



**India's Forest Rights Act -*The anatomy of a necessary but not sufficient institutional reform*\***

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## **SUMMARY AND MAIN CONCLUSIONS**

Institutions relating to forest management in India have a critical impact on the livelihoods of hundreds of millions who live in forested landscapes and have had their rights deprived through state appropriation of forest land. India's Forest Rights Act 2006 is undoubtedly a landmark legislation providing the legal framework for major pro-poor institutional reform in the governance of the country's forests. 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 effect a major re-distribution of control over forest resources in favour of severely marginalised forest dependent people. By empowering village assemblies to protect, conserve and manage statutorily recognised community forests for sustainable use, the Act aims to reform the existing system of state 'fortress conservation' combined with centralised resource extraction towards one centred on community controlled forest, wildlife and biodiversity conservation which also ensures livelihood and food security.

This paper examines the contents of the law to analyse whether its detailed provisions, the outcome of intense contestation between different socio-political forces, are likely to fulfil its ambitious mandate. The procedural details outlined in the Rules are assessed for their adequacy for the recognition of different rights and the extent to which legitimate claimants may be excluded. The paper also discusses some of the unique provisions of the law and the early patterns of their implementation evident in different states. Finally, the paper discusses the complementary institutional reform required for strengthening the law's provisions and the limited attention this has so far received.

The analysis shows that due to the technical challenges and political contests during drafting of the Act and the subsequent Rules for implementation, a number of dilutions, ambiguities and omissions contained by them make implementation highly contingent upon whether implementing agencies follow the spirit of the Act or seek to obstruct it or minimise its impact. Areas of dilution / ambiguity / omission may be summarised as; 1. Limitations on the full identification of the rights deprived groups, 2. Adequacy and safeguards within the implementation procedures and its timetable, 3. The local institutional basis for the claims process, and 4. Effectiveness of awareness raising for prospective claimants.

For each of these areas limitations are reducing the scope for redressal of rights deprivations with the contest for rights now shifting to demands for complementary institutional reform in the powers and mandate of the forest bureaucracy.

## **ABBREVIATIONS**

CFR	Community Forest Rights
CSD	Campaign for Survival and Dignity
CWH	Critical Wildlife Habitats
CTH	Critical Tiger Habitats
DLC	District Level Committee
FCA	Forest Conservation Act, 1980
FRA	The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights Act), 2006
GoI	Government of India
JFM	Joint Forest Management
JFMC	Joint Forest Management Committee
JICA	Japanese International Cooperation Agency
MFP	Minor Forest Produce
MoEF	Ministry of Environment and Forests
MoTA	Ministry of Tribal Affairs
NTFP	Non Timber Forest Products
OTFD	Other Traditional Forest Dwellers
PESA	Panchayats (Extension to the Scheduled Areas) Act, 1996
PIL	Public Interest Litigation
PTG	Primitive Tribal Groups
SDLC	Sub-Divisional Level Committee
SLMC	State Level Monitoring Committee
ST	Scheduled Tribes
WLPA	Wildlife Protection Act, 1972

## 1. INTRODUCTION

The Forest Rights Act 2006<sup>1</sup> (FRA) is the product of an unprecedented historical conjuncture which brought the historical injustice of the non-recognition of the rights of forest dwelling communities centre stage in Indian national politics. The Act was passed at the end of 2006 but came into force on 1<sup>st</sup> January 2008 with the passage of its associated Rules. The Act does not provide for the state to magnanimously 'grant' rights as an act of benevolence. Rather it provides for pre-existing (often customary) rights, which were not recognised during the unsound processes of state appropriation of forested landscapes, to finally be recognised.

Twenty three percent of the country's geographical area has been designated as forest, upon which an estimated 200 million people depend for their livelihoods to varying degrees. The FRA has particular significance for the forested, tribal inhabited, and mineral rich but most impoverished belt of central and eastern India. Here ancestral tribal lands, despite being protected by the Constitution, have largely been declared state forests without following the due legal process of enquiring into the pre-existing rights of the customary tenure holders. It is this population of the country's poorest people, numbering perhaps 100 million, who have suffered institutionalised disenfranchisement during colonial rule and after independence, who stand to benefit the most from proper implementation of the FRA.

The FRA 2006 therefore appears to be a strong example of a pro-poor institutional reform. However this paper asks: to what extent is this really so? The final text of the Act is an outcome of drafting processes, prompted by the Prime Minister's Office, which involved both what we might call 'technical-bureaucratic' and 'political-economic' aspects, which affect the extent to which the final text fulfils its aims.

In terms of its 'technical' considerations, a key challenge in drafting the Act was to target a wide range of extremely complex and diverse local rights deprivations scenarios without either focussing too narrowly, thereby excluding legitimate groups, nor too broadly to include non-legitimate opportunists. This paper examines the Act's effectiveness in providing for redress across this range.

