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The *Godavarman* Case: The Indian Supreme Court's Breach of Constitutional Boundaries in Managing India's Forests

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Editors' Summary: With its ruling in the 1995 Godavarman *case, the Supreme Court of India commandeered for itself the roles of policymaker, administrator, and interpreter of the law. The Court's actions pursuant to this ruling have had serious effects on India's forest policy. In this Article, Armin Rosencranz, Edward Boenig, and Brinda Dutta explore the ramifications of the Supreme Court's actions. The authors begin with an overview of changes in forest policy following the 1995 ruling and describe the deleterious effects that these changes have had on Indian forests. They then analyze the constitutionality of the Court's actions and evaluate whether these actions have had the effect that the Court desired. Finally, the authors conclude with some suggestions for resolving the problems created by the Court's overstepping of its judicial role.*

I. Introduction

In 1995, T.N. Godavarman Thirumulpad filed a writ petition with the Supreme Court of India to protect the Nilgiris forest land from deforestation by illegal timber operations.[1] The Supreme Court expanded the *Godavarman* case from a matter of ceasing illegal operations in one forest into a reformation of the entire country's forest policy. In its first order on the *Godavarman* case, the Court suspended tree felling across the entire country, paralyzing wood-based industries. Despite a series of subsequent orders with far-reaching implications, the case is still pending in the Supreme Court. In the process of hearing over 800 interlocutory applications since 1996, the Court has assumed the roles of policymaker, administrator of policy, and interpreter of law.[2]

The Supreme Court's vast assumption of powers concerning environmental issues has no precedence from past cases, neither in India nor in other developing countries. The *Godavarman* case opened a Pandora's box that continues to affect industries and forest dwellers across the country.

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1. Writ Petition No. 202 of 1995, T.N. Godavarman Thirumulpad v. Union of India, Supreme Court of India; Down to Earth, *Interview Between T.N. Godavarman Thirumulpad and Surendranath C.*, Aug. 31, 2002.
2. Down to Earth, *Deep in the Woods*, Jan. 15, 2003, at 1.

II. History

In its first order in 1996, the Supreme Court interpreted the meaning of the word "forest" in applying the Forest Conservation Act (FCA) of 1980. Prior to this clarification, the word forest had not been explicitly defined, and some state governments chose to apply the vaguely defined term only to "reserve forests," i.e., those that receive the highest level of legal and environmental protection.[3] States used this narrow interpretation to effectively "de-reserve" other protected forests and allocate them for commercial and/or industrial use.[4]

In 1996, the Supreme Court interpreted the word forest by its dictionary meaning. According to this new broader definition, any forest thus defined, regardless of ownership, would be subject to §2 of the FCA.[5] Section 2 of the Act specifies that no state government or other authority may allow the use of any forest land for any non-forestry purpose without prior approval from the central government.[6] Under the new interpretation of forest land under §2 of the FCA, states could no longer de-reserve protected forests for commercial or industrial (non-forestry) use without permission.

But the Supreme Court did not stop at interpreting the word forest under the FCA. The Supreme Court assumed the responsibility of executing and enforcing its new interpretation of the FCA in an effort to improve the country's

3. Shyam Divan & Armin Rosencranz, Environmental Law and Policy in India 304 (2001).
4. *Id.*
5. T.N. Godavarman Thirumulpad v. Union of India, (1996) 9 S.C.R. 982.
6. Forest Conservation Act, 1980, No. 69, Acts of Parliament, 1980, at 2(ii).

forests. The Court ordered all non-forestry activities, such as saw mills and mining operations, which had not received explicit approval from the central government to cease operating immediately.[7] It temporarily suspended all tree felling in all forests with the exception of state governments' working plans.[8]

The order effectively froze the country's timber industry.[9] The Supreme Court 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 where a complete ban was directed; and it banned any transportation of timber out of the North East states.[10] The order required state governments to constitute expert committees to map forest land, conduct a detailed survey of the timber industry, and measure the sustainability of forests with respect to the number of saw mills.[11] In 1998, the Supreme Court suspended all licenses to all wood-based industries in the seven North East states and ordered the relocation of those industries to state-specified industrial zones where they could be more closely monitored.[12]

The Supreme Court's role as executor and administrator of the law became more evident in its later directions concerning the management of already felled timber. The Court maintained its ban on the seven North East states and required the state governments of those states to gather, process, and sell already felled timber in the manner it specified.[13] When the state of Arunachal Pradesh reported the presence of illegally felled timber, the Supreme Court ordered that it be inventoried and auctioned in Delhi, specifying that one-half of the proceeds would be directed toward assisting the tribal, forest-dwelling population and the other half to the state.[14] To maintain its control of the case, the Court excluded the jurisdiction of all lower courts in matters concerning seized illegal timber, choosing to micromanage such proceedings itself.[15]

After instituting the bans on tree felling, the Supreme Court ordered investigations into various complaints of illegal mining operations.[16] The Court observed that the reported mining operations were blatantly contrary to its orders and demanded a response from the state governments.[17] It assumed the policing role of state authorities and constituted its own committee to investigate and report on illegal mining so that proper action could be taken.[18]

With the *Godavarman* case, the Court made itself a director and an overseer of forest issues, involving itself in national and local forest protection, timber pricing, timber transport, licensing of timber industries, management of forest revenue, and enforcement of its own orders concerning forest law, all independent of the central and state governments. The Supreme Court's far-reaching measures to control deforestation resulted in confusion among state and national organizations, mismanagement of forestry issues, and attempts at forest protection at the expense of human rights. The problem became increasingly unmanageable with the eventual involvement of state governments, the Ministry of Environment and Forests (MoEF), and the Central Empowered Committee (CEC), which the Supreme Court created in 2002.

As the problem of managing the complexity of its own orders grew, the Supreme Court increasingly micromanaged problems that would normally have been dealt with by government agencies. On November 24, 2001, the Supreme Court asked the MoEF to put together guidelines for compensatory afforestation so states could grant diversions of forest land while simultaneously ensuring a stable percentage of forest cover in the country.[19] The Court asked that these guidelines be provided by February 18, 2002. On that date, no such guidelines had been submitted. Without these guidelines, the MoEF could not adequately implement any policy allowing diversions of forests for commercial use while increasing forest land in other areas.

