Wildlife First, People Later? Forest Rights and Conservation – Towards an Experimentalist Governance Approach

—Arpitha Kodiveri*

I. Introduction

"We have applied for our rights two years ago; we have not heard back about our community forest right claim. The coal mines are likely to expand and we do not know if it is considered as a community forest area or not?" said an Adivasi impacted by the coal mining operations of the Mahanadi Coalfields in the Himgiri coal block in Sundergarh, Odisha.[1] Forest governance in India is a contested terrain with the competing claims of forest rights, forest land for development and the conservation of forest areas.

The challenge of conservation and forest rights in India is a complex one. It is one of the many wicked problems that India has to confront. The political economy of extraction and acquisition of forest land for development projects contextualize the implementation of forest laws in India. Conservation has come to shape decisions taken on development, rights of forest-dwelling communities and the fate of our forests in the near future.

In 2006 when the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, hereinafter referred to as the Forest Rights Act (FRA), was passed, it recognised the role of forest-dwelling communities in conserving forest areas. Under the colonial forest laws like the Indian Forest Act, 1927 it created enclaves with the categorisation of forest areas. In these categories

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I would like to thank Ms. Anamika Kundu for her research assistance and Nitin Sethi as well as Shomona Khanna for helping me understand the nuances of this case. The argument made in this paper is informed from fieldwork in Odisha over the past two years and learning from having assisted the Gujjar community in their forest rights claims in the Sariska Tiger Reserve between 2012 to 2014. While the readers perceived depth in these arguments need to be attributed to these conversations and experiences, the flaws are purely my own.

1 Interview in Tumulia village, Sundergarh district undertaken by the Author in July 2018.

of forest areas, the exercise of rights of forest-dwelling communities was restricted or prevented.[2]

The forest law regime is framed by a conflict of approaches towards conservation. While the Indian Forest Act, 1927 and the Wild Life (Protection) Act, 1972 are driven by the practice of exclusionary conservation where the exercise of the rights of forest-dwelling communities are restricted or prohibited. The FRA speaks to a rights-based approach towards conservation. This creates what I refer to as a non-porous binary within the forest law regime that has shaped forest governance in India. Shared governance strategies like Joint Forest Management which were implemented have failed.[3]

The Forest Rights Act arguably challenged the fundamental values of existing forest laws. This challenge to the existing forest law regime has attracted contestation from conservationists. A group of Writ Petitions were filed by wildlife conservation organizations challenging the constitutionality of the FRA. The constitutional challenge was configured by their support towards practices of exclusionary conservation enshrined in the older forest law regime. The FRA went on to be implemented across India, while the petitions were pending before the court.[4]

On February 13th, 2019 an interim order was passed by the Supreme Court in this matter where it called for the eviction of forest-dwelling community members to prevent encroachment in forest areas.[5] This decision by the Supreme Court favoured a certain approach towards conservation which did not account for the rights of forest-dwellers. This order created a sense of uncertainty for forest-dwelling communities as many had applied for their rights to be recognised under the FRA and awaited a decision.[6] The order however was stayed in a subsequent hearing before the court.

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2 Ramchandra Guha, The Past and Future of Indian Forestry in Deeper Roots of Historical Injustice: Trends and Challenges in the Forests of India, available at <https://rightsandresources.org/wp-content/uploads/2014/01/doc_5589.pdf> (Last visited on 29-10-2019).

3 Sharachchandra Lele, Forest Governance: From Co-option and Conflict to Multilayered Governance?, Economic and Political Weekly, 24-6-2017.

4 Four Writ Petition were filed, one by four wildlife conservation organisations, namely, Bombay Natural History Society, Wildlife Trust of India, Wildlife Society of Orissa and the All Assam Tribal Youth League in 2006 before the Supreme Court challenging the constitutionality of the Act. The other was a similar writ petition filed by Wildlife First before the Supreme Court. In 2008, retired forest officials and their associations filed six cases before six High Courts challenging the Forest Rights Act, 2006. All of these petitions have now been grouped together to be heard by the Supreme Court as Writ Petition No. 109/2008 which is the ongoing case ("the Supreme Court case") in this paper.

5 *Wildlife First* v. *Ministry of Forest and Environment*, 2019 SCC OnLine SC 238.

6 Ishan Kukreti. Does the Supreme Court Order mean eviction of forest dwellers right away? in Down to Earth available at <https://www.downtoearth.org.in/news/forests/does-the-supreme-court-order-mean-eviction-of-forest-dwellers-right-away--63315> (Last visited on 31-10-2019).

This paper tackles the complex conflict of forest conservation in India between the two competing approaches referred to earlier. I do this by unpacking the background to the Writ Petition and the orders that followed. The question I seek to address in this paper is twofold, firstly are courts the right site to resolve such a complex conflict? And secondly, can an experimentalist governance approach assist in addressing this complex conflict?

I begin this paper with a brief overview of the legal and judicial context of forest conservation and law in India and recognise that courts are an inadequate setting to address what I argue is essentially a problem of forest governance in India. I then explore the contours of this conflict through an exploration of the arguments in the petition and interviews with local community members and rights-based activists. I will then present an alternative approach to addressing this conflict which is an experimentalist governance form of institutional design.

Experimentalist governance is an emerging idea which has been used to study how provisional rules of the European Union (EU) are adapted in the member states to implement different EU legislations. Experimentalist governance, Charles Sabel states is,

> A form of governance that establishes deliberately provisional frameworks for action and elaborates and revises these in light of a recursive review of efforts to implement them in various contexts.[7]

This approach to governance allows for experimentation in institutional arrangements to take place given certain fundamental rule-based parameters. This I argue is quite relevant to the context of conservation in India which is currently characterised by the presence of a non-porous binary approach in conservation law and policy.[8] The fundamental rule-based parameters for such experimentation in the context of conservation in India are drawn from the rights based framework present in the FRA.

The reason for the non-porosity between the two approaches I attribute to the polarised nature of the discourse that guides the two groups who influence conservation law and policy, namely the hard-line conservationists and the rights-based activists. Each group is wedded to a particular solution to the wicked problem of conservation. The hard-line perspective leaves no room to experiment with governance solutions that lie between the two ends of the spectrum of conservation practice, namely, exclusionary conservation and complete community control. An experimentalist governance approach can assist in moving beyond the

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[7] Charles F. Sabel, Experimentalist Governance, available at <http://www2.law.columbia.edu/sabel/papers/Sabel%20and%20Zeitlin%20handbook%20chapter%20final%20(with%20abstract).pdf> (Last visited on 31-10-2019).

[8] The non-porous binary is referred to the lack of space available within conservation law and policy to find approaches which are not found on either extreme of exclusionary conservation or complete community control.

non-porous binary approach to conservation by making forest governance responsive to the local context. I conclude with a set of recommendations for a rules-based framework within which experimentation can take place to enable just, inclusive and rights-based decision-making in India's forests.

