

**INCLUSION IN LAW AND EXCLUSION IN PRAXIS:
THE SCHEDULED TRIBES & OTHER TRADITIONAL FOREST
DWELLERS (RECOGNITION OF FOREST RIGHTS) ACT 2006**

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In this comment, the author describes the intricacies of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. He highlights the role of the forest dwellers in urging the legislature for the enactment of such a legislation. According to the author it is unjustified on the part of the government to acquire forest land without following the due process of law. Throughout his work the author focuses on answering the question as to whether the Forest Rights Law can replace a conservation regime based on the exclusion of the citizens from the forests.

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INTRODUCTION

The Scheduled Tribes & Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 marks a watershed in the ordinary process of law making, where the state is the moving force behind legislation, either proactively or preemptively, in order to meet an anticipated pressure from the subalterns. Examples of this would include the recent clutch of 'rights legislations' beginning with the right to information or retroactive legislation addressing lacunae in the regime of rights adversely affecting the masses, for instance the right to food. The Scheduled Tribes & Other Traditional Forest Dwellers (Recognition of Forests Rights) Act 2006 hereinafter referred to as the Forest Rights Act is an exception from the previous rights legislations, which have been the handwork of genuine social activists but have not been a response to a mass upsurge. The forest rights law did not emerge from the wisdom of the Union government or its bureaucracy or its legislators, as is ordinarily the case. It emerged as the law of the subalterns, who through their widespread struggle and unrest over the past 200 years, both organized and spontaneous, party political and non-party

political; who called upon the post colonial state to accept the 'factum' of their history and recognize the continued exclusion of the forest subalterns, rooted in the negation of their rights by its colonial predecessor.

The widespread unrest in the forested areas, particularly in the past four decades, forced the post colonial Indian state to admit that the negation of forest rights and the exclusion of the tribal people from their rightful homelands, by the operation of colonial laws is historically unjust. The admission of 'historical injustice' by the forest bureaucracy in an affidavit before the Supreme Court of India further triggered a series of events, which finally pushed the Union government to decide to set right the historical injustice of exclusion of the tribal people from the legitimacy of their existence in the forests, by recognizing and recording in the present, rights that were exercised from the past. The construction of the Forest Rights Act hence must be seen as an agency and instrumentality of inclusion, not merely as an end product but as an enduring and an all pervading process that privileges inclusion.

The Praxis of Inclusion in the Construction of the Forest Rights Act

By its very character as an enduring process that privileges inclusion, not only was the Forest Rights Act required to be constructed as a legal instrument of inclusion, but the process of construction of the instrument itself had to actualize inclusion as a necessary condition of its formulation and passage and later for its enforcement. This in turn required that the process of drafting the law to re-order a historical injustice consciously relied on a long history of struggle and dialectic-dialogical exchange between a state responding under pressure from the ruling elites, and party political and non-party political subaltern actors asserting their claims. The Campaign for Survival & Dignity ("CSD") was the necessary cause while the protracted struggle of the forested subalterns ensured its sufficiency. CSD, as the national platform of organizations of the forest subalterns forged in the struggle for rights over four decades, fought a prolonged battle on the streets even while it engaged in continuous negotiation with various players. This included the Technical Support Group which drafted the law, the parliamentarians who wrested the bill from the clasp of elitist

environmentalist factions, the members of the Parliamentary Sub-Committee who attempted to reorder the flaws which crept in through statist legalities and the members of Parliament of all political persuasions who kept up the pressure in the 'House'.

Inclusion was the result of persistent negotiation between the struggles on the ground and their articulation, ensuring that the formulation of the Forest Rights Act was embedded in the subaltern discourse of rights between humans and nature and the discourse of rights evolved over generations of resistance to the colonial discourse of law, lawfulness and lawlessness. Inclusion in the law itself and assessment of its enforcement or 'inclusive implementation' calls for a different frame of analysis and exploration.

