



Incompatibility of environmental laws, equity and sustainability: Experiences of forest laws and Adivasis in India

Debendra Kumar Biswal

Professor, Department of Anthropology, Utkal University, Bhubaneswar, Odisha, India

Abstract

The environmental laws have two major principles of sustainability to confirm; development that meets the needs of the present without compromising the ability of future generations to meet their own needs and equity i.e. "the right of future generations to enjoy a fair level of the common patrimony". However, very recently the Supreme Court of India and some High Courts through different cases and citizen-led Public Interest Litigation (PIL) have found several instances of incompatibility in regards to mandate of the constitution, environmental laws and the issue of sustainable development. These cases have forced the courts to re-examine the issues of Public Trust Doctrine, sustainable development, precautionary principles and Polluters Pay Principle. Based on these observations, the present paper has tried to sort out three major objectives. Firstly, it has a critical analysis of the principles and perspectives of environmental laws in India. Secondly, citing the instances of breach of public trust doctrine, it has critically evaluated Forest Rights Act, 2006, which has poised a debate on people vs wildlife and people vs protection of the forest. For instance, in the M.C. Mehta v. Kamal Nath, (1996) 1 SCC 38 and MI Builders Pvt. Ltd. v. Radhey Shyam Sahu, AIR 1996 SC 2468 Case, the court observed that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. Thirdly, it has tried to locate the aspirations for sustainable development in context to forest-tribe relationship and the role of forest and wildlife laws in facilitating it.

Keywords: Environmental law, sustainable development, tribals, public trust doctrine

Introduction

The Environmental laws have been developed in response to emerging awareness of and concern over issues impacting the entire world. These laws have developed piecemeal and for a variety of reasons based upon a couple of common guiding principles; principle of Sustainable development i.e. development that meets the needs of the present without compromising the ability of future generations to meet their own needs," and equity i.e. "the right of future generations to enjoy a fair level of the common patrimony" (Beckerman, 1994; De-Shalit, 1995; Taylor, 1986 and Barry, 1977) ^[1, 2, 7]. Based on these principles, the Government of India has enacted several Laws, Acts and Constitutional provisions to protect, conserve and improve its environment (Divan and Rosencranz, 2003; Leelakrishnan, 2002; Choudhary, 2001 and Desai, 2002) ^[5, 6, 11].

However, over the last three decades, the Supreme Court of India and some High Courts through different Cases and citizen-led Public Interest Litigation (PIL) have found several instances of incompatibility in regards to mandate of the constitution, environmental laws and the issue of sustainable development. These cases have forced the courts to re-examine the public trust doctrine, sustainable development, precautionary principles and polluter pays principle (T.N. Godavarman Thirumulpad v. Union of India, WP (Civil) No. 202 of 1995; Sushila Saw Mills v. State of Orissa, AIR 1995 SC 2484; Purabi and others, Land Use Policy 29, 2012). This paper has critically analysed principles and perspectives of environmental laws with specific reference to Forest Rights Act, 2006 with citing the instances of breach of public trust doctrine. How FRA 2006 has poised a debate on people vs wildlife and people vs protection of the forest to locate the aspirations for sustainable development in context to forest-tribe relationship.

1. Philosophy of environmental laws and tribal communities

The natural environment encompasses all living and non-living things occurring naturally on Earth, which encompasses the interaction of all living species, climate, weather, and natural resources that affect human survival and economic activity. These are complete ecological units that function as natural systems without massive civilized human intervention, including all vegetation, microorganisms, soil, rocks, atmosphere, and natural phenomena that occur within their boundaries. In India, the Environment Protection Act, in Sec. 2(a) defines of "environment" includes water, air, land, and the inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, microorganisms and property (Belshaw, 2001; Sarkar, 2012; Weston, 1999; Benson, 2000) ^[3, 4, 15, 23]. The environmental laws or "environmental and natural resources law" - is a collective term describing the network of treaties, statutes, regulations, and common and customary laws addressing the effects of human activity on the natural environment. The legal enactments are designed to consciously preserve the environment are found throughout history. However, the concept of "environmental law" as a separate and distinct body of law is a twentieth-century development in response to growing awareness of the unity and fragility of the biosphere; increased public concern over the impact of industrial activity on natural resources and human health; the increasing strength of the regulatory state; and more broadly the advent and success of environmentalism as a political movement. One of the important and distinct set of regulatory regimes of environmental law is management of specific natural resources, such as forests, minerals, or fisheries (Leelakrishnan, 2002) ^[11]. The five major

principles of environmental laws are Public Trust Doctrine, Precautionary Principle, Polluter Pays Principle, Equity and Sustainable Development (Leelakrishnan, 2002) ^[11]. When the impact of forest laws upon the communities' dependent upon forest is concerned, the principle of Equity and Sustainable Development need to relook within the framework of law and society. United Nations (2024) ^[21] defines sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs," it may be considered together with the concepts of "integration" (development cannot be considered in isolation from sustainability) and "interdependence" (social and economic development, and environmental protection, are interdependent). The UNEP defines inter-generational Equity as "the right of future generations to enjoy a fair level of the common patrimony" - and intra-generational equity - "the right of all people within the current generation to fair access to the current generation's entitlement to the Earth's natural resources" (UN, 2018) ^[20].