II. Brief Overview Of The Legal And Judicial Context Of Forest Rights And Conservation

A. Conflict of Laws In India's forests which restrict the scope for the recognition of forest rights

The problem of forest governance as mentioned earlier is rooted in the conflict of laws in forest areas. India adopted the colonial legal framework to govern its forests. During the colonial period forest laws strengthened state control over forest areas like the Indian Forest Act, 1927 (IFA) .[9] The Forest Department under the IFA enjoys a large amount of discretionary power in the governance and administration of forest areas.[10] Local communities have seldom had space in determining the decision-making on the governance of forest areas.[11]

Rights of forest-dwellers have not been recognised adequately and were indeterminate in forest areas due to the Indian Forest Act, 1927. Depending on the categorization of forest areas, rights to forest produce and land were selectively recognized or entirely restricted.[12] Forest rights were acknowledged in the process of settling such rights by the forest settlement officer who would compensate or acquire them in setting up a reserve or protected forest.[13] The IFA did recognize village forests where local communities would have complete control, however this was not adequately identified or implemented by the Forest Department.[14]

As the movement for wildlife conservation gained momentum globally and domestically in the 1970s, the Wild Life (Protection) Act, 1972 (WLPA) came into being. With it came the concepts of inviolate and protected areas.[15] The WLPA enabled the identification of forest areas as national parks, sanctuaries and community conservation reserves.[16] Similar to the Indian Forest Act categories,

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[9] R. Guha & M. Gadgil, State Forestry and Social Conflict in British India: A Study in the Ecological Bases of Agrarian Protest, Past and Present, 123, 141-77 (1989).

[10] Ch. IX on penalties and procedure of the Forest Act, 1927 demonstrates the nature and degree of discretionary power enjoyed by the Forest Department.

[11] See *supra* text accompanying note 9.

[12] Ramachandra Guha & Madhav Gadgil, This Fissured Land: An Ecological History of India, 113-140 (1992).

[13] The Forest Act, 1927, Ss. 7 and 8.

[14] The Forest Act, 1927, S. 28.

[15] KS Bawa et al, Rights, governance, and conservation of biological diversity, Conservation Biology, 25,639-641 (2011).

[16] The Wild Life (Protection) Act, 1972, Ch. IV.

there is a gradient in the recognition of forest rights, wherein national parks areas are strictly governed and where the exercise of forest rights is not allowed, this changes with the categorization of areas as sanctuaries where some rights are recognized. Community reserves and conservation reserves were introduced through an amendment in 2003 to the Wildlife Protection Act with the objective to increase the role of the local communities in conservation[17]. There has not been an active effort by the forest and wildlife bureaucracy to recognize and identify such areas.[18]

The National Forest Policy in 1988 identified the role of local communities in conservation, the same has not been successful as the forest bureaucracy has failed to earnestly engage with this possibility.[19] Joint Forest Management (JFM)[20] is a practice that emerged from the National Forest Policy, and was an attempt to bring communities on board in the management of forests, but was inadequately implemented as the Forest Department retained control over the decision-making process.[21] A similar approach was adopted towards eco-development were again local communities were not entirely involved in the decision-making process.[22] This trail of laws, policies and its implementation reveals that forest governance is shaped by a powerful Forest Department with little room for forest-dwelling communities to be involved in developing governance strategies.

The Forest Rights Act then recognised the role of forest-dwelling communities in the conservation of forest areas. The Forest Rights Act identifies three kinds of rights, individual forest rights which recognize rights over forest land, Community Forest Rights (CFR) which allow for management and governance of the CFR designated areas and community forest resource rights which recognize access to non-timber forest produce by the forest-dwelling community.[23]

The FRA, however, is in conflict with the IFA and WLPA in fundamental ways. This is because it recognizes rights in categories of forest areas which are considered to be inviolate or where rights were restricted under the IFA and WLPA. Forest areas are governed by these conflicting legislations where the IFA and WLPA operate alongside the FRA.

The FRA in Section 13 states that the FRA will be read in addition to and not in derogation of other laws. This has created a situation where communities

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17 The Wild Life (Protection) Act, 1972, Ss. 36-C and 36-D.

18 A. Kothari and N. Pathak, Indigenous and Community Conserved Areas: The Legal Framework in India, available at <https://www.iucn.org/downloads/india_3.pdf> (Last visited on 31-10-2019).

19 The National Forest Policy, 1988, S. 4.6.

20 JICA-MoEF Project, Joint Forest Management: A Handbook available at <http://ifs.nic.in/Dynamic/pdf/JFM%20handbook.pdf> (Last visited on 31-10-2019).

21 Nandini Sundar & Roger Jafferey, Branching Out: Joint Forest Management in India 100-153, (2002).

22 See *supra* text accompanying note 20.

23 The Forest Rights Act, 2006, S. 3.

have been denied forest rights on account of the area being a tiger reserve or being categorised as a protected area.[24] Similarly, community forest rights have been canceled to make way for coal mining in the Hasdeo Arand forest area in Chhattisgarh.[25]

The implementation of the FRA is restricted by the lack of corresponding amendments to the IFA and WLPA. In essence, as the FRA was enacted-for its provisions to be fully realised it warranted amendments to the IFA and WLPA. An example of this is the chapter within the IFA on forest offences. The exercise of forest rights like collection of non-timber forest produce or fuelwood is considered as a forest offence within the IFA and a right within the FRA. The lack of corresponding amendments can be attributed to the fact that the FRA was brought forth by the Ministry of Tribal Affairs while the other forest laws by the Ministry of Environment, Forests and Climate Change. The mandates of these two ministries vastly differ and conflict. In the process of making this law the MoEFCC was concerned about the capacity of the FRA to reduce the power of the Forest Department.[26]

The FRA does recognise inviolate areas with the identification of critical wildlife habitats (CWH). CWH are areas scientifically recognized and require the free, prior and informed consent of the gram sabha in the area before it is designated.[27] The recognition of Critical Wildlife Habitat areas has not occurred as guidelines to identify such areas have taken a long time to be agreed upon by different stakeholders and recognized. The guidelines which were eventually formulated dilute procedural safeguards placed within the FRA of obtaining the free, prior and informed consent of the gram sabha as per Section 4(2)(*e*).[28]

Thus, the FRA operates in a legal context where conflicting legislations are used to undermine or challenge its implementation. The present writ petition being discussed in this paper challenges the rights based framework of the FRA and favours the existing model of forest governance characterised by a power Forest Department. The decision by the Supreme Court is yet to be made and it will determine how the conflicting approaches to conservation embedded within these forest laws will be resolved.

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[24] As seen in the non-recognition of forest rights claims in Similipal Tiger Reserve or Sariska Tiger Reserve.

[25] K Kohli, An unresolved legal question about forest rights, available at <https://www.cprindia.org/articles/unresolved-legal-question-about-forest-rights> (Last visited on October 30, 2019)(Last visited on 31-10-2019).

[26] M. Rajshekhar. The Act that Disagreed with its Preamble: The Drafting of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, unpublished paper, available at <https://mrajshekhar.wordpress.com/on-the-drafting-of-the-forest-rights-act/> (Last visited on 31-10-2019).