Examining the logic of this legislation, as an instrument of inclusion, also emerges from the fact that this law is perhaps the first of its kind in the present day and age which does not create a right or entitlement in the future or because of the act of munificence of the legislature. This law is not focused on a future event but on a past event, locked in the silence of history, whose key is inter-generational memory and the spoken word of the forest subalterns. The Forest Rights Act does not create rights prospectively, it creates a new inclusive frame or recognition of rights that already exist *in rem* but were not recognized *de jure*, due to the operation of the alien colonial legality of *res nullius* and eminent domain. Hence, the law calls upon the administration to rectify the errors of 'exclusion' of colonial and postcolonial forest expansion, recognize pre-existing rights and record them in its present juridical frame.

A third perspective behind the law is that the act does not seek to deliver a 'good' to some potential beneficiaries, who have also been victims of historical injustice, an example being the 'reservation policy' as a means to enable and enhance inclusion. The law seeks to address a historical injustice of exclusion and redress the injustice by recognizing inclusion in restoring the exercise of rights by the forest subalterns.

Hence this law, by its very character, is grounded in the continuous struggle of the subalterns to de-colonize an inherited administrative mindset that excludes

the forest subalterns from their forested homelands and calls upon the functionaries of the state to uphold the law as a legal marker of inclusion and not merely implement the law by excluding the 'ineligible' as the enforcement of the law remains the right of the forest subalterns. The state is called upon to respect the inclusive rights of the subalterns, while the subalterns are called upon to enforce the law against the predatory instincts of a post colonial state and its penchant for patronage, euphemistically referred to as 'social inclusion'.

Preamble - Forests are the Homelands of the Tribal People & Traditional Forest Dwellers - the Bedrock of their Being and Becoming

The preamble to the law lays the foundation for re-inclusion as it clearly asserts that the forests were the homelands and survival assets of the tribal people and traditional forest dwellers till the advent of the colonial regime, which appropriated their homelands and converted them into property of the Crown using typical colonial legal principles of appropriation like *res nullius*. This ex-parte appropriation and exclusion from their homelands however did not go unopposed as fierce resistance followed colonial usurpation of people's assets; this continues unabated till the present day in multifarious forms. The forests have reverberated with calls of resistance for the past 25 decades.

25 decades later, the agency of forest management created by the colonial government, which continued in a near original form with only a change of guard post independence, admitted in an affidavit before the Supreme Court of India, in *Godavarman Tirumalpad v. Union of India*, that the appropriation of the homelands and survival assets of the tribal people and other traditional forest dwellers without due legal process was a 'historical injustice'. While the admission before the Green Bench of the Supreme Court did not cut any ice with the august judges preoccupied as they were with the conservation of the forests and protecting them from predatory forces, the admission of the historical injustice in the Court found its echo in the distant forests. The subalterns revived their resistance combined with advocacy that culminated in the adoption of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act by Parliament in 2006.

The Act continues to be a celebration of 25 decades of resistance, which fundamentally seeks to de-colonize the forests of the nation by taking the forested landscapes out of the colonial construct of private property of the state, protected through a system that excludes the citizen. The message of law, which gives a new perspective to social inclusion in the natural resource rights regime, recognizes forests as the wealth of the nation to be held in trust and conserved by the forested subaltern citizens for coming generation of citizens of the nation as a shared heritage and a sacred trust. The subaltern notion of inclusion transcends an 'instrumentalist relationship' of nature and humans as 'object and subject' and creates a 'relationship of mutuality' with nature locating the human as part of the community of nature.

While recognizing that the tribal people and other traditional forest dwellers are vital for the survival and sustenance of the forests, the construction of the law attempts to introduce yet another form of inclusion in the natural resource rights regime by 'democratizing' conservation as a 'citizen's right' to fulfill a historic duty to present and future generations. The law seeks to locate the involvement of the forest subalterns in conservation, enabled by legislation, not as a 'members on the margin' in Joint Forest Management program or as 'members with privilege' in the Vana Suraksha Samithi. The Act reflects an attempt of the forest subalterns to provide a synthesis in the dialectic between the colonial discourse of 'wilderness which is bereft of or excludes humans' and citizen rooted discourse on conservation and hopefully alter not just the terms of a inclusive discourse of rights within the natural resource regime but also the rights between humans and nature. The paper attempts to discuss the discourse that functions as an unbroken thread weaving together into a tapestry of social inclusion the aspirations of numerous organizations of forest subalterns struggling for rights to the forest over four decades, and the dialectical dialogue with all three wings of the state: the legislative, the executive and the judiciary.