In terms of the 'political-economic' aspects of drafting, there was however no consensus over the need for or aims of the Act. The final text is rather the outcome of contest between three main social forces who had greater or lesser influence during different periods of the long drawn process. At one end of the spectrum was 'the Campaign': representatives of tribal and other forest citizens led by the umbrella Campaign for Survival and Dignity (CSD), who sought a comprehensive replacement of the oppressive control of the forest bureaucracy on forested tribal homelands by restoring democratic control over forest governance to statutorily empowered village assemblies. At the other end was the forest bureaucracy, supported by highly vocal hard-line urban wildlife conservationists popularly dubbed the 'tiger-wallahs'. These lobbied for the continuation of centralized bureaucratic forest management based on the quasi-autocratic colonial model, and 'fortress' conservation. This alliance tried their best to prevent the law from being enacted at all, and also to dilute its provisions so as to render them inconsequential. Less visible and less known, in the middle there was a mixed group of people both from within and outside government, who supported the law but did not favour a major change; they wanted only limited recognition of land rights, just sufficient to ameliorate the underlying causes for the intense conflict prevalent in forested tribal inhabited areas.

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<sup>1</sup> The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights Act), 2006.

The intense contestation over the precise wording of the Act led to many ambiguities in the final text and dilution of original proposals, even at the most fundamental level of definitions. This means that the 'pro-poor' mandate is much more thrown in question than one might expect, and that for understanding whether the text will really facilitate pro-poor reform we must seek 'the devil in the details'.

For instance the Act defines 'forest dwelling scheduled tribes' as members or community of scheduled tribes who 'primarily reside in and who depend on the forests or forest lands for *bonafide* livelihood needs' and includes the scheduled tribe and pastoralists communities. The 'other traditional forest dweller' is defined as any member or community who has for at least three generations (which is 75 years before 13 December, 2005 according to the Act) primarily resided in and who depend on the forests or forest land for *bonafide* livelihood needs. Narrowly interpreted, this covers only those actually residing on forest land as eligible for claiming rights. In practice this opened the risk of excluding the majority of potential tribal and non-tribal claimants who may not be dwelling on forest land but are dependent on it. The Ministry of Tribal Affairs (MoTA) had to issue a special clarification that those dependent on but not necessarily living on forest land were also eligible (Ministry of Tribal Affairs, 2008).

In order to answer the headline question this paper reviews the content of the Forest Rights Act 2006 (FRA) and the FRA Rules, 2008. In particular it considers the extent to which the FRA covers the range of existing forest rights deprivations and rights deprived poor, and the adequacy with which it does this. It also discusses the prescribed mechanisms for implementation.

## **2. THE ACT'S OBJECTIVES, CONTENTS AND ENVISAGED IMPLEMENTATION PROCEDURES**

This section reviews the text of the Act<sup>2</sup> itself. The Act contains a Preamble followed by seven chapters containing 14 sections. The Preamble articulates the ambitious sweep of the Act's aims. Subsequent sections provide definitions of key terms, the rights to be conferred under the Act, the conditions attached to the rights, empowerment of right holders and their *Gram Sabhas* (village assemblies) for conservation, and the authorities and procedures for the recognition of rights. Section 11 provides that the nodal ministry responsible for implementing the Act shall be the Ministry of Tribal Affairs (and not the Ministry of Environment and Forests (MoEF)). Other sections deal with miscellaneous matters, including the relationship of the FRA to the application of other laws.

### **The Preamble of the Act**

The Act's aim is declared in the Preamble as follows:

"to recognise and vest the forest rights and occupation in forest land in forest dwelling Scheduled Tribes and other traditional forest dwellers who have been residing in such forests for generations but whose rights could not be recorded; to provide for a framework for recording the forest rights so vested and the nature of evidence required for such recognition and vesting in respect of forest land."

The following paragraphs of the Preamble then outline the Act's radical mandate of major institutional reform in the governance of India's forests through empowerment of the country's tribal and other forest dwelling communities by stating:

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<sup>2</sup> The Act can be found on the GoI Ministry of Tribal Affairs website: <http://tribal.nic.in/index1.asp?linkid=360&langid=1>

".....the recognised rights ..... include the responsibilities and **authority** for sustainable use, conservation of biodiversity and maintenance of ecological balance .... **thereby strengthening the conservation regime of the forests while ensuring livelihood and food security .....**;

**....the forest rights on ancestral lands and their habitat were not adequately recognized** in the consolidation of State forests during the colonial period as well as in independent India **resulting in historical injustice to the forest dwelling Scheduled Tribes and other traditional forest dwellers who are integral to the very survival and sustainability of the forest ecosystems;**

....it has become necessary to address the long standing insecurity of tenurial and access rights .... including (of) those who were forced to relocate their dwelling due to state development interventions."

*(Preamble of the FRA, 2006 - emphasis added)*

These statements represent a milestone in Indian legislative history. Parliament has not only acknowledged the historical injustice done to India's forest dwelling communities due to non-recognition of their rights on ancestral lands, but has also effectively overturned the inherited colonial framework of the forest bureaucracy's exclusive territorial control and management of enclosed forested landscapes. By linking rights with the **authority** for conservation and sustainable use and viewing this as a means to strengthen the conservation regime while ensuring livelihood and food security, the FRA lays the foundation for democratic decentralization of forest governance in the country.

