

IMPEDED IMPLEMENTATION OF FOREST RIGHTS ACT: A SOCIO-ECONOMIC CONCERN

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ABSTRACT

The current study touches an aspect of forest governance in India, namely the use of forest land by the traditional forest dwellers and their role in the administration of forest-related issues like conservation of forest land, protection of flora and fauna. The author portrays the subject through the lens of contemporary dynamics with respect to the forest governance in India, namely the implications of the recent eviction order of more than one million forest dwellers passed by the Apex Court in the case dealing with the constitutional validity of Forest Rights Act and Draft National Forest Policy's proposed amendments in the Indian Forest Act, 1927 along with other proposed changes. The study is a brief description of the casual approach of the authorities in the implementation process of forest rights and highlights the plight of various local stakeholders in the forest. The first part of the study gives a brief historical perspective of forest governance in India, the second part consists of an in-depth discussion on the implementation of Forest Rights Act and the last part is a contrition of the conduct of the present pro-corporate and pro-crony government regime in undermining Forest Rights Act. The author concludes by suggesting potential steps, which can be undertaken in order to implement Forest Rights Act in its complete essence. The argument of the author in substance is the need to counter the hegemonic idea of conservation, which treats local communities as a critical threat to forest and to accede to the fact that a sustainable and effective protection of sensitive ecosystems requires the democratic involvement of those who live in and depend on those ecosystems as legally empowered rights holders.

Keywords: Forest Rights Act, Forest Dwelling Communities, Implementation, Gram Sabha, Forest Rights.

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INTRODUCTION

Amidst the quest of development, the care and caution for the environment have been diluted to a large extent. The reasons for the same are manifold but in substance, lack of planning and sustenance in development lead to the exploitation of resources in a devastating manner which ultimately affects the ecology and environment. It is not only the procedure, which is detrimental, but also the consequences which cause irreparable injury to the environment. The first material attempt to preserve and protect the environment was made at the Stockholm Conference, 1972. Twenty years after the Stockholm Conference, the UN convened a second international meeting, the UN Conference on Environment and Development (*hereinafter* UNCED), to assess events during the intervening years and to focus on the relationship between environmental protection and economic development. Five texts emerged from UNCED. Three of these were non-binding instruments: The Rio Declaration on Environment and Development, Agenda 21 and the non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests.¹ The Forest Principles and Chapter 11 of Agenda 21, which were adopted by 1992 Earth Summit, spell out the unfolding crisis of the world's forests and recognise the need for speedy action. In spite of the existence of a number of international legal instruments that bear some relation to forests, opinions have emerged about the need for a legally binding international instrument on all types of forests.

In the post-Rio period, many initiatives have been launched at various geographical levels.² In March 1995, the Food and Agriculture Organisation convened a high-level meeting of the ministers responsible for forests where the need for a more focused approach to forest-related issues was discussed which resulted into the adaptation of the Rome Statement on Forestry. It also established an open-ended ad-hoc Intergovernmental Panel on Forests (*hereinafter* IPF) to provide an assessment of action already undertaken to combat deforestation and to promote sustainable forest management. In pursuit of the same, the Intergovernmental Task Force

¹ Dinah Shelton, 'Stockholm Declaration (1972) and Rio Declaration (1992)', *The Max Planck Encyclopaedia of International Law* (2008).

² 'Resulting Documents, Processes and Follow-up Mechanism of RIO 92' (*WRM*, 27 December 2000) <<https://wrm.org.uy/other-relevant-information/resulting-documents-processes-and-follow-up-mechanism-of-rio-92/>> accessed 12 September 2019.

(*hereinafter* IFF) was formed by United Nations Economic and Social Council in 1997. The IPF, and subsequently the IFF, contributed substantially to strengthening the political profile, commitment and consensus building on forest issues and narrowing the North-South gap.³ Perhaps, an even larger contribution was the impetus that these processes provided for national authorities to take initiatives in support of global policy dialogue on forests.

Thus, there were significant developments concerning forest conservation, which ultimately resulted in the formation of the United Nations Forum on Forests. It is an intergovernmental policy forum, established in 2000, which promotes management, conservation, and sustainable development of all types of forests and aims to strengthen long-term political commitment to this end.⁴

However, the battle of protection of environment still continues and is getting tough day by day due to the advancements made by humankind in technology. In India, in the pursuit of protecting as well as regulating the forests, there are various frameworks among which the pivotal enactments are the Indian Forest Act, 1927, the Forest Conservation Act, 1980, and the Forest Rights Act, 2006. This study analyses the implementation aspect of the Scheduled Tribes and Other Forest Dwellers (Recognition of Forest Rights) Act, 2006 (*hereinafter* FRA).

The FRA provides a framework for the recording of forest rights of the Forest Dwelling Communities (*hereinafter* FDC) and the procedure to be followed in establishing the same. The term FDC used by the author includes Scheduled tribes⁵ as well as other traditional forest dwellers⁶. The study is in light of the recent dynamics with respect to forest governance in India.

BACKGROUND OF FOREST GOVERNANCE

In India, the shift from the traditional community authority over common forest resources to centralised government control was the result of colonial rule.⁷ Among the various stakeholders

³ Sen Wang, 'Towards an International Convention on Forests: Building Blocks Versus Stumbling Blocks' (2001) 3(4) *The International Forestry Review* 251-264.

⁴ Richard Tarasofsky, 'UN Intergovernmental Forum on Forests Ends - UN Forum on Forests to Begin' (2000) 30(1-2) *Environmental Policy and Law* 32.

⁵ Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, s 2(c).

