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Forest Regulation in India: The Role of the Judiciary

DISSERTATION

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DECLARATION

I, Pooja Adike do hereby declare that this dissertation titled 'Forest Regulation in India: The Role of the Judiciary' is the outcome of bona fide research undertaken by me in partial fulfillment of the Degree of Master of Laws (LL.M.) for the academic year 2023-24, at the National Law School of India University (NLSIU), Bangalore, under the guidance and supervision of Prof Dr. Gayathri D. Naik.

I declare that this dissertation is my own original work and all sources used have been properly acknowledged and cited. I further declare that I have not used any generative artificial intelligence (AI) and AI-assisted technologies in the writing process.

I also declare that this work has not been submitted either in part or in whole for any Degree or Diploma at any other university.

Date: 30.04.2024 Pooja Adike

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CERTIFICATE

This is to certify that this dissertation titled **'**Forest Regulation in India: The Role of the Judiciary**'**, submitted by Pooja Adike (ID No:M23059) at the National Law School of India University, Bangalore, in partial fulfillment of the Degree of Master of Laws (LL.M.) for the academic year 2023-24, was undertaken under my supervision.

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Introduction

In the context of the growing problem of climate change and the fast-depleting forest cover across the world, the question of forest conservation has become a key consideration. India's forest cover has been reported to be about 22% in 2019, but a minimum of 30% forest cover is required in order to maintain ecological stability[1]. Anticipating an unavoidable climate hazard which includes food and water insecurity, fear of extinction, the creation of uninhabitable land, forest conservation has been recognized as one of the most effective methods of mitigating the horrors of climate change[2]. For a developing country like India, the task of forest conservation is much more important because it bears the burden of having to balancing its developmental goals alongside the global mandate of environmental protection as a lot of the developmental goals are reliant on the resources the environment has to offer[3]. The focus on development in the present capitalist society has inevitably caused concerns of Environment sustainability and therefore, in the recent past, there has been an ever-increasing focus on environmental issues considering issues of depleting natural resources, its increased usage, and interests in conservation of the environment.

Indian governmental policy since Independence, has deeply focused on the question of economic development of the country which has resulted in a fair raise in the overall growth in terms of the economic indicators, but the same developmental goals have also created new risks and actual deterioration of the environment[4]. The rapid economic growth, poverty eradication and developmental projects have been a key feature of the freedom movement in British India and a key feature of the newly independent India under Nehru and environmental issues were not a concern at this point for policy makers, the public or the international community[5].

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[1] Forest Survey of India, India State of Forest report :2019.
[2] Intergovernmental Panel on Climate Change, 'Working Group II Contribution to the Sixth Assessment Report' < https://www.ipcc.ch/report/ar6/wg2/> accessed 30 April 2024.
[3] Munazah Nazeer, Uzma Tabassum & Shaista Alam, 'Environmental Pollution and Sustainable Development in Developing Countries' (2016) 55 Pakistan Development Review 589.
N.A. Sarma, 'Economic Development in India: The First and Second Five Year Plans' (1958) 6(2) *International Monetary Fund Staff Papers* <https://www.elibrary.imf.org/view/journals/024/1958/001/article-A002-en.xml?ArticleTabs=fulltext> accessed 10 August 2021.; Ramachandra Guha, 'Ecological Roots of Development Crisis' (1986) 21(15) EPW, 623–625.
[5] Supra note 3.

This developmental attitude changed during the 1970's when the State witnesses a Constitutional Mandate to ensure environmental protection and further in the 1980's after the creation of the Ministry of Environment and Forest. But post the Liberalisation policy in the 1990's, there has been an additional burden on Indian governmental policies to keep up with the international economies which further put out of sight, all the environmental concerns that was gaining traction during the 1970's and 1980's. With development being the only focused goal, several developmental projects were approved even in ecologically sensitive parts of the country which required preservation[6]. These factors severally tipped the scale to prioritise economic growth over development. A change was promised with the enactment of the Forest Rights Act[7] and the National Environmental Policy in 2006[8] which attempted to conserve and efficiently manage natural resources in India, but there has been a failure in the delivery of such promises due to various political, regulatory and administrative failures[9].

This paper conducts a qualitative investigation into the role of the judiciary in forest regulation in India. The paper seeks to do a doctrinal analysis of the cases of the Supreme Court and High Courts in India to look at its approach in the pre-liberalisation and post-liberalisation periods to analyse any difference in its approach to developmental projects and other commercial activities in relation to the environment and any effects such acts may have on it by looking at the various cases that have reached the higher courts. It also seeks to look at judgements of the said courts to find the effects and influences the international law and international treaties framework may have had upon its adjudication approach. Further the paper will look at different policies and legislations that are a product of the guidelines or orders of the Supreme Court to understand the regulation framework and the paper will look at other relevant secondary material such as Commission reports and other studies to analyse the implementation of such orders and administrative and legislative orders and acts.

This paper seeks to look at the active role played by the judiciary in forest regulation in India and to compare the shift in the judicial activism pre and post the economic reforms of 1991. It

[6] Manmohan Singh, 'Environment and the New Economic Policies' (15 September 1992) 36(16) Yojana 4-10, 28.
[7] The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006
[8] Ministry of Environment, Forest and Climate Change, *National Environment Policy 2006* (GOI 2006). <https://www.indiawaterportal.org/sites/default/files/iwp2/National_Environment_Policy_ _MoEF_2006.pdf> accessed 30 April 2024.
[9] C.R. Bijoy, 'Community Forest Resources: How the Government is Undermining the Forest Rights Act' (The Wire Science, 24 November 2020) https://science.thewire.in/politics/government/community-forest-resources-forest-rights-act-2006-ministry-of-tribal-affairs-implementation-gram-sabha/ accessed 30 April 2024

also traces the trajectory in the evolution of environmental regulation in India keeping in mind the commodification of nature, allowing environmental harms to be offset or compensated for in ways that further distributive injustice, regulatory turf wars between institutions, and the centralisation of environmental regulation? Additionally, it also examines the ways in which environmental regulations have (by the State machineries) been used as a device of state domination over India's indigenous communities?