The Discourse of Inclusion and the Struggle for Forest Rights

A law recognizing forest rights became an imperative for the political executive as the struggles of the forest subalterns, particularly in the dense forests of Central India, progressively roused the state out of its stupor. Reports

from investigating agencies repeatedly highlighted the fact that exclusion of the tribal people from their traditional forest rights was the cause of widespread disaffection, manifested through the struggles of the subalterns led by peoples' organizations and parties of all shades of left political persuasion. The groundswell of disaffection resulting from 'exclusion from the forest' allowed the CPI (Maoist) to enter and entrench itself deep in the forests, from where it launches its guerilla war against the state.

Inclusion in the forest is much more than just physical space to reside or access to land for cultivation. Inclusion in the forest can best be understood as the 'communion with the bedrock of one's being and becoming', a relationship that is as much physical as it is metaphysical, is as much ethical as it is etiological or etymological. Trying to decipher the ethos of the forest subaltern leads the honest seeker to recognize how much the forest is central to the meaning, healing and relating systems of the subaltern, relations that are embedded in their culture and spirituality and social discourse. Exclusion therefore must be seen as being 'uprooted from earth which nurtures the body and the soul, giving the historian a glimpse into the heart of the insurrectionists and their desire to be free in the society of nature'. The agenda of modernity that has been rigorously pursued from the colonial times to the present to 'civilize the primitive savage' has clouded a great deal of the visible illustrations of conviviality. Long years of colonial forestry with its commercial thrust, which continues to the present, has eroded the layers of the philosophical underpinnings of the being and becoming of the forest subaltern; nonetheless what remains is enough to sustain the fire in the 'heart of the forest'. Exclusion remains a potent reason for disaffection and continued revolt of the forest subalterns.

The growing disaffection was worsened by the hardened attitudes of the forest agencies post the Supreme Courts *ex parte* involvement in forest management, which worked as an iron fist in a velvet glove. A carefully worded instruction of the Inspector General of Forests (MoEF) to Chief Secretaries, which twisted an *obiter dicta* into an Court order to evict 'encroachers', paved the way for widespread evictions and resistance of the forest subalterns to state legality, challenging the latter in favour of subaltern legality. The revival

of discourse of rights of inclusive humanistic conviviality with nature grounded the resistance. The struggle was not for forest land or the ubiquitous 'regularization of encroachment', the struggle was for survival and dignity, for the right to freedom for forests as the substratum of their being and becoming as the forest subalterns, for inclusion as forest subalterns in a new regime of 'forest citizenship', facets of a discourse that remained the substratum of the nationwide struggle under the banner of the Campaign for Survival and Dignity.

Exclusion through State Private Property & Elitist Environmentalism

The colonial forest act appropriated the forests, converted them to 'exclusionary' state property, excluded the forest people from their homelands and overnight turned them into encroachers in their own homelands, left at the mercy of the tyranny of forest officials, created by the same colonial enterprise in the evening of the 19th century.

The early years of independent India witnessed an unanticipated phenomenon. This was the hunger for land by the citizens, alienated from grounded livelihoods, of the postcolonial state and the ravaging of the forested areas by the principalities in the early years of independence. Anticipating the loss of forest wealth in their kingdoms to the emergent post colonial state, the erstwhile local rulers, hitherto operating under the tutelage of her Majesty the Queen of England, embarked on a project to cut and sell as much of the forest timber before they lost their independence to do as they pleased with the lush forest areas in their kingdoms. The consequence of this was widespread clear felling and deforestation. Post independence, a new generation of forest contractors took over and forests continued to be felled in order to fuel the hunger of the emergent elite.

Vast tracts of forests continued to be added to the government's green kitty, without following the due process of law. A fig leaf of legality in a new terminology of 'deemed reserved forests' made its way into the forest legal lexicon. With each new conversion of forest tracts into the private property of the state with suspect legality and with total disregard for the rule of law, which

required recording rights of people living in or dependent on the forests as a basic requirement of forest settlement, more and more forest citizens slipped into 'illegality' created by the illegality of the post colonial state, excluded from survival in their sylvan surroundings. Exclusion by operation of law was the most serious threat to the survival of forest subalterns in postcolonial India. The areas covered under this dubious legality are phenomenal. For instance, over 82 percent of the state forests have not been formally surveyed and settled to date. The same is majorly the case of Chattisgarh, Orissa, Andhra Pradesh and several other states. Until then, millions of forest people remain excluded from rights by virtue of the 'illegality' of the state.