⁶ Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, s 2(o).

⁷ NHR Avindranath and P Sudha, 'Community Forestry Initiatives in Southeast Asia: A Review of Ecological Impacts' (2006) 5 *International Journal of Environment and Sustainable Development* 1, 2.

involved in forests, the colonial government recognised the colonial (or nation) state in revenue-generation through the harvest of major commercial products and the decisions were entirely in the hands of the forest department in each province. Indian forests were harvested in large quantities by the British Empire for establishing railways and facilitating revenue generation. The entire practice was composed of ecologically unsound methods. The principal purpose of the Colonial Empire was to exploit the natural resources for the purpose of their trade and development exclusively. The blanket colonial restrictions on local communities to access and use forest resources outlawed traditional management regimes and widened the political gap between forest officials and local communities. This arrangement displayed not only colonial arrogance but also a disconnect from the unique context of South Asia, an ecologically diverse landscape that has been densely settled and intensively used by a diverse set of communities' indifferent ways over millennia.⁸

It should be noted that the Constitution of India had accepted the validity of the Indian Forest Act, 1927 and the right of 'eminent domain' of the State.⁹ After India gained independence many new areas were declared 'forest' areas, the rights of the people who historically inhabited them were not settled. This augmented the control of the Forest Department (*hereinafter* FD) over the lives of local communities and forests were exploited in the name of 'national development'.¹⁰ Post-colonial India saw that the government continued the colonial policy of 'scientific forestry' through which industry-friendly trees were planted at the cost of mixed forests, helping neither forests nor its attendant wildlife. The Indian state did enact several laws, like Wildlife (Protection) Act, 1972 and the Forest Conservation Act, 1980, to improve the conditions of forests and wildlife. However, in reality, these laws only increased the control of the state over the lives of FDC. The irony was that these laws were used to restrict and control the activities of local communities while the important obligations of the State were being rampantly violated.¹¹

⁸ Sharachchandra Lele, 'Forest Governance from Co-option and Conflict to Multi-layered Governance?' (2017) 52(25-26) Economic and Political Weekly <https://epw.in/journal/2017/25-26/forest-rights-act/forest-governance.html?0=ip_login_no_cache%3Df8e33783d2ecf8ad2fdfebf40f127145> accessed 6 September 2019.

⁹ Kamal Nayan Choubey, 'The State, Tribals and Law: The Politics behind the Enactment of PESA and FRA' (2016) 46(3) Sage Journal <<https://doi.org/10.1177/0049085716654812>> accessed 6 September 2019.

¹⁰ *ibid.*

¹¹ Ramachandra Guha, 'Forestry in British and Post-British India a Historical Analysis' (1983) 18(44) Economic and Political Weekly 1882.

RECOGNITION OF RIGHTS OF FOREST DWELLERS

Lack of transparency and accountability in the decisions on forest concession by the post-colonial governments and the absence of procedural rights in many environmental laws have played a big role in alienating forest-dependent communities from their traditional forest resources. All of this, along with a lack of strict enforcement laws, led to communal conflicts, forest degradation, and illegal deforestation. However, from the period of 1970 onwards various local struggles where a variety of grassroots organisations emerged opposing the ‘development’ model imposed by the state. Chipko Movement and Narmada Bachao Andolan are prominent examples of these movements which compelled the government to introduce the concept of Joint Forest Management (*hereinafter* JFM). JFM attempts to change the centralised, top-down, bureaucratic forest management system introduced by the British to one centred on decentralised, participatory, local need-based planning and management. The concept of JFM is based on the premise that local forest-dependent woman and men have the greatest stake in sustainable forest management because of their cultural, economic and environmental dependence on the forests.¹²

After 1991, the post-liberalisation era saw the opening of the country’s forest regions to corporate capital and the consequent exploitation of its resources. Such rampant misuse propelled the people’s struggle in forest areas, a large part of which came under the Schedule V or Scheduled Areas of the Constitution of India. Laws made for other parts of the country were also imposed in these Scheduled Areas without considering their appropriateness, criminalising in a sense, the cultural ethos of these regions. The presence of local communities, their traditions and use of forest resources for livelihood, under these laws, all become illegal.¹³

As a result, several STs and SCs created a furore of ‘Our Rule in Our Village’.¹⁴ There were various protests wherein the contentions of these groups were that the local communities had primary rights on their resources and their consent should be taken before implementing any form of development. Though there was still some continuity in colonial and post-colonial policies towards tribes and forests, the democratic processes, and, in some cases, radical/ violent

¹² Madhushan Bhandi, ‘Towards the End of Struggle for Tribals?’ (2014) 42(1/2) Social Scientist <<https://jstor.org/stable/24372999>> accessed 8 September 2019.

¹³ Choubey, ‘The State, Tribals and Law: The Politics Behind the Enactment of PESA and FRA’ (n 9).

¹⁴ *ibid.*

movements increased consciousness amongst tribal communities about their rights which eventually resulted in two statutes namely Panchayat Extension to Scheduled Areas Act (*hereinafter* PESA), 1996 and FRA. PESA recognised the authority of Gram Sabha given by the Bhuria committee and also stated that the state legislations for Scheduled Areas should be in consonance with the customary law, social and religious practices and traditional management practices of community resources. Thus, this historical law was clearly a crucial stage for the local communities in their voyage to seek affirmation and proprietorship of their rights over forest. The next significant development was the enactment of FRA, which was brought for restitution of management of the forest back to the local communities.