To compensate for the MoEF's failure to cooperate, the Supreme Court, in October 2002, began making its own guidelines for management of afforestation.[20] It required that states pay the net present value (NPV) of forest land that they divert for public sector projects, mining companies, and private companies.[21] This NPV could be between Rs 5.8 lakh[22] (approx. $12,800) and Rs 9.2 lakh (approx. $20,200), depending on the density and quality of the forest land diverted.[23]

The Supreme Court also curbed the diversion of funds to non-afforestation activities by ordering the creation of a central fund for all money collected by NPV payments. States, particularly in the North East, were not spending all the funds collected for afforestation, sometimes diverting over one-half of the funds for other purposes.[24] In accordance with the Supreme Court order, the MoEF constituted the Compensatory Afforestation Management and Planning Agency (CAMPA) to manage the collected funds. CAMPA can redistribute funds directly to organizations engaging in afforestation, effectively bypassing the state governments.[25] The member secretary of the CEC, which recommended a central fund to the Supreme Court, suggested that

7. *See supra* note 5, at I.1.
8. *Id.* at I.3.
9. Divan & Rosencranz, *supra* note 3, at 294.
10. Forest Conservation Act, *supra* note 6, at I.4.
11. *Id.* at I.5-7.
12. T.N. Godavarman Thirumulpad v. Union of India, Supreme Court of India, A.I.R. 1998 S.C. 769, 12.
13. T.N. Godavarman Thirumulpad v. Union of India, Supreme Court of India, (1997) 7 S.C.C. 440, B(a), (b).
14. T.N. Godavarman Thirumulpad v. Union of India, Supreme Court of India, (1998) 9 S.C.C. 632, 4 (1997).
15. T.N. Godavarman Thirumulpad v. Union of India, (2001) 10 S.C.C. 645.
16. T.N. Godavarman Thirumulpad v. Union of India (IA Nos. 71, 79, 104, 105, 107, 113, 121, 166, 260, 261, 262 in Writ Petition (C) No. 202 of 1995) with Environment Awareness Forum v. State of Jammu and Kashmir (IA No. 13 in Writ Petition (C) No. 171 of 1996), A.I.R. 1999 S.C. 97 (1998).
17. *Id.*
18. *Id.*
19. Down to Earth, *Operation Hoodwink*, May 31, 2002.
20. In India, "afforestation" refers to: (1) the planting of trees where there were none before; and (2) the planting of trees on previously forested land.
21. Ministry of Environment and Forests, Circular F. No. 2-1/2003-FC, at 10 (Oct. 20, 2003).
22. One "Lakh" equals 100,000 rupees, or approximately $2,200.
23. Down to Earth, *Doubts Sown: Will New Deforestation Fund Management System Work?*, June 30, 2004.
24. Prabhjot Singh, *SC Orders Body on Afforestation Fund*, The Tribune (Chandigarh, India), Nov. 24, 2002.
25. *Id.*

the CAMPA could be handling up to Rs 2000 crore (approx. $440 million) per year.[26]

In 2005, the Supreme Court issued another order concerning NPV, detailing the legal motivation and justification for NPV, the specific means by which the value of forests should be calculated, and how the collected funds should be managed.[27] The legislature has responsibility for implementing the equivalent of a tax on forest land use and for managing that policy, but through the *Godavarman* case, the Supreme Court has assumed a legislative role, and has not only created fees for wood-based industries using NPV, but has also specifically defined the details of monetary management. In addition to interpreting the law, the Supreme Court has effectively designed it and has required other government organizations, which have had no role in developing the law, to implement it.

III. Effects of the Case

A. Devastation of the Timber Industry in the North East States and Judicial Lack of Foresight

The North East states of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, and Tripura contain one-fourth of India's forests and account for one-half of the domestic timber trade.[28] A total of 31,700 hectares of forest, on which many of the states' poor forest dwellers depended, were being cut down every year by these states' timber industries.[29] When the Supreme Court instituted its ban on tree felling, it dealt a powerful economic blow to the North East states. More than 90% of production units closed, and the country's import of timber rose from 10% to as high as 90%.[30] In Arunachal Pradesh, the state's revenue dropped almost 84% from Rs 49 crore (approx. $11 million) in 1995 to 1996 to Rs 7.9 crore (approx. $1.7 million) in 2000 to 2001 as a result of the tree felling ban.[31] In Manipur, the revenue from forest products dropped from Rs 2.9 crore (approx. $638,000) in 1996 to 1997 to Rs 0.6 crore ($132,000) in 1999 to 2000.[32]

The Supreme Court did not make any consideration of the potential economic losses in its initial order suspending tree felling in 1996.[33] In fact, the Supreme Court did not even provide any expectation as to how the orders might help increase the nation's forest cover. The Supreme Court's lack of consideration of the potential economic effects led to implementation of policies that proved economically harmful to the North East states. The Court did offer the North East states the opportunity to designate zones in which wood-based industries could be relocated.[34] But the notification for relocation, when passed by the state government of Nagaland, for example, was held invalid by the Supreme Court without provision for an alternative and in complete disregard of the economic consequences.[35] In response to the economic loss caused by these orders, a writ was filed to question their correctness.[36] Since the orders passed by the Supreme Court cannot be questioned on their merit, this petition was held as not maintainable, even though it raised important issues.

B. Failure of Working Plans and the Black Market for Timber

The 1996 Court order allowed tree felling to recommence on the condition that states develop a working plan to be approved by the central government, presumably by the MoEF.[37] States have been extremely slow in developing and implementing these working plans. Between 1997 and 2002, only 14% of working plans were completed, and in 2001 the states of Manipur and Mizoram had still not submitted any working plans at all.[38] Instead of surveying all of its forests (even those in private hands as the 1996 order instructed) and developing working plans, the government of Meghalaya asked the MoEF to recognize its forests as "plantation forests" so as to exclude them from the working plan requirements.[39] Rather than using the system to benefit its constituency, the government of Meghalaya complained about the system and sought exception from a policy intended for its ultimate benefit. The Supreme Court's provision for restarting timber operations through working plans was obviously ineffective, but instead of changing its orders to adapt to the political and economic climate that deters development and execution of working plans, the Court fined the MoEF Rs 5,000 for not devising the required comprehensive plans.[40]

The inability and incompetence of state governments to obey the Supreme Court, which did not solicit states' recommendations or opinions, reveals a gross failure of cooperation. Without direct representation in the Supreme Court's decisionmaking process, state governments have little motivation to change local policies to function under guidelines that do not reflect their local political situations. The disincentive is especially potent when enforcement of the Court's orders would be detrimental to officials' political careers in future elections. The Supreme Court failed to account for the states' interests and the competing interests at local levels.