A little more than a century after the colonial take-over of the forests, Ms. Indira Gandhi, the then Prime Minister was alarmed at rampant deforestation for industry and commerce at the hands of forest departments. In her anxiety to preserve the shrinking forested area that remained unscarred, she gave the colonial Forest Act, which had converted the community forest resource of the subalterns into the private property of the state, a rigid cast-in-steel frame through the Conservation Act of 1980. The private property regime of the forests got a new votary, the exclusion from common resources of the citizens got a new lease of life, 'exclusionist criminality' of the forest subalterns grew exponentially, the long reach of the law encircled increasing millions in its vice like grip, the devastation of the lives of the forest subalterns and the resultant destitution followed in its wake.

A decade and a half later, in response to the anxieties of a small *zamindar*, agitated at the encroachments by corporate tea plantations into the virgin *shola* forests he owned previously, the Supreme Court threw its weight and its near absolute power behind the protection of the forests as the private property of state, without even examining the legality and the legitimacy of their take over by both the colonial and post colonial state. Through a series of *interlocutory* orders, 'forests' were defined, huge tracts expropriated as 'forests on record', conservation became the new buzz word, forest agencies grew in power, urban and urbane neo-environmentalists ruled the 'conservation' debate, forest subalterns became

‘potential risks, ‘exclusion’ and ‘eviction’ became an inescapable reality, tigers took precedence to citizens, rights and legality a back seat.

The three arms of the state, the legislature, executive and judiciary had joined forces to ‘protect the forests from the people of India’ resulting in a new discourse of ‘exclusionist elitist environmentalism’ with the inevitable conclusions of ‘unverified vilification of forest subalterns’, ‘unwarranted criminalization of forest dependent communities, ‘unquestioned territorial expansionism without due legal process’, ‘unfettered powers to the forest bureaucracy’ to evict and demolish. At the root of the new discourse of forest governance was a reinforced private property construct with the state at the center, elitist exclusionist environmentalism, largely urban, as its ‘civil society’ support, the citizen at the periphery and the traditional forest dweller, tribal or non tribal, at the extreme margin as an ever present threat to the brave new ‘green’ world.

Sustained resistance led by forest subalterns, to confront the expansionism and landlordism and questionable use of power by the forest bureaucracy, prompted their leadership to re-visit the basics and re-define the contours of the discourse of inclusion of humans with nature and the discourse of rights of nature outside the exclusionary private property construct. The debates were tempered by the inter-generational wisdom of the forest subalterns, the sensitivity of people who lived in intimacy with the dynamism of nature and the sobriety of communities who lived at peace with their natural environment.

The logic of the Forest Rights Act is therefore permeated with the discourse of inclusive rights of humans in dialogue with the unclaimed yet recognized rights of nature. What is attempted hereafter is to present the mosaic of thought and feeling of the forest people seeking to experience freedom in the company of nature. At times, this mosaic may appear a bit frayed, at other times overblown, as the paper attempts to negotiate the sensibilities and sensitivities of the communication between humans and nature sometimes drowned in the cacophony of contending and competing logics and posturing between the various actors in the discourse.

Forest Rights - Locus of Challenge of Legality of Citizens to Legality of State

The first facet of the Forest Rights Act that needs to be recognized is that the rights frame of the law is essentially rooted in the juridical construct of the subalterns and the construction of the act is infused with the understanding of rights in the realm of subaltern legality as a departure from the legality of the ruling elites and the state.

In the realm of forest subaltern legality, a forest right is understood as 'secure accesses to the forest landscape based on need', the boundaries of which are determined by non-extractive, non-appropriative, non-accumulative subsistence requirements, further defined to include the need of nature to regenerate itself, a principle which underlies rotational agriculture.