Historically, all forests were essentially owned by indigenous communities and families. These rights were appropriated, however, in the face of an expansion of feudalism, colonialism, and imperialism in the last five centuries, until eventually almost all forests were claimed by the state.¹⁵ Under colonial rule tribal rights on the resources of forests had been rejected; those Adivasi who could not present any written proof supporting their ownership of private property located in forest areas were deemed ‘encroachers’.¹⁶ The scheme and procedure under FRA are discussed in the next part of the study.

FOREST RIGHTS ACT, 2006

In India, forests support, directly, more than 100 million forest dwellers living in and around forestlands and indirectly, another 275 million.¹⁷ However, due to the absence of proper survey and land records, their customary rights over forest land have always been under threat. FRA is an excellent attempt at trying to appease two warring parties.¹⁸ The ambitious preamble of FRA envisages the recognition as well as affirmation of vesting forest rights in the Forest Dwellers. Section 3 gives a wide variety of rights like the right to live on forest land, the right to collect minor forest produce, confers privileges like fishery and grazing rights.

¹⁵ Augusta Molnar and others, ‘Community-Based Forest Management: The Extent and Potential Scope of Community and Smallholder Forest Management and Enterprises’ (Rights and Resources Initiative 2011) <<http://indiaenvironmentportal.org.in/files/cfm.pdf>> accessed 6 September 2019.

¹⁶ Guha (n 11).

¹⁷ NC Saxena, *The Saga of Participatory Forest Management in India* (Center for International Forestry Research 1997) <http://cifor.org/publications/pdf_files/Books/SP-Saga.pdf> accessed 24 August 2019.

¹⁸ Madhu Ramnath, ‘Surviving the Forest Rights Act: Between Scylla and Charybdis’ (2008) 43(9) *Economic and Political Weekly* 37.

FRA allows for the conversion of pattas, leases or grants to the title on forest land and ensures that forest dwellers with the legitimate claim have a perpetual vested right over the forest land which ensures the stability in the rights of Tribes and thus furthers the objective of the Act. Section 4 and 5 provides for Recognition, Restoration and Vesting of Forest Rights. The commitment of Parliament regarding vesting of forest rights is evident by the use of non-obstante clause in Section 4.

Thus, even in case of any conflict, the provisions of FRA will be given preference. Another prominent feature of FRA is Section 4(7) which provides that the land shall be conferred to the tribes free of all encumbrances and there is no need to get clearance under the Forest Conservation Act, 1980 and even there is no requirement of paying the ‘net present value’ and ‘compensatory afforestation’. The Legislature has taken a pragmatic view that the indigent forest dwellers who do not possess as such any material wealth are clearly unable to pay any amount in lieu of the land conferred to them.

CRITICAL WILDLIFE HABITATS

During the enactment of the FRA, the issue of including Protected Area (*hereinafter* PA) in its ambit was contentious.¹⁹ It led to an acrimonious but fruitful debate between conservationists and tribal rights organisations, which resulted in the creation of a new category of PA Critical Wildlife Habitats (*hereinafter* CWHs). According to this, the rights of FDC will be recognised in PAs but if a particular part of a PA is deemed vital for the existence of wildlife, humans will be relocated and rehabilitated at some other place.

There is an alarming conflict between the rights of local communities in forest and conservation of wildlife, which needs to be discussed. The model of conservation enshrined in the Wildlife Protection Act, 1972 is premised on creating human-free zones for the protection of rare species based on the erroneous notion that local people are the prime drivers of wildlife decline. While such protected areas approach has been successful to some extent in protecting certain species, it

¹⁹ Kamal Nayan Choubey, ‘Turning the Tide in Forest Rights?’ (2017) 52(1) Economic and Political Weekly 20.

has done so at the cost of the cultural, economic, social and political rights of communities living in these areas.²⁰

In 2016, two persons in a peaceful demonstration were killed in police firing near the Kaziranga National Park in Assam. This happened while the villagers were being evicted from their homes, following a Guwahati High Court order. The police used force against a peaceful demonstration by the Minority Students' Union against the eviction. The demand of the protestors was proper resettlement and adequate compensation. As per FRA, proper compensation and rehabilitation in terms of their education and livelihood were needed to be arranged by the Government before carrying out the eviction drive.²¹ Instead, there was brutal violence by the police who did not even spare women and children. It is submitted that the action was a gross violation of human rights. The violation of the right to livelihood and right to education seemed to target a particular section of the community under the cloak of wildlife protection.

It is pertinent to mention that FRA empowers FDC to preserve their habitat from any form of destructive practices affecting the cultural and natural heritage and empowers them to stop any activity, which adversely affects the wild animals, forests and biodiversity. Furthermore, the Supreme Court of India in the landmark Niyamgiri case described FRA as 'strengthening the entire conservation regime' in India.²² Therefore, local communities must be given the sole responsibility to preserve the wildlife in their land, as they are most competent to do so.

PARTICIPATORY FOREST MANAGEMENT

With popular revolt and democratic practice, there has been a slow move back to the recognition of local rights. During the enactment of FRA, State was finally talking in terms of Participatory Forest Management (*hereinafter* PFM), in vogue among some conservationist over the last decade, interlaced with the language of the tribal rights activist.²³ It is unanimous among scholars that environmental problems are forms of social conflicts, involving interests, senses and ends, in

²⁰ Neema Pathak Broome and others, 'Biodiversity Conservation and Forest Rights Act' (2017) 52(25-26) Economic and Political Weekly 51.

²¹ 'HR Body Flays Nagaon Admin over KNP Eviction' *Assam Tribune* (Guwahati, 30 October 2016) <<http://www.assamtribune.com/scripts/detailsnew.asp?id=oct3016/state052>> accessed 4 September 2019.