[27] The Forest Rights Act, 2006, S. 4(2)(*e*).

[28] Guidelines issued by the Ministry of Tribal Affairs, The Recognition of Critical Wildlife Habitats available at <https://tribal.nic.in/FRA/declarationsClarifications/CWHGuidelines04012018.pdf> (Last visited on 31-10-2019).

B. Contextualizing The Role of the Supreme Court in Forest Conservation

The Supreme Court has been active on the issue of forest conservation and environmental protection. In 1993 Godavarman had filed a petition before the Supreme Court against illegal felling in the Nilgiris. This PIL went beyond the question of illegal felling to determine the day-to-day operations of forest governance.[29]

The important outcomes of this PIL were the definition of forests which the court held meant any area which falls within the dictionary meaning of forests. The SC in 2002 in light of arguments raised by Harish Salve on the eviction of forest-dwelling communities before the deadline of 1980 had asked to states to accordingly respond. The MoEFCC then issued a directive on May 3rd, 2002 requiring states to evict communities who were unable to prove that they had resided in the forest areas prior to 1980. A decision that was welcomed by hard-line conservation groups, resulted in the forced eviction of forest-dwelling communities.[30] This jurisprudence of the Supreme Court in enabling the idea of exclusionary conservation practice to be realised is an important aspect in the role that it has played in forest conservation.

These orders and MoEFCC directive led to nationwide protests demanding for a law that secured the rights of forest-dwelling communities which eventually led to the FRA.[31] While the Godavarman case was evidence of judicial overreach, it is difficult to color the role of the Supreme Court as being against rights-based conservation either. There have been progressive judgments like the Samata judgment where the SC recognized the rights of Scheduled Tribe communities to scheduled areas and prevented the sale of land in scheduled areas to private mining companies[32].

Similarly, in the Vedanta judgment, the SC recognized the rights of forest-dwelling communities to their rights over forests and sacred areas. The jurisprudence has been a mixed bag, while there has been a history of supporting the eviction of forest-dwelling communities in the interest of conservation, there has been a deliberate recognition of the rights of forest-dwelling communities when their land is being acquired by mining companies.[33]

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[29] *T.N. Godavarman Thirumulkpad* v. *Union of India*, (1997) 2 SCC 267 : AIR 1997 SC 1228.

[30] Armin Rosencranz, Edward Boenig and Brinda Dutta, *The Godavarman Case*: The Indian Supreme Court's breach of constitutional boundaries in Management of India's Forests available at <https://elr.info/sites/default/files/articles/37.10032.pdf> (Last visited on 30-10-2019).

[31] Amita Baviskar, Cows, Cars and Cycle-Rickshaws: Bourgeois environmentalists and the battle for Delhi's Streets in Elite and the Everyman eds Raka Ray and Amita Baviskar 391-416 (Routledge, 2011).

[32] *Samatha* v. *State of A. P.*, (1997) 8 SCC 191 : AIR 1997 SC 3297.

[33] *Orissa Mining Corpn.* v. *Ministry of Environment and Forest*, (2013) 6 SCC 476.

To better understand this chequered history, Anuj Bhuwania's study on PILs shows us that this judicial innovation which was made to ensure access to justice has, in turn, harmed the rights of the most marginalized. PILs need to be assessed with a critical lens, on the one hand, they opened up the judiciary to the citizens, on the other, it has been used by different groups for ends which can undermine the rights of the most vulnerable.[34]

The case by Wildlife First case[35] is an example of a PIL where the interest of what has been termed by scholars as elite conservationists and organizations whose exclusionary conservation practice undermine the rights of the forest-dwelling community.[36] PILs have been used as an avenue to articulate the interests of the upper class and their notions on environmentalism, Sociologist Amita Baviskar identifies this phenomenon as bourgeois environmentalism on her analysis of the politics of environmental movements in Delhi.[37] The Wildlife First case when viewed from this perspective can be identified as an elitist effort which adversely impacts the rights of the vulnerable forest-dwelling community.

In this paper, I will view the court as a site of struggle where multiple interests are articulated and negotiated with unpredictable outcomes from supporting the rights of forest-dwellers to those that compromise their rights. The court I argue is not an appropriate venue for such a complex struggle given its adversarial set-up and argue that the question of underrepresentation of the interests of the marginalized makes it a difficult venue for a favorable outcome.

In an interview with a Supreme Court lawyer who had worked on this case and represented the Ministry of Tribal Affairs what emerged is that the lawyer representing the interests of the forest-dwelling community was not adequately heard or given an opportunity to be heard prior to the February order of eviction by the SC.[38] Such a setting does not enable a nuanced decision to emerge which a wicked problem like conservation demands. A complex problem riddled by conflicting legislation and priorities should be reconciled through legislative or governance initiatives.[39] In this paper, I present the possibility of an experimentalist governance approach to conservation as a potential pathway to addressing this conflict.

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[34] Anuj Bhuwania, Courting the People: Public Interest Litigation in Post-Emergency India, 112-134 (Cambridge University Press, 2016.

[35] *Wildlife First* v. *Ministry of Forest and Environment*, 2019 SCC OnLine SC 238.

[36] P. Kashwan, The Politics of Rights-Based Approaches to Conservation in Land Use Policy, 613-626 (2013).

[37] See *supra* text accompanying note 28.

[38] Interview undertaken by the Author with Shomona Khanna on June 2019.

[39] *Ibid*.

III. Background to the Case and Legal Arguments as well as Applications in the Wildlife First and Others Petition

A. The Transition from Challenging Constitutionality to Directions on Implementation of the Act

This section will focus particularly on the arguments made in a petition by Wildlife First and others. The core argument being made in the original writ petition is that the Forest Rights Act, 2006 is unconstitutional and in violation of Article 14 and Article 21, thus the Act should be struck down. The argument challenging the constitutionality of the Act rests on the following grounds:

a. Violation of the Precautionary Principle and the Public Trust Doctrine which form part of Article 21: The petition argues that the recognition of forest rights will violate the Precautionary Principle as there may be irreversible or serious damage to the forests, particularly the fragmentation of forest areas. It violates the Public Trust doctrine as the state is divesting its duty as a trustee of natural resources by recognizing the rights of forest-dwelling communities as stewards of forest areas.

b. Right to Life under Article 21: They argue that since "Natural heritage/ ecology/biodiversity/natural resources" which includes all forest land and wildlife, falls within the compendious of right to life and is fundamental to all persons within the boundaries of the country, The assumption is that implementing the Forest Rights Act, 2006 will violate this aspect of the Right to Life.

c. Article 14: The petition argues that the recognition of rights over land under the FRA is in violation of Article 14 as it discriminates between non-forest landless on the one hand and those citizens who have unauthorizedly occupied forest land. In addition, the petition states that Scheduled Tribes who are already in legal possession of land will be given addition of 4 hectares of forest land.

d. Neglect, omission, and failure of the respondent governments: The petitioners state that the neglect, omission, and failure of the respondent governments to restore the land to the Tribals as provided for in their respective tribal land alienation and restoration Acts is violative of Article 14 and Article 21 of the Constitution.[40]

The legal weight of these arguments is still being discussed as the hearings continue in the Supreme Court. The prayer seeks to strike down the Act on it

[40] *Wildlife First* v. *Ministry of Forest and Environment*, 2019 SCC OnLine SC 238.

being unconstitutional. While the petition was making its way through the corridors of the court, FRA was being implemented on the ground in full force.