The 'security' in this inclusive legality is affirmed by the consensual respect of limits and boundaries of the access, collectively recognized, agreed on and enforced by the will of the community. An individual can enjoy a right only if it is respected and protected by the collective in any system. In the legality of the forest subalterns, the right is recognized in the shared consensus of the community and it is not a right against the whole world. The access or entitlement is considered an endowment of the spirit of the forest and is accompanied with obligations to protect the forest as the environs of the community, clan or family spirits and totems, enshrined in the social and cultural realm.

Legality of the forest subalterns is rooted in a non-adversarial, fiduciary relationship between humans and the spirits of nature. Hence nature is worshipped, protected and accessed as a provider much like the relationship between a mother and child. This inclusive legality permeates the physical and metaphysical world of the forested subaltern and affirmed through ritual and cultural practices that include the well-being of nature as the 'silent other' while meeting one's survival needs.

On the other hand, an elite legality visualizes the relationship between forests and nature within the boundaries of private property – ownership of a

legal person, individual, corporate or state. This ownership is instrumentalist and exclusionist, imposed through dubious colonial legality in most colonized countries and enforced through the 'rule of law and visited with punishment' by the 'authority' of the ruler. The relationship between the owner and others is adversarial and in principle excludes the other, as a private property right is enforceable against the whole world, though nature and forests cannot be brought under a private property regime because they are the shared heritage of all humankind.

A closer look at the forest rights act shows that the subaltern perspective is the clear substratum of the act, which for the first time in history, while recognizing the historical injustice done to the forest dwelling communities, provides for their 'right to conserve the forests according to their traditions', a right from which the subjects were excluded by the Crown. By providing for the recognition of the right to conservation of the forest subalterns, the state has surrendered its unilateral and equivocal control over the forested landscapes in favour of its citizens. In including the 'forest citizen' in the 'society of nature', the forest rights act lays the foundation for a citizen based governance of natural resources as separate from a state based management of these same resources.

By agreeing to the concept of 'community forest resource' which by definition in Section 2(a) extends to all types of forest landscapes, the state further recognizes that the forest is not merely a source of timber and non-timber products, accessed for the needs of trade and commerce. The law provides that 'usufructory' rights of the forest subalterns, still constructed within the adversarial property construct, which were progressively reduced to privileges and concessions to be exercised at the 'pleasure of the state' are transformed into rights to be exercised by the citizen?.

As a critical departure from our inherited colonial jurisprudence, with underpinnings of constructed 'exclusion', which pits claimants adversarial against each other and makes the 'detached' erudite judge a repository of wisdom and font of justice and fairness, the legislation posits the *Gram Sabha*, the assembly of the common villagers, an institution of inclusion of both people and

collective wisdom, as the 'Authority', to determine the nature and extent of the rights as 'experienced grounded realities' of the village community, while the Forest Rights Committee created by the *Gram Sabha* and constituted by its members verifies the ground situation, draw a *Panchanama* and a hand drawn map to bring the grounded facts within the legal construct of the state.

This fundamental difference between the legality of the subaltern and of the state is an important reason why the state and its functionaries understand their role as agencies 'implementing' the Act rather than recognize that the post-enactment scenario of the Act is one where the forest subalterns claim their rights before the village assembly which resolves on the recognition of these rights, thereby allowing the claimants to enforce their collective rights.

The inherent contradiction between the legality of the subalterns and the legality of the state is recognizable in the manner in which the 'implementation' of the Forest Rights was initiated and energies were focused on exclusive private property rights to rights thereby devaluing and derailing community processes and relegating 'inclusive' community rights - a majority of the 13 rights covered in the act - to the background, and above all rendering the recognition of the rights of nature articulated as 'peoples' conservation rights subservient to departmental initiatives. The approach of the authorities in examining individual property rights, often in an adversarial role with the forest department, as the central theme of the rights process have reduced rights assertion to patronage seeking, assisting state governments to project the act as a land distribution program. The fallout is obvious: the new land distribution agenda and the consequent land grab have subverted the will of the people and role of the community collective to recognize rights, ensure conservation and sustainable access to nature. Core objectives of the Act are effectively relegated to the background.