²² *Orissa Mining Corp v MOEF* 2013 6 SCC 476.

²³ Ramnath (n 18).

the relation between man and environment.²⁴ The difficulty of local communities is the inability to adapt to new rules that restrict land use and natural resources. PFM seeks to meet the dual objectives of forest conservation and traditional rights of FDC over forest resources. It essentially refers to co-management of forests by sharing responsibilities and benefits in the process²⁵ by the two crucial entities involved namely the state, which is bound to protect and conserve forests, and the FDC, which traditionally depend on forests for their sustenance.²⁶

FUNCTIONS OF GRAM SABHA

The duties of Gram Sabha are mainly concerned with the protection of wildlife and biodiversity, to ensure that the ecologically sensitive areas are adequately protected and the habitat of Forest dwellers is preserved. Gram Sabha has several functions like to initiate the process of determining the nature and extent of forest rights, to form the Forest Right Committee (*hereinafter* FRC), consider resettlement packages, constitute Committees for the protection of wildlife, forest and biodiversity in order to carry out the provisions of Section 5 of the FRA. The Gram Sabha needs to be consulted before any diversion of forest land and thus, prior informed consent becomes necessary in case of use of forest land for any non-forest purpose. The entire process shows the flavour of inclusion of local indigenous people in the sustainable management of forests and ensures that in most stages the local representation from the local community to ensure the process is comprehensive and considers the case of every person. FRA is a good example of the participatory and consultative statute and is significant in seeking to democratise the process of recognition of rights by making Gram Sabha the key authority in the process. Hence, this Radical Law was a proper tool to restore the injustice done to the FDC. However, a law is as good as it is implemented. There are critical lapses in implementation of FRA which begin from an insensitive attitude of Central as well as State Government and the weak nodal agency Ministry of Tribal Affairs (*hereinafter* MoTA). MoTA is understaffed and under-resourced to supervise this massive task of implementing FRA to its full spirit. These issues are discussed in depth in the next part of the study.

²⁴ Jose Manuel, 'Participatory Management of Conservation Areas' (2017) 14 US-CHINA Law Review 832.

²⁵ LA Willey, 'Participatory Forest Management in Africa: An Overview of Progress and Issues' in *Second International Workshop on Participatory Forestry in Africa* (Food And Agriculture Organization Of The United Nations Rome 2003) <<http://fao.org/3/Y4807B/Y4807B03.pdf>> accessed 4 September 2019.

²⁶ 'Promoting the Sustainable Management of All Types of Forests' (Collaborative Partnership on Forests 2013) <www.fao.org/forestry/31399-05cb2e3e5848832c3e0b5b52006a90a50.pdf> accessed 4 September 2019.

TARDY IMPLEMENTATION OF FOREST RIGHTS ACT, 2006

Forest Rights Act was a step towards recognition and a reaffirmation of the rights of FDC over forest lands. It empowered the communities to use, manage and govern forests for their livelihood as well as for the conservation and protection of forests. But its poor implementation remains an issue. The author focuses on the analysis of issues involved rather than a description of each problem as that is outside the scope of the paper. In the subsequent proceedings of the Wildlife First Case, it was observed by the Supreme Court that many states have not followed the procedure in rejecting the claims of tribals over the forest land. The key reasons for poor implementation of FRA include lack of political commitment; lack of adequate human and financial resources with the MoTA, which is the nodal agency for implementation of FRA; unkind and irresponsible forest bureaucracy which influences decision at various levels; poor or non-functioning of district and sub-division level committees, which consider the claims filed by Gram Sabhas.²⁷ The manner in which various State governments neglected its implementation speaks a lot about the tragedy of the forests. The Supreme Court order asking states to evict people, whose claims to forest land have been rejected by them, is a glaring example of this.²⁸ The state governments have made no systematic efforts to recognise and record the individual and community rights of forest dwellers. The author argues that the eviction order in the case regarding the constitutional validity of though not in complete consonance with the scheme of FRA²⁹ was indeed a necessary evil as it gave a push to the process of implementation of FRA and was a mandate for authorities to consider the matter with utmost diligence. The various aspects of the impeded implementation of FRA need to be discussed.

LACK OF AWARENESS

The major obstacle for proper implementation of FRA is that there is a serious lack of awareness on the part of not only the beneficiaries but also among the concerned officials mandated to

²⁷ T Haque, 'Securing the Forests Rights of Tribals' (*The Hindu Business Line*, 6 March 2019) <<https://thehindubusinessline.com/opinion/securing-the-forest-rights-of-tribals/article26449073.ece>> accessed 4 September 2019.

²⁸ *ibid.*

²⁹ 'Government's Failure to Defend FRA in the Supreme Court Forces Eviction of Millions of Adivasis and Forest Dwellers' (Joint Statement by CFRLA, AIFFM, MAKAAAM, ABMKSS) <<https://fra.org.in/document/Press%20Release%20on%20Supreme%20Court%20Order.pdf>> accessed 12 September 2019.