Forest Regulation during the British Era

Before the advent of the colonial rule, Indians in general had a sacrosanct relationship with forests, they revered it for its several gifts and mysterious ways, to the extent that they worshiped the forests as goddess Aryanyani[10]. Forests were also protected by rulers and the ruled alike, it was seen as a social responsibility of the community. Several indigenous communities have been inhabiting forests for years without titles before the colonial era. Before the advent of the colonial powers in India, particularly the British, tribes in India were seen as the protectors and guardians of forests, they shared a symbiotic relationship with forests.

This traditional and culturally specific understanding of forests in India changed drastically with the British rule in India who saw the forests as a source of revenue and therefore exploited them for its resources to meet the needs and demands of the British empire[11]. The imperial power enacted the 1865 act concerning forests which established the forest department[12]. The primary objective of this act was to facilitate the felling of forest trees for imperial use and for the British to take control of forests in India by bringing the forests under government ownership[13]. Finding it lacking, the British enacted a more draconian law, granting more power to the forest authorities in 1878 which had a stronger claim on the forests to address the inadequacies of the previous legislation[14]. This period marked a significant decrease in the

[10] Sudha G Tilak, ''India has many sacred forests: Here's the goddess of one of them' (Scroll, 11 Nov, 2019) <https://scroll.in/article/943257/india-has-many-sacred-forests-heres-the-goddess-of-one-of-them> accessed 30 April 2024.
[11] Madhav Gadgil and V.D. Vartak, 'Sacred Groves in Maharashtra: An Inventory', in S.K. Jain (ed), *Glimpses of Indian Ethnobotany* (Oxford University Press, Bombay, 1981).
[12] Indian Forest Act, 1865.
[13] Bharti Nandwani, 'Forest Rights Act: An Account of Contradictory Conservation Laws' (Ideas for India, 22 September, 2023) < https://www.ideasforindia.in/topics/governance/forest-rights-act-an-account-of-contradictory-conservation-laws.html > accessed 30 April 2024.
[14] Supra note 13.

forest cover in India[15]. Both these legislations were replaced by the Forest Act of 1927 which was enacted to consolidate all forest legislations. Although the legislation categorized forests and systematized forest regulation, its underlying objective was primarily to legitimize the extraction of forest resources without any due regard to the objective of conservation[16]. Being industrial friendly, the 1927 act was responsible for a severe reduction in forest cover in the country.

Forest Regulation and Legislation in the Post-Independence era

The National Forest Policy, 1952[17]: This policy entailed some amounts of forest protest but prioritized the production and revenue maximization goas of the county at the time. This policy very much followed the British regulatory attitude towards forests.

The Constitutional Amendment, 1976[18]: While there were no provisions in the Constitution to protect the environment, the 42nd Amendment to the Constitution added articles 48A and 51A(g) which imposes a duty upon the State and citizens to protect wildlife and forests respectively[19]. Although not justiciable, these duties are specifically provided for in the Constitution and have a driving force. This amendment was a result of the Stockholm Declaration[20] and the growing movement towards Environmental preservation in the international realm during the 1970's. Further, this amendment also centralized forest governance by moving forests from the State List to the concurrent list giving the Central government the authority to legislate over forests. Moreover, the Constitutional scheme was strengthened by the efforts of the judiciary in India to bring several environmental concerns such as access to clean water[21], right to a clean environment[22] etc., within the scope of Articles 14, 19, 21 and 32 of the Constitution which protects the fundamental rights of all citizens and

[15] Supra note 3.
[16] E.A. Smythies, *India's Forest Wealth: India of Today* (vol. 6, Humphery Milford 1925).
[17] The National Forest Policy, 1952.
[18] The Constitution (Forty-second Amendment) Act, 1976.
[19] Ibid.
[20] *Report of the United Nations Conference on the Human Environment, Stockholm,* 5—16 June 1972 (United Nations Publication, Sales no E 73 II A 14).
[21] *Subhash Kumar v. State of Bihar* AIR 1991 SC 420
[22] *Rural Litigation andEntitlement Kendra, DehraDun v State of Uttar Pradesh* AIR 1988 SC 2187, 2195.

people, thereby elevating the status of environmental issues from ones that are not justiciable to ones that are.

Forest Conservation Act 1980[23]: This act was in response to the rapid decline in forest cover in the country at the time in addition to fulfill the Constitutional mandate of Forest Conservation and Environmental Protection in general. The primary purpose of the act was to ensure the protection of forests and it placed restrictions on the use of forest land for non-forest purposes while furthering the developmental goals of the country. This was one of the first legislations to attempt to strike a balance between the developmental goal stacked against the concerns of environmental and forest protection. While it did not abandon the developmental goals for the cause of environment, the restrictions places on the diversion of forest land were to act as a check. Central Governments' approval was essential for diverting land, in cases where there was a diversion, compensatory afforestation was mandated to mitigate the effects of such diversion which was managed by the CAMPA, bodies were setup by the Ministry of Environment and Forests to oversee such diversions and the clearance processes involved. Despite these efforts, the act further strengthened forest bureaucracy and did not have the effect of inclusive participation in forest matters[24].

The National Forest Policy, 1988[25]: This policy marked a shift in the mandate from the earlier ones. The primary objective of this policy was to maintain ecological stability and ensure environmental protection[26]. This policy differed from the previous ones because it shifted its focus from profit making, exploitation of forests and industrial maximization to that of forest conservation[27]. This policy envisioned incentive for the local communities and individuals to participate in the conservation process. For this purpose, various bodies such as the National Wasteland Development Boards, Joint Forest Management program and the Forest Protection Committee were setup under this policy[28].

[23] Forest Conservation Act, 1980
[24] Supra note 13.
[25] The National Forest Policy, 1988
[26] S. Upadhyay and V. Upadhyay, *Forest laws, Wildlife and the Environment* (Lexis Nexis Butterworths Publications, New Delhi, 1st edn, Year), p. 28.
[27] Ibid.
[28] Ibid.

The Schedule Tribe and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006[29]: The primary aim of this legislation was to entrust forest land to the original forest dwellers, grant the use of some restricted forest resources, ensure their participation in claims over forest land and the using of forest resources and allow for a more symbiotic relation between forest dwellers and the forest by allowing them to protect the forests and the wildlife within. It was also designed to correct historical injustice which started during the colonial period.[30] This legislation received a lot of backlashes on the grounds that it would legalize encroachment upon forest land, allow for a scheme of land distribution. It was also opposed by corporates looking to use forest resources for profit maximization as it would make eviction of forest dwellers more difficult for them if they had a legal claim over the land[31]. The Forest Rights Act represented a historic step forward for forest management in India, and it is often hailed as such. However, it did not emerge from struggles for the control over forests alone but was a product of an ongoing intersection between political conflict, features of Indian capitalism, and the conceptions of "environment" and "development" in India's political discourse. In that sense, it is not only an "environmental" legislation, but an economic and social one, and one that belongs to a particular political conjuncture, representing both its limitations, and more importantly, its liberatory possibilities[32].