The belief in the supremacy of state legality which evolved in the colonial construct of nature as private property of the state lies behind the skewed proportion between the number of claims filed and those admitted, between the number of claims recognized by the '*Gram Sabha*' and those recognized by

the DLC. The legality is perceivable when agencies of the state, particularly the forest department, believe and propagate the view that they are being forced to part with their forested estates to the citizen. The forest personnel believe that their duty to the state, which has empowered them, is to keep the diversion of state property to the minimum. In doing so the predominant experience is that the Forest Rights Act will turn out to be yet another Abolition of Zamindari Act, opposed by the largest *zamindar*, the Forest Department, and doomed to an early demise. The current data on the 'implementation' of the act only corroborates this fact.

The state legality as internalized by the functionaries of the state is effective in subverting the legality of the subalterns, the tribal people and traditional forest dwellers. In doing so, the functionaries of the state are effective in undermining 'a culture of community driven and regulated voluntary conservation' which is the probably the only proven system for the protection, regeneration and conservation of nature.

Forest Rights- Realm of Struggle for Inclusion of the Citizen

The conflicting legalities internalized by the functionaries of the state and the community of forest citizens transforms the Forest Right Act into a terrain of contestation and struggle between the legality of the subalterns seeking their inclusion in the regime of rights and the legality of the state functionaries, who function as if they are the arbiters of 'right and wrong, true and false' and have the power to confer or deny forest rights. They continue to play 'God', roles they played in hitherto legislations and cannot accept forest subalterns as arbiters of forest rights; right which are not just 'individual rights' but more importantly the 'myriad inclusive collective rights of communities and nature'.

The subalterns, therefore, through their struggle are required to continue to affirm and assert the legal principles of the forest rights act, clearly articulated in the Preamble but rarely appreciated by state functionaries. Their struggle asserts that law considers that the rights of the forest citizens pre-exist the moment when the administration is 'seized of the matter' and do not come into existence only when the administration recognizes them. One presumes that

this conflict of reasoning is inevitable in the dialectal process of understanding different logics and legalities.

The Preamble to the legislation submits that the act has risen out of the struggle between the citizen and a postcolonial state, still circumscribed by colonial perspectives on the forest. Most state functionaries are blissfully unaware that the law is 'not notional but juridical', 'reverting back in time' to a period when the rights of the forest communities were rights *in rem* as a factum of subaltern legality but were derecognized *de jure* through the colonial juridical principle of *res nullius*.

The struggle of the subalterns to affirm and assert their rights challenges the construction of a post-colonial state, which continues with inherited perspectives, structures and functions within the colonial juridical frame, crystallized and dogmatized by a seemingly conservationist but actually colonialist construction of the forest as the eminent domain of the crown. The enforcement of the act itself becomes the site of resistance of the subalterns opposing the continual 'colonization of the forests'.

This contestation between the subalterns and the state is best depicted in the recent amendment to the Indian Forest Act of the Madhya Pradesh government, wherein even before the process of recognition and vesting of rights is complete, the state legislature acting presumably on the proposal of the forest bureaucracy, enhances 'criminality' and penalty for the exercise of rights that the Forest Rights Act seeks to vest. Instead of integrating the new rights, the Madhya Pradesh amendment allows for exercise of discretionary power by a forest official to implicate a forest subaltern in a criminal offence with an enhanced penalty upto Rs. 25,000 or sentence of a year of imprisonment even when exercising the right of 'ownership of minor forest produce'; this has also been recognized by the Forest Rights Act 2006 and the Panchayats (Extension to the Scheduled Areas) Act 1996.

The contestation continues as forest authorities, in open contravention of the Act, continue to auction bamboo to industry, in spite of the law which says that it belongs to the forest people. The argument advanced to legitimise this is

that as the right is not 'formally' recognized or vested by the competent authority, the Forest Department is free to continue with the auctions. The irony is that the legal construction of the law implies that rights to minor forest produce, including bamboo, are an existing right, prior to vesting and not consequent to their vesting by the state.

Forest Rights- Site of Contestation between Ideologies of Inclusion & Exclusion

Forest rights therefore bring to the forefront the contestation between conflicting ideologies of inclusion-exclusion and constructions of the forest as an inclusionary or exclusionary space. The traditional ideological construct of the forest subalterns, mainly tribal people, holds the forest and the diversity of its life forms as the locus of their being and becoming, the abode of their spirits and ancestors and the substratum of their physical and cultural survival. These ideological perspectives view the 'individual' as a 'citizen in the community of nature' wherein the exercise of rights of humans is circumscribed by the reciprocal responsibilities, most of which have evolved over generations and are integrated in living culture and philosophical traditions, evolved over centuries as humans humanized nature and nature naturalized humans.