handle their implementation process on the ground.³⁰ At various times, due to lack of awareness, the Forest Department officers bypass the FRC members and undermine the importance of the Act. While implementing a welfare programme or legislation, especially in the rural areas, the biggest concern has always been the awareness level (or lack of it) of the beneficiaries. Time and again, it has been proved that the outcome is proportional to the awareness level.³¹ The Authorities have failed to extensively spread awareness regarding the rights under FRA and the proper procedure to get recognition of these rights. Most of the tribal people of the central India belt are illiterate especially in legal affairs and do not easily speak the state language imposed upon them. The state should provide sensitive and competent translators who can decide the land claims with empathy.³² In many states, it has been noticed that the working of FRC regarding training and awareness of the Act is not effective and extensive. Many of the FRC members themselves are not conscious of their duties and responsibilities, and so could not create awareness among the wider communities. The villagers often claim that the process was implemented in a hurried manner without going into the details.³³ The awareness of the Act can be either self-attained or gained through government or non-government agencies working with the local authorities. A report published on completion of ten years of FRA in India calls for initiation of awareness programmes on a large scale and to build capacity of FRCs and the Gram Sabha.³⁴

DEFICIENCY OF COOPERATION BETWEEN THE AUTHORITIES

MoTA, the nodal agency for implementing FRA is crippled as it is understaffed and under-resourced. Against the sanctioned strength of 137 employees, only 101 are in place and there is no separate fund allocation made to implement the FRA.³⁵ It is necessary to mention that in 2008, soon after the FRA was passed, a range of conservation groups like Wildlife First and Nature Conservation Society, challenged the constitutional validity of FRA by claiming that it

³⁰ Madhusudan Bandi, 'Forest Rights Act: Is there an Underlying Pattern in Implementation?' (2016) 51(19) Economic & Political Weekly 16.

³¹ *ibid.*

³² Ramnath (n18).

³³ M Gopinath Reddy and others, 'Issues Related to Implementation of the Forest Rights Act in Andhra Pradesh' (2011) 46(18) Economic & Political Weekly 73.

³⁴ Citizens' Report as part of Community Forest Rights-Learning and Advocacy Process, 'Promise and Performance: Ten Years of the Forest Rights Act' (CFR-LA December 2016)

<<https://fra.org.in/document/Promise%20and%20Performance%20Report.pdf>> accessed 4 September 2019.

³⁵ *ibid.*

was beyond the legislative competence of the Parliament since land is a State issue. They also objected to the MoTA being given the responsibility for implementing the Act as against the Ministry of Environment, Forests and Climate Change (*hereinafter* MoEFCC), a touching concern for the very institution under whose watch wildlife has suffered and forests have degraded.³⁶

The role of MoEFCC has been prolific in creating hurdles in the process of implementation of FRA. Granting of CFR to Vana Samrakshna Samithis (*hereinafter* VSSs) in various states, issuance of village forest rules which place the control of management and governance of forests in the hands of committees that are constituted and controlled by the forest department, laying down guidelines, not in consonance with FRA and continuance of afforestation programmes without regard for the fact that the entire forest landscape is no longer their sole property are some examples of blatant violations of FRA by the MoEFCC. Recently MoTA censured the MoEFCC's circular that had waived compliance of forest clearance under FRA.³⁷ According to the Forest (Conservation) Amendment Rules 2016, the district collector needs to complete the process of vesting of forest rights under the FRA and obtain written consent of the affected Gram Sabhas before any proposal reaches the FD for consideration. Over the years, activists and administrators alike have cautioned against bypassing the FRA in the clearance process.³⁸

INCOHERENCE OF STATUES

Forest land, as well as forest in this diverse country, has a different meaning for different classes. The industries and corporates visualise them as resource mines, while for FDC it is both their livelihood as well as their ancestral home often having divine value. The state also ensures the conservation of biodiversity as well as the ecosystem in these areas. There are various government and non-government organisations performing social, economic and political functions in forest lands. Therefore, there are various statutes operating in the same field with

³⁶ Nandini Sundar, 'A Mahagatbandhan in the Forests is the Need of the Hour' (*The Hindu Centre for Politics and Public Policy*, 2019) <<https://thehinducentre.com/the-arena/current-issues/article26862187.ece>> accessed 12 September 2019.

³⁷ Express News Service, 'Modify Circular that Violates FRA, Tribal Affairs tells Environment Ministry' (*The Indian Express*, 12 April 2019) <<https://indianexpress.com/article/india/modify-circular-that-violates-fra-tribal-affairs-tells-environment-ministry-5671525/>> accessed 12 September 2019.

³⁸ Jay Mazoomdaar, 'Before Backing Tribals in SC, Govt Diluted their Gram Sabha Powers in Forest Act' (*The Indian Express*, 10 March 2019) <<https://indianexpress.com/article/india/before-backing-tribals-in-sc-govt-diluted-their-gram-sabha-powers-in-forest-act-5618779/>> accessed 12 September 2019.

different objectivity. The inevitable outcome is the conflict of interests of working authorities. The same has affected the working of FRA. The paramount issue is the conventional view that local ways of use of forests and conservation cannot co-exist. This view is the primary basis for opposition to the implementation of FRA from the conservationist groups as well as the other authorities. The conventional top-down models of conservation envisaged enclosures for wildlife without any human interference, therefore all rights need to be extinguished or only partially allowed. This model continues to exist, both in law and in wildlife practice, though other frameworks that encourage the leadership, wisdom and partnership of tribal and local communities in conservation have also evolved.³⁹

It was the enactment of the National Forest Policy, 1988 that stressed on the fact that forests are the first charge to tribal communities. Their livelihood needs are paramount and superior to commercial needs. However, the MoEFCC failed to implement this policy extensively due to the Forest Conservation Act, 1980. Thus, while on one hand, the Indian government has adopted a policy sympathetic to the needs of the forest dwellers; on the other, it has enacted laws that restrict the access of these people to the forest.⁴⁰

In the case of Government of India, the left-hand does not know what the right-hand is doing. As regards forest development, the right-hand is undoing what the left-hand is trying to do.

