Supreme Court and India's Forests

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The T N Godavarman vs Union of India case in the Supreme Court, also known as the "forest case", is an example of the judiciary overstepping its constitutional mandate. The court has effectively taken over the day-to-day governance of Indian forests leading to negative social, ecological and administrative effects.

In 1995, T N Godavarman Thirumulpad filed a writ petition with the Supreme Court of India to protect a part of the Nilgiris forest from deforestation by illegal timber felling.[1] The Supreme Court clubbed the Godavarman case with another writ petition with similar issues,[2] and expanded its scope from ceasing illegal operations in particular forests into a reformation of the entire country's forest governance and management. In its first major order in the Godavarman case on December 12, 1996, the court inter alia redefined the scope of the Forest Conservation Act 1980, suspended tree felling across the entire country, and sought to radically re-orient the licensing and functioning of forest-based industries. Subsequently, more than 2,000 interlocutory applications have been admitted,[3] and several hundred orders have been issued, many with far-reaching implications. But the case is still pending in the Supreme Court. In the process, the court has gone far beyond its traditional role as the interpreter of law, and assumed the roles of policymaker, lawmaker and administrator.[4]

The Supreme Court's assumption of such vast powers has no precedent, either in India or in other developing countries. While the initial orders may have been justified, the implications of this sweeping and continuing intervention by the judiciary are far more double-edged than celebratory accounts of the Godavarman case[5] suggest. Indeed, the time has come to call a halt to this judicial adventurism and focus on improving the quality of forest-related jurisprudence.

From Reinterpretation to Execution

The Supreme Court began by reinterpreting the meaning of "forest" in the Forest Conservation Act (FCA) of 1980. The FCA essentially requires central government approval for conversion of forest land to non-forest purposes. Till 1996, the FCA was assumed to apply only to reserve forests. The Supreme Court said the act applied to all forests regardless of their legal status or ownership.[6] It also redefined what constituted "non-forest purposes" to include not just mining but also operation of sawmills. But it did not stop at reinterpreting the law for the cases at hand. The Supreme Court ordered all such non-forestry activities anywhere in the country that had not received explicit approval from the central government to cease immediately. It also suspended tree felling everywhere, except in accordance with working plans approved by the central government. It completely banned, with minor exceptions, tree felling in three whole states and parts of four other states in the forest-rich north-east. It ordered saw mills to close down not only where a complete ban was directed but even within a 100 km radius of Arunachal Pradesh's state boundary. Finally, it banned any transportation of timber out of the north-east states.

Very quickly, the court got sucked into a whole maze of administrative and management issues. Disposal of felled timber, timber pricing, licensing of timber industries, felling of shade trees, budgetary provision for wildlife protection, disposal of infected trees, determination and utilisation of the compensation paid for conversion to non-forest purposes, confidential reports of forest officers, and even painting of rocks in forests – all became grist to the Godavarman mill.[7] The court created high powered committees, authorities and a fund for compensatory afforestation. Eventually, as the number of matters coming to the court spiralled out of control (due to its own expansion of the case) it got a central empowered committee (CEC) set up under section 3(3) of the Environment (Protection) Act, 1986.

More importantly, the court insulated the committee's members from their roles as central government employees, delegated wide-ranging powers to it to dispose matters in accordance with the orders of the court, and made the committee answerable only to the court. The court has kept the case open under a "continuing mandamus" and continues to hear and dispose a large number of interlocutory applications every month. To maintain

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control of the case, it has excluded the jurisdiction of all lower courts in forest matters. The Supreme Court has become an executor and administrator of the law.

Justification

The court's justification for such a dramatic intervention was the critical state of forest cover and the non-responsiveness of the governments concerned. Certainly, in 1996, the state of forest conservation in the country was generally poor, that indiscriminate felling (legal and illegal) was common in the north-east,[8] the FCA had become simply a procedure that still permitted large development projects to go through, and mining permits had been given out in contravention of the FCA in many parts of the country.