Citizenship of nature excludes an instrumental relationship between humans and nature and challenges the dominant hegemonic view of forests as a commodity, which can be calculated in monetary value, whether as timber or as carbon credits. Citizenship excludes value enhancement through commercial timber plantations, as they are not conservation of nature. Citizenship excludes the very same forests being reduced to a new marketable commodity with exchange value as standing trees, raised and fenced off for carbon credits in the near future.

The conflicts in the ideological construct of forests and nature of the subalterns and the state remain the underlying cause for the official focus on 'curtailed individual rights' and gross neglect of community rights, particularly rights to 'conservation and sustainable use'. This is particularly the case of thousands of communities who have 'voluntarily' revived barren lands,

regenerated forests and conserved nature as community initiatives, without so much a concern for ownership as much as for sustainable use. The forest department, however, through a careful use of funds for JFM and VSS has subverted many community initiatives and brought them under the umbrella of state sponsored conservation schemes, where the state official is the main actor and the forest is a 'state resource'.

A third area of subterranean conflict within this ideological frame is 'community forest resource', being perceived as a major problem area as communities could oppose its utilization for carbon credits. Hence, from being a space for 'inclusion' of the needs of the common citizen, the community forest resource is rapidly metamorphosed into a space for exclusion, for earning green dollars.

Forests Rights as a Fiduciary Relationship between Humans and Nature

In the traditional thought realm of the forest subalterns, both tribal and other traditional forest dwellers, the forest was not an object that could be defined by metes and bounds or owned by an individual or a group. The letter of Chief Seattle to the European 'colonizers' seeking to purchase the lands of the indigenous people of America defines this fiduciary relationship quite succinctly. The forest or nature did not belong to human beings - it was humans who belonged to the forest.

Most traditional communities visualized the forest as the 'endowment' that came from their ancestors, the abode of their spirits, source of their well-being, corner-stone of their physical and cultural survival, different ways of explaining 'symbiosis'. Most considered the forests as an endowment to the present generation, to be held in trust for the future generations. As one village elder, in his brief reply to the question as to why they protected the forests at a great personal cost, captured quite succinctly the entire picture. He said, "the forests are the medium through which we can hand over the past to the future generation. Without the forests, we would have no receptacle in which we can meaningfully retain our past and our present as the forest defines human presence. Hence we

are only vessels, holding in trust the wealth of life forms on behalf of future generations.”

Sunita Narain, Chairperson of the Tiger Task Force observed in a Conference that in four maps, namely Map- 1 – Areas Covered by Dense Forests; Map -2 Areas with High Density of Tigers; Map-3 Areas Covered under Vth Schedule; and Map-4 Areas with High Proportion of Tribal Population, one would observe that the maps coincide. The conclusion to be drawn is that the Vth Schedule Areas, with high tribal population, are covered by dense forests and are the habitat of tigers.

The traditional understanding stands in stark contrast to the elitist environmentalist understanding of forests as ‘wilderness’ bereft of human presence, posing forest subalterns as the biggest threat to the future of the forest. The alienation of the forest subalterns from the forest, the severance of their umbilical cord of interdependence with the forests, their progressive reduction into cheap labour and finally their categorization of their present as primitive and transition into a modernity has been instrumental in the destruction of the forested landscapes has followed the logical conclusion that flows from private property, whether of the individual or the state, wherein the owner is in an adversarial relationship with all others who do not care because they cannot share.

Forest Rights: Outside Boundaries of Exclusionary Adversarial Jurisprudence

Forest Rights are outside the boundaries of adversarial jurisprudence on three main grounds. They are rights which are *ante lex*, pre-exist *in rem* but are un-recorded *de jure*. Hence the law provides for the nature and extent of the rights verified by the Forest Rights Committee to be recognized by a resolution of the *Gram Sabha* acting as a quasi-judicial authority and entered into the Record of Rights by the Revenue authorities. Hence the law transcends the ‘realm of adversarial jurisprudence’, where the claimant has to prove a right against the adversary. The law also redefines the ‘legitimacy of sources of evidence’ ordinarily relied upon in adversarial processes, like the primacy of documentary

versus oral evidence, valuing evidence having withstood the test of 'cross examination' by giving evidentiary value to the statements of the elders.