The result of the Supreme Court's lack of consideration has been an increase of corruption in forest management within state governments. This corruption has undermined the Supreme Court's efforts to improve the nation's forest cover. In Assam, 60% of timber in the city is illegal.[41] There are reports of large illegal timber transport operations

26. *Id.* One "crore" equals 10 million rupees, or approximately $220,000.
27. T.N. Godavarman Thirumalkpad v. Union of India, JT, (2005) 8 S.C. 588.
28. Down to Earth, *Logjam*, Mar. 15, 2002, online edition, at 2, 3.
29. *Id.* at 1.
30. *Id.* at 2.
31. *See supra* note 2.
32. *Id.*
33. *See supra* note 3.
34. T.N. Godavarman Thirumulpad v. Union of India, (1998) 2 S.C.C. 59.
35. T.N. Godavarman Thirumulpad Kitply Indus. v. Union of India, Supreme Court of India, IA No. 295 in Writ Petition (C) No. 202 of 1995 with IA Nos. 397, 408, 409, Contempt Petition No. 336 in IA No. 397 in Writ Petition (C) No. 202 of 1995, (1999) 9 S.C.C. 151.
36. Sabia Khan v. State of U.P., Writ Petition (C) No. D 2117 of 1998, A.I.R. 1999 S.C. 228 (1998).
37. *See supra* note 6, at I.3.
38. *See supra* note 28, at 3.
39. *Id.*
40. *Id.*
41. Northeast Vigil, *40,000 Hectares Added to State Forest Cover*, Issue No. 5.22, June 16, 2004.

among the city's districts, and forest officials and police personnel are suspected of being involved in these operations.[42] Officials turn a blind eye to illegal timber operations or even grant approval without authorization to gain public favor in upcoming elections. Government officials or wealthy landowners who operate or are involved in logging operations attempt to earn a quick profit illegally rather than attempting to preserve a limited resource for long-term gains. The economic incentives for preserving forests disappeared with the imposed ban on felling, and while states could have partially counteracted the decline in revenue by instituting working plans, their failure to do so left many to pursue forms of illegal forest activities and cultivation that further degrade forest areas. In some places, forests did improve because illegal felling was reduced, but in other places degradation continues because incentives for preservation are still absent. Because people no longer have control of the forests that they were logging, they have less or no incentive to protect those forests with sustainable practices. State and local agencies also lack the funding, the personnel, and the expertise necessary to enforce the Supreme Court's orders and develop viable working plans compatible with environmental concerns. By not having the representation of state and local bodies and by not addressing and incorporating state-level needs and inefficiencies in its orders, the Supreme Court created policies that have been extremely difficult, if not impossible, to implement successfully.

C. Interference in the Responsibilities of the Ministry of Environment and Forests

The Supreme Court's creation of national and local forest management policies has interfered with the work of the MoEF, which is normally responsible for managing India's forests and wildlife. Because the Supreme Court assumed the responsibilities of the MoEF in creating forest policy and because the Court has expected the MoEF to enforce its regulations, the MoEF's actions during the *Godavarman* case have been closely tied to the Supreme Court's decisions. By imposing policies on the MoEF that it did not create, the Supreme Court demanded action from an organization whose structure did not evolve from the policies it was expected to execute.

In recent years, the MoEF has become less scientific and more bureaucratic due to changes in personnel and increasing bureaucracy. Insufficient funding has made it difficult for the MoEF to manage India's forests effectively, especially given the country's size (3,287,590 km^2) and the fact that managing the environment also requires managing the environment's relationship with over one billion people, many of whom, for example, depend on forest land for their daily sustenance. The Supreme Court's orders have forced the MoEF to enforce policies without the proper resources and have provoked it to act in ways that attempt to protect forests in name only and at the expense of India's rural populations. The issue of encroachments on forest lands by people whose livelihoods depend on the forests is an example of the perverse results of the Supreme Court's decisions.

In 1999, three nongovernmental organizations (NGOs) filed an interlocutory application (No. 502) in the *Godavarman* case on behalf of the Onge tribe, an indigenous people living on the Little Andaman Islands in the Bay of Bengal.[43] Encroachments on forest land were destroying the environment on which the Onge tribe depended. The application was filed in the Calcutta High Court, and in an interim order in October 2001, the court prohibited the felling of naturally grown trees on the islands.[44]

On November 23, 2001, Harish Salve submitted an amicus intervention petition to the Supreme Court in the Andaman's application.[45] Salve cited forest encroachments as one of the biggest threats to deforestation. He pointed out various cases of forest degradation as a result of encroachments and accused states of allowing encroachments despite the Supreme Court's December 12, 1996, order.[46] Salve suggested that the Court require all states to remove encroachers who had not regularized their encroachments before the 1980 deadline for doing so.[47] On February 18, 2002, the Supreme Court asked the states to respond to Salve's assessment. The states responded and on April 1, 2002, the Supreme Court replied that it would review the states' reports and issue a response in six weeks.[48]

Motivated by the Supreme Court's attention to the matter—and before the six weeks had passed—the MoEF issued a directive on May 3, 2002, to all states requiring that they summarily evict all illegal encroachers on forest land and regularize only eligible encroachments before 1980.[49] This meant that if a group had legitimately used certain forest lands before 1980, then they could still be allowed to use those lands now. If any group did not meet this criterion, the states should evict the group from the area where forest encroachment was occurring. The states had to complete the evictions and/or regularizations by September 30, 2002.[50]

The MoEF's directive had detrimental effects on many of the country's tribal communities. Like the Supreme Court, the MoEF failed to account for inefficiencies and inadequacies in the state forest departments. In the week after the MoEF circular, the state of Assam used elephants to destroy huts and homes in a designated forest area.[51] While the inhabitants of those dwellings may have been encroaching illegally on forest land, they were not even provided the time necessary to dispute the eviction notice. In Maharashtra, the government issued eviction notices to families with standing crops.[52] The government destroyed homes and left hundreds homeless.[53]

Many tribal groups are illiterate and/or do not have documentation of their legal encroachment of forest land. As a result, many groups were evicted or threatened with eviction even though they had been living on their land since before the 1980 deadline. Their inability to prove their residency before 1980 often resulted from state governments

42. Indian Jungles, *Timber Smuggling Assam/W. Bengal*, June 11, 2004.

43. *See supra* note 2, at 1.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 2.

48. *Id.*

49. *See supra* note 2; *see also* Samudra, Traditional Fisheries: Jammed in Jambudwip (2003), *available at* http://www.icsf.net/jsp/publication/samudra/pdf/english/issue_34/art10.pdf.

50. *See supra* note 2.

51. *Id.* at 1.

52. *Id.*

53. *Id.*

losing records. A number of groups raised complaints that they were being evicted from land that was not a forest and in some cases never was a forest. Inaccurate and intentionally altered surveys led the state forest departments to submit eviction notices to people who were not encroaching on forest land at all.

The Supreme Court had already addressed the problem of inaccurate forest surveys. In its December 12, 1996, order, the Supreme Court required the states to form a committee to survey forest lands and determine which areas are and are not forests.[54] This committee would also calculate the sustainability of the different forests in order to measure how much use the forests could withstand without degrading.[55] Once this information would become available, the MoEF and the state forest departments could properly regulate forest resources. State governments have not followed this order and have wrongly issued eviction notices.