Forest records in the country were (and continue to be) in a mess. It is equally true that the state governments were quite apathetic in their response to the court's notices, especially prior to December 1996. The court had to use its power of "contempt" to evoke responses, and get its orders implemented. Subsequent behaviour of the state and central governments has not indicated a strong commitment to forest conservation or a carefully thought out balancing of local needs and forest sustainability. For instance, senior bureaucrats in Maharashtra state consciously violated the court's ban on sawmill licensing, eventually attracting contempt action. The response from the government of Meghalaya was simply to ask that all unregistered clan, community or individually owned forests be recognised as "plantation forests" in order to exclude them from the court's orders.

The ministry of environment and forests (MOEF) has tried to roll back the court's interpretation by proposing a redefinition of "forests" as "legally notified forests".[9] Given this state of forest governance in the country, a wake-up call was required. Not surprisingly, the conservationist community in the country has been generally very enthusiastic about the court's intervention. Many see the CEC and the Supreme Court as the only conservation-minded elements in the state apparatus today.[10]

Overstepping Its Bounds

But is this level of intervention by the judiciary in the day-to-day governance of the country's forests constitutionally defensible?[11] While the doctrine of separation of powers does not find explicit enunciation in the Indian Constitution, the court has over the years elevated the separation of powers to the basic inviolable structure of the Constitution in the landmark judgment in Kesavananda Bharati vs Union of India. The judiciary's role is therefore primarily one of interpreting the law, resolving contradictions between laws and with the Constitution, and protecting the basic structure of the Constitution.

At the same time, the Indian Constitution endows the judiciary with certain extraordinary discretionary powers and powers of judicial review. Moreover, the court has innovatively read the right to a healthy environment into Article 21 (right

to life) and thereby equated it to a fundamental right. The court's orders in the Godavarman case could therefore be justified by arguing that to enforce the right to life, the government has the legal responsibility to effectively conserve forests and protect biodiversity. The government's past inaction can be viewed not as exercises in executive discretion, but as violations of statutory responsibilities, and therefore of the law.

There is, however, ample basis to argue that, in its zeal to protect the right to a clean environment, the Supreme Court has, through a series of measures, strayed far beyond even this fuzzy boundary between the judiciary and the executive. Firstly, it has gotten involved in micromanagement to a level that simply cannot be considered as falling within its purview – whether it is defining the value of forests across the country, banning the transport of timber, determining the location of sawmills outside forest lands, or giving permission for pruning of shade trees in coffee plantations. Secondly, it has created a quasi-executive structure (the CEC) that, while legally notified, functions in a manner that is at complete odds with the separation of powers, since it is nominated by and reports only to the court. Not surprisingly, the court eventually had a confrontation with the MOEF, which sought to exercise its statutory right to constitute the forest advisory committee under the FCA, an issue that still remains unresolved.[12]

Thirdly, the court has extended its assumption of powers beyond any reasonable time frame. The notion of "continuing mandamus" is not envisaged by the Constitution. Its past use by the court has been carefully calibrated and justified for "extraordinary cases" where the court wanted to ensure that the execution of its orders was not being tampered with, not to interfere in the other functions of the executive.[13] In the Godavarman case, however, the court has kept the case open for more than 11 years now, during which it has essentially administered the law – deciding on applications that would normally be dealt with by the executive – thereby breaching constitutional limits.

Finally, there are severe practical limitations to what the court can actually do. The courts of India do not have the resources or the capacity to investigate and ensure implementation of orders that go beyond individual cases. Enforcing orders even in individual cases has proved hard enough, as in the Bandhua Mukti Morcha case.[14] The irony lies in the fact that the court itself has recognised that it has "no means for effectively supervising and implementing the aftermath of [its] orders, schemes and mandates… Courts also have no method to reverse their orders if they are found unworkable".[15]

Mixed Outcomes

It is not even clear that the ends justify the means – that the outcomes justify this heavy-handed and continuous intervention in forest governance. The results are mixed, at best. Certainly, many irregularities in the implementation of the FCA have been brought to light and many illegal activities have been shut down. Dramatically increasing the value of compensation to be paid for converting forest to non-forest may act as a deterrent to commercial interests who want to convert forests into tourist resorts or golf courses. For the first time, some states, such as Bihar, actually examined how many sawmills their forests could sustainably support, and brought their licensing policy in line with this capacity. Moreover, by entertaining so many interlocutory applications, the court has given greater access to the decision-making process on forests than the MOEF or state governments typically gave. And there is willy-nilly greater "transparency" in the procedures through which the conversion of forest to non-forest takes place, since much of them are discussed in the court or in CEC hearings.