As the Act was being implemented, the petitioners had approached the Supreme Court to get the operation of the Act stayed but that was unsuccessful. In 2014 an interlocutory application was filed by one of the petitioners, Wildlife First[41]. This was an application that was filed after the Act had been implemented for six years. The application is aimed at highlighting the ecological impact of the implementation of the Forest Rights Act, 2006 which Wildlife first affirms is resulting in the fragmentation of the forest areas.

This interlocutory application focuses on the implementation of this Act and moves away from the original petition challenging its constitutionality. In is this application; the petitioner argues that the implementation has been flawed as it has enabled many false or bogus claimants to obtain forest land. Herein begins the transition from the original petition challenging constitutionality to one where the executive functioning of the Act is brought before judicial scrutiny. In an interview with Shomona Khanna who was part of the legal team of the Ministry of Tribal Affairs working on this case, she stated

> "This is a sheer violation of procedure; the initial case was about constitutionality and it has now become one that seeks to challenge the implementation of this Act."[42]

The interlocutory application brings to the fore arguments of how the Act has indiscriminately recognized forest rights over ecologically sensitive areas and resulting in the fragmentation of forest areas. The terms that repeatedly appear throughout the application are indiscriminate implementation, bogus or false claimants and encroachments. These terms stem from the understanding of hard-line conservationists that the Forest Rights Act, 2006 has assisted in the process of deforestation by the recognition of individual and community forest rights.

The petitioner distinguishes between genuine claimants and false claimants. The petitioner argues that after the enactment of the FRA, there have been instances where forest land has been cleared and rights have been claimed. The petition refers to an example from Andhra Pradesh of a campaign termed "Bhuporatam" where forest land has been forcefully occupied in the Kawal sanctuary to claim rights.[43] These examples are used to produce evidence of the alleged misuse of the Forest Rights Act, 2006.

The interlocutory application states that the process of recognition of claims goes on for a long period of time with no end in sight. The petitioner, Wildlife First, refers to the FRA Rules, particularly Rule 11 which was amended in 2012

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[41] *Wildlife First* v. *Ministry of Forest and Environment*, 2019 SCC OnLine SC 238.

[42] See *supra* text accompanying note 15.

[43] Annexure A-10 to *Wildlife First* v. *Ministry of Forest and Environment*, 2019 SCC OnLine SC 238.

that allowed fresh claims to be filed in areas where the process may have been completed.[44] Further, it makes eviction from the forest subject to the recognition and verification of forest rights. This the petitioner states will have a disastrous effect on the forests.

The order by the Supreme Court on February 13th, 2019[45] is rooted in this interlocutory application where it calls for the chief secretary to furnish evidence on steps taken to evict forest-dwellers whose claims have been rejected with finality. This order would have displaced lakhs of forest-dwellers.[46] After a lot of civil society outrage on February 28th, 2019, the previous order was put on hold until further notice, while calling for State Governments to provide an update on the process of rejection of claims.[47]

B. Applications made by Scholars and Adivasi Women from Uttar Pradesh

Additional applications were made by a group of scholars and Adivasi women from Uttar Pradesh have filed before the Supreme Court.[48] These applications are under consideration and the arguments drawn from them can be summarized as follows:

a. The Forest Rights Act, 2006 was meant to correct historical injustice and in order to do so, it requires that individual forest rights and community forest rights be adequately recognized. The problem they state is not in the recognition of forest rights but rather in the incomplete implementation of the law by the state bureaucratic actors involved in the process;

b. The conservation potential of the FRA has not been recognized as merely three percent of the community forest rights[49] has been recognized which enables communities to conserve forest areas;

c. There is a need to correct the narrative of forest loss as being caused by the recognition of forest rights as these are rights which pre-exist the reservation of forest areas. It is the diversion of forest areas for development which is the real cause of concern in conserving forest areas; and

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[44] The Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, (Amendment Rules and Guidelines) 2016.

[45] *Orissa Mining Corpn.* v. *Ministry of Environment and Forest*, (2013) 6 SCC 476.

[46] Supreme Court continues its stay on the eviction of lakhs of forest dwellers, 13-9-2019 available at<https://www.thehindu.com/news/national/supreme-court-continues-its-stay-on-eviction-of-lakhs-of-forest-dwellers/article29403695.ece> (Last visited on 30-10-2019).

[47] The Hindu, *Wildlife First* v. *Ministry of Forest and Environment*, 2019 SCC OnLine SC 238.

[48] Application for Directions by Sharachchandra Lele and Others in Writ Petition No. 109/2008 and Application for Intervention by Sukalo Gond and Others in Writ Petition No. 109/2008.

[49] See *supra* text accompanying note 20.

d. That eviction from forest areas cannot take place without the due recognition of rights unless the area is to be declared as a Critical Wildlife Habitat. In order for it to be declared as a CWH, it requires a scientific basis for the categorization of the area as an inviolate space, the free, prior and informed consent from the concerned gram sabha and proof that co-existence is not possible.

These arguments bring to light the complex nature of this conflict and reinforce the limitations of it being resolved in the courts. The lack of procedural clarity on how PILs will be decided upon as seen in the drastic shift from a constitutional challenge to one that examines the implementation of the Act.

To summarise, after a quick glance of the Wildlife First petition I reiterate that courts are an inappropriate site to resolve this polarized conflict-given their adversarial setting. The contours of this conflict will be discussed in the next section which will demonstrate its complex and non-porous nature and speak to why an adversarial setting will further aggravate the conflict. Referring back to Anuj Bhuwania's work, this case as a PIL has the potential to adversely impact the rights of the vulnerable forest-dwelling community while PILs were meant to bring justice to the most vulnerable. If this conflict is addressed in the realm of forest governance it will enable the exploration of options to address issues of conservation that lie in between the two ends of the spectrum that frame conservation practice i.e. complete state control and complete community control.

IV. Contours of the Legal Conflict and the Making of the Non-porous Binary Approach to Conservation in India

In this section I will sketch the contours of this complex conflict that is visible in the Wildlife First case being discussed. I will do so by examining three aspects of the conflict they are: conservation practice, the dichotomy of the genuine and false claimant and the narrative of historical injustice. These grounds of conflict between the two approaches on conservation are rooted in the struggle between the colonial framework and logic of conservation and the demand for increased localized control. It becomes important to understand these grounds shape the making of this non-porous binary approach- as hard-line conservationists and rights-based groups are located on either end of the spectrum of conservation practice.

A. Conservation Practice

In his article conservation as politics, Vasant Saberwal argues that decisions on conservation are determined by social and political processes. He states

> What gets conserved, and by whom will be determined by social and political processes as much, if not more, than by the scientific knowledge we bring to bear on resource management[50].