The process of verification requires the Forest Department which has hitherto been considered an adversary of the forest subalterns, booking them in cases, prosecuting them for 'traditional rights turned offences', fining them for accessing survival needs in the forest, to undertake a dramatic change of character and assist the Forest Rights Committee and the *Gram Sabha* in spatially demarcating the right in metes and bounds. The role of the forest officials is not to confront the claim of the forest subaltern with documentary evidence in its custody or more importantly the absence of documentary evidence with the department, but rather to make available to the FRC all the evidence at its disposal and to allow the FRC to arrive at a legitimate assessment of the claim.

Forest Rights takes the forested landscapes of the nation out of the 'private property construct', taking the first steps towards making them 'rightfully' the 'wealth of the nation' to be conserved by the citizens as a fiduciary right provided in Section 5 of the act which 'empowers the *Gram Sabha*'. This underlying perspective of the Act requires the forest subalterns and forest officials to be equal partners in this fiduciary enterprise and not as adversaries, protecting so to say their 'private property'. The concept of the fiduciary enterprise is presumed though not perceived in various participatory forest protection schemes like the Joint Forest Management Scheme or the Van Suraksha Samithi initiatives, but the actual relationship between the forest officials and forest subalterns and the forest remains at best an instrumental one between 'unequals' both in terms of the two agencies in a joint effort and the human-nature relationship.

The Forest Rights frame is premised on an egalitarian, empowered citizen community construct and not an instrumental one. This would call for a much higher level of cohesiveness and collaboration between the two trustee agencies - the forest officials and forest subalterns - which could evolve into a sustainable voluntary effort for the conservation of nature.

Forest Rights as non-adversarial property rights ‘privilege’ local knowledge

The Act recognises the evidentiary value of the statements of the elders, who are residents of the village and are witness to the exercise of the right by the claimant through a long passage of time compared to the ‘documented’ knowledge of, at best, transient forest functionaries in transferable jobs, circumscribed by the periodicity of their postings. In doing so the Act restores to the citizens the ‘value’ accorded to them in a democratic state.

While privileging local knowledge, the Act attempts to restore to the forest subalterns their primary role in a ‘citizen based conservation regime’ and creates the conditions for the restoration of the local knowledge of the forest subalterns particularly conservation of the forest as a treasure house of biodiversity. In doing so the act also reaffirms that forests are the wealth of the ‘people of India’ and not the handmaiden of industry and commerce.

Forest Rights primarily recognized by the citizen and recorded by the state

The Forest Rights Act restores to the forest citizen the pre-eminence accorded to the citizens of India by the Constitution as the Act requires that the recognition of the rights begins with *Gram Sabha*, the assembly of the resident citizens of the village, as the authority to verify the nature and extent of the rights claimed by other citizens.

Having said so, the original construct of the act visualized the role of the Sub Divisional Committee (“SDLC”) as one of examining the resolutions passed by the *Gram Sabha* for their completeness and prepare the records of forest rights to be forwarded to the District Level Committee for a final decision. The SDLC was in principle not authorized to examine the merit of the resolution of the *Gram Sabha*. Only in such cases where a person appealed against the resolution of the *Gram Sabha* could the SDLC examine the merit of the resolution of the *Gram Sabha*.

The law provided for a District Level Committee to consider and finally approve the record of forest rights prepared by the *Gram Sabha*. The Act thereby created a new legal regime of recognition of rights in a democratic polity where the citizen is supreme. The citizen acting through the *Gram Sabha* recognized rights while the District Collector as the head of the district registered them in the Record of Rights.

CONCLUSION

This brings us to the end of the beginning – can the Forest Rights law replace a conservation regime based on exclusion of the citizen from the forest? In this regime, the forest is viewed as the property of the state inherited through a colonial process of appropriation. The question to be asked is this- can this regime be replaced by a citizen grounded conservation regime of forests as a shared heritage and the sacred trust with empowered forest subalterns at the vanguard. The law has all the provisions that could make it possible. The question is whether the nation has the political will to make it a reality.