scale, first with VFs and then with similar '*Panchayat* Forests', but the VF experiment was short-lived and the *Panchayat* Forest experiment was also deemed unsuccessful and wrapped up (ironically) after Independence, with the Andhra Forest Act, 1957 dropping the VF chapter entirely.[61] Similarly, the princely state of Mysore and even Bombay Presidency had allowed the formation of some VFs in Shimoga and North Canara districts respectively, but these were dissolved after the passing of the Karnataka Forest Act, 1963, even though the Act had a VF chapter. Only two villages managed to obtain a stay on their dissolution and continued to protect and manage their forests.[62] JFM never went beyond the status of a superficially participatory programme run and controlled by the state Forest Departments.[63] Attempts to provide JFM with legal status were taken up only in the state of Karnataka by introducing an additional section for JFM committees in the VF chapter,[64] but even this amendment was never used.[65] It is only with the passing of the FRA and the recognition of Community Forest Resource rights under its section 3(1)(i) in a few states[66] that statutorily recognized and reasonably autonomous and democratic village-level forest management has come into existence in mainland India. Legal mechanisms for addressing intra-village inequities or inequities between settled villagers and nomadic communities that may have historically been using those forests are, however, yet to be put into place.

e) **Democratic accountability and transparency**: The (colonial-origin) legal regime also provides state forest officers with an enormous amount of discretionary p. 481 ↳ police power over largely illiterate and socio-economically marginalized forest-dwellers without proportionate accountability. Even in the post-Independence period, accountability to a democratically elected state government has translated into limited real accountability, as a powerful forest bureaucracy and elected governments in which forest-dwelling communities (especially *Adivasis*) were hardly represented, have continued to ignore the enormous oppression and injustice that have been perpetrated—the scale of which is

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only now being documented.[67] In addition to this gross misuse of power, the forest bureaucracy wields its powers in other unaccountable ways, such as not making all its documents including Working Plans and maps available in the public domain, not permitting independent reviews of the outcomes of their forest management activities, arbitrary delays and refusals in giving permission to carry out scientific research in forested areas,[68] and as mentioned above, being the policeman, the proprietor, the funder, the monitor, and the policy-maker all rolled into one.

f) **Conservation/diversion criteria**: The FCA curbed the power of the states to denotify forests and asked for some information (whether the area overlapped with a Protected Area; whether 'any rare/endangered/unique species of flora and fauna found in the area'[69] and even the 'cost-benefit analysis' of the project!). But it laid down no criteria for deciding in favour or against diversion using this information, and there is no record of the cost-benefit analysis ever being discussed. Implicitly, PAs were not to be diverted, but no-go areas beyond PAs were never identified. The attempt to use multiple criteria with the help of a computerized decision-support system since 2014 is a step forward, but there has been no public scientific debate on the criteria or how they would be operationalized. There is no official position on whether the purpose of diversion is to be given any consideration. Implicitly, however, 'developmental' projects (both public and private sector) have been prioritized while livelihood projects (such as diversion for agriculture) have been rejected.[70] Following the demand for NPV, the question of proposing diversion for agriculture by peasants simply did not arise. An analysis of six months of forest clearance decisions (January-December 2019) showed the rejection rate to be less than 2.5 per cent (most on procedural grounds), and more than half the approved diversions were in dense or very dense forest.[71]

p. 482

g) ↳ **Conservation/diversion process**: There have been multiple and repeated critiques of the process by which the permissions for diversion are given. First, given the size and diversity of the country, a set of experts sitting in the national capital can never on their own check the veracity of information submitted—such as whether information regarding forest quality and wildlife presence/absence is accurate. They need information from local concerned citizens, but the local public hearings are absent from the process; the process depends entirely on information provided by the forest bureaucracy. Second, the absence of a voice for those directly affected by the diversion, namely, the customary users of the forest, was a glaring gap for almost thirty years before the 2009 order required that the consent or otherwise of holders of forest rights under the FRA be recorded. Unfortunately, notwithstanding the judgement in the *Orissa mining* case, this order has been observed only in its breach.[72] Certifications that the FRA process is complete have been issued by Collectors without Community Forest Rights having been recognized or communities even being informed of these rights in the FRA, and where consent has been obtained, it is often found to be fraudulent.