The compensatory Afforestation Fund Act, 2016[33]: The act was in response to a large amount of funds that were collected as fines, towards compensatory afforestation etc., which were held with an ad hoc committee waiting to be used after the setting up of the statutory authority[34].The act setup National and State funds which are to be used for the purpose of forest and wildlife management and conservation.

Role of the Judiciary in Forest Regulation

Historically, the judiciary has heard claims relating to environmental issues under tort law. Tort law actions were the first to evolve in Environmental jurisprudence and this regime held

[29] The Schedule Tribe and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006
[30] S. Divan and A. Rosencraz, *Environmental Law and Policy in India* (3rd edn, OUP 2022) p. 89.
[31] Forest Sector Report India (2010), (India Council of Forestry Research and Education, Dehradun, Ministry of Environment and Forest, Government of India)
[32] Sarin, Madhu, 'Undoing Historical Injustice: Reclaiming Citizenship Rights and Democratic Forest Governance through the Forest Rights Act', in Sharachchandra Lele, and Ajit Menon (eds), *Democratizing Forest Governance in India* (Delhi, 2014; online edn, Oxford Academic, 18 Sept. 2014)
[33] The Compensatory Afforestation Fund Act, 2016
[34] Supra note 29.

individuals responsible for their actions. This was a regime of individual claims and individual responsibility. This regime was then refined by the various statutes that addressed specific environmental concerns and the more complex issues in environmental law. This gave way for a larger scope of environmental litigation which could address issues affecting large groups of people but when larger claims started to be addressed, the idea of individual responsibility was forgone to be replaced by a regime of public litigation and non-responsibility.

A. Procedural Relaxations

One of the major relaxations courts in India have used is the relaxation of the traditional understanding of locus standi in the court setting to allow for Public Interest Litigation because the narrow understanding of locus standi would not have allowed the courts to be innovative and decide matters of public interest. The courts explicitly allowed for such a procedural relaxation in the case of SP Gupta v. Union of India[35]. This has been used to adjudicate on issues such as prisoners' rights, discrimination against women in workplaces, environmental concerns, etc. This relaxation has been a major benefit to environmental litigation as about 79 percent of the cases filed in the Supreme court were either filed by NGO's or by people who were not directly affected by the concerned issue[36]. The benefit of allowing has been two-fold in that it allows an individual or a group to represent or for the court to take suo-moto action in cases where (a) the affected are several and scattered or are unable to represent themselves for any reason and (b) in case the environment is affected without explicitly harming or affecting any being.

There have been several instances in Forest litigation where the PIL has been invoked for either one of the above-mentioned reasons. In the case of Tarun Bharat Sangh v. Union of India[37] where there were alleged illegal mining operations being carried out in a protected area under Forest and Wildlife Conservation laws, the Supreme Court was able to issue orders to stop such practices and adhere to the law because of procedural relaxations where a voluntary organization was allowed to bring a petition before the Apex court under Article 32 of the

[35] SP Gupta v. Union of India AIR 1982 SC 149
[36] Geetanjoy Sahu, PUBLIC INTEREST ENVIRONMENTAL LITIGATIONS IN INDIA: Contributions and Complications, The Indian Journal of Political Science, October-December 2008, Vol. 69, No. 4, pp. 745-758.
[37] AIR 1992 SC 514.

Constitution[38]. Similarly, in the Doon Valley case[39], a cohort of residents of Mussoorie appealed to the Supreme Court saying that the forest cover was being affected which in turn led to landslides and other issues due to excessive mining in the hills. The court was thus able to intervene and order for all the concerned mines to be closed. Additionally, in the In Re Felling of Trees in Aarey Forest Case[40], the court took suo-moto action upon receiving a letter by law school students alerting the court of the several trees that were being felled for a proposed metro project. The Godavarman case[41] was also a result of the Supreme Court's initiative. This case allowed the Court to take more initiative and redefine the term 'forests' to expand its scope[42].

Another procedural innovation attempted by the supreme court can be explicitly seen in the case of TN Godavarman Thirumulpad v. Union of India[43]. In this case, the SC has instead of passing final orders on the case before it based on the facts and the issues of law, has attempted to keep the executive in line and tried to monitor its actions by passing interim orders and directions instead of delivering its final judgement[44]. The case has therefore been under hearing because of such procedural relaxations since 1995. By employing such a continuing Mandamus, the courts have also extended their authority beyond reasonable time frames.

By allowing a continuing mandamus in this this case, the court institutionalised new bodies for forest management and took up a wide range of issues that were key to forest management and conservation in India. This has allowed the courts to have a tremendous impact on the cause of forest conservation in the Nilgiris. It has been able to place a complete ban on all activities in National Parks and Sanctuaries, no reserved forest can be de-reserved without the approval of the court, and many other such restrictions in order to further the cause of conservation. The court in this case also ordered the formation of the Central Empowered Committee (CEC) at the national level which was to monitor the execution of the orders of the court. This body was also to exclusively to report to the Court. The court in its 2006 order constituted the Compensatory Afforestation Fund Management and Planning Authority with the purpose of collecting and managing funds for compensatory afforestation[45]. All of these executive

[38] Supra note 37.
[39] Rural Litigation and Entitlement Kendra v. State of UP, 1985 AIR 652.
[40] In Re: Felling of Trees in Aarey Forest 2023 LiveLaw (SC) 334.
[41] TN Godavarman Thirumulpad v. Union of India, AIR 1996 SC 1228.
[42] Ibid.
[43] Ibid.
[44] Ibid.
[45] T.N. Godavaraman Thirumulpad v. Union of India AIR 2005 SC 4256.

functions were taken up by the court with the sole objective of forest conservation and to substitute executive inaction. While this is a noble pursuit in terms of environmental protection and to initiate positive awareness and dialogue amongst the stakeholders and the public at large, it also raises several questions on the federal principles front. This extent of intervention on that part of the courts raise questions about its Constitutional validity, but one could also argue that it is also the only recourse that the courts could resort to in cases of administrative failure.