But the Godavarman orders have also had many negative impacts, socially and even ecologically, and certainly governmentally. The ban on felling severely hurt local forest owners, labourers and forest-based industries (many locally owned) in the north-east. The ban has perversely led to trees being felled for charcoal or firewood, since the ban was only on felling for and movement of timber. [16]

The Supreme Court triggered a series of mistakes in the MOEF's handling of the question of forest encroachment. The court-appointed amicus curia (in this case Harish Salve) suggested that states were allowing encroachments despite the court's directives. Motivated by the Supreme Court's attention to the matter, the MOEF unilaterally issued a directive on May 3, 2002 to all states requiring that they summarily evict all illegal (post-1980) encroachers on forest land, and to complete the process by September 30, 2002, ie, five months.[17] This directive was both impracticable, given the magnitude and complexity of the encroachment issue, and also completely in contradiction with the MOEF's own earlier (1990) detailed guidelines of how such matters should be dealt with.[18] The May 2002 MOEF circular led to a series of ruthless and often substantively unfair evictions in various parts of the country, sparking protests and hardening attitudes against the court and the state in tribal areas already under the influence of Naxalism.

The Godavarman case has also led to further concentration of power in the centre vis-à-vis the states. Working plans, even for individually owned forest patches, must now be centrally approved. The CEC has enormous investigative powers, making it a super-sleuth in forest matters. The MOEF has been in conflict with the court on certain matters such as the constitution of the forest advisory committee, but it is also the only other agency through which the court can implement its orders, and thereby has increased its role vis-à-vis state forest departments. And yet, many of the court's orders remain unimplemented or shabbily complied with. Working plans have been hurriedly prepared, but forest records still remain a mess.[19] The capacity of the MOEF or state agencies to better execute the FCA has probably atrophied, as all their attention is diverted towards either circumventing or zealously anticipating the court's orders. And permissions for development projects such as mining and large dams are being granted under the FCA, while well-defined forest use rights to local forest-dwelling communities are being withheld.

Faulty Jurisprudence

The Godavarman case offers strong evidence to suggest that judicial overreach not only hurts the process of governance

by undermining the role of the executive, but also the content of governance by producing flawed judgments, i e, interpretations of the law that are both unsound and impracticable. This happens for several reasons, including inadequate application of mind in the hurry to produce "landmark" judgments, and the impossibility of a central court knowing the complexities of conditions and laws across such a diverse country.

The problem starts with the expansion of the definition of forest. There is no doubt a lot of ambiguity in the FCA about whether it applies only to reserve forest. It is also true that there are many parcels of land in the country that are densely forested but by some quirk of the settlement process have been classified as revenue land, and that these lands have therefore evaded the FCA. But by the same token, many hundreds of thousands of hectares of legally notified forests, especially in the central Indian tribal belt, have been under continuous cultivation for several decades or more due to faulty settlement processes – an anomaly that the court simply did not recognise and that has finally led to the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Rights) Act 2006. In other words, rationalising the boundaries of "forests" will require notifying some revenue lands and de-notifying some forest lands whereas the court ordered that legally notified forests would continue to be under the purview of FCA.

Moreover, operating on the basis of physical status is eminently impracticable – what is required is a proper reinvestigation and resettlement of the boundaries. Additionally, drawing a sharp and simple distinction between forest and non-forest is counter-productive in a country that has enormously varied land use practices, including "fuzzy" land uses such as shifting cultivation.

The problem is compounded by the court's misinterpretation of what constitutes "non-forest" purposes. All over the world, "forestry" includes logging. Sawmills are an essential component of such forestry. To equate sawmills with mining, as the December 1996 order does, is really extreme. There is nothing then to prevent basket weaving or 'bhabbar' (a kind of grass) grass rope-making from also being declared as non-forest activities, and thereby requiring central approval. To further ban sawmills from being set up in a radius of 100 km from the Arunachal Pradesh state boundary – on any kind of land – is an astonishing interpretation of the mandate of the FCA.