### **The main rights to be recognised under the Act**

At the outset, it is useful to point out that four of the listed rights are based on guidelines issued by the Ministry of Environment and Forests (MoEF) on September 18, 1990<sup>3</sup>. These were based in turn on a framework for the resolution of disputes related to forest land between tribal people and the State recommended by the Commissioner for Scheduled Castes and Scheduled Tribes in his 29th report (1987-89) to the President of India (GoI, 1990).

The Commissioner had observed widespread disquiet in the central Indian tribal-forest belt caused by major irregularities in the declaration of vast areas of tribal lands as state forests without proper enquiry into their rights as required by law. He had also come across serious anomalies in official land records such as vast areas of the same land being recorded as both revenue and forest lands. While revenue departments had allocated *pattas* (land titles), leases or grants over this land to poor cultivators, forest departments treated these as illegal 'encroachments'. Whereas guideline FP(2) dealt with recognition of rights not recognised by forest settlements, FP(3) required granting legal title to those allocated land by revenue departments despite the land also being recorded as forest land. However, only the first of these guidelines, for regularizing supposed 'encroachments' on forest land prior to enactment of the Forest Conservation Act, 1980, had been partially implemented, the rest being left ignored.

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<sup>3</sup> Circular No. 13-1/90-FP of Government of India, Ministry of Environment & Forests, Department of Environment, Forests & Wildlife dated 18.9. 90 addressed to the Secretaries of Forest Departments of all States/ Union Territories. The six circulars under this were:

- 1) FP (1) Review of encroachments on forest land
- 2) FP (2) Review of disputed claims over forest land, arising out of forest settlement
- 3) FP (3) Disputes regarding *pattas*/ leases/ grants involving forest land
- 4) FP (4) Elimination of intermediaries and payment of fair wages to the labourers on forestry works
- 5) FP (5) Conversion of forest villages into revenue villages and settlement of other old habitations
- 6) FP (6) Payment of compensation for loss of life and property due to predation/ deprecation by wild animals

The key section of the Act listing the rights which may be recognised is Chapter II, Section 3: Forest Rights. The listed rights are to be recognised on all categories of forest land, including in wildlife sanctuaries and national parks.

“3. (1) For the purposes of this Act, the following rights which are secure individual or community tenure or both, shall be the forest rights of forest dwelling Scheduled Tribes and other traditional forest dwellers on all forest lands, namely:-

- a. right to hold and live in the forest land under the individual or common occupation for habitation or for self cultivation for livelihood by a member or members of a forest dwelling Scheduled Tribe or other traditional forest dwellers;

This provides for both individual or community tenure to those in occupation of forest land, and is equivalent to MoEF’s FP(1) guideline of 1990 (see footnote 3) permitting regularisation of ‘encroachment’ on forest land prior to October 1980 i.e. before the Forest Conservation Act, 1980 came into force. Under the Forest Rights Act, this cut-off date has been moved forward to December 13, 2005 in the case of eligible Scheduled Tribes (STs) whereas ‘Other Traditional Forest Dwellers’ (OTFDs) now have to prove continuous occupation of the land for 3 generations of 25 years each. The wording of this right, however, does not clearly specify conversion of such forest land into a non-forest category. The longer term implications of the land remaining categorised as forest land, on which forest departments normally have exclusive jurisdiction, remain unclear. This has to be read with Section 4.6 of the Act, which limits the maximum area under occupation over which this right may be claimed to 4 ha.

“3(1)b. community rights such as *nistar*<sup>4</sup>, by whatever name called, including those used in erstwhile Princely States, *Zamindari* or such intermediary regimes;”

This aims to restore customary usufruct rights over adjoining forests which were often legally recognised prior to independence. However, these were arbitrarily either extinguished or diluted through declaration of such common lands as state forests during the merging of Princely States in the Indian Union and abolition of intermediary regimes after independence. In areas where *nistari* forests are clearly demarcated and recorded, such forests can also be claimed as ‘community forest resource’ (CFR) under section 3(1)i (see below).

“3(1)c. right of ownership, access to collect, use, and dispose of minor forest produce which has been traditionally collected within or outside village boundaries;”

This needs to be read with the definition of ‘Minor Forest Produce’ in section 2(i) below:

“2(i) “minor forest produce” includes all non-timber forest produce of plant origin including bamboo, brush wood, stumps, cane, tussar, cocoons, honey, wax, lac, tendu or kendu leaves, medicinal plants and herbs, roots, tubers, and the like;”

‘Minor Forest Produce’ (MFP) is a prejudicial term meaning non timber forest products (NTFPs) which were considered ‘minor’ in relation to timber by the colonial Indian Forest Act, 1927 despite their critical importance for forest dwellers’ livelihoods. Ownership of MFPs/NTFPs was earlier vested in the *Gram*

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<sup>4</sup> The term *nistar* connotes usufruct rights for meeting domestic needs.