With respect to inaccurate or absent records on encroachments, the MoEF 2002 circular did not give adequate attention to a set of circulars it previously issued in 1990, which circulars provided guidelines for disputes that might arise in the eviction process. The 2002 directive reiterated the first 1990 circular, FP (1), which requires the eviction of illegal encroachers, emphasizing the 1980 deadline.[56] The 2002 directive ignored the second 1990 circular, FP (2), entitled "Review of Disputed Claims Over Forestland, Arising Out of Forest Settlement."[57]

FP (2) outlines the procedure for state governments' handling of disputed claims over forest land. States are first instructed to identify three categories of claims since different types of claims require different research and attention. After categorizing claims, the states should submit them to a committee composed of the Divisional Forest Officer, a Subdivisional Officer from the Revenue Department, and a representative from the Tribal Welfare Department. The committee is empowered to decide on the tribals' claim and to respond to other issues accordingly. The MoEF's neglect of FP (2) seems to have caused widespread oppression and injustice against tribal people who were threatened with evictions when they were rightfully occupying forest land.

The eviction drives have also had a detrimental effect on the Supreme Court's attempt to protect forests. The National Forest Policy of 1988 states:

> Having regard to the symbiotic relationship between the tribal people and forests, a primary task of all agencies responsible for forest management, including the forest development corporations should be to associate the tribal people closely in the protection, regeneration and development of forests as well as to provide gainful employment to people living in and around the forest.[58]

In addition to promoting a cooperative existence between people and forests, the government is responsible for using the tribal people to protect the forests that they use and for ensuring that tribal people find employment. In many successful government programs, tribal people partner with the forest department to patrol local forests for illegal non-forestry operations. In return, the tribal people receive permission to use the forest for subsistence. They are instructed on sustainable forest use, are provided with jobs, and are used to protect the forests. By ensuring that tribal people engage in sustainable use of the forest's resources, the government preserves current forests. By providing jobs, the government reduces the number of jobless people who resort to illegal tree felling for profit. By empowering local communities, the government can cooperate with them to protect forests. The *Godavarman* case went so far as to oppose the tribal groups that could be used to protect the forests according to the Supreme Court's original intent.

In the judgment of *Samatha v. State of AP*,[59] a five-judge bench of the Supreme Court recognized that for tribals, forests are their traditional source of sustenance. They have a historical right to minor forest produce and to communal residence on forest land. These rights of tribals have been neglected in the *Godavarman* orders. The restrictions placed on forest use and access have had an especially debilitating effect on the tribal communities in the North East. The continuing immigration from Bangladesh has caused a demographic and social shift in the region. The displacement caused by this judgment has exerted further pressure on scarce jobs and resources.[60] Because tribals have no training or skills other than in forest industries, it seems unfair and inequitable to expect tribals to raise money from sources other than the forest. Some state governments did challenge the unfair treatment of the tribals, but the Supreme Court did not pay heed.[61] The region has lapsed into a state of constant violence which resulted in over 50 civilian deaths in October 2004.[62] The causal link between terrorism and the tribal people can be traced to the steady deterioration of their way of life, which was compounded by the effect of orders in the *Godavarman* case.

After receiving complaints that tribals were being unjustly evicted, the MoEF issued a circular on February 5, 2004, modifying its instructions on dealing with encroachments and showing the first reasonable steps toward recovery from the Supreme Court's 1996 decision.[63]

The circular explains the need for states to utilize FP (2) and (3) of the six circulars it had previously issued in 1990; FP (2) and (3) provide guidelines for settling disputed claims.[64] The 2004 circular distinguishes between disputed claims and proposals for the regularization of encroachments. Hearings on the regularization of encroachments had only considered the 1980 deadline and were decided summarily, whether the encroachment was an eviction or not. Disputed claims and the other provision under FP (2) and (3) allow tribals to retain access to the forest land they use.

The 2004 circular requires that "[t]he State Government/UT Administration should recognize the traditional

54. *See supra* note 6.

55. *Id.*

56. Ministry of Environment and Forests, Circular No. 13-1/90-FP, at FP (1) (Sept. 18, 1990).

57. *See supra* note 2.

58. National Forest Policy, 1988, at 4.6.

59. (1997) 8 S.C.C. 191.

60. Malabika Das Gupta, *Land Alienation Among Tripura Tribals*, XXVI Econ. & Pol. Wkly. 2112 (1991).

61. T.N. Godavarman Thirumulpad v. Union of India, Supreme Court of India,, Writ Petitions (C) No. 202 of 1995 (under Article 32 of the Constitution of India) with Nos. 171 and 897 of 1996, decided on Mar. 4, 1997, A.I.R. 1997 S.C. 1233.

62. Arijit Mazumdar, *Back to the Roots of Violence*, *retrieved from* http://www.northeastvigil.com/.

63. Ministry of Environment and Forests, Circular No.2-1/2003-FC (Pt) (Feb. 5, 2004).

64. *Id.*

rights of the tribal population on forest lands, and these rights should be incorporated into the relevant acts, rules and regulations prevalent in the concerned States/UTs by following the prescribed procedure."[65] This recognition, if more than words on paper, will improve the way tribals are treated and compensate for the lack of attention to tribal needs in the Supreme Court's articulation of forest policy.

The second and third provisions of the circular recognize the legal rights of forest dwellers to use forest lands as long as they have been in continuous occupation of the land since December 31, 1993.[66] Tribal groups that have been occupying land since 1993, rather than the previous deadline of 1980, can acquire legal rights to the land rather than being evicted. The legal rights would only be granted on the condition that the forest department initiate an integrated forest rehabilitation scheme, presumably to show tribals how to rehabilitate the forests they use. These two provisions provide a positive change to the MoEF's previous policy. Obtaining these rights, however, is subject to the state taking the initiative to file proposals, but at least tribals have the opportunity for better protection which they lacked under the Supreme Court's decisions alone.

The governments of the North East states have tried to create schemes of participatory resource management involving the tribal populations, since those populations have led a symbiotic existence with forests that revolved around common property. A number of these states passed Joint Forest Management Resolutions in the late 1990s.[67] These schemes aimed to regenerate degraded and unclassified forests. The resources to do so are supplied by the government, and the local people and the poor are the beneficiaries. But these schemes for compensatory afforestation have been neglected by the Supreme Court's continuing directives.

Recent developments have favored the rights of tribals and have nullified to an extent the effect of the May 2002 notification. In May 2005, the Union Environment and Forests Minister informed the parliament that the MoEF had issued directions to all state and union territory governments not to resort to eviction of tribal people from forest land in the absence of verification and determination of their rights. The other main development has been the floating of a bill, the Scheduled Tribes (Recognition of Forest Rights) Bill of 2005, that was introduced in the parliament for discussion. The proposed bill aims to recognize and vest forest rights and occupation of forest land to forest-dwelling Scheduled Tribes, whose rights were not recorded before the 1980 deadline.[68] The bill is extreme in that it intends to give complete inhabitation rights to the tribals, which would have an adverse impact on the protection of the environment if compensatory afforestation programs are not mandated. The introduction of this bill is seen as fallout from the reaction sparked by the eviction order of May 2002, and is an example of how the MoEF's rushed and Supreme Court-motivated initiatives have been counterproductive in the long run.