Conservation practice in India as seen earlier has been an exclusionary one. The IFA did provide for the recognition of village forests which were thus not adequately recognized. Similarly, the amendments made to the WLPA to identify community and conserved areas were not adequately implemented. Shared governance strategies are an attempt to generate porosity between the binary approach to conservation but failed as the Forest Department did not share their powers with the forest-dwelling community who were partaking in the joint forest management committees.[51]

At the heart of the case before the Supreme Court is the conflict over conservation practice.[52] The Forest Rights Act, 2006 brings to the fore legal provisions which recognize the right to forest land, non-timber forest produce, and community-based conservation. The hard-line conservationists believe that the FRA will result in the fragmentation and degradation of forest areas. The rights-based activists are concerned with this approach to conservation as it results in the relocation of local communities and the criminalization of their rights.[53] They advocate for community-based conservation as a pathway out of the exclusionary conservation model this reinforces the binary approach to conservation law and policy.

The conservation potential of the FRA has not been adequately realized as only three percent of the potential forest area which can be recognized as CFR rights have been recognized and CWH areas have not been declared[54]. The reason for this according to a report by the community forest learning and advocacy group is the lack of political will on part of the Forest Department in sharing power with the forest-dwelling community.[55]. Having said this, the problem that conservation practice struggles with is one of non-porosity between these extreme approaches to conservation characterised by a strong forest bureaucracy.

While the problems with exclusionary conservation practice are many, there are issues with community-based conservation too. Arun Agarwal and Clark

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[50] Vasant Saberwal, Conservation as Politics: Wildlife Conservation and Resource Management in India, 3 Journal of International Wildlife Law and Policy, 166-173 (2000).

[51] Application for Directions by Sharachchandra Lele and Others in Writ Petition No. 109/2008 and Application for Intervention by Sukalo Gond and Others in Writ Petition No. 109/2008.

[52] *Wildlife First* v. *Ministry of Forest and Environment*, 2019 SCC OnLine SC 238.

[53] See *supra* text accompanying note 2.

[54] National Working Plan Code - 2014, available at <https://rightsandresources.org/en/publication/promise-performance-10-years-forest-rights-act-india/#.XWd7_nuxU2w> (Last visited on 29-10-2019). (In a study of the promise and performance of the Forest Rights Act, 2006 by the Rights and Resources Initiative it was found that 85.6 million acres of forest area can be recognised as CFR areas, however only three per cent of this potential area has been recognised).

[55] *Wildlife First* v. *Ministry of Forest and Environment*, 2019 SCC OnLine SC 238.

Gibson identify the key challenge with community-based conservation which is understanding of the community. The assumption embedded within community-based conservation is that the community is a small spatial unit, is homogenous and has common interests or shared norms. This is seldom the reality on the ground as communities are heterogeneous with a multiplicity of interests.[56]

It is here that Agarwal and Gibson provide an alternative lens to understanding community-based conservation which is to shift from the focus on communities to institutions that can democratize decision-making on conservation. While community forest rights are offered as an alternative conservation model that is inclusive it does not do much in resolving the adversarial relationship between the Forest Department and forest-dwelling communities. The forest department perceives this law and particularly community forest rights as a challenge to its authority, thus there has been bureaucratic backlash on the implementation of this provision. The challenge has been a difficult one where conservation in forest areas has been driven by state-controlled bureaucracy without local participation.

It is in light of this focus on institutions that I argue that there is a need to move away from non-porosity to experimental governance where institutional arrangements can be arrived at based on a set of shared principles that guide decision-making. This, of course, sounds like a simple solution to this wicked problem as the institutional arrangements in forest areas are rife with power asymmetry.[57]

To address this power asymmetry and to democratize the institutional architecture I argue that there is a need for forest-dwelling communities to work with the Forest Department as a way to generating porosity - as opposed to completely eliminating the Forest Department from the governance architecture of forest areas.

Designated Community Forest Rights (CFR) areas recognise that communities have the right to manage and govern the area. The management of CFR areas sits within the larger working plan for the stretch of forest area.[58] The working plan, in turn, is put in place by the Forest Department who very often do not take into account the rights-based approach to conservation.[59] The challenge is how do these two conservation practices co-exist if at all.

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[56] Arun Agarwal & Clarke Gibson, Enchantment and Disenchantment: The Role of Community in Natural Resource Conservation, 27(4) World Development, 629-649 (1999).

[57] See *supra* text accompanying note 17,

[58] Citizen's Report as part of CFR-LA Process, Promise & Performance: Ten Years of the Forest Rights Act in India, available at http://www.indiaenvironmentportal.org.in/files/file/Promise-and-Performance-10-Years-of-the-Forest-Rights-Act-in-India.pdf (Last visited on 29-10-2019). (The Working Plan is a written document containing the boundaries of the forest and strategies for conserving the area. It is drafted by the Forest Department of the State based on the forest manual of that State and the recently passed National Working Plan Code, 2014).

[59] Sharachchandra Lele & Ajit Menon, Democratising Forest Governance in India, 181-221 (2014).

An experimental governance approach provides flexibility on the ground for communities and the Forest Department to arrive at workable solutions within a framework of principles that guarantees just and democratic decision-making. Like most wicked problems, it is difficult to have a one size fits all solution; conservation practice will have to be contextual and locally determined. There may be areas best suited for community-driven conservation, others where the role will have to be shared between the community and Forest Department and where forest-dwellers are not present the responsibility is vested in the Forest Department.

The Vedanta case saw the convergence of the competing interests of forest rights and conservation- an example of the possibility of co-existence of the two approaches to conservation. The Dongria Kondh community struggled to protect their rights over the Niyamgiri hills, they approached multiple for a both domestically and internationally.[60] The Supreme Court in response to the ongoing struggle decided to devolve decision-making to the forest-dwelling community on whether a mining lease is to be granted. The decision was made by the local village assembly in the twelve villages which were likely to be impacted by the mining project.

The SC recognised the gram sabha within the FRA as being the regulatory authority for decisions that affect the forest and the forest-dwelling community. This interpretation of the FRA enabled the recognition of the gram sabha as a legitimate authority alongside the Forest Department in conserving the area. This example, however, has not changed the perspective of conservationists about the conservation potential of the FRA. As in an interview with Praveen Bhargav from Wildlife First when asked about the conservation potential of the FRA keeping in mind the Vedanta case, he described it as a unique situation and was unsure if it would set a strong enough precedent given the political economy of extraction in India's forests.[61]

B. The Dichotomy of Genuine and False Claims

The interlocutory application tries hard to distinguish between genuine and false claimants. A close reading of the interlocutory application reveals that there is not a clear definition of who constitutes a false claimant.[62] The term false claimant is scattered across the interlocutory application and suggests that they are claimants who are allegedly misusing the law in order to gain land rights.