*Sabhas* (village assemblies) in Schedule V<sup>5</sup> areas by the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996 (commonly known as PESA). The forest departments of most states, however, refused to recognise such ownership rights on the dubious grounds that PESA had not defined or specified MFPs (and, remarkably, their interpretation has been able to prevail). The Ministry of Environment and Forests also argued that the rights vested by PESA did not extend to reserve and protected forests outside administrative village boundaries on the ground that the jurisdiction of the *Gram Sabha* was limited to the area within such boundaries. The Ministry of Tribal Affairs challenged this interpretation pointing out that PESA was applicable to the entire Schedule V areas, including the reserve forests within them, but to no avail. Both these lacunae have been addressed in the FRA by including a clear definition of MFPs which includes commercially valuable *tendu*<sup>6</sup> leaves as well as cane and bamboo traditionally collected from 'within or outside village boundaries'.

"3(1)d. other community rights of uses or entitlements such as fish and other products of water bodies, grazing (both settled or transhumant) and traditional seasonal resource access of nomadic or pastoralist communities;"

In addition to securing rights over water bodies and their produce, this restores rights of seasonal use by nomadic and pastoral communities which were largely extinguished through classification of multi-functional pasture and forested landscapes as uni-functional state 'forests'.

"3(1)e. rights, including community tenures of habitat and habitation for primitive tribal groups and pre- agricultural communities;"

Section 2(h) provides the following definition of 'habitat':

"2(h)"habitat" includes the area comprising the customary habitat and such other habitats in reserved forests and protected forests of Primitive Tribal Groups and pre-agricultural communities and other forest dwelling Scheduled Tribes;"

This right is specifically included for tribal communities classified as 'primitive tribal groups' (PTGs) by the Government of India, who retain many traits of semi-nomadic hunter-gatherers or who continue practicing shifting cultivation over larger forested landscapes. PTGs are the most vulnerable and marginalised even amongst tribal communities, and their gaining community tenures over their customary habitats could provide them significant protection against usurpation of their resource rights by powerful private interests as well as the state.

"3(1)f. rights in or over disputed lands under any nomenclature in any State where claims are disputed;"

This is based on MoEF's FP(2) guideline of September 18, 1990 (see footnote 3 above) and is meant to enable people to reclaim their rights over lands disputed between them and forest departments arising out of faulty or non-existent forest settlements<sup>7</sup>. This is particularly relevant to forested tribal areas in central and eastern India, which were declared 'deemed' state forests after Independence

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<sup>5</sup> Schedule V of the Indian Constitution provides for special administration of notified tribal majority areas under which laws considered detrimental to tribal interests can be withheld from them although this has never been done since independence.

<sup>6</sup> Leaves of the *tendu* tree (*sp. Diosporas melanoxylon*) are used for rolling Indian cigarettes called *Bidis*

<sup>7</sup> The Indian Forest Act, 1927 (which is still the operative forest law) provides for a 'settlement officer' enquiring into pre-existing rights, and recording the accepted claims in a 'forest settlement' prior to the final notification of an area over which the state has proprietary rights as a reserve forest. In the majority of tribal inhabited forest areas in central India, ancestral communal tribal lands were classified as state property during colonial rule or 'vested' in the state after Independence, and then notified as state forests without the legally required enquiry into pre-existing rights.

without following the due process of enquiring into pre-existing rights. This can include both individual and communal claims over customary lands without any limit over the claimable area. The notified Rules, however, have not clarified this and the wording of this right does not make the link with disputed claims arising out of forest settlements clear.

“3(1)g. rights for conversion of *Pattas* or leases or grants issued by any local authority or any State Government on forest lands to titles;”

This is based on MoEF’s FP(3) guideline of September 18, 1990 and is meant to enable people granted *pattas* (titles), leases or grants by the revenue department, but which are not recognised by the forest department due to the same land also being classified as forest land in poorly compiled official land records, to claim secure legal titles over such lands<sup>8</sup>. In the states of Madhya Pradesh and Chhattisgarh alone, an estimated one million such *pattas* or leases have been issued primarily to poor Scheduled Tribe and Scheduled Caste households with the land area disputed between the two departments estimated to be 1.24 million hectares (Ekta Parishad, 2003; Garg, 2005). There are similar problems in many other states such as Maharashtra, Rajasthan, Andhra Pradesh, Orissa and West Bengal. Any form of titles granted even by pre-independence rulers but not legally recognised after independence can also be converted into legal title under this clause. The maximum 4 ha restriction does not apply to such claims as the area for which existing documents are held is to be converted into legal title irrespective of size.