The MoEF's premature and hasty attempt to enforce the Supreme Court's developing policies shows the conflict that arises when the Supreme Court assumes other agencies' powers and responsibilities. The Supreme Court issued policy decisions independently of the MoEF, making it awkward for the MoEF to develop and enforce its own policies. The MoEF reacted to the Supreme Court's attention to the problem of encroachments as if it were in competition with the Supreme Court to do something about the problem. Rather than assisting the MoEF and providing guidance to it, the Supreme Court assumed its responsibilities without consulting it. The MoEF has deferred to the Supreme Court rather than developing its own forest policies. As a result, its actions are often premature and not guided by an organized and well-planned agenda.

D. Creation of New Government Entities and of New Managers of Forest Policy

In its order issued May 9, 2002, less than a week after the MoEF's order to summarily evict all forest encroachers, the Supreme Court constituted the CEC so that "[a]ny individual having any grievance against any steps taken by the Government or any other authority in purported compliance with the orders passed by this Hon'ble Court will be at liberty to move the Committee for seeking suitable relief."[69] Because the MoEF did not adhere to its own 1980 circular FP (2) with respect to forest encroachments, and because it acted prematurely with detrimental consequences, the Supreme Court created the CEC to fill the gap of the MoEF's failure to provide a means for addressing grievances as outlined in FP (2). The Supreme Court instigated the MoEF's premature and insufficiently planned actions and then created a government entity to compensate for it, even further complicating the management of India's forests.

Actions taken by the state or central governments can be challenged before the CEC.[70] Complaints can be brought for grievances based on deforestation, encroachments, and any of the environmental laws implemented by the state and central governments. Because the CEC is not an "Authority," it is only empowered to issue orders that conform to orders passed by the Supreme Court. When asked to make orders outside of the Supreme Court's previous rulings, the CEC only has the power to make recommendations.

After its constitution, the CEC issued a report on forest encroachments. It estimated that the amount of forest area under encroachment was at least 725,861 hectares, but probably more due to faulty surveying.[71] Calculating the monetary cost of environmental damage to these areas over 50 years, the CEC arrived at the figure of Rs 459,978 crores (approx. $102 billion) in potential environmental damages. As to why encroachers had not been evicted as per the MoEF orders, the CEC compiled a list based on data provided by state officials. The overarching reason for non-eviction was the absence of political will. Local governments not only

65. *Id.* at 1.

66. *Id.* at 2(i).

67. Government of Nagaland, Joint Forest Management Resolution of March (1997); Government of Tripura, Joint Forest Management Resolution of December (1991); Government of Mizoram, Joint Forest Management Resolution of September (1998); Government of Arunachal Pradesh, Joint Forest Management Resolution of October (1997).

68. Meena Menon, *Campaign for Forest Rights to Tribals*, THE HINDU, Aug. 24, 2005.

69. Central Empowered Committee, notification No. 1-1/CEC/2002, June 20, 2002.

70. *Id.*

71. 2002 Recommendations of the Central Empowered Committee in Interlocutory Application No. 703 of 2001 in Interlocutory Application No. 502 of 2000 in Writ Petition No. 202 of 1995.

tolerated encroachments but actually encouraged them, either to gain support before elections or to generate profit by allowing illegal commercial use of forest land.

The CEC was useful in gathering and providing this information, but like the Supreme Court, it assumed the responsibilities of the MoEF and failed to address the issues at hand. For a solution to the problem, the CEC recommended that "[t]he First Offence Report issued under the relevant Forest Act shall be the basis by which to decide whether the encroachment has taken place before 25.10.80."[72] The First Offence Report records the government's first official recognition of an encroachment on forest land. To deter corruption, the CEC imposed a fine on states of Rs 1000 (approx. $22) per hectare per month for land still under illegal encroachment. Like the MoEF, the CEC ignored circular FP (2) of 1990. The CEC suggested using a First Offence Report to determine eligibility to regularize an encroachment, but provided no guidelines to settle disputes, such as those provided in FP (2). In many cases, First Offence Reports were not filed because officials did not consider certain groups as encroachers; in other cases, the reports were missing. The First Offence Report is not an accurate or reliable indication of a group's right to use forest land, and in cases where the Reports were not issued or were lost, the CEC's recommendation neglects to provide any alternative means by which states can settle claims.

While the CEC is strictly empowered to act in accordance with Supreme Court orders, its recommendation conflicts with the Supreme Court's statement in an earlier case: "[I]n all cases where the claim (for regularization of forest land) is not supported by documents, the committee should conduct an inquiry, receive evidence and then come to accept the claim."[73] The 1986 Supreme Court order accepted an interim report that explained the necessity of a thorough investigation, including a study of current forest practices, testimonies of inhabitants, and related documents filed by the local government.[74] By not providing guidelines for investigation of disputes and settlements, the CEC did not allow tribal groups the opportunity to legally remain on their homeland. The Supreme Court passed off responsibility for grievances and for all the problems that arise from its orders to the CEC, and once again failed to respect the responsibilities of the MoEF. It created a committee to perform functions that would normally be performed by the MoEF. The MoEF has not adequately dealt with the problem. By attempting to deal with the problem on its own, and by creating new organizations to effectively replace the MoEF's functions, the Supreme Court has complicated the system of managing India's forests while failing to effectively address local people's relationships to the forests.

IV. Analysis

A. Constitutionality, the Separation of Powers, and the Expansion of Judicial Activism

The *Godavarman* case marks hitherto unseen assumption of powers by the Supreme Court in disregard of constitutional limitations, which has profound implications for the further rise of judicial activism in India. This case marks a culmination of a process by which the Court has gradually usurped the role of every arm of the government.[75]

In the *Godavarman* case, the Court impinged upon the power of the legislature by banning the transport and felling of timber and by creating the CEC. It assumed the role of the executive in administering its own interpretation of the law in addition to its specific orders. Rather than directing, guiding, and motivating the existing national and state bureaucracies to realign their infrastructures and goals toward more stringent and effective forest management, the Supreme Court bypassed their authority and attempted to selectively micromanage the entire country's forests. The Court, rather than the legislature, became responsible for creating environmental regulations, and the Court, rather than the executive branch of the government, assumed responsibility for enforcing its own interpretations and regulations. Consequently, when national, state, or local organizations do act, it is often in competition with the Court's orders, as seen in the MoEF's premature order against encroachments. By assuming the powers of other government actors through judicial activism, the Supreme Court has restricted the growth of a responsible and independent bureaucracy.[76]

The Court has also extended its assumption of powers beyond a reasonable time frame. Under the Constitution, the writ of mandamus is restricted to compelling action with reference to previously existing and clearly defined duties.[77] Mandamus is not a creative writ under the cloak of which the court can usurp the role of lawmaking and policy formulation. In the *Godavarman* case, the Court micromanaged the implementation of its orders by keeping the case open. This practice of "continuing mandamus" is not envisaged by the Constitution. It was introduced through the judgment of *Vineet Narain v. UOI*,[78] which was a sensitive case involving political corruption. In its last order in this case, a constitutional bench of the Supreme Court clarified that the application of mandamus was an extraordinary one.[79] The Court stated that it had respected the constitutional scope of mandamus because it kept the case open only to receive reports that executive action was not being tampered with by politicians. It did not interfere with the manner of investigation of the executive at any stage during the issuance of continuing mandamus. In contrast, in the *Godavarman* case, which is the only other case of continuing mandamus, the Court has strayed from the limits of such orders by continuing to act as an administrator of law and of its own regulations.