Centre for Environmental Law, EEF v. Union of India[46] was another case of continuing mandamus where the Supreme court passed orders significantly reducing the power of the government to de-reserve or de-notify a land as forest land[47]. It also imposed restrictions on non-forest activities to be conducted in National Parks and Sanctuaries, despite having obtained relevant clearances under the Forest Conservation Act. These cases clarify that the courts using continuing mandamus have tried to streamline various administrative authorities and eased the process of the implementation of law to a certain extent.

These innovations on the part of the judiciary seem intuitively very useful but they also bring with them several other considerations that have to be evaluated. Apart from the federal issues of judicial activism in this manner, there are also several practical difficulties that arise with these kinds of procedural relaxations. There have been cases where actions have been filed without proper evidence under the pretence that the judiciary will step in to gather said evidence to support environmental causes[48]. As seen in the Godavarman case, the need to monitor the executive has caused an excessive burden upon the courts and the valuable time of the judiciary is being diverted to take over administrative functions. Further, the remedies that are provided for in case of PIL litigation are not generally compensatory, the relief is generally in the form of injunctions which are interim relief methods. Since there cannot be any one clear solution in such cases, they are also viewed as being inadequate.

Additionally, the Supreme Court has also not been consistent in its attitude towards entertaining PIL's[49]. While it has allowed PIL's in several environmental litigations as previously illustrated, it has also rejected several of them in cases where developmental projects are at

[46] Environmental Law, WWF v. Union of India (2013) 6 SCR 757.
[47] Id.
[48] Ramesh, M.K, *Environmental Justice: Courts and Beyond, Indian Journal of Environmental Law*, (2002) Vol.3, No. 1.
[49] Supra note 30.

stake[50]. This position of the court was clearly evident when a PIL was filed to stop the construction of the Tehri Dam and the power plants in the Dahanu Taluk, Maharashtra. The PIL pointed out the several flaws and violations of conditions upon which the Ministry of Environment and Forests had given clearances for the developmental projects but the courts response was to suggest that the conflict resolution between developmental concerns and environmental concerns is the prerogative of the Executive. The court seemed to have used its discretionary powers extensively for environmental concerns in the 1980's but this this plummeted in the 1990's where developmental projects were concerned[51].

Furthermore, PIL litigation, which was seen originally as ensuring the rights of the most marginalised communities, is now hindering the rights of forest dwellers. The Constitutional validity of the Forest Rights Act, 2006, was challenged in the case of Wildlife First v. Union of India in 2008.[52] While the case had not been decided in several years, the focus of the case shifted to evicting illegal forest dwellers. The Supreme Court in this case strictly adhered to procedure without any due consideration to the issues concerning the forest dwellers in establishing their claim to the forest land, going against the very purpose of the PIL litigation which was to provide easy access to justice for marginalised communities[53].

B. Substantive and Procedural Interpretations of the Law

It cannot be denied that forest regulation has gained a broader understanding and scope because of the interpretations of the judiciary in deciding cases before it. While the judiciary has tried to interpret the legislations in place, it has also made a serious effort to broaden the scope of the laws to accommodate the needs of forest conservation in several of its judgements and orders. It also has taken on the task of balancing developmental and industrial goals against forest conservation in its interpretations in many cases. The judiciary has also had a hand in placing institutions in order to make the application of the legal framework more efficient. The National Green Tribunal is one of the best examples of this institutional change. The Supreme court in several cases[54] called for the creation of a separate tribunal to deal with environmental

[50] Ibid.
[51] Ibid.
[52] Wildlife First v. Union of India WP (C) 109/2008.
[53] Yamunan S, 'PIL Was Meant to Help Marginalised People Access Justice. Now, It's Being Used against Them' (*Scroll.in*, 27 February 2019) <https://scroll.in/article/914514/pil-was-meant-to-help-marginalised-people-access-justice-now-its-being-used-against-them> accessed 30 April 2024.
[54] Supra note 30.

issues which was then acknowledged by the Law Commission in its 186th report[55] after which the NGT was established in 2010.

Several countries have been extending a constitutional guarantee to better environment and ecology in the past years[56]. These guarantees are either procedural or substantial. Substantial guarantees dictate a particular outcome while procedural guarantees focus on the manner to address the concern. Procedural rights such as a mandated public hearing, right to information, etc are just as effective as substantial rights in preventing environmental degradation[57]. Avenues to seek justice, platforms of dispute redressal, public participation in decisions such as developmental projects in forest areas etc., and the right to information are the procedural rights which are key to conservation of forests, especially in the context of forest dwellers' rights and the conflict between their rights and the environmental protection. The Judiciary in India has made the effort to provide both substantial as well as procedural guarantees in its decision making process as will be illustrated below.

The Supreme Court in the case of TN Godavarman v. Union of India[58] was faced with the issue of misuse of the definition of the term 'forest' in the Forest Conservation Act by the State authorities who narrowly interpreted to allow for timber and other activities in forest areas that were not classified as reserve forests. The court here unilaterally broadened the scope of the term 'forest' and hence placed a complete ban on non-forest activities in some areas and a partial ban, subject to the approval of the Central Government's approval in some parts. In the next few orders in the case, the court constituted a High Power Committee to monitor forest activities and issued directions for the proper conservation of forests in the north-eastern parts of the country.

The court in its 1998 order in the case[59] addressed the question of licenses that were given to all wood based industries and suspended all licenses and allowed for renewal only in cases where there were no irregularities found[60]. This was the courts explicit attempt to adjust the working of the industries to the capabilities of the forests keeping in mind their conservation and not the other way around. Further this order also took up the management of forests in a

[55] Government of India, *Law Commission report (186, 2003)*.
[56] Erin Daly, *Constitutional Protection for Environmental Rights: The Benefits of Environmental Process*, International Journal of Peace Studies, Volume 17, Number 2, Winter 2012.
[57] Id.
[58] (1997) 7 SCC 440
[59] TN Godavarman Thirumalpad v. Union of India, AIR 1998 SC 769.
[60] Supra note 59.

scientific manner and ordered for the turnover of the industries to be less than the annual harvestable yield of the forest and banned any activities in eco-sensitive zones[61]. The court in this case took the initiative to discuss other related issues of errant officials, timber pricing, transport of timber, in order to provide a holistic resolution of issues in the case.