h) **Compensation for diversion**: The idea of compensatory afforestation was a legislative innovation. But its implementation left a lot to be desired. The afforestation did not often take place in practice; it involved only monoculture plantations; it happens on village commons already under use without consulting the users; and the charging of NPV over and above the cost of compensatory afforestation is flawed for multiple reasons: the compensatory forest will over time surely produce some of the lost benefits, the NPV amount charged has a weak empirical and conceptual foundation (involving double counting and miscounting), and the NPV amount is not shared with the actual stakeholders who lose the forest benefits,[73] as the Supreme Court rejected the recommendations of its own Committee.[74]

i) **Federalism**: The IFA, a colonial creation, was no doubt a central act, but it co-existed with several state acts and regulations that were somewhat adapted to the local context.[75] Post-Independence, one would have expected much more regional specificity since forest was a state subject under the Constitution. But this did not transpire in practice—state acts are largely copies of the IFA and, in fact, they wiped out nuances already accepted by colonial-period regional laws. The creation of the

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IFS was another step towards indirect central control, but the shifting of forests to the Concurrent List of the Constitution in 1976 and the passing of p. 483 ↳ the FCA in 1980 are sharper markers of increased central control. Central control may be justified on the grounds that forests provide certain benefits (biodiversity, hydrological regulation, and carbon sequestration) that accrue to stakeholders beyond state boundaries. Similarly, nudging by the central government also led to the launch of the attempt at participatory forestry (JFM), and the FRA is a central legislation that champions the rights of the local population on the ground of redressing historical injustice. So, the issue is not whether the central government should have a say in the forest sector, as much as whether state governments have developed (and the central government has fostered) independent capacities and regionally appropriate legal frameworks, whether central funds have given them the leeway to do so, and whether central scrutiny has been substantive or just bureaucratic in nature—whether in diversion proposals or for Working Plans. The answers here seem to be in the negative.

j) **Role of the Supreme Court**: Forests are an emotive issue that immediately triggers considerations of (the expanded interpretation of) Article 21 of the Constitution (right to life as the right to a clean environment) and provides a justification for intervention by an activist judiciary. The Court has played an important role in clarifying the scope of the FCA and, more generally, in drawing attention to the important issue of forest conservation that tends to get short shrift in the political process in a rapidly developing country. However, the *Godavarman* case is a globally unique case of an open-ended and unending intervention by a court in the domain of both law-making and day-to-day governance under the cloak of a 'continuing writ of mandamus'.[76] The number of interlocutory applications filed is in the thousands and the orders are also in the hundreds. Instead of dealing with one-off questions of the scope/applicability of the FCA, the Court has engaged in all kinds of questions and matters that fall beyond not only its constitutional purview but also its physical ability to delve into and monitor in any realistic manner. The consequence has been several conceptually flawed decisions as much as the creation of a parallel structure of micromanagement that is (and always will be) poorly informed of ground realities (especially with continuously changing judges—inevitable in a 26-year-old case). Court-managed forest governance reflects instead the judiciary's simplistic notion of 'conservation' as 'non-use' or 'preservation', ignoring the socio-ecological reality of India's forests and the continued belief in state control, ignoring the colonial roots of this approach and its devastating impacts on the lives of forest-dwellers.