The writ of mandamus was applied in this case in a manner that breaches constitutional limits. In recent judgments, the Court has sought to restrain itself from transgressing upon the authority reserved for government functionaries.[80]

72. *Id.*

73. Videh Upadhyay, *Understanding "Encroachment,"* India Together, June 2003 (citing Writ Petition No. 1778/1986, Supreme Court of India).

74. *Id.*

75. *See* Supreme Court Advocates-on-Record Ass'n v. Union of India, (1993) 4 S.C.C. 441, 688; The Constitutional Obligation of the Judiciary Hon'ble Shri J.S. Verma, *Chief Justice of India*, (1997) 7 S.C.C. (Jour) 1.

76. Divan, as cited in Armin Rosencranz & Michael Jackson, *The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power*, 28 Colum. J. Envtl. L. 121 (2003).

77. Mansukhlal Vithaldas Chauhan v. State of Gujarat, (1997) 7 S.C.C. 622.

78. (1996) 2 S.C.C. 199.

79. Vineet Narain v. UOI, (1998) 1 S.C.C. 226.

80. Tirupati Balaji Developers Pvt. Ltd. v. State of Bihar SLP (C) No. of 2004 (CC No. 8071-8072 of 2002), Apr. 21, 2004.

With regard to the issue of mandamus, the Supreme Court has stated that a functionary conferred with a public duty should be given full range of discretion to perform that duty.[81] In *Godavarman*, the court failed to respect the doctrine of separation of powers and set a dangerous precedent for unilateral and exclusive judicial management of executive and legislative functions.

The doctrine of separation of powers does not find explicit enunciation within the Indian Constitution. (Only Article 154 states that the judiciary would be free from interference or control by the executive.) An amendment along the lines of Articles I, II, and III of the U.S. Constitution was proposed in the constituent assembly. But this amendment was opposed in favor of a harmonious governmental structure without a complete separation of powers. An analysis of the views of the constitution makers and subsequent cases of the Supreme Court clearly show that in Indian constitutional jurisprudence, there is no strict separation of powers. However, the Indian constitutional framework embodies this doctrine by necessary implication through the allocation of powers among the three arms of the state. Within one year of the coming into force of the Constitution, the Supreme Court discovered the essence of separation of powers as the core of the Constitution in the *Delhi Laws* case[82] and 25 years later in 1975 in *Indira Nehru Gandhi v. Raj Narain*.[83] The Court elevated this feature of separation of powers to the basic inviolable structure of the Constitution in the landmark en banc judgment of the Supreme Court in *Kesavananda Bharti v. Union of India*.[84] The separation of powers is accepted so as to preserve the freedom and independence of the organs of the state, whose independence is necessary for their proper functioning.

The Indian Constitution endows the judiciary with certain extraordinary discretionary powers, including the power under Article 142 to make any order in the interest of justice in any cause or matter before it. Further, Article 144 requires all authorities in the country to act in aid of the orders of the Supreme Court. The encroachment of the Supreme Court on legislative discretion was initially restricted through judgments like *A.K. Gopalan v. State of Madras*[85] and *State of Madras v. V.G. Row*[86] which held that the concept of substantive due process could have no role in the interpretation of Article 21 (the right to life) because it essentially involved substituting a judge's notion of reasonableness with that of the legislature's. However, from *Maneka Gandhi v. Union of India*[87] onward, the Supreme Court introduced into Article 21 the concept of substantive due process, or in other words, a standard that requires executive and legislative action to be reasonable or fair. With the power of substantive due process behind them, the courts have created further rights by treating them as flowing from Article 21 of the Constitution.

The courts of India do not have the resources or the capacity either to investigate completely the claims of litigants or to ensure the implementation of its orders. The weapon of contempt to ensure enforcement can only have limited application and may become stunted and ineffective with overuse. The reliance on affidavits tendered or even placing reliance on a report of a court-appointed commissioner can hardly supplant a judgment made by a competent executive officer. These practical difficulties have cropped up in the implementation of the orders in the *Bandhua Mukti Morcha*[88] case, where the Court-ordered benefits have still not reached their intended recipients and the lack of executive direction and management has hampered relief efforts.[89]

The problem of the Supreme Court's encroachment upon the responsibilities of the other branches of government becomes especially prominent in light of the fact that the constitutional role assigned to the judiciary is to be the sentinel on the *qui vive* that prevents the subversion of the Constitution. In extending the interpretation of this power, the Supreme Court is itself breaching the limits of the Constitution. The irony lies in the fact that the legal, constitutional, and practical fallacies of the Supreme Court's usurpation of executive and legislative power arise from the Court's own views on the subject. For instance, in the case of *P. Ramachandra Rao v. State of Karnataka*,[90] while examining the courts' rules setting new limitation periods for instituting criminal trials and enabling the issuance of orders on the administrative processes to be followed by the criminal courts, the Supreme Court observed:

> Courts also have no means for effectively supervising and implementing the aftermath of their orders, schemes and mandates, since courts mandate for isolated cases, their decrees make no allowance for the differing and varying situations which administrators will encounter in applying the mandates to other cases. Courts have also no method to reverse their orders if they are found unworkable or requiring modification. The Supreme Court could have well left the decision-making to the other branches of government after directing their attention to the problems rather than itself entering the remedial field.[91]

The Supreme Court seems to recognize the limitations of its powers and of its duty to restrain itself concerning decisions that interfere with the responsibilities and functions of other government bodies. In the *Godavarman* case, however, the Court continues to breach its own doctrine. Instead of directing its attention to the controversy at hand and seeking a limited adjudication of it, the Court has attempted to address the supposed defects of an entire policy arena without the information, resources, and organizational capacity necessary to manage India's forests and its forest-dwelling people, not to mention the collateral impacts on the forest industry, wildlife habitats, and state and local governments.

B. Inadequate Alternatives

Part of the problem of the Supreme Court's intervention in forest policy management is the fact that the judicial system is currently unable to handle even ordinary litigation; it

81. Union of India v. S.B.Vohra, Supreme Court of India Civil Appeal No. 2887 of 2001, decided on Jan. 5, 2004.

82. A.I.R. 1951 S.C. 332.

83. (1975) Supp. S.C.C. 1.

84. A.I.R. 1973 S.C. 1461.

85. (1950) 1 S.C.R. 88.

86. (1952) 1 S.C.R. 597.

87. (1978) 1 S.C.C. 248.