“3(1)h. rights of settlement and conversion of all forest villages, old habitation, unsurveyed villages and other villages in forests, whether recorded, notified, or not, into revenue villages;”

This has to be read with the definition of ‘forest village’ given in section 2(f):

“2(f) “forest villages” means the settlements which have been established inside the forests by the forest department of any State Government for forestry operations or which were converted into forest villages through the forest reservation process and includes forest settlement villages, fixed demand holdings, all types of taungya settlements, by whatever name called, for such villages and includes lands for cultivation and other uses, permitted by the Government; ”

This section, based on ‘FP(5)’ of the aforementioned MoEF’s 1990 guidelines, (see footnote 3 above), enables residents of all ‘forest villages’ as defined above, many created by the forest departments themselves in the past to ensure availability of bonded labour for forestry operations, to get their villages/settlements converted into revenue villages. At present, over 60 years after Independence, residents of ‘forest villages’ and other settlements and unsurveyed villages in forests remain deprived of access to most development programmes due to the land on which these are located continuing to be recorded as ‘forest’. Whereas officially there are an estimated 2500 to 3000 Forest Villages, unofficial estimates suggest their number to be over 10,000. As no agency other than forest departments can undertake any development work on forest land, most of these settlements remain outside the jurisdiction of any local government, and their residents in some states cannot obtain even domicile certificates (as only the revenue department can issue these, but it does not have

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<sup>8</sup> Neither state-level forest departments nor the central MoEF maintain any records of disputed claims or *pattas* issued by revenue departments. Official records treat all occupants of forest land as illegal ‘encroachers’ and only an estimate of the area under ‘encroachment’ is maintained.

jurisdiction over forest land) or even voting rights. Due to their residents lacking any legal rights over the land, they are treated like 'non-citizens' ever vulnerable to eviction or displacement without entitlement to compensation or rehabilitation.<sup>9</sup>

"3(1)i. right to protect, regenerate, or conserve or manage any community forest resource, which they have been traditionally protecting and conserving for sustainable use;"

This needs to be read with the definition of 'community forest resource' in section 2(a):

"2(a) "community forest resource" means customary common forest land within the traditional or customary boundaries of the village or seasonal use of landscape in the case of pastoral communities, including reserved forests, protected forests and protected areas such as Sanctuaries and National Parks to which the community had traditional access"<sup>10</sup>;

This is amongst the most powerful and significant rights for re-commoning the enclosures and restoring community controlled democratic forest governance within customary village boundaries. In the undivided<sup>11</sup> state of Madhya Pradesh alone, about 1 million hectares of common lands with well recorded community forest and other rights, which were declared state forests after independence without following the due legal process (Garg, 2005), could be reclaimed under this clause. The first two cases of the recognition of community forest rights in the country are over such well recorded community forests in Maharashtra state.

"3(1)j. rights which are recognised under any State law or laws of any Autonomous District Council or Autonomous Regional Council or which are accepted as rights of tribals under any traditional or customary law of concerned tribes of any State;"

This is particularly relevant for the north-eastern Indian states to protect their already recognised customary rights under state or local laws<sup>12</sup>. This clause also protects rights of STs in Schedule V areas where existing state laws bar alienation of any land in such areas to non-tribals.

"3(1)k. right of access to biodiversity and community right to intellectual property and traditional knowledge related to biodiversity and cultural diversity;"

This was included to secure the rights of forest dwelling communities over their rich indigenous knowledge of biodiversity. However the subsequent Rules for

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<sup>9</sup> For a study of such villages in north west Bengal, see Ghosh, 2006

<sup>10</sup> A Joint Parliamentary Committee which examined the initial Bill tabled in Parliament in December 2005 had recommended the inclusion of community rights over all produce, including timber and minerals from the community forest resource area. That was deleted by MoTA's bureaucrats at the last minute.

<sup>11</sup> The tribal dominated area of eastern Madhya Pradesh was made into the separate state of Chhattisgarh in 2000.

<sup>12</sup> Initial misgivings among people in the north-eastern states that their diverse customary tenurial arrangements may be overruled by the FRA have been laid to rest with the state governments of Nagaland, Arunachal Pradesh, Manipur and Meghalaya, having clarified to the Ministry of Tribal Affairs (MoTA) that due to most land and forest resources in their states already belonging to communities under customary law, the FRA is not relevant for them. The Union territory of Andaman and Nicobar Islands has similarly pointed out that existing regulations already protect the territorial and resource rights of the highly vulnerable tribal communities on the islands. (sourced during January, 2010 from <http://tribal.nic.in/index1.asp?linkid=360&langid=1> under 'Status of implementation')

implementation of the Act have not provided any clarity about how these may be claimed or protected, a very complex matter.

“3(1)l. any other traditional right customarily enjoyed by the forest dwelling Scheduled Tribes or other traditional forest dwellers, as the case may be, which are not mentioned in clauses (a) to (k) but excluding the traditional right of hunting or trapping or extracting a part of the body of any species of wild animal;”<sup>13</sup>

This provision provides space for claiming any traditional right not specifically listed such as rights over sacred areas, right to practice shifting cultivation, and so on. The first draft of the law had specifically provided for recognising the rights of shifting cultivators over their individual or communal lands used for practicing shifting cultivation but was removed as the dominant view in the government persists in considering shifting cultivation to be an ‘environmentally destructive’ practice (even though rotational forest clearance for cultivation in principle is more benign for biodiversity conservation than settled agriculture (which permanently destroys forests) and the Forest Departments own management practices, and generally smaller in scale).