This order also allowed for the participation of District, Regional and Village councils in the management of forest and forest resources[62]. This is an excellent example of procedural rights granted by the court as it allows for relevant people's participation in important matters of the forest.

Following this case, the Bombay high court in the case of Goa Foundation v. Conservator of Forest[63] recalled the permissions granted to Tata Housing Development company to build residential apartments on a hill and told the company to restore the hill to its natural vegetation.

In the Dehradun Quarrying case[64] the court was tasked with the problem of balancing economic interests against the demands of the industries upon the forests. The court here played the activist, conducted an environmental review and the need for the quarrying activities and finally deemed that the activities in question violated the FCA and therefore not only shut down the activities but also ordered for the reforestation of the affected areas, placed a monitoring committee and also provided the committee with funding to conduct their functions. In the Vedanta case[65], where the question was whether to allow the company to setup a refinery in a reserved forest, the court again did a careful balancing of the growth of the Indian economy and suggested that a rise in growth rate does not always mean inclusive growth[66]. In doing this, the court allowed for the project to be developed if it complied with the various restrictions such as compensation, rehabilitation, conservation, etc and upon receiving consent of the tribal communities being affected.

Another instance of substantial interpretation by the court can be seen in the case of Orissa Mining Corporation Ltd v. Ministry of Environment and Forest[67]. Here, the court mainly dealt with the rights of the traditional forest dwellers. While interacting with international

[61] Ibid.
[62] AIR 1998 SC 769.
[63] AIR 1999 BOMBAY 177.
[64] *Rural Litigation and Entitlement Kendra, Dehradun v State of Uttar Pradesh* AIR 1988 SC 2187.
[65] TN Godavarman Thirumulpad v. Union of India, (2008) 2 SCC 222.
[66] Ibid.
[67] (2013) 6 SCC 476.

conventions and the provisions of the Constitution, the court highlighted the inherent right of indigenous people to maintain their spiritual and distinct relationship with forest land, it also recognised the role of indigenous people in maintaining forests. The court also ordered for the Gram Sabhas concerned to vote on whether the project was to be allowed or not[68]. This was another important step in the advancement of procedural guarantees in environmental protection.

The Supreme Court had to deal with a grave issue of indiscriminate mining in Karnataka. In Samaj Parivarthana Samudaya v. State of Karnataka[69] complained that several illegal mining operations were being carried out in the area of Bellary in consort with the government officials, political goons, etc. The court took cognizance of this and ordered the CEC to check the extent of environmental degradation caused due to these activities and upon finding that it caused significant damage to the environment, the court ordered an immediate shut down of all the activities. Despite shortage of ore, the court did not allow for further mining without implementing Reclamation and Rehabilitation measures in order to restore the area. The court also ordered a macro level EIA to be conducted. These drastic steps of the court resulted in restoration of forest area, improved the air quality, etc. More importantly, the court was able to restore environmental rule of law by its own volition.

Several other such initiatives of the judiciary has led to a construction of a strong Environmental Rule of Law in India. It has taken up the responsibilities of the legislature as well as the executive as seen in the cases above in addition to performing the role of the judiciary itself. This approach cannot be said to be completely successful, there have been cases where contesting rights have caused one interest group to take priority above another, cases where the court has had to prioritise issues and various other such concerns[70]. But it is also true that the judiciary has done a significant amount of weightlifting when it comes to forest conservation and general environmental protection in whatever ways it can, stretching its limits, sometimes to the point of criticism, very validly so. The judiciary has taken up the concern of environmental and forest conservation while the executive and legislature have been

[68] Ibid.
[69] (2013) 8 SCC 154.
[70] Armin Rosencranz, Edward Boeing, & Brinda Dutta, *The Godavarman Case: The Indian Supreme Courts Breach of Constitutional Boundaries in Managing India's Forests,* 37 Envronmental. L. REP. 10032.

primarily concerned with developmental goals of the country and for this, due regard must be extended to the judiciary.

The 1991 Economic Reforms and Forest Regulation

At the time of independence, Indian government was strictly concerned with the growth of the Indian economy and alleviation of issues such as food security, national security, infrastructural development, etc. The prime focus on these issues took away from any consideration due to environmental concerns. As seen, this changed with the development of the Constitutional mandate of Environmental protection in the 1970's and 1980's. Policy and legislative initiatives were taken to improve the management and protection of forests with the goal of conservation and sustainable development. These legislative reforms incited and allowed the judiciary with a new approach towards the protection of the environment and this phase saw excessive judicial intervention and procedural relaxations for the cause of environmental and forest protection as will be illustrated below. This momentum was again affected by the economic reforms of 1991 which put burden on the Indian state, which was not open to the international market, to make itself more development and market oriented in order to sustain itself in the international market. These reforms had once again brought development and profit maximisation back to the centre of the environmental question and had caused a fear that these reforms would increase environmental problems and lead to injustice[71].

The regulatory framework in place till the time of economic liberalisation in 1991 was one of control and command[72]. This system, although progressive, has not been able to sufficiently manage and maintain environmental degradation and deforestation. The 1995 Survey of the Government of India revealed that environmental indices had been steadily falling at the time[73]. The control and command framework had largely failed because of trivial penalties, bribes subverting the environmental regulation purposes, etc[74]. Furthermore, government authorities also rarely used their powers to prohibit industries from causing environmental offences because of the fear of economic dislocation[75].

[71] A. Kothari, 'Environment and New Economic Policies' (1995) *Economic and Political Weekly* 30(17) 924.
[72] Rosencranz, Pandian and Campbell, *Economic approaches for a Green India*, New Delhi Allied, 1999.
[73] Government of India, *Economic Survey* (1995).
[74] S. Divan and A. Rosencraz, *Environmental Law and Policy in India* (2nd edn, OUP 2002)
[75] Supra note, 74.