The source of false claimants in the interlocutory application is located in the change in the cut-off date from the original date as the Forest Conservation Act, 1980 to 13thDecember 2005. This, they argue, has allegedly triggered a free for all process for the encroachment by communities to occupy and clear the

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[60] *Orissa Mining Corpn.* v. *Ministry of Environment and Forest*, (2013) 6 SCC 476.
[61] Interview by the Author with Praveen Bhargav in 2015 in Bangalore.
[62] *Wildlife First* v. *Ministry of Forest and Environment*, 2019 SCC OnLine SC 238.

forest area. The examples that the interlocutory application uses are one where forest-dwelling communities are allegedly clearing forests in order to generate evidence and claim forest rights. The dichotomy of genuine and false claimants is used as a basis to highlight that there exists no mechanism within the impugned act to remove ineligible encroachers.[63]

The terms false claimants, ineligible encroachers, and encroachment form the crux of this interlocutory application. Encroachment is a contested term as it indicates that communities do not have a right over forest land and are thus encroaching. This term is particularly used in the context of protected areas where the exclusionary conservation model as prescribed within the Wild Life (Protection) Act, 1972 requires forest-dwelling communities to be relocated from these forest areas.[64] This was the source of incredible injustice to forest-dwelling communities who were displaced in order to create tiger reserves and national parks.[65]

False claimants, according to the applicant in the interlocutory application seems to suggest is a product of recognition of forest rights in ecologically sensitive areas which broadly includes sanctuaries and national parks. As the interlocutory application states as follows:

> "Petitioner is moving the present application in the backdrop of some rather disturbing developments that gravely threaten the future of forest and wildlife conservation due to large scale indiscriminate distribution of forest lands even in the ecologically sensitive and biodiversity rich areas within national parks and sanctuaries"

The Forest Act, 1927 and the Wild Life (Protection) Act, 1972 are laws that the interlocutory applicant relies on to advocate for the eviction of forest-dwelling communities by the Forest Department. The interim application states as follows:

> "authorities have practically given up the task of monitoring and removing encroachers due to the blanket immunity granted by the provisions of the impugned Act to all including the encroachers."[66]

This interpretation of the Forest Rights Act, 2006 is a departure from the spirit of the law enacted to recognize forest rights, and include participatory approaches to conservation. As mentioned earlier, encroachment is a laden term and has become deeply politicized with slogans from the rights-based movement

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[63] *Orissa Mining Corpn.* v. *Ministry of Environment and Forest*, (2013) 6 SCR 881. (pls chk not found)

[64] *Ibid.*

[65] Ashish Kothari and Antoine Lasgorceix, Displacement and Relocation of Protected Areas: A Synthesis and Analysis of Case Studies, 44(49) Economic and Political Weekly, (December 2009).

[66] See *supra* text accompanying note 19.

asserting ownership overland of forest-dwelling communities.[67] The term encroachment is seen as taking away from this sense of belonging as communities who have been living there for generations and have cultural ties to the forests.[68] The reliance of hard-line conservationists on the importance of eviction reinforces the non-porous binary approach by undermining the values of a rights-based conservation practice.

A hint of who might be regarded as a false claimant is embedded within the FRA itself as it recognises two kinds of beneficiaries for such a law namely Scheduled Tribes and Other Traditional Forest Dwellers (OTFD). OTFD communities are required to provide evidence of having lived and depended on forest areas for a period of seventy-five years.[69] It has been difficult for OTFD communities to produce valid evidence to be able to claim forest rights; the rate of rejection in forest rights claims is higher among OTFD communities[70]. Wildlife First who is one of the petitioners, in this case, have mentioned in their press release[71] that OTFD communities are a nebulous category.

As the order of February 13th, 2019[72] argued for the eviction of forest-dwelling communities whose claims had been rejected. OTFD communities are likely to be impacted disproportionately if this order had not been stayed as their claims are rejected based on a bureaucratic perception that emerged from interviews with the Forest Department across four districts in Karnataka that OTFD communities are not worthy of forest rights and make opportunistic use of the law as hard-line conservationists have also argued.[73].

C. Conflicting Narratives of Historical Injustice

As stated earlier, the Forest Rights Act, 2006 is a law that sought to correct historical injustice. However, historical injustice as experienced by forest-dwellers is a deeply politicized term; conflicting narratives underpin the term. It is construed differently by hardline conservation organizations and the drafters of the Forest Rights Act. It is thus useful to locate the Supreme Court order[74] on the eviction of forest-dwellers that stems from the petition being discussed within the broader understanding of the competing narratives of historical injustice.

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[67] A Kothari, et al, 2011. Forests, Rights and Conservation: FRA Act, 2006, Critical Review of Selected Forest-Related Regulatory Initiatives: Applying a Rights Perspective Institute for Global Environmental Strategies, Japan 19-49 (2011).

[68] See *supra* text accompanying note 19.

[69] The Forest Rights Act, 2006, S. 2(*o*).

[70] Asavari Sharma, Why India's Forest Rights Act is Discriminatory Against Non-Tribals, *Business Standard*, 2-7-2018.

[71] Press Release, Conservation India, available at <http://www.conservationindia.org/articles/fra-sc> (Last visited on 30-10-2019).

[72] *Wildlife First* v. *Ministry of Forest and Environment,* 2019 SCC OnLine SC 238.

[73] *Wildlife First* v. *Ministry of Forest and Environment,* 2019 SCC OnLine SC 238.

[74] *Orrisa Mining Corpn.* v. *Ministry of Environment and Forest*, (2013) 6 SCC 476.

Historical injustice as understood by the drafters of the FRA, is embedded in a process that has led to the dispossession of forest-dwellers. The regime of dispossession[75] in forest areas has been characterized by the systematic erosion of rights of forest-dwelling communities. It is this historical injustice that motivated the drafters of the FRA to make a law where the rights of forest-dwelling communities to land and resources can be recognized. The preamble to the Act reads as follows:

> "The forest rights on ancestral lands and their habitat were not adequately recognized in the consolidation of State forests during the colonial period as well as in independent India resulting in historical injustice to the forest-dwelling Scheduled Tribes and other traditional forest dwellers who are integral to the very survival and sustainability of the forest ecosystem"[76].

This narrative of historical injustice is perceived very differently by conservationists who have filed the petition before the Supreme Court. They argue that the rights of forest-dwelling communities were permanently settled during the colonial period and areas were specifically demarcated for the exercise of forest rights. The increase in the population of forest-dwelling communities has resulted in their dependence on reserve forests which are away from the previous forest areas where their rights were accommodated. They argue that the dependence on reserved forests has caused large areas of forest land to be released for agriculture.[77]

The rights-based groups articulate that the colonial legal framework was a legal regime that dispossessed communities, Conservationists affirm that tribal rights were secured through scheduled districts or agency areas where land rights were protected against exploitation by non-Tribals through colonial laws. In their Supreme Court petition[78], they state

> "It would, thus, be clear that right from the inception of the colonial administration, the agency areas were treated distinctly from other areas. Tribal's were protected from exploitation, their rights and title to enjoy the lands in their occupation and their autonomy, culture, and ecology were preserved; infiltration of the non-Tribal's into tribal areas was prohibited"[79].