“3(1)m. right to in situ rehabilitation including alternative land in cases where the Scheduled Tribes and other traditional forest dwellers have been illegally evicted or displaced from forest land of any description without receiving their legal entitlement or rehabilitation prior to the 13<sup>th</sup> of December 2005.”

This right is a response to the massive and disproportionate displacement of STs and OTFDs for development projects in the past without rehabilitation due to their rights not having been recognised at the time of displacement. This enables those who have been illegally evicted or displaced from forest land to reclaim their rights over it or to claim rehabilitation on alternative land. The wording leaves it unclear however whether the right involves restitution of the lost land or being compensated with alternative land. Furthermore the Rules also do not clarify which agency will be responsible for providing alternative land where restitution is not feasible due to the land being submerged or brought under other use.

“4.(8) The forest rights recognized and vested under this Act shall include the right of land to forest dwelling Scheduled Tribes and other traditional forest dwellers who can establish that they were displaced from their dwelling and cultivation without land compensation due to State development interventions, and where the land has not been used for the purpose for which it was acquired within five years of the said acquisition.”

Although provided in the next chapter of the Act, this section also enables those displaced by the state without land compensation to reclaim their land if it has not been used for the required purpose within 5 years of acquisition. The contradiction in this provision is that where the land has been used for the specified purpose within 5 years, the claimant is not entitled to any recompense.

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<sup>13</sup> Some tribal communities, particularly from the North Eastern states objected to the non-recognition of traditional hunting rights but hunting is also banned under the Wildlife Protection Act, 1972 which has proved difficult to enforce in community owned forests in the north east.

## **Review of FRA Chapter III: Recognition, Restoration and Vesting of Forest Rights and Related Matters**

This chapter of the Act lays down the conditions attached to the recognition and vesting of rights under the Act. That the recognition of rights under the Act supersedes all existing laws is clarified in the first clause of this chapter;

“4. (1) **Notwithstanding anything contained in any other law for the time being in force**, and subject to the provisions of this Act, the Central Government hereby recognises and vests forest rights in - ....STs .... and OTFDs...”(emphasis added)

The recognition of rights is subject to the following conditions:

- That the forest land over which rights are claimed had been under occupation of the claimants before the 13<sup>th</sup> day of December, 2005<sup>14</sup> (Section 4.3).
- That the rights shall be heritable but not alienable or transferrable and shall be registered jointly in the name of both spouses in case of married persons and in the name of the single head in the case of households headed by single persons (Section 4.4).
- That no potential claimant shall be evicted or removed from forest land under their occupation till the recognition and verification procedure is complete (Section 4.5).
- That the “... forest rights recognised under sub-section 3(1)a ... shall be restricted to the area under actual occupation and shall in no case exceed an area of four hectares” (Section 4.6).
- That the recognition of rights will not require central government clearance under the Forest Conservation Act, 1980 or the payment of ‘net present value’ or ‘compensatory afforestation’ for the diversion of forest land. This is a major relief for the claimants of rights and the only major provision in the Act clearly providing for the complementary adaption of an existing law and Court orders<sup>15</sup>.

The chapter also provides for modification of recognised rights in ‘Critical Wildlife Habitats’ (CWH) identified through a transparent and consultative process within protected areas, and the conditions under which relocation from such CWHs may be undertaken. This is discussed separately later in the paper.

### **‘Duties’ versus ‘empowerment’ of holders of forest rights in Section 5.**

Section 5 of the Act embodies a major institutional reform by changing the existing balance of power between the forest bureaucracy and right holding communities. It statutorily empowers holders of forest rights and their *Gram Sabhas* to protect wildlife, forests and biodiversity as well as their habitats from destructive practices affecting their cultural and natural heritage:

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<sup>14</sup> This was the day on which the initial bill was tabled in Parliament.

<sup>15</sup> Besides requiring clearance from the central government under the Forest Conservation Act, 1980, (FCA), the FCA rules require that ‘Compensatory Afforestation’ should be undertaken on double the area of degraded forest land or an equivalent area of non-forest land for any forest land diverted for non-forest uses. The underlying assumption is that loss of a natural forest can be ‘compensated’ by afforesting degraded forest or non-forest land elsewhere. The delays in receiving central government permission combined with the cost of compensatory afforestation has been a major reason for the non-regularization of so called pre-1980 ‘encroachments’ on forest land. More recently, the Supreme Court has made it mandatory that the ‘net present value’ of between Rs.0.6 to 0.9 million per hectare of the forest land to be diverted should also be paid by the agency applying for diversion of forest land. Other Supreme Court orders issued under the ongoing Godavarman Public Interest Litigation (PIL) now require that no de-reservation of forests or regularization of pre-1980 encroachments should be undertaken without the Court’s permission. This provision of the Act exempts the recognition of rights from all these requirements.