During the 1991 reforms, the FCA became a routine legitimising body to clear forests as economic rationales took centre stage and the core of regulation became hassle-free, quick clearances for developmental projects on forest land where clearance took precedence over the agenda of conservation. Post facto clearances, temporary clearances and such procedural relaxations became much more prevalent during this era. To the extent that 1991 reforms saw the withdrawal of the state from many things and furthered the centralisation of forest management[76]. The incentives for companies to follow creative non-compliance increased. Instances of using environment clearance to begin work even though FCA clearance was still pending increased manifold and such violations were backed by the State to a large extent. The rate of forest clearance has become much faster since 2003. 26% of all forests cleared between 1980 and 2007 were cleared between 2003 and 2007[77]. Similarly, between 1992 and 2004, twice the amount of forests were cleared in Odisha than between 1981 and 1991[78]. The interplay of the logic of compensatory afforestation with the logic of quick clearances means that the government has moved towards a land bank model. It consolidates land banks that can be made readily available to projects seeking forest diversion to undertake compensatory afforestation[79]. Revenue lands that can be used in land banks are insufficient. So government circulars indicate that common lands, such as scrub forests, are acquired for land banks**.** Pasture lands are being considered as degraded forests so that they can be used for Compensatory Afforestation[80]**.** Thus, economic efficiency and, to some extent, participation are encouraged, while social solidarity and rights rationales suffer.

Dereliction of the Judiciary

The role of the judiciary has been an important one in the development of Environmental Rule of Law in India as has been illustrated above. In its attempt at balancing developmental goals against the goals of all other stakeholders in forest litigation, the judiciary has favoured the conservation agenda over the developmental agenda. In this way it has held the role of a protector of the environmental goals in the country but this role shifted to some extent. In addition to this shift in the judiciary's attitude, there have also been some major issues with the

[76] Supra note 30.
[77] Ashish Kothari and Milind Wani, 'Globalisation vs India's Forests' (2008) Vol. 43, Issue No. 37, 13 Sep.
[78] Ibid.
[79] Ibid.
[80] Ibid.

various quasi-judicial bodies that the judiciary set up in order to better regulate forest conservation.

In the Lafarge Umiam Mining Ltd v. Union of India[81] case, the Ministry of Environment and forest claimed that the company had misrepresented the fertile forest land in Meghalaya upon which the project was to be situated, to be barren land and had obtained all necessary clearances. The court in this case allowed the company to continue with its project on the grounds that previously the MoEF had granted clearances. This case is a clear example of the shift in the Judiciary's attitude towards forest concerns. In earlier cases, the court by its own volition had taken up studies and conducted assessments of the project's impact etc, but such steps were not taken in this case and complete reliance was placed upon the clearances granted. It also guised its ruling as one being useful to the local communities involved as well but this is a questionable conclusion considering the process used to gain consent of local communities are extremely questionable and are rarely implemented properly. Similarly, in subsequent decisions such as In Re: Construction of Park at Noida near Okhla Bird Sanctuary[82] and Godrej and Boyce MFG Co Ltd v. State of Maharashtra[83], it is very clear that the developmental agenda has also been prioritised over the rights of tribal communities and the goal of forest conservation by the Judiciary.

Post the 1976 Constitutional Amendment which put 'forests' which was originally in the State List, into the Concurrent List, the State government required the approval of the Central government to use forests for non-forest purposes, to recognise the rights of communities over forests, etc. The Central government also introduced the Compensatory Afforestation (CA) scheme as compensation for use of forests for non-forest purposes by State Governments in 1980 under the guise that it would decrease the use of forests for commercial purposes[84]. This looped the Central government into all claims over the forests, from the claims of the governments and private industrialist to that of local communities' which enabled it to justify projects which were in national interest i.e., the economic growth of the country[85]. This over-centralisation of regulation takes away from the need to cater the law's implementation to the

[81] (2011) 7 SCR. 954.
[82] (2011) 1 SCC 744.
[83] (2014) 3 SCC 430.
[84] Manju Menon and Kanchi Kohli, 'The Judicial Fix for Forest Loss: The Godavarman Case and the Financialization of India's Forests' (2021) 16 Journal of South Asian Development 3, 414-432.
[85] Rangarajan M, 'Striving for a Balance: Nature, Power, Science and India′s Indira Gandhi, 1917-1984' (2009) 7 Conservation and Society 299–312.

particular situation at hand, after duly considering the interests of all parties involved while retaining forest conservation as the primary objective.

Furthermore, the Supreme Court created several bodies to take over the administrative functions of the government. This created several issues of real-time implementation and practical concerns such as the lack of administrative bodies and other resources to take on the monumental tasks given to the said bodies by the court. For example, under the CA scheme, the State failed to acquire the land required for the compensatory afforestation and this led to the creation of the land banks model in revenue forests[86]. When this failed because of multiple claims over land and inter-departmental conflicts[87], the CA was to be done in degraded forests which would not be able to compensate for the damage caused. These are considerations for the executive bodies in the government to consider and cater to. But the Judiciary's activism in this case set a standard that could not have been followed through.

While the intervention of the Supreme Court has had its uses, it cannot be completely said that the attempts of the courts in overstepping their jurisdiction is particularly useful. In the forest cases, despite dramatically increasing the compensations, the radical interpretation of the term forest itself and the complete ban on the exploitation of the forest, there are several negative impacts of the judgement which the Courts have failed to reconcile[88]. The interpretation also caused several issues in enforcement by the Ministry of Environment and Forests. The appointment of the amicus curia in this case had the opposite effect of its intention and caused a concentration of power in the hands of the centre[89].

Concerns of the Tribal Communities in relation to Forest Conservation and Developmental Goals

The Forest Rights Act[90] is a legislation with the intention to restore the right to land of all indigenous people community use, habitation, cultivation etc., and to be involved in the

[86] Tiwari A, 'Forest Lands Shrink as Rules Are Blatantly Flouted' (*India Today*, 25 September 2013) <https://www.indiatoday.in/magazine/environment/story/19910315-forest-lands- shrink-as-rules-are-blatantly-flouted-814141-1991-03-15> accessed 30 April 2024.
[87] Ibid.
[88] Armin Rosencranz and Sharachchandra Lélé, 'Supreme Court and India's Forests' (2008) *Economic and Political Weekly,* p. 11-14.
[89] Ibid.
[90] Supra note 29.

management and conservation of forests and its resources. It also gave the local bodies the authority to be consulted with for the establishment of developmental projects which affected their rights in the land and forests. This act also has a provision for community rights such as collective ownership over land, rights over conversion of land, traditional methods of conservation of forests, etc., in addition to individual rights it grants to forest dwellers. Additionally, the Panchayat (Extension to the Scheduled Areas) Act, 1996 (PESA) was also enacted with the objective of protecting tribal rights by recognising their right over resources and their customary laws and norms. The Gram Sabha has an important power to consent to projects or activities in forests that might cause traditional dweller's displacement under the PESA[91].