One final example of poor jurisprudence is the court elevating working plans to a status that is neither tenable legally nor substantively. Nowhere in Indian forest law is there a requirement that working plans be approved centrally. The FCA is about regulating the conversion of forest to non-forest. Working plans are meant for management of forests as forests – whether for timber, firewood or wildlife. The FCA does not require central regulation of such management.

The whole idea that making a centrally-approved working plan will ensure conservation or sustainable use of the forest is highly questionable. Working plans are a legacy of colonial forestry, systematised ways of "working", i e, exploiting forests. Colonial and post-colonial forest departments did not manage forests for the purpose of either biodiversity conservation or local needs – forest management objectives that are now considered higher priority than commercial forestry, under the National Forest Policy 1988. The same policy also emphasised the idea of participatory forest management. It is a cruel irony that the court should deify the bureaucratic device of the working plan while the government is talking, however half-heartedly, of community-based micro-plans for forest management.

Backing Off

The Supreme Court has played an important role in increasing awareness about the sorry state of forest governance in the country. But it cannot – constitutionally or practically – manage India's forests. It may be tempted to take on the tribal act, about which much misapprehension has already been created by the conservationist lobby. But it would have to tread very carefully, as this law attempts to redress a genuine anomaly in the settlement of forest boundaries in the country. The court should move towards closing down the Godavarman case and, if necessary, invoke the constitutional duty of the state (under section 48A) to prepare comprehensive legislation for a more decentralised, locally sensitive and sustainable use-oriented forest governance system.

NOTES

1 W P (Civil) No 202 of 1995, T N Godavarman Thirumulpad vs Union of India, Supreme Court of India; Down to Earth, 'Interview between TN Godavarman Thirumulpad and Surendranath C', August 31, 2002.
2 W P (Civil) No 171 of 1996, Environment Awareness Forum vs State of Jammu and Kashmir.
3 Based on Forest Case Update Oct 2007 (http://www.forestcaseindia.org/f14/Iss%2039%20Oct%2007.pdf).
4 *Down to Earth*, 'Deep in the Woods', January 15, 2003, at 1.
5 Eg, Ritwick Dutta and Bhupender Yadav, 2005, Supreme Court on Forest Conservation, Universal Law Publishing Co, Delhi.
6 T N Godavarman Thirumulpad vs Union of India (1996), 9 SCR 982.
7 See Dutta and Yadav, 2005, op cit for details.
8 Even critics of the court's decision to ban felling in the north-east have recognised that tribal, clan and private forests were not always sustainably managed, although they have argued that much of this helped local peasants improve their conditions, send their children to college, etc. See Dev Nathan, 2000, 'Timber in Meghalaya', *Economic & Political Weekly*, January 22, 25(4): 182-86 and Tiplut Nongbri, 2001, 'Timber Ban in North-East India: Effects on Livelihood and Gender', *Economic & Political Weekly*, May 26, 36(21): 1893-1900.
9 Debarshi Dasgupta, 2007, 'Lumberjack's Law: Will an Effort to Define Forests Open Them up to Commercial Use?' *Outlook*, December 17.
10 Dutta and Yadav, 2005, op cit, p xii.
11 For more details, see Armin Rosencranz, Edward Boenig and Brinda Dutta, 2007, 'The Godavarman Case: The Indian Supreme Court's Breach of Constitutional Boundaries in Managing India's Forests', *ELR News & Analysis*, 37: 10032-10042.
12 See *Forest Case Update*, Issue 38, September 2007 on www.forestcaseindia.org.
13 Vineet Narain vs UOI, 1998, SCC 226.
14 Bandhua Mukti Morcha vs UOI (1984), 3 SCC 161.
15 P Ramachandra Rao vs State of Karnataka, AIR 2002, SC 1856.
16 See Nathan, 2000 and Nongbri, 2001, supra note 8.
17 MoEF, Circular No 13-1/90-FP.
18 *Down to Earth*, 'Deep in the Woods', January 15, 2003.
19 Madhu Ramnath, 2002, 'Meghalaya: Impact of ban on Timber Felling', *Economic & Political Weekly*, November 30, 37(48): 4774-76.