"5. The holders of any forest right, Gram Sabha and village level institutions in areas where there are holders of any forest right under this Act are empowered to-

- (a.) protect the wild life, forest and biodiversity;
- (b.) ensure that adjoining catchments area, water sources and other ecological sensitive areas are adequately protected;
- (c.) ensure that the habitat of forest dwelling Scheduled Tribes and other traditional forest dwellers **is preserved from any form of destructive practices affecting their cultural and natural heritage**;
- (d.) ensure that the decisions taken in the Gram Sabha to regulate access to community forest resources and stop any activity which adversely affects the wild animals, forest and the biodiversity are complied with;"

*(emphasis added)*

By binding right holders to complying with collectively taken decisions in the *Gram Sabha* for regulating access to community forest resources, this section devolves rule making authority over village forest commons from the forest department to the village assembly.

Here it is interesting to note that during the drafting of the Act, there was strong disagreement over whether the rights recognised under the law should be tied to the right holders' duties related to conservation. Based on strong pressure from the conservationist lobby, an earlier draft of the law made the right holders *duty bound* to protect forests, wildlife and biodiversity and divesting them of their rights if they committed an offence a second time. Those supporting the law argued that a historical law belatedly recognising rights should not provide for taking them away again. Endorsing this view, and arguing that the Constitution makes it every citizen's duty to protect the environment and that there was no justification for linking the rights of only forest dwellers to such duties, the Joint Parliamentary Committee which reviewed the law initially tabled in Parliament, substituted the term 'duties' with 'empowerment' of right holders. The marginal heading for Section 5 still says 'duties of right holders' as an oversight during final editing whereas the main body of the final law empowers them to conserve their forests<sup>16</sup>. Another dilution which took place during finalisation of the draft law was that the *Gram Sabha's* powers to penalise offenders with fines was deleted, thereby making the procedure for exercising these powers somewhat ambiguous.

#### **Review of Chapter IV: Authorities and Procedures for Vesting of Forest Rights**

This chapter specifies the authorities and procedures for the vesting of rights. Essentially, three authorities are specified for the purpose (these are: 1. Gram Sabha (village assembly); 2. Sub-Divisional Level Committee (SDLC); and 3. District Level Committee (DLC). A State Level Monitoring committee (SLMC) is charged with monitoring the process of recognition of rights.

"6.(1) The *Gram Sabha* shall be the authority to initiate the process for determining the nature and extent of individual or community forest rights or both....."

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<sup>16</sup> The continuing confusion among official agencies about this is evident in the Rules. Although the Rules list the constitution of committees from among its members for carrying out the provisions of section 5 as one of the *Gram Sabha's* functions, they expect the Sub-Division Level Committee to inform *Gram Sabhas* about their 'duties' towards protection of wildlife, forests and biodiversity.

This has to be read with Section 2(g) which states

“*Gram Sabha*” means a village assembly, which shall consist of all adult members of a village ..... with full and unrestricted participation of women;”

And also with Section 2(p) which defines 4 different types of ‘villages’ whose *Gram Sabha* has to be the initiating authority:

(i) As defined in PESA comprising of a hamlet or a group of hamlets in Schedule V areas; (ii) As defined in any state law relating to Panchayats in non-Schedule V areas; (iii) forest villages, old habitations/settlements or unsurveyed villages and (iv) the traditional village in case of states where there are no Panchayats.

The village *Gram Sabha* is thus the authority to initiate the process of inviting, verifying and consolidating claims for rights and preparing a map showing the area of each recommended claim. This is a key although diluted provision of the Act designed to provide a democratic, accessible and transparent forum for claiming rights instead of the normal vesting of such authority in inaccessible and unaccountable officials<sup>17</sup>. However, for the *Gram Sabha* to perform its envisaged role, it must not be too large or heterogeneous because of which the definition of the village whose *Gram Sabha* is the designated authority is critical. A resolution of the *Gram Sabha* approving the verified claims is then to be forwarded to the next authority at the Sub-Divisional level for further processing.

The Sub-Divisional Level Committee (SDLC) is the next authority responsible for preparing the records of forest rights based on examining the *Gram Sabha* resolutions. The SDLC is to forward these to the District Level Committee (DLC) which is the authority for taking a final and binding decision on the claims for rights.

The Act also provides for persons aggrieved by the decision of the *Gram Sabha* or the Sub-Divisional Level Committee to petition the next level committee (SDLC or DLC) within 60 days of a decision. No such petition can be disposed of against the aggrieved person without giving them a reasonable opportunity to be heard.

Finally, each state government is to constitute a State Level Monitoring Committee (SLMC) to monitor the process of recognition and vesting of forest rights and report to the nodal GoI ministry.

The Sub-Divisional Level Committee, the District Level Committee and the State Level Monitoring Committee are to consist of officers of state Revenue, Forest and Tribal Welfare departments and three members of the Panchayati Raj Institutions at the corresponding levels.