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Concluding Remarks: Navigating Colonial Legacies with Statist and Conservationist Blinkers

p. 484

As mentioned, forest law is perhaps the oldest environmental law in India. But this history, instead of making it the most mature legal framework, makes it the most contentious one. This is because the 'Indian' Forest Act is not an act created for the welfare of Indian citizens but very much a colonial construct, formulated with the singular purpose of establishing state control over forest resources for colonial gains while limiting their use by the local population. The replacement of the colonial purpose with a 'national' purpose did not change the foundational concept of forests as state property, to be managed by a technocracy for some (largely self-defined) public purpose, nor did it change the technocracy's colonial mindset of viewing local communities as 'abusers', 'encroachers' or 'degraders' who 'burden' their property. Consequently, the forest sector has been a site of enormous conflict since the 1878 Act to date. The conflict is as much over 'what are forests for' as 'whose forest is it'. But the answers are not binaries: to cast 'state' and 'community' in stark opposition to the second question is as simplistic as to cast 'local benefits' and 'global benefits' being mutually exclusive or 'forest' and 'non-forest' being neatly separable. Forests are complex socio-ecological entities that potentially provide multiple benefits at multiple scales but also impose costs (such as crop damage or human deaths due to wildlife or habitat for pathogens) and opportunity costs (land that could be used for other purposes). They are 'common-pool resources' but also provide positive environmental externalities. This creates a genuine tension between a purely 'communitarian' perspective and a broader 'environmental one',[77] where the positive externalities have become as important, especially in the context of a sharp decline in forest cover over the past 150 years.

Unfortunately, the 'broader' interest in India's forests has always come at the expense of local interests and the rights of forest-dwellers. The colonial interest was in products and revenues, though also sometimes cloaked in 'environmental concern' about the harm that deforestation causes.[78] After independence, when the Chipko movement was demanding rights to derive forest-based livelihoods, its message was misinterpreted ↳ p. 485 as being simply driven by a broad ecological concern.[79] This coincided with a rising modern urban conservationist discourse that simplifies forests to 'green cover', 'pristine ecosystems' or 'wildlife habitat' that provide benefits 'at a distance' and that must be saved at any cost for a (homogeneous) 'national public good'. This discourse rendered invisible the 250 million forest-dependent people in the country or the historical injustices they have faced and provided continued support for the idea of professionally managed state forestry, except with a modified objective of conservation or environmental balance. The IFA remained intact with the addition of the FCA. But the FCA itself became a forest diversion act, setting up hoops to jump and compensatory solutions rather than engaging with substantive issues and local stakeholders, allowing logging to continue as long as it was apparently 'scientific', denying diversion for agriculturalists while permitting it for mining and dams in the 'public interest'. This discourse informs the Supreme Court's judgements as well.

Thus, a re-establishment of community tenure has to be the foundation or the starting point of forest governance reform in India. These community-level institutions will have to meet norms of participatory democracy and embrace multi-objective forestry and multiple sources of knowledge. But community tenure alone cannot be the end-point: some form of multi-level governance is essential, given the legitimate broader environmental stakes. If, however, this governance is not to become the same old state control in a new garb, its structure would have to be radically democratic, with a separation of roles and powers—both vertical and horizontal—coupled with downward accountability. The upper levels will have to play different roles—protection support, technical support, financial support and regulation—but combining these roles into the same old forest bureaucracy or ministerial functioning would be a recipe for failure. The FRA—as the next chapter will show—does not provide answers to the question of how the upper levels are to be structured, but the question emerges—as did the conclusion that local rights-holders must have a say in

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forest diversion—as a logical corollary to the FRA's attempt to set the foundation right. Answering these questions wisely to produce a broad-based, environmentally sound, socially just, and democratic structure is the challenge before the next generation of forest lawmakers in India.[80]

Suggestions for Further Reading

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Ramachandra Guha and others, *Deeper Roots of Historical Injustice: Trends and Challenges in the Forests of India* (Rights and Resources Initiative 2012).
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p. 486 Kanchi Kohli and others, *Pocketful of Forests: Legal Debates on Valuating and Compensating Forest Loss in India* (Kalpavriksh and WWF-India 2011).
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Notes

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17 E.g., Assessed Waste Lands in South Canara District of Madras Presidency. See AS Shrinidhi and Sharachchandra Lélé,

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