These words can be again used to describe the status quo of forest governance in India. The critical issue is that there are still orders by courts, rules by authorities and circulars by the executive branch that completely fail to adhere to the scheme of FRA. On an analysis of the current circumstances, it is submitted that it is unlikely that the FRA process can be accomplished properly without Gram Sabha being given some concrete powers to do the same.

In 2016, the Compensatory Afforestation Fund Act, 2016 was passed, providing for an expenditure of more than Rs 50,000 crore on forestry-related activities that would have a direct

³⁹ Kanchi Kohli, 'Historical injustice and "Bogus" Claims: Large Infrastructure, Conservation and Forest Rights in India' (*Heinrich Boell Foundation*, 7 June 2019) <<https://in.boell.org/2019/06/07/historical-injustice-and-bogus-claims-large-infrastructure-conservation-and-forest-rights>> accessed 12 September 2019.

⁴⁰ Satyakam Joshi, 'Tribes, Land and Forests: Emerging Legal Implications With Reference to PESA and FRA' (Governance, Resources and Livelihoods of Adivasis in India: Implementation of PESA and FRA, NIRDPR, Hyderabad, 18-19 November 2016) <http://nirdpr.org.in/nird_docs/srsc/srsc230217-22.pdf> accessed 10 September 2019.

impact on forest dwellers, and despite objections from the opposition, the new law did not even contain the words ‘forest rights’.⁴¹ An assurance was instead given that the rules under the new act would address forest rights issues, which unsurprisingly did not happen, and in any case, was legally impossible.⁴² This new act mandates huge funds from the diversion of forests to be simply handed over to state forest departments for a wide variety of activities. As these activities are likely to affect the rights of indigenous tribes, a sound policy would have kept the consultation of local people and the consideration of FRA in account however, it does not contain a single provision referring to the FRA.⁴³ Despite several reports, including one by the Comptroller and Auditor General of India, pointing out that the state forest departments lack the planning and implementation capacity to carry out compensatory afforestation and forest conservation, the CAF Act reinforces the existing structures to carry out the afforestation programme⁴⁴. Hence, the new law brings the forest governance back to square one.

VEHEMENCE OF HISTORICAL INSTITUTIONS

FRA is qualified with the construction of a political community at least at the village level, where sole responsibility and authority has been given to the Gram Sabha. The legislative intent being that Community-based forest governance will ensure that forests used by forest dwellers are managed in a way that best meets their livelihood needs, rather than the objectives of the forest department. Moreover, it is much more likely to ensure forest conservation and sustainable use as forest dwellers have a long-term stake in the forest and are best positioned to use their traditional knowledge and proximity to protect and manage the forests. Therefore, now there is no legality of JFM as a mechanism of collaborative governance to protect the forests because the Act does not leave any provision for collaboration between the FD and the forest villagers instead, it empowers the Gram Sabha to control and manage their own forests and the role of FD

⁴¹ Campaign for Survival and Dignity, ‘A Black Day for the Rights of Millions – Rajya Sabha Passes Afforestation Bill’ (*The Forest Rights Act*, 2016) <<https://forestrightsact.com/2016/07/28/a-black-day-for-the-rights-of-millions-rajya-sabha-passes-afforestation-bill/>> accessed 15 September 2019.

⁴² Mayank Aggarwal, ‘India’s New Compensatory Afforestation Rules Dilute Rights of Forest Dwellers’ (*Mongabay*, 2018) <<https://india.mongabay.com/2018/08/indias-new-compensatory-afforestation-rules-dilute-rights-of-forest-dwellers/>> accessed 15 September 2019.

⁴³ Geetanjoy Sahu and others, ‘Political Economy of Community Forest Rights’ (2017) 52(25-26) *Economic & Political Weekly* 44.

⁴⁴ CAG, *Compliance Audit on Compensatory Afforestation in India*, Ministry of Environment and Forests, Government of India (Report number 21, 2013) paras 4.2- 4.4.

and other state authorities are expected to assist the Gram Sabha in that process.⁴⁵ However, unfortunately, the whole process of community building and community control has been reduced to a mere *patta* giving process under the ongoing colonial regime of hegemonic control of the forest department.⁴⁶

It is pertinent to mention that when FRA came into force, there was a radical change in forest governance. The regulation, protection, and administration, which was earlier done by the forest department, underwent a sea change as the majority of power is now vested with the Gram Sabha. Lele expresses that FRA was a single piece of all the forest governance questions across such a vast spatial, historical and legal terrain in such a radical and comprehensive manner. For 160 years, forest officers have been the owners, managers, police, knowledge-producers and policymakers for about 70 million hectares. To now be deprived of day-to-day control over almost three quarters of this estate is a huge blow to their prestige and pelf.⁴⁷ Forest Bureaucracy, which prevailed in India since the colonial era, always viewed India's conservation policy through the forest department's eyes. This group was implacably opposed to any change in forest policy at all.⁴⁸ Institutions are inevitably framed in the context of power relations, and hence, institutional formation and change is essentially a political process, which has far-reaching economic implications. Historical institutionalises take a politically realistic approach to the link between the authorship and distributional outcomes of institutional reforms. Those with the power to prevail in negotiations and can organise institutions best suited to their interests.⁴⁹ The need of the day is to ensure that the forest department gives due consideration to FRA, and should assist in its implementation, rather than creating hurdles. FRA should be read as a beneficial legislation for the FDC and the forest officers should not subvert the Act by issuing orders or rules, which are not in the spirit of FRA.

⁴⁵ Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules 2007, r 4(3).