The legislations until the 1988 National Environmental Policy have all viewed forest dwellers as a threat to the environment. This policy was because of the efforts of various social movements[92]. These legislations, starting during the British rule, have taken control of the previously unregulated forests which was home to the forest dwellers. This attempt at regulation has essentially caused the forest dwellers as a threat to the forests because of their usage of the forest according to their customs and traditions.

The economic deregulation in 1991 opened floodgates of excessive exploitation of natural resources by corporates[93]. This was also sanctioned by the government. For Example, the government amended the Mining (Regulation and Development) Act in 1993 to further the interests of domestic and international corporates. This developmental agenda directly put tribal welfare and interests and environmental concerns in a vulnerable position. This has also led to a flagrant violation of, several tribal rights and their displacement, as well as environmental rules[94]. A study conducted shows that Tribal Communities have been affected disproportionately due to displacements owing to the economic deregulation[95]. Several causes affect this situation, some of which include a non-present will to enforce the law, a lack of awareness, lack of sufficient agency of forest dwellers, etc.[96]

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[91] Section 4, The Provisions of the Panchayats (Extension to Scheduled Areas) Act, 1996.
[92] Kulkarni. S, *Forests: Law versus Policy* (1989) Economic and Political Weekly, *22*, 859– 862.
[93] Aseem Shrivastava and Ashish Kothari, *Churning the Earth: The Making of Global India* (Penguin 2014) 195.
[94] Ibid.
[95] Sahu G, 'Forest Rights and Tribals in Mineral Rich Areas of India: The Vedanta Case and Beyond' [2019] Research Handbook on Law, Environment and the Global South.
[96] Usha Ramanathan, 'A Word on Eminent Domain' in Lyla Mehta (ed), *Displaced by Development: Confronting Marginalisation and Gender Injustice* (Sage 2009) 133.

The Judiciary in India has had to decide several claims on behalf of the tribal dwellers being represented by their leaders and activists, NGO's etc. One of the best examples of such a litigation is the Vedanta case[97] where a bauxite mining project was proposed in the Niyamgiri hills in Orissa. After the approval of the project, a couple of villages belonging to the Borbhata and Kinari community were being evicted overnight, using force to realize the project[98]. A petition was then filed alleging violations of Environmental and Forest Conservation laws. The Supreme Court ordered the CEC to produce a report on the said violations and upon finding that there were several issues including the fact that there were no complete studies conducted about the effects of the project on the tribes or the forests and that there were major lapses on the part of the government as well as the Ministry of Environment and Forests, the Court stayed the project. The project was reopened when the company came up with revised assessments and plans and this faced political backlash and protests, and the NC Saxena committee was constituted which found severe violations of several laws including the FRA[99] and recommended against the continuing of the project. Finally, the Supreme Court disallowed the company to continue its activities and instructed the Gram Sabhas of all the affected villages to hold meetings and decide the fate of the project. All he Gram Sabhas unitarily decided against the project.

The legislations and the favorable interpretations of the courts in favor of the forest dwellers in granting them their rights was seen as correcting the historical injustice towards indigenous communities beginning in the colonial era. This was seen as a community-based model of forest conservation and resource management rooted in democratic structures[100]. This was however undermined by various parallel procedures created by states dominated by the role of the forest department[101] who used illegal means such as pressure and monetary incentives instead of limiting the regulation to the already existent FRA, PESA, etc.

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[97] *Orissa Mining Corporation v Union of India and Others* (2013) 6 SCC 476.
[98] Keren Wang, 'Framing Human Rights and the Production of Translation Legal Consciousness' (2016) 5(2) Journal of Civil & Legal Sciences 4.
[99] NC Saxena and others, 'Report of the Four Member Committee for Investigation into the Proposal Submitted by the Odisha Mining Company for Bauxite Mining in Niyamgiri' (Ministry of Environment and Forests, Government of India 2010)
[100] Shankar Gopalakrishnan, 'The Conflict in India's Forests: Will State-driven Expropriation Continue?' (2019) Vol. 54, Issue No. 23, *Economic and Political Weekly,* 08 Jun.
[101] Id.

There is evidence to suggest that after the enactment of the Forest Rights Act whose sole purpose was to restore land rights to forest dwellers after years of injustice being meted out to their community, there has been an increase in the forest land disputes between forest dwellers and the government authorities[102]. One of the reasons for this is the excessive fragmentation of forest legislations and the various rules and orders passed by subsequent governments as will be illustrated below.

Fragmentation of laws: The 2016 legislation on compensatory afforestation which approved a total of more than 50000 crore rupees for spending on forest-related activities. These activities would have a direct effect on the rights of the forest dwellers upon being implemented but the 2016 legislation does not either acknowledge the fact that there are such irregularities, not does it attempt to conciliate them. The situation worsens when the irregularities were to be addressed in the rules to the legislation but were not. Moreover, the rules to the Compensatory Afforestation Fund notified in 2018[103] places more power in the hands of the forest officials and takes away from the rights granted to the Gram Sabha in the decision-making process of how the fund is to be utilized[104]. The draft rules make no mention of the power granted to the Gram Sabha. There has also been an attempt to substitute the role of the Gram Sabha with that of other non-statutory bodies such as the Village Forest Management Committee[105] which stands to be a gross undermining of all the statutory provisions as well as the judicial decisions that granted the Gram Sabha these powers.