Both these perspectives are based on a particular construction of the historical injustice question. The legal regime of dispossession existed

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[75] Refers to a legal regime that has enabled the State to dispossess communities from their legitimate rights to land and resources.

[76] See *supra* text accompanying note 19.

[77] *Wildlife First* v. *Ministry of Forest and Environment,* 2019 SCC OnLine SC 238.

[78] *Ibid.*

[79] See *supra* text accompanying note 19.

alongside empowering provisions of scheduled districts during the colonial period. Exclusionary forest laws were applied to vast stretches of forests which were not categorized as scheduled districts, in scheduled districts the governor general had discretionary power in applying forest laws with a few modifications.[80]

The question the hardline conservation group pose is whether the FRA is a mechanism to recognize land rights, and if so, are forest areas being seen as land that can be provided to communities whose land rights were not recognized due to the failure of land reforms in the 1970s? In their petition, they state:

> "Should there be a new law to correct the act of omission and neglect of the respondent governments ability to enforce their respective tribal land restoration laws".[81]

Instead of introducing a new law they suggest that there should be speedy implementation of the tribal land restoration laws with a dispute redressal mechanism that can address instances where land has been transferred to non-tribal communities. While the conservation groups argued that existing constitutional provisions like protection of Scheduled Areas are sufficient to address historical injustice, rights-based groups saw the need for a new law to recognize rights in forest areas where existing forest laws continue to erode the rights of forest-dwelling communities.

Further, the hardline conservation group insist that the FRA instead of correcting historical injustice was perpetuating it by preventing forest-dwelling communities' access to education, public health, and electricity which seldom reach the remote forest areas. In protected areas and reserved forests, forest-dwelling communities have not had access to welfare services such as education and healthcare due to the inability of the state to reach these areas or restrictions by the Forest Department as they create zones within the forest areas where such services cannot be provided.

An instance of this is in the B.R.T Tiger Reserve in Karnataka where the Soliga Adivasis have not been able to build houses as their land comes within the boundary of the tiger reserve.[82] Conservationists challenge the rights-based groups understanding that if forest rights are recognized historical injustice will be corrected, as the development potential in these areas is quite limited.

The Forest Rights Act, 2006 addresses this by allowing forest-dwelling communities to clear forest areas to the extent of seventy-five trees to build schools

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[80] O. Springate-Baginski et al, Redressing Historical Injustice Through the Forest Rights Act, 2006, available at <https://rightsandresources.org/wp-content/exported-pdf/indiaforestrightsactdp27.pdf> (Last visited on 28-10-2019).

[81] *Orissa Mining Corpn.* v. *Ministry of Environment and Forest*, (2013) 6 SCC 476.

[82] Nitin Sethi, Conservations New Face, *Business Standard*, 2-8-2019.

and public health centers.[83] The activities that forest-dwelling communities can engage in forest areas is regulated by their duty to conserve these areas, thus deforestation beyond seventy-five trees is not permitted. The conservationists see a solution to this dilemma by relocating communities outside forest areas where they can access education, public health, and other basic facilities.[84]

These competing narratives of historical injustice have framed the Supreme Court petition and the conflict that continues between conservation groups and rights-based groups. This contributes to the making of non-porosity. In the backdrop of these competing narratives, the making and implementation of the Forest Rights Act, 2006 also becomes a battleground between the two groups.

The forest-dwellers are viewed by rights-based groups as legitimate right holders whose rights have been historically eroded. The conservationists and the forest department, on the other hand, see them as "opportunist encroachers" and largely landless farmers claiming rights over land. The Supreme Court is now left with the uneasy question of distinguishing between "encroachers" and right holders. In its order on February 13th, 2019[85] it calls for the eviction of forest-dwelling communities whose claims for forest rights has been rejected. This order however has been stayed.

V. Moving From non-porosity to porosity with An Experimentalist Governance Approach To Conservation In India

Conservation laws in India have operated in a binary — complete state control or a push towards complete localized control. This binary is characterized by non-porosity as explored in its many contours in the previous section. Given the complex reality on the ground with competing interests of different stakeholders in forest areas, an experimentalist governance approach can pave the way in generating porosity between this binary approach to conservation.

Experimentalist governance argues in the creation of provisional rules where the community involved in its implementation can decide based on an iterative process of what works.[86] This would require reshaping the existing forest governance structure by shaving away the excessive discretionary power enjoyed by the Forest Department and making room for shared decision- making.

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[83] The Forest Rights Act, 2006, S. 3(2).

[84] Krithi Karanth, Bhadra Wildlife Sanctuary: Addressing Relocation and Livelihood Concerns, 40(46) Economic and Political Weekly (12-11-2005).

[85] *Orissa Mining Corpn.* v. *Ministry of Environment and Forest*, (2013) 6 SCC 476.

[86] C.F. Sabel & J. Zeitlin, Learning from Difference: The New Architecture of Experimentalist Governance in the European Union, 14 European Law Journal 271-327 (2008).

The present forest governance structure needs to be located in the power asymmetry on the ground which has been etched through laws like the IFA and the WLPA- rendering the Forest Department as the most powerful actor in decision-making. It is to be noted that the forest-dwelling communities have the least power in these areas despite laws like the FRA.

Experimentalist governance lays emphasis on local and context specific problem solving within a governance structure that is flexible and has equitable distribution of power in decision-making. This is where shared governance strategies can be explored on a terrain where the two important actors, namely, the Forest Department and the forest-dwelling community have equal power to influence decision-making.

Experimentalist governance refers to a model of rule-making that is based on a principle framework upon which, through recursive review emerging from the local context, changes are made.[87]

The challenge with applying an experimentalist approach to conservation is in deciding on the principle framework that will guide decision-making and distribution of power. This requires a collaborative exercise between the two groups and other institutions who have been engaged in implementation on the ground. As an experimentalist governance approach would require the inclusion of diverse interests in addressing the issue of conservation it will facilitate the generation of porosity as opposed to an adversarial setting like a court where non-porosity is reinforced.[88] I argue that the starting point for the discussions on the principle framework should be rooted in the rights-based approach put forth by the FRA.

An example of an experimentalist governance approach to conservation can be seen in the Habitat Conservation Plans under the Endangered Species Act[89] in the United States. Here the plan is drafted through in a collaborative problem-solving exercise between the stakeholders involved including the state actors and ecologists.[90] The working plan for India's forests can potentially be drafted in a similar manner as opposed to it being an exercise solely undertaken by the Forest Department.[91]

A. Exploration of Shared Governance Strategies

Porosity can be generated by a forest governance structure that fosters collective problem solving on the ground where identified stakeholders enjoy equal powers in decision-making. Though the collaborative approach has failed through

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87 See *supra* text accompanying note 2.

88 Archon Fung, Empowered Participation: Reinventing Urban Democracy, 144-175 (2004).

89 The Endangered Species Act, 1973.

90 George F. Wilhere, Adaptive Management in Habitat Conservation Plans, 16(1) Conservation Biology, 20-29 (2002).

91 Agarwal & Gibson, *supra* note 56.

attempts like Joint Forest Management and Eco-development, there is a need to provide for experimentation to how shared governance can be achieved.

