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More Info: published in EPW, co-authored with Armin Rosencranz

Research Interests: [Supreme Court](#), [Judicial Activism in India](#), [Environmental Policy and Governance](#), and [Forestry](#)

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COMMENTARY

Supreme Court and India's Forests

ARMIN ROSENCRANZ, SHARACHCHANDRA LÉLÉ

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, 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 policy-maker, lawmaker and administrator.⁴

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 man-

agement 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 print-

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MARKET, LAWMAKERS AND ADMINISTRATORS.

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 case⁵ 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

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 conser-

vation-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



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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 micro-management 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

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