Additionally, the NPV that is to be paid to the states for using forest land for non-forest purposes is to be used by the States for afforestation purposes to strike a balance against the forest cover lost. This process does not encompass that the forest land is used by forest dwellers for non-forest purposes such as habitation, cultivation, etc., all of which are essential for their livelihood. No amendments were made to these laws considering the position of the forest dwellers[106]. The 2016 legislation does mention that the Gram Sabha are to be consulted but no process is set for these consultations[107] and moreover, there are several inconsistencies even

[102] Nandwani, Bharti, "Community forestry and its implications for land related disputes: Evidence from India", (2022) *European Journal of Political Economy,*73: 102155.
[103] Compensatory Afforestation Fund Rules, 2018.
[104] Aggarwal M, 'India's New Compensatory Afforestation Rules Dilute Rights of Forest Dwellers' (*Mongabay*, 23 August 2018) <https://india.mongabay.com/2018/08/indias-new-compensatory-afforestation-rules-dilute-rights-of-forest-dwellers/> accessed 30 April 2024.
[105] Ibid.
[106] Supra note 13.
[107] Ibid.

within the 2016 legislation as mentioned above. It is suggested that most of these disputes arising regarding land are due to failure to consult with forest dwellers before commencing projects on their land[108]. In the more recent past, the Supreme Court passed an order evicting over 10 lakh forest dwellers whose claims have been rejected in over 15 states in India owing to the negligence of the government[109] in defending a challenge to the constitutionality of the forest Rights Act.

These challenges in the implementation highlight two important factors: (a) the rights of forest dwellers are typically seen as being against not just the developmental goal but also against environmental concerns. This is the reason the duo of State and corporations with their developmental goal as well as the environmentalists view their interests to be stacked against that of the forest dwellers rights. This is the result of an incomplete misguided understanding of the rights of the forest dwellers. Focus must therefore be placed on understanding the symbiotic relation between forests and forest dwellers. (b) the power balance is tilted very much against the forest dwellers in the regulatory framework as well as in the practical considerations that affect the implementation of the law. This has caused a negligent behavior towards the rights of forest dwellers despite there being a complete legal and administrative framework which explicitly deals with their rights. Despite the fact that there are several substantial and procedural guarantees that seemingly protect forest dwellers' rights, they are not being implemented for this very reason. There is therefore a need by popular means to sensitize all the regulatory authorities involved about the claims of forest dwelling communities and their validity in order to create an actual structure of counter-hegemonic governance that balances the interests of all involved groups.

Analysis

It can be observed from these instances and cases that the regulation in India has gone through a few phases in its regulation of the Environment in general and Forest Regulation in particular. The period between 1985-1995: As the developmental foals of the country were being advanced by expanding industries, mines, etc, the higher courts in India became more active by way of PIL litigation. Several activists, NGO's etc filed claims before

[108] Ibid.
[109] Wildlife First v. Ministry of Forest and Environment, 2019 SCC OnLine SC 238.

the Supreme Court and the High Courts for a speedier and easier access to environmental justice and these courts also played along by incorporating international principles of Environmental Law to cater to the domestic necessities by way of judicial activism[110].

Mid-1995 onward: This was the period during which the SC heard several varying issues relating to forests such as land issues, tribal rights, mining leases, regulation of other industries, etc., the issues relating to the use of forest for non-forest purpose, the concept of compensatory afforestation etc. These cases revealed a series of violations in the implementation of the laws. It is evident from these proceedings that the centralisation approach of forest regulation has failed to stop forest cover loss, let alone mitigate its affects. This particular period of the Supreme Court's efforts in taking over forest regulation from the Government is widely criticised for being against the Constitutional boundaries of the Judiciary[111]. This attempt of judicial overreach by the judiciary, particularly the Supreme Court, was not supported and complimented by institutional bodies which could implement the regulatory framework being set by the Judiciary[112]. This was one of the reasons the courts had to resort to methods such as issuing continuous mandamus in order to ensure the administration reports back to the judiciary with relevant information and updates. This was therefore the period when the judiciary had essentially taken over the role of all the three bodies of governance. The courts justification for such drastic measures in taking on the role of all bodies of governance is the non-responsiveness of the concerned governments. This suggests that there were underlying fundamental concerns with forest regulation which the judiciary interpreted as mere lax in implementation of the law itself[113].

During this period, the Court setup several committees and bodies to check on the implementation of their orders. These bodies functioned on a State as well as the national level. The court along with these bodies set up the Compensatory Afforestation Fund (CAF) and the Net Present Value which was a compensatory fund to be deposited with the CAF for the loss forests in lieu of any developmental project in forest land. These fund systems was the greatest causes of the re-commodification of forests again, like the colonial era, because forests were now seen as commodity which could be exploited for a certain price. The Supreme Court in

[110] Supra note 30, pp 584.
[111] Ibid.
[112] N. Chowdhury, 'From judicial activism to adventurism: The Godavarman case in the Supreme Court of India' (2014) 17 *Asia-Pacific Journal of Environmental Law* 177–189.
[113] Supra note 84.

2005 defined NPV to be the monetary cost of loss of any forest services to the public because of the non-forest purpose[114]. This became the unit of trade or the value of exchange for forest commodity which essentially sanctioned the plundering of forests under the guise that it would be compensated for. This gave a legitimacy to the neo-liberal, capitalistic tendencies of capital accumulation without due concern for natural resources.

Additionally, during this period while the Supreme Court has taken up important questions of forest regulation into consideration, it has also categorically failed to take into account the interests of all the concerned stakeholders[115] such as the forest communities. This brought environmental regulation to resemble one of the colonial period which incentivised the exploitation of resources for the gain of a few sections of the society while causing active harm to people whose stake lies in the conservation of the forests.

Conclusion

This article has attempted to lay out the various challenges in the forest regulatory framework. These challenges and difficulties are due to various reasons such as the variety of laws that are dealing with the same issues, the overlap between them, the various regulatory authorities and a lack of a clear structure, the lack of institutional capacities, etc. The judiciary by way of intervening into the realm of the legislature and the executive has further complicated these concerns and has made the regulatory framework a messier one. These regulatory frameworks that are in place also have no guidance in how to manage the various interests of all concerned stakeholders and generally resort to corruption, political and personal interests to make decisions, especially post the commodification of forest resources in the recent past. This has caused the regulatory framework to be extremely unreliable and inconsistent in addition to failing in the actual process of regulation with the primary goal of forest conservation.

There is therefore a need to systematize the regulatory framework keeping in mind two things: (a) that the primary goal of regulation must remain conservation and not the current rendition of the crude neo-liberal method of extraction of forest resources that exists and (b) that the regulatory framework must be substantially accessible to all stakeholders in the substantial way

[114] Ibid.
[115] Ibid.

and not just on paper. This would mitigate several of the concerns that the regulatory framework at present faces and would help better navigate the concern of balancing competing interests. There is also a need for widespread sensitization of the importance of forests and the claims of stakeholders who do not hold the power in the neo-liberal world that rewards profit maximation above all else.

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