Based on above principles, India has enacted several Constitutional provisions, Acts and Laws to protect conserve and improve its environment. The state shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country (Article 48-A). This is the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures {Article 51-A (g)} and this is the responsibility of the state government to protect and improve the environment and to safeguard the forests and wildlife of the country (42nd amendment to the constitution in 1974). Legally, India has an elaborate legal framework with over two hundred laws and individual legislations relating to environmental protection governed by the Environment Protection Act, 1986. The National Environment Policy, 2004 seeks to address the question of environmental management in the country in a comprehensive manner (Kothari, 2004) ^[10].

Table 1

Institutions	Jurisdiction	Powers and Functions	Comments
Environmental courts	National Tribunal acts as the appellate authority at all-India level. State level environmental courts.		Deals with environmental offences and awards punishments
Green Bench of the Supreme Court		Deals with cases related to the environment in the Supreme Court.	
Green Bench of the High Court		Deals with cases related to the environment in the High Court.	
Forest Administration	Inspector General of (Forests). Assistant Inspector General of Forest. Divisional forest officers	Forest officers are equipped with both administrative and judicial powers.	

Advasi rights in forest laws and environmental protection: cases of contradictions

The rights of the tribal communities over the forest land for cultivation and habitation are justified in constitutional rights as well as in the legal rights in India. The Constitution of India guarantees right to habitat in Article-15(4) and 46. Article 15(4) grants exemption to the state for making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or Scheduled Tribes. Under Article 46, the state shall promote with special care the educational and economic interests of the weaker sections of the people, in particular, of Scheduled Castes and Scheduled Tribes and shall protect them from social injustice and all forms of exploitation. Their rights have been justified in different Acts and Laws in international instruments; like United Nations Declaration on the Rights of the Indigenous Peoples, 2007 (UNDRIP) argue for the rights of the tribal communities over land and habitation, which states that no relocation shall take place without the free, prior and informed consent of the indigenous peoples.

The relevance India Laws are The Wildlife (protection) Act, 1972, Protection of Civil Rights (PCR) Act, 1976, The forest conservation Ac, 1980 (amended in 1988): to provide for the conservation of forest. The Act imposed restrictions on the de-reservation of forests or use of forest land for non-forest purposes, National Forest Policy, 1988, Panchayat Extension to the Scheduled Areas Act 1996 and very recent one ST and other Traditional Forest Dwellers (recognition of forest rights) Act, 2006, conferred the right of habitation

on STs and other traditional forest dwellers. All these Acts and laws are backed by several judicial decisions.

Before, FRA 2006 several case laws too justified the balance between tribal livelihood and forest conservation. The case of Samatha vs. state of AP (1997) 8 SCC 191 is a judgement under right to life in Article 21. It was a landmark judgement which requires permission from the Gram Sabha in setting up business and industrial units in areas under tribal self-rule or areas under Schedule V of the constitution. In Narmada Bachao Andolan vs Union of India (2000), 10 SCC 664 it was ordered that construction of the dam will continue as per the award of the tribunal but Narmada Control Authority will prepare an Action Plan to fix a time frame so as to ensure relief and rehabilitation. In Enviro-Legal Action vs. Union of India, it was held that every attempt should be made to preserve the fragile ecology of the forest area and to protect the tiger reserve and the right of tribals in the state of Madhya Pradesh.