⁴⁶ Sourish Jha, 'Process Betrays the Spirit: Forest Rights Act in Bengal' (2010) 45(33) Economic & Political Weekly 24.

⁴⁷ Lele (n 8).

⁴⁸ Shankar Gopalakrishnan, 'The Forest Rights Act Political Economy of 'Environmental' Questions' (2017) 52(3) Economic & Political Weekly 71.

⁴⁹ M Gopinath Reddy and others, 'Issues Related to Implementation of the Forest Rights Act in Andhra Pradesh' (2011) 46(18) Economic & Political Weekly 7381.

CONTRASTING APPROACH OF THE GOVERNMENT

The casualness of the present government towards forest rights can be best reflected in the recent Supreme Court eviction order. Though the Centre sought a stay on the order, by contending that FRA was a beneficial legislation and should be construed liberally to help extremely poor and illiterate people who are not well informed of their rights and procedure under the law.⁵⁰ Over the years, the governments have tried to create new institutional mechanisms to support mining in forest areas by private companies in the name of creating pro-investment climate and ease of doing business. New institutional mechanisms and structures in the form of Invest India and Project Monitoring Group are found to wreck dilution of the FRA in the process of obtaining forest clearance.⁵¹ This contrasting approach of the government, which expresses support for forest rights of FDC, creates a sense of uncertainty.

Since 2014, a series of steps have been taken to eliminate the key provisions of the FRA. The requirement for the consent of the Gram Sabha before diverting forestland for large projects was in any case not implemented even by the UPA, and there has been a continuous effort to dilute it in the last three years. The forest bureaucracy has also hit on its most successful strategy so far, which is simply to create new policies and institutions in complete disregard to the FRA. Thus, state governments have passed new village forest rules for the forest department-controlled participatory management with no reference to the FRA. The inability of the centre to make states adhere to FRA speaks a lot. There are various other factors, first being the prolonged silence of the Modi government in wildlife first case, lack of senior and competent representation to protect the constitutional validity of FRA,⁵² political leaderships mending ways in favour of corporate interests and undermining the MoTA.⁵³ In keeping with its overall character as a more pro-corporate and pro-crony capitalist regime as compared to its predecessor, this conflict has

⁵⁰ PTI, 'Supreme Court Stays its Feb 13 Order Directing Eviction of 11.8 Lakh Forest Dwellers' (*India Today*, 28 February 2019) <<https://indiatoday.in/india/story/supreme-court-stays-its-feb-13-order-directing-eviction-of-11-8-lakh-forest-dwellers-1467541-2019-02-28>> accessed 20 September 2019.

⁵¹ Sahu (n 43).

⁵² PTI, 'No Legal Representative in SC to Defend Forest Rights Act a Matter of Concern: Brinda Karat' (*The Times of India*, 13 September 2019) <http://timesofindia.indiatimes.com/articleshow/71112218.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 15 September 2019.

⁵³ Mayank Aggarwal, 'PMO Tells Environment Ministry to Ease Forest Clearance Rules Further' (*Livemint*, 5 April 2017) <<https://livemint.com/Politics/eaILxmXtyIABmX0GqXup9N/PMO-tells-environment-ministry-to-ease-forest-clearance-rule.html>> accessed 18 September 2019.

taken on a much more polarised and intense character.⁵⁴ Therefore, the eviction order is an alarm for the government to accept the importance of forest rights and implement FRA in its full spirit. The state has to accept the reality that development can only take place in an ecologically sound and sustainable manner considering the interest of FDC.

It is often argued that the process of clearing projects is non-transparent, non-consultative, and without the consent of the communities which depend on these lands and resources.⁵⁵ The Central Government has recently withdrawn the draft of proposed amendments to the Forest Act, 1927.⁵⁶ These amendments made Forest bureaucracy, the real villain and reason for the draconian age-old forest land problems by making the offence by tribes a criminal act with the burden of proof on the offender. Experts apprehended that proposed amendments to the Forest Act, 1927 increase powers of the forest departments, thereby taking away whatever benefits the FRA granted.⁵⁷

It is astonishing that MoTA, a major stakeholder in forest governance and the nodal ministry for FRA, was not even included in the drafting process of the amendments. Moreover, there was no one representing FDC.⁵⁸ This is another illustration of Government pushing through forest legislation without consulting with all stakeholders. For example, Gram Sabhas were left out of the decision-making process in the Compensatory Afforestation Fund Act, enacted in 2016.⁵⁹ After facing strong criticism by various stakeholders⁶⁰ the Government was compelled to withdraw the proposed amendments. Interestingly, these amendments were reflected in the forest

⁵⁴ S Gopalakrishnan, 'The Conflict in India's Forests: Will State-driven Expropriation Continue?' (2019) 54(23) Economic & Political Weekly <<https://epw.in/node/154505/pdf>> accessed 6 December 2019.

⁵⁵ Neema Pathak Broome and others, 'Biodiversity Conservation and Forest Rights Act' (2017) 52(25-26) Economic & Political Weekly 51.

⁵⁶ ET Bureau, 'Govt Withdraws 'Officer's' Draft on Amendment to Forest Act' (*The Economic Times*, 16 November 2019) <<https://economictimes.indiatimes.com/news/politics-and-nation/govt-withdraws-officers-draft-on-amendment-to-forest-act/articleshow/72083357.cms?from=mdr>> accessed 6 December 2019.