Community forest rights which envision that these areas will be solely conserved by communities will not be able to operate in isolation of the influence of the Forest Department, as the networks of the state are so deeply embedded in the everyday governance of forest areas.[92] There will be some dependence on the state for cases of forest offenses for instance. As Uday Chandra argues, that rights-based activists at times view forest-dwelling communities as being able to operate in pristine settings where they are not embedded within the networks of the state or the market, this he states is far removed from their everyday reality[93].

The report by the National Committee set up to study the implementation of the FRA, has in its guidelines for the future of forest governance which can be a point of departure along with the FRA in shaping the principle framework within which experimentation can take place.

The guidelines read as follows:

It begins by stating that the multiplicity of vertical roles (planning, regulation, execution, and monitoring) vested in a single agency (such as the FD) leads to a conflict of interest alluding to excessive power being vested in the Forest Department which needs to be checked.

It then goes on to suggest that Exclusive state control over forests that are used by communities on a daily basis is not feasible in any case, especially in the Indian context and there is a need to share decision-making power with the forest-dwelling community.

Lastly the guidelines make an important point on day to day governance where they state that democratization has to include devolution to the community of users. In other cases, where users are distant or occasional, democratization means increased transparency and accountability of bureaucratic structures that may be doing day-to-day forest management on users' behalf.[94]

These guidelines lay the foundation for reshaping the forest governance structure with the principal rule-based framework of sharing power with the forest-dwelling community of users to enable collective problem solving.

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[92] Amita Baviskar, Fate of the Forest Conservation and Tribal rights, 29(38) Economic and Political Weekly, (17-9-1994).

[93] Uday Chandra, Liberalism and Its Other: The Politics of Primitivism in Colonial and Postcolonial Indian Law, 47 (1) Law & Society Review , 135-168 (2013).

[94] Ministry of Environment and Forests, Report by National Committee on Forest Rights Act, available at <http://www.indiaenvironmentportal.org.in/content/321536/report-by-national-committee-on-forest-rights-act/> (Last visited on 30-10-2019).

The principle framework can draw from the rights-based safeguards provided in the FRA which include due process and protection from eviction can create an enabling environment where just and inclusive models of conservation can be arrived at.

The possibility of working with the state bureaucratic apparatus is not rejected in this vision of the future of forest governance being discussed in the Manthan report as it speaks to the need for multi-stakeholder institutions to guide decision-making. It states the following:

> "Monitoring and enforcement....: must be done by democratic/multi-stakeholder institutions through relevant government agencies, not just by "government".[95]

The situation of non-porosity exists because of excessive powers vested with the Forest Department and an experimentalist governance approach requires sharing of power with the intention of collective problem solving.

A practical example of such an experimentalist approach would be in the process of drafting a working plan which determines administration of a forest area. The working plan is drafted based on exclusionary forest laws, if this was a shared exercise with the forest-dwelling communities, the outcome can be more inclusive and just.

This space for collective problem solving and co-creation of a rules-based framework for the local context can potentially offer porosity in conservation practice. The inclusive manner of drafting a working plan and the rules framework can be revisited through an iterative process till a workable model of conservation for that forest area is arrived at.

The institutional architecture for experimentation I propose should be varied based on the context but should be characterised by room for shared decision-making where forest-dwelling communities are frequent users of the forest.[96]

The Wild Life (Protection) Act, 1972 for instance provided for the constitution of an advisory committee where members from the Forest Department were required to work with members from the department of Panchayati raj institutions and non-governmental organisations.[97] This provision has not been adequately implemented. These institutional structures where competing interests can be negotiated will strengthen forest governance as opposed to the present situation of non-porosity.

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[95] *Samatha* v. *State of A. P.*, (1997) 8 SCC 191 : AIR 1997 SC 3297.
[96] Sabel, *supra* note 7.
[97] The Wild Life (Protection) Act, 1972, S. 33-B.

The way to move from non-porosity to porosity between the two approaches to conservation can be through an experimentalist governance approach. In this section I have documented some potential core principles for such an approach namely, a shared governance structure, compliance to rights-based safeguards and room for collective problem solving.

The principle framework would demand that the guiding principles are negotiated among the different stakeholders an opportunity that presented itself was in the new draft of the Forest Act[98] which was being negotiated, the changes have since been withdrawn. However, I would like to suggest changes to particular provisions in the existing act that can enable such experimentalist approach and harmonization of forest laws in tune with the FRA they are as follows:

Management of Forests: The Act can do away with the excessive state control of forests by recognizing the role of forest-dwellers in managing forest areas. In its present form however, the state continues to retain control with powers to assume management responsibilities over forest areas.

Forest Offences: Forest offences continue to criminalize legitimate exercise of forest rights like access to fuelwood. The Act should reconcile these provisions, instead in its present form provides for unchecked discretionary power of the Forest Department in making arrests and gathering evidence.

Rules on drafting the working plan for forest areas: As mentioned earlier, this is where the potential of an experimentalist approach can be realized is where different stakeholders are involved in the drafting process instead of it being an exercise exclusively undertaken by the Forest Department.

The experimentalist governance approach as argued earlier would require the reimagination of the forest governance structure where shared decision-making can take place. The pathway out of this non-porous binary that plagues conservation laws rests in new governance approaches and not in an adversarial setting like courts.

VI. Conclusion

Conservation is a wicked and complex problem; whose solution lies in a deliberative process among different interest groups and right holders and not through the amplification of conflict through forced evictions as was ordered by the Supreme Court and then went on to be stayed. The adversarial setting of the courts will only deepen the fissures between these two differing perspectives.

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[98] Forest Policy Division MOEF & CC, Proposed Amendments to Indian Forest Act, available at < https://forest.mizoram.gov.in/uploads/attachments/4bdb5e07743b1d97755783ec4d88459b/pages-226-proposed-amendments-to-ifa-dated-7032019.pdf> (Last visited on 30-10-2019).

An issue which emerges from the governance paradigm in forest areas is being decided in an adversarial setting where the complexity is simplified.

To conclude, an experimentalist governance approach guided by principles of environmental democracy and rights can lead to novel solutions that emerge from the ground. This is an aspirational pathway being proposed which would require a radical destabilization of positions that the Forest Department, rights-based groups, conservationists and local communities to be able to engage in a deliberative process without fear that forest rights will always be compromised.

An inclusive approach to conservation in many forest areas will require assistance from the state and state will need the assistance of local communities to be able to govern the forests in a tenable manner. The localized solutions that emerge from collective problem solving can pave the way forward for more secure forests.

Forest diversion for development will have to be resisted and regulated by the state and local community to ensure that large scale diversion is prevented. There exists a spectrum between the two approaches to conservation practice expressed either as inviolate spaces or community-based conservation. There is a need to facilitate the exploration of the options available in between which is guided by the tenets of due process, social justice and rights of forest-dwelling communities as enshrined in the FRA.