The recently enacted Scheduled Tribes and other Traditional Forest Dwellers (recognition of forest rights) Act, 2006 recognised historical injustice upon them and guarantees responsibilities and authority for sustainable use, conservation of biodiversity and maintenance of ecological balance, livelihood, food security and rights on ancestral lands and their habitat. The forest dwelling Scheduled Tribes ^[1] and other traditional forest dwellers ^[2] are integral to the very survival and sustainability of the forest ecosystem. Under Section 3(1) of this Act, the communities are given four categories of rights over forest land ^[3]. Title rights – i.e. ownership – to land that is being farmed by

tribals or forest dwellers as on December 13, 2005, subject to a maximum of 4 hectares; ownership is only for land that is actually being cultivated by the concerned family as on that date, meaning that no new lands are granted; Use rights – to minor forest produce (also including ownership), to grazing areas, to pastoralist routes, etc.; Forest management rights – to protect forests and wildlife and Relief and development rights – to rehabilitation in case of illegal eviction or forced displacement and to basic amenities, subject to restrictions for forest protection. There is also the provision of scientific resettlement of villages^[4] if people are displaced wildlife conservation (Sec.4-2). For which, consent of the community to the resettlement is a must and the government will provide not only compensation but a secure livelihood. Also it provides for legal rights to the community concern.

The Forest Rights Act 2006 has given exclusive individual as well as community rights over different categories of forests lands; rights to hold and live in the forest land under the individual or common occupation for habitation or for self-cultivation; community rights defined during princely states, zamindari or such intermediary regimes; rights to collect, use and dispose of Minor Forest Products (MFPs); community rights over Common Property Resources (CPRs) like water bodies, grazing lands; community tenure of habitat to Particularly Vulnerable Tribal Groups And rights for conversion of *Pattas* or leases or *grantis* issued by any local authority or any state government on forest lands to titles. There are strong arguments that tribal communities have lived in forests for centuries, and granting them the formal right over forest land is just undoing a historical injustice (Springate-Baginski, *et al.* 2009)^[19]. This is the compulsion which may be located in the demands of a political constituency, located in the recognition of the growing threat of left-wing insurgency, to address the immediate issue of survival and security for forest dwellers that might be needed to pacify those marginalized and even persecuted by “development”(Gopalkrishnan, 2017)^[9].

However, the provisions of exclusive forest rights to the tribals and other communities have raised three major debates among the environmentalists, anthropologists, wildlife conservationists, legal experts and at large the policy makers; tribal rights vs environmental conservation (Sarangi, 2017)^[14], do forest rights threaten wildlife (Rangarajan, 1996)^[13] and recognition of rights of the community (Upadhyaya and Sane, 2009)^[22]. One of the major issues is preference of wildlife or tribals. The FRA is empowered to declare and demarcate the “critical wildlife habitat” (CWLH), but government has decided to evict villagers from the villages falling in the way of the special tiger corridor. Under such circumstances, the forest department enjoys interpretational freedom. Whether it is occupation on forest land or demarcation of CWLH or ownership over Non-Wood Forest Products (NWFPs), the forest department does what suits its interests best.

Another issue of contention between the Act and environmentalists is of resettlement of evicted people, if it requires. The FRA has the provision that if the people living inside the Protected Areas (Sanctuaries and National Parks) are evicted for any reason, should be resettled (Science Wire, 2022). The Section 4(5) of the Act: “Save as otherwise provided, no member of a forest dwelling Scheduled Tribe or other traditional forest dweller shall be evicted or removed from forest land under his occupation

till the recognition and verification procedure is complete.” Against which, the environmentalists straight forward believe that these Protected Areas should be kept inviolable and all the people living inside should be evicted and resettled outside. Today, there are 600 odd Protected Areas in the country. More than 4 million people live in these Protected Areas (PAs). Hence, how and where these many people could possibly be resettled (Science Wire, 2022). Another way of looking at displacement is that Section 3 (1) of FRA provides for various community rights of access and use of forest resources by the tribals and other forest dwellers, whereas section 3 (2) says that the state can divert forest land for developmental facilities like roads, irrigation, electricity and communication lines and other. The process of enclosing these commons, and pushing adivasi and other forest dwellers out of the forests, has been going on for the past 200 years and continues unabated. The Indian Courts have clearly stated that if a forest-dwelling community is physically displaced because of a development project, the state should make all possible arrangements for the community to continue its livelihood and maintain its cultural identity elsewhere. This is one of the core forest rights that are bestowed on forest dwellers by the FRA. The rules published in 2008 neither elaborated this key right of forest dwellers nor stipulated how a development project that would displace them could rectify such a breach of their rights. Thirdly, whose duty is to conserve forests. The FRA authorizes forest-dweller communities to protect forests against destruction, conserve forest and forest resources as a “duty”, but the rules do not clarify whether forest dwellers will be consulted on a free, prior, and informed basis in formulating such working plans (Nitnaware, 2023)^[12].