88. Arun Shourie, Courts and Their Judgments: Premises, Prerequisites, and Consequences (2001).

89. Bandhua Mukti Morcha v. Union of India, (1984) 3 S.C.C. 161.

90. A.I.R. 2002 S.C. 1856.

91. *Id.*

faces a huge backlog of undecided cases and now has to contend with a large array of public interest litigation (PIL). The writ jurisdiction of the higher judiciary has been used to entertain PIL. The principle of *locus standi* is abandoned in the name of social justice and lifting up the downtrodden sections of society. Ordinary writs, PIL, and appellate matters have ensured that the higher courts find it difficult to control the flood of litigation. The problem is compounded by the continuing vacancy in posts of judges, especially in the High Courts.[92] This increases the pressure on the Supreme Court to deliver justice expeditiously in multiple cases. Furthermore, spending on the judiciary by the government is abysmally low.[93] Judges do not have the human or financial resources to ensure compliance with their orders.

The MoEF could and should bear the responsibility for doing what the Supreme Court is doing, but it too does not have the monetary resources to monitor the country's forests, to research forest problems, or to develop new methods of dealing with forest issues that would protect the environment while providing local people with sustainable livelihoods. The MoEF also lacks sufficient professional and trained personnel necessary for dealing with local circumstances and creating policies that will have ecological and economic benefits. The legislature has proven itself inadequate in managing forest issues because it reacts primarily to crises or interest groups. Deforestation is difficult to recognize as a crisis, and interest groups are not powerful enough to effect new national forest policy. The MoEF and the legislature seem content to defer to the Supreme Court's forest management rather than building their own capacity, professionalism, and frameworks for dealing with forest issues. This deference absolves them of responsibility. Environmental and natural resource protection NGOs seem to prefer judicial direction of forest policy to management by corrupt and incompetent bureaucrats.

C. Has the Supreme Court Order Had the Desired Effect?

Godavarman Thirumulpad filed his case against the Union of India for the purpose of preserving a forest in his home region. The Supreme Court took the case and used it as justification for implementing and administering national forest policy to a degree far beyond the original scope of the case. The Supreme Court made interpretations and issued orders that apply to all states and forests in India, not just the forests of Godavarman's home region.

The Supreme Court was attempting to address the very important problem of forest management, or mismanagement, in India. Forest cover in the country was decreasing, and unless India quickly adopted sustainable forest practices, the country's ecological stability and biodiversity would suffer immensely to the detriment of future generations. The Supreme Court recognized the importance of forest preservation and observed the increasing destruction and degradation of forest land. The Supreme Court noticed that those national and state organizations responsible for forest management were failing in their duties. In light of national and state governments' inaction, the Supreme Court's unusual assumption of powers seems justified, especially given India's alarming statistics on forest cover.

The Forest Survey of India (FSI) last reported India's forest cover as 20.64% of the country's geographic area.[94] With the goal of increasing the national forest cover to 33% by 2012, India still seems underforested.[95] Moreover, the methodology behind this statistic suggests that the figure of 20.64% is meretricious. The measurement of forest area breaks down as follows:

Very dense forest (more than 70% forest cover)	1.56% of the geographic area.
Moderately dense forest (40-70% forest cover)	10.32% of the geographic area.
Open forest (10-40% forest cover)	8.76% of the geographic area.
Total forest cover:	20.64% (includes mangroves, 0.14% of the geographic area).[96]

FSI reports that 8.76% of India's forest cover is open forest, but what is "open forest?" With a minimum area of 1 hectare (or 2.471 acres) for measurement, land with a canopy density of only 10% hardly seems to qualify as "forest." Furthermore, FSI does not distinguish between private and public land, i.e., it does not distinguish between forests and fruit orchards or tea and coffee plantations. The survey counts all perennial woody vegetation with a canopy density above 10%, regardless of its ownership or makeup. Open forest could be too thinly covered to be considered forest in measurement of India's ecological health. Because FSI's idea of open forest includes sparsely vegetated land in its total count and because it fails to distinguish among different types of vegetation and ownership, the real forest cover of India could be as low as 12%, a far greater distance from the national goal of 33%. Given the problems with the current statistics and the alarmingly low percentage of real forest cover, the Supreme Court's intervention in forest policy was, at least in this respect, justified. National and timely action was necessary to curb deforestation.

In many ways, the Supreme Court's aggressive stance toward forest management has had some positive effects. India already had environmental laws to manage forests and encroachments, but sub-competence, insufficient staffing, and corruption prevented the executive branch and its underlying agencies like the MoEF from enforcing policies and adapting them to India's changing environmental needs. Hence, the Supreme Court's radical orders and its wide assumption of powers slowed and possibly reversed two ecologically dangerous trends: that of an ineffective govern-

92. N.L. Rajah, *India's Courts: The Long Wait for Justice*, The Hindu Friday, Sept. 30, 2005.

93. 127th report of the Law Commission of India (1988).

94. State of Forest Report, 2003, Forest Survey of India, Ministry of Environment and Forests, Dehradun, June 2005. Until 2001, when the scale for mapping from satellite data was 1:50,000, the scale for satellite mapping was 1:250,000. So while recorded data since 1987 (when the forest cover was recorded 19.49%) suggests that forest cover has increased by 1% to the current 20.64%, the increasing accuracy of measuring forest cover suggests the possibility that no significant change has occurred. J.K. Rawat, et al., *Application of Satellite-Based Remote Sensing for Monitoring and Mapping of India's Forest and Tree Cover*, *available at* http://www.gisdevelopment.net/application/environment/ffm/ma04067pf.htm.

95. National Forest Policy of India (1988).

96. *See supra* note 94, at 20-21.

ment and that of decreasing forest cover. By so aggressively and controversially addressing forest issues, the Supreme Court has also raised awareness concerning India's forest cover. Although its hastiness caused many predictable and perhaps avoidable effects, these efforts have in many ways benefited India's environment and given advocacy groups a renewed opportunity to protect India's forests.

The Supreme Court's actions have also addressed negligent forest management. India recognizes that the constitutional right to life depends on the right to a clean and healthy environment. To enforce the right to life, the government has the legal responsibility to effectively conserve forests and biodiversity. The government's past inaction and inadequate response to environmental issues can be viewed not as exercises of executive discretion, but as violations of law that would warrant the Supreme Court's intervention. From this perspective, the Supreme Court's policies have attempted to uphold the right to life when it was being seriously neglected.

Although decisive action may have been necessary, the Supreme Court's orders made demands far beyond its control. The Supreme Court assumed too much power too quickly to effectively manage it. Its orders may have been logically sound, though incomplete, from a policy perspective, but from a practical perspective, they demanded too much from India's weak state and local governments. The Supreme Court did not exercise sufficient caution in extending its role to directly oversee forestry issues. Despite the Supreme Court's defense of the right to a clean and healthy environment as part of the right to life, the Court's aggressive policymaking violated people's right to life by severely disrupting the timber industry, i.e., people's right to a livelihood, and sparking violent action against tribal peoples and alleged forest encroachers. The Supreme Court could have limited its decisions to the scope of the original *Godavarman* case or even delegated responsibility for handling certain issues to government agencies. Slowing down its intervention in forest management or limiting its geographical scope might have prevented states from hastily and unjustly evicting tribals from their homelands in response to an order by the MoEF. So while the Supreme Court has in some ways improved India's approach to forest issues, its aggressive role in the process has disrupted the balance of powers among government organizations and caused severe economic and social turmoil. By assuming so much power, the Supreme Court has perpetuated an incompetent government bureaucracy that defers to the Supreme Court for policymaking.