⁵⁷ Prasana Mohanty, 'Draft Indian Forest (Amendment) Bill 2019: Arming State to Undermine Rights and Wellbeing of Tribals' (*India Today*, 7 August 2019) <<https://indiatoday.in/news-analysis/story/draft-indian-forest-amendment-bill-2019-arming-state-to-undermine-rights-and-wellbeing-of-tribals-1578054-2019-08-07>> accessed 13 September 2019.

⁵⁸ Ishan Kukreti, 'Extensive Amendment to Forest Law will Dehumanise Forests' (*Down To Earth*, 18 April 2019) <<https://downtoearth.org.in/news/forests/extensive-amendment-to-forest-law-will-dehumanise-forests-64046>> accessed 18 September 2019.

⁵⁹ *ibid.*

⁶⁰ Srishti Choudhary, 'Why Proposed Changes to Forest Act have Stirred up a Hornets' Nest' (*Livemint*, 12 June 2019) <<https://livemint.com/politics/policy/why-proposed-changes-to-forest-act-have-stirred-up-a-hornets-nest-1560886010911.html>> accessed 18 September 2019.

law of some states.⁶¹ The said moves bring time when the tree felling in Aarey Milk Colony has ignited an environment conservation debate in India⁶² and ahead of elections in Jharkhand.⁶³ It is submitted that the said move is not only tainted with the unrestrained political will to be in power but shows that how the issue of forests is just a matter of vote bank to the concerned authorities.

Clearly, the shelved amendments sought to dilute the provisions of FRA, which were considered as obstructions in performing developmental aspirations and international commitments. It is submitted that a new law should attempt to change the colonial way for forest governance in India. It needs to be progressive, but also recognise that FDC is integral to the survival of the forest ecosystem and conservation of the forests. Even after ten years of enactment of FRA, the paramount issue remains the same, which is the rights, ensured under the Act remain subject to the state's eminent domain in the acquisition of lands in the name of development projects.⁶⁴

Keeping in view the enormous economic, social and ecological benefits of individual and community forest management, the Centre in cooperation with State governments should implement the Forest Rights Act, 2006 in its right spirit. The way forward would include reviewing all rejected and pending claims to IFR and CFR expeditiously; ensuring regular meetings of district and sub-division level committees to consider and approve IFR and CFR claims in a time-bound manner; and building capacities of Gram Sabhas for governance and management of community forest resources.

CONCLUSION

As the Niyamgiri case shows, it is the villagers that are empowered under Acts like the FRA or PESA, which are the best bulwark against senseless mining and destruction of forest cover – not forest departments, not authoritarian conservationists, and certainly not corporates that promise

⁶¹ Ishan Kukreti, 'Draft Amendment to Forest Act: Javadekar Denies, but Different Pictures at States' (*Down To Earth*, 18 April 2019) <<https://downtoearth.org.in/news/forests/draft-amendment-to-forest-act-javadekar-denies-but-different-pictures-at-states-66071>> accessed 6 December 2019.

⁶² Anupama Katakam, 'Mumbai Metro's Car Shed Project vs Green Brigade' (*Frontline*, 8 November 2019) <<https://frontline.thehindu.com/social-issues/general-issues/article29766681.ece>> accessed 6 December 2019.

⁶³ Srishti Choudhary, 'Government Takes U-Turn, Withdraws Draft Bill to Amend Forest Act, Ahead of Jharkhand Polls' (*Livemint*, 20 November 2019) <<https://livemint.com/politics/policy/government-takes-u-turn-withdraws-draft-bill-to-amend-forest-act-ahead-of-jharkhand-polls-11573826534924.html>> accessed 6 December 2019.

⁶⁴ Sharachchandra Lele, 'A Forest of Misconceptions' (*India Today*, 5 March 2019) <<https://indiatoday.in/magazine/up-front/story/20190311-a-forest-of-misconceptions-1467435-2019-03-05>> accessed 12 September 2019.

compensatory afforestation. It is time to do away with the hegemonic idea of conservation that prevails among policymakers, administrators, and the intelligentsia which treats the local communities as hazardous to the forests, wildlife and biodiversity; and to accede to the fact that sustainable and effective protection of sensitive ecosystems requires the democratic involvement of local people.

The author in substance argues that the value of forest rights does not emerge from the FRA rather it gets recognition and reaffirmation from the statute. These forest rights of local indigent communities, whose very livelihood depends on these rights, form a part of socio-economic rights. FRA was the result of such a revolution, which dealt an issue of pivotal importance, namely the forest rights of tribal communities and the act of eradicating the historical injustice faced by them for more than hundred years. However, the lack of implementation support to it also indicates a refusal of the political system to embrace the historic opportunity created for democratic governance of forests in India. It is a fact that the question of rights, in rural government, was subordinated to the priorities of national development. Forests, rivers, and common lands were all legislated and administered on the principle that the first charge upon them would be for national service.⁶⁵

However, there is a need to respect the cultural and natural heritage of the local communities and prioritise their needs over development in an all-encompassing manner. This is a social as well as economic concern for the government as the tribes are already marginalised and socially backward. Thus, the authorities should respect the constitutional and legal rights of local forest communities and should implement the FRA in the broadest manner as a matter of Restorative Justice. By aiming to belatedly recognise the pre-existing rights of India's forest dwelling communities through a transparent and democratic village assembly based process, the Act has the potential of restoring the enclosed commons to communities and private land to individual cultivators. This would thereby affect a major re-distribution of control over forest resources in favour of severely marginalised forest-dependent people, thereby accomplishing the directive principles of the state under Article 38 and 39 of the Constitution of India.

⁶⁵ K Sivaramakrishnan, 'Environment, Law, and Democracy in India' (2011) 70(4) *The Journal of Asian Studies* 908, 909.