Another major issue is tribal rights vs environmental conservation. Do the forest rights threaten wildlife conservation? It is argued that though the rights to habitat of tribals have been recognised in the Act, people be resettled out of national parks and sanctuaries if their presence threatens wildlife. The Forest Rights Act in consultation with several conservationists has recommended for a scientific, non-corrupt and non-coercive site specific, participatory and scientific procedure for relocation in section 4(2) of the Act. These laws now say that resettlement will only happen i. if people’s rights have been recognized (without this, people cannot demand proper rehabilitation, ii. It is shown that continued community presence will lead to irreversible damage to wildlife, iii. the community agrees to the resettlement package being offered or iv. Full facilities are provided at the resettlement site. However, in many Cases, the Courts have found that there are incompatibilities between the Forest Rights Acts and the Environmental Laws when the issue of conservation is concerned. Besides, the major laws, several sectoral laws like the Environment (Protection) Act, 1986 (EPA), The Biological Diversity Act, 2002 and The National Green Tribunal too observed the same.

Over the last twenty years, the Supreme Court of India and some High Courts of the states have led the way in the enforcement of environmental laws through citizen-led public interest litigation (PIL) that has its legal basis in the constitutional right to a healthy environment. Through this judicial activism, the courts have issued orders with specific implementation requirements for remedy, new policies and doctrines for enforcing mandatory compliance of environmental regulations. On the issue of environment and

sustainable development, in *M.C. Mehta v. UOI*, AIR 1997 SC 734, *State of Himachal Pradesh v. Ganesh Wood Products*, AIR 1996 SC 149, the court observed that Inter-generational equity i.e. moral obligation of the present generation to manage the earth in a manner without jeopardizing the aesthetic and economic welfare of the future generations is advanced as an argument in favour of “sustainable development” and natural resource use. If present generations continue to consume and deplete resources at unsustainable rates, future generations will suffer the environmental (and economic) consequences. This is the responsibility of the man to safeguard the natural resources of the earth for the benefit of the present and future generations through careful planning and management. Now the issue is, will we be able to maintain sustainability if the forest dweller communities are given forest rights in absolute term.

In Dehradun Quarrying Case the Supreme Court of India observed: “We are not oblivious of the fact that natural resources have got to be tapped for the purposes of the social development but one cannot forget at the same time that tapping of resources have to be done with requisite attention and care so that ecology and environment may not be affected in any serious way” (SC, 1986) ^[16]. On inter-generational equity, in *State of Himachal Pradesh v. Ganesh Wood Products*, the Supreme Court recognized the significance of intergenerational equity and held a government department’s approval to establish forest-based industry to be invalid because: “It is contrary to public interest involved in preserving forest wealth, maintenance of environment and ecology and considerations of sustainable growth and intergenerational equity. After all, the present generation has no right to deplete all the existing forests and leave nothing for the next and future generations.” On the issue of Public Doctrine, the court held that “certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership”. The Supreme Court in India has recognized that this doctrine is part of Indian law.

Conclusion

Based on the principle of Sustainable Development, the Indian state has enacted several Laws, Acts and Constitutional provisions including forest Acts to advocate for conservation, protection and improvement of environment. On parallel level, we have enacted several Acts for the utilization of natural resources by the original inhabitants or a specific community on the ground of ‘rights’, constitutional provisions or marginality of the community concern. The most visible one is FRA 2006 (implemented since 2012) under which the tribal and other forest dweller communities have been guaranteed legal and constitutional rights over land, forest and habitat. This Act has poised lot of debates on people vs wildlife and people vs protection of the forest to locate the aspirations for sustainable development in context to forest-tribe relationship. Hence a kind of incompatibility between environmental laws and community rights has been tabled. The FRA is empowered to declare and demarcate the “critical wildlife habitat” (CWLH), but government has decided to evict villagers from the villages falling in the way of the special tiger corridor. Under such circumstances, the forest department enjoys interpretational freedom. The

FRA has the provision that if the people living inside the Protected Areas (Sanctuaries and National Parks) are evicted for any reason, should be resettled. But, the rules published in 2008 neither elaborated this key right of forest dwellers nor stipulated how a development project that would displace them could rectify such a breach of their rights. Thirdly, whose duty is to conserve forests. The FRA authorizes forest-dweller communities to protect forests against destruction, conserve forest and forest resources as a “duty”, but the rules do not clarify whether forest dwellers will be consulted on a free, prior, and informed basis in formulating such working plans. Further, the SC and High Courts have observed incompatibility in terms of concepts of sustainable development, inter-generational equity, when a specific community is given any absolute right over natural resources.

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25. “Other traditional forest dweller” means any member or community who has for at least three generations prior to the 13th day of December, 2005 primarily resides in and who depend on the forest or forests land for bona fide livelihood needs.
26. “Forest land’ means land of any description falling within any forest area and includes unclassified forests, sanctuaries and national parks.
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