The MoEF's recent efforts to correct its past mistakes concerning tribal encroachments suggest that the government is making the necessary adjustments to ease the economically and socially harmful effects of the Supreme Court's orders. But the process of building the bureaucratic infrastructure, which hung loosely behind the Supreme Court for so many years, will require more time. Even though the MoEF is improving its policy toward tribals, the *Godavarman* case has provided it with ample opportunity to expand its powers, and it has vigorously done so. Similarly, the CEC has immense influence with its authority to issue orders consistent with the Supreme Court. The CEC is comprised of the former Secretary of the MoEF as its chairman, the Additional Director General of Forests of the MoEF as its MoEF representative, and the Inspector General of Forests as its member secretary.[97] As the MoEF has representation in every national forest-related committee, it continues to grow in power as new committees are constituted to manage forest issues that states have been unable to handle.

The centralization of forest management bypasses much state inefficiency. It also increases the distance between the administrators of forest policy and the tribal people who are affected by it and who are inextricably involved with forest protection. The Supreme Court's "continuing mandamus" in the case also leaves open the possibility for further judicial activism that might interfere with the progress of other agencies toward fair and productive forest and human rights policies.

D. Possible Resolutions

To protect India's forests, particularly in the North East, the state governments need to prevent illegal tree felling and deforestation. This can be achieved not through more rigorous attempts at control, but rather by addressing the simple fact that people need work to earn a living. The states need to develop, gain approval for, and execute working plans to provide jobs for those people who now resort to illegal tree felling. For those people who are not satisfied with the available working plans and who do not participate in them, the government must impose strict regulation on their activities to prevent deforestation. People cannot be completely blamed for illegally felling trees when they need to do so to feed themselves and their families. Before states can effectively reduce illegal tree felling, they need to ensure that sufficient working plans are in place so that most, if not all, the people who have lost their jobs can be provided with new ones.

At the same time, the MoEF, instead of the Supreme Court, needs to develop afforestation guidelines by which states can revive their timber industries at little or no expense to the forests. With the proper afforestation efforts, timber industries can improve the forests while using them as commercial resources. If states do not file working plans, then individual logging companies must be given permission from the central government for tree felling and afforestation. In the current system, states must develop a plan and get approval from the central government through the MoEF. The individual timber companies, in turn, must provide plans and get approval from the state government. But companies are limited by the states' inefficiencies. Instead of delegating responsibility to the states, the MoEF could set up the same approval program for companies on a national level and work directly with companies, completely bypassing the states. While this results in the centralization of powers, the facts of the situation indicate that direct central regulation of timber companies might be necessary and beneficial, at least temporarily. While micro-managing all the forests of all the states is too much responsibility for the central government, reviewing applications of companies seeking to bypass state inefficiencies through local MoEF branches would not be an impossible task.

In terms of dealing with the relationship between tribals and forests, the Center-Left parties in India now insist on a bill that would grant rights to certain scheduled tribes but not to all local communities in the forests. Because of such political self-interest and favoritism, it is clear that another

97. *See supra* note 69.

round of conflict will arise around the issue of encroachments. Instead of entertaining this partisan legislation, the Supreme Court could, under the mandate of Article 48A of the Directive Principles of State Policy of the Indian Constitution, invoke the duty of the state to prepare comprehensive legislation, which would:

- overhaul the Forest Conservation Act, incorporating the beneficial points of the *Godavarman* judgments;
- institutionalize the CEC and CAMPA and formulate layered redress mechanisms which would involve the Supreme Court only at the appellate stage;
- involve industry-based federations in the process of economic evaluation and control of commercial felling of timber;
- formulate concrete principles for the participation of the local communities in forest management through the panchayat system[98] (This is instead of adopting the path taken in cases of joint forest management, which tried to implement the principle of community participation in forestry management. This principle emanated from the older Forest Policy of 1988 and instead of being laid out clearly, was enforced through ad hoc orders.);
- clearly lay down the role of the executive branch of the government and distinguish the role of the MoEF from the role of state forest departments; and
- set up an ombudsman mechanism such that the Supreme Court can be relieved from its role of continual review.

Legislation along these lines would more evenly distribute responsibilities for managing India's forests among the various parts of the government. Instead of playing the role of the legislature and the MoEF, the Supreme Court would spend its time interpreting constitutional rights. It would motivate national organizations to clearly delegate responsibilities to organizations whose infrastructures and personnel exist to manage India's forests. With these changes, the Supreme Court would stay in the background to check that national and state organizations fulfill their duties. By not trying to replace government organizations, the Supreme Court would help build a stronger and more effective bureaucracy.

98. The panchayat is a council of elected officials taking decisions on issues key to a village's social, cultural, and economic life.

V. Conclusion

When the Supreme Court received the *Godavarman* case in 1995, India's environmental policy was in dire need of reform. The Supreme Court's actions, although extreme, addressed an issue vital to the human and natural health of the country and gave heart to advocates of forest protection. However, in raising awareness of environmental issues and bringing them to the forefront of national and judicial concern, the Supreme Court began the disquieting practice of "continuing mandamus." In hearing over 800 interlocutory applications since 1996, the Supreme Court has extended its involvement in forest issues and thereby increased the country's dependence on the Supreme Court for forest management. This dependence on a judicial institution that has already exceeded the boundaries of its responsibilities has been further complicated by the lack of monitoring of the Supreme Court's orders and the vagueness of the legislative and executive roles regarding forest issues.

With its micro-management of forest issues and the increasing number of Supreme Court-instituted organizations, the potential for conflict is hardly over. How long will the Supreme Court maintain an active continuing mandamus and who will monitor the Court's hundreds of decisions, interpretations, and policy judgments to ensure it does not roam dangerously far beyond the boundaries of its constitutional role? As the centralization of power to government organizations like the MoEF increases, will the executive, legislature, and judiciary succeed in cooperatively managing India's forests, or will the Supreme Court's far-reaching assumption of powers clash with the central government's policies? And amidst the delegation, redistribution, and reorganization of responsibilities and powers, what will happen to India's forests and the tribal people who inhabit them?

The Supreme Court's aggressive forest management has incurred large economic and social costs. It remains to be seen whether the Court can successfully transfer control to the appropriate governmental organizations, whether it can effectively manage the organizations it has formed, and whether it will avoid further economic and social disruption while attempting to restore India's forest cover.