### **MoTA as the Nodal Ministry for implementing the Act**

Section 11 provides that the nodal central ministry responsible for implementing the Act shall be the Ministry of Tribal Affairs. Initially proposed by the Campaign, this found support from many non-forest bureaucrats at the highest level who accepted that impoverished forest dwellers were unlikely to receive justice from the forest bureaucracy as it was an interested party in the reform, having a range of land, powers and revenue streams to lose. Contested fiercely by the forest bureaucracy and hardcore conservationists through MoEF till the end, this is another major institutional reform embodied in the Act. Through effecting a

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<sup>17</sup> Earlier drafts made the *Gram Sabha* the final, rather than only the initiating authority for recognizing rights. Tribal movements lobbied hard but ultimately unsuccessfully to incorporate this major institutional reform because predominantly non-tribal revenue officials are known to have transferred large areas of tribal lands to non-tribals while undertaking revenue and forest land settlements.

change in the Central Business Rules<sup>18</sup> defining the functions of ministries, all powers related to tribal rights in forest areas have been transferred from MoEF to MoTA, thereby disempowering MoEF from interfering with the recognition and exercise of forest dwellers rights.

### **The Relationship of the FRA with other laws.**

The issue of the relationship of the FRA with existing laws is crucial; for determining the scope of its applicability, as the parallel continuation of existing but contradictory laws and policies may threaten the efficacy of the Act. However Section 13 of the Act states unambiguously:

“Save as otherwise provided in this Act and the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996, the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.”

Although rights are to be recognised '*notwithstanding any other law for the time being in force*' under section 4.1, and section 13 reiterates this by stating '*save as otherwise provided in this Act and the provisions of PESA*', the provision that this Act shall be '***in addition to and not in derogation of any other law in force***' has created ambiguity and left space for divergent interpretations. Although the law makes it clear that rights must also be recognised in all wildlife sanctuaries and national parks, it does not clarify how the provisions of other existing forest and wildlife conservation laws may be applicable to the exercising of the recognised rights in them other than with respect to the subsequent modification of recognised rights in identified critical wildlife habitats within protected areas (discussed later in this paper).

While it remains to be seen how the exercise of rights after they are recognised may be affected by other overlapping laws, the parallel ongoing implementation of those laws is creating rights deprivations in new areas. For example, under the requirement for 'compensatory afforestation'<sup>19</sup> (CA) in lieu of diversion of forest land for non-forest uses, MoEF has issued guidelines that where CA is undertaken on an equivalent area of non-forest land, that land must be notified as a protected or reserved forest and mutated in the name of the forest department. Through this process, large areas of common lands classified as revenue 'wastelands' or even community lands in north eastern states are being notified as state forests without following the process of enquiring into and recognising the pre-existing rights of their existing users. Thus while the FRA is attempting to address deprivations of rights in the past, new deprivations are being effected. Similarly, huge areas are being declared protected through the non-democratic process provided for under the Wildlife Protection Act (WLPA). This has been particularly so with the notification of all existing tiger reserves as inviolate 'critical tiger habitats' from which all those living in such areas need to be relocated, without following the consultative process laid down both in the FRA and the 2006 amendment to the WLPA. Simultaneously, forest departments are continuing to prepare forest 'working plans' as if the FRA does not exist. This will lead to conflict with the management plans developed by *Gram Sabhas* for the areas recognised as community forest resources under the FRA.

### **Summing up**

The Act appears to give a remarkably comprehensive coverage of redressal of rights deprivations. However the wording of the text is critical in determining the

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<sup>18</sup> Section 5A) stating that "All matters including legislation relating to the rights of forest dwelling Scheduled Tribes on forest lands" Was added to the Central Business Rules for MoTA

<sup>19</sup> See footnote 15 above.

scope for interpretation of inclusions and exclusions in implementation. For instance proof of eligibility is a key bottleneck. Non-tribal forest dwellers are likely to be amongst the biggest category of losers due to the unreasonable requirement of having to prove 75 years of residence. Many others are also likely to be excluded due to not being able to marshal evidence of their eligibility.

### **3. THE ASSOCIATED RULES**

Section 14 of the Act empowers the central government to notify rules for implementing the provisions of the Act. These can include procedural details for implementation and other related matters. The Ministry of Tribal Affairs (MoTA) constituted a technical support group to assist it in drafting the rules. The rules prepared by this group provided procedural details and clarifications on practically every clause of the Act.

The Rules associated with the Act ('Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2007'<sup>20</sup>), which were issued on December 31<sup>st</sup> 2007, provide the guidance for its implementation. However, the powerful urban wildlife conservationist lobby used their influence not only to delay notification of the rules but also their final shape and content. The outcome is that the rules are vague, even silent in places, on some key procedural issues.

The finally notified Rules had most of the procedural clarifications recommended by the technical support group removed. Instead, the Rules have introduced new ambiguities which have enabled state governments to violate some of the critical provisions of the Act. This is particularly so with regard to the unit treated as a 'village' the *Gram Sabha* of which is the authority for initiating the process for determining rights. This section critically examines the key provisions of the Rules and their implications.

#### **Lack of clarity about the 'village' and 'Gram Sabha'**

The most damaging provision in the Rules for fulfilling the pro-poor aims of the Act is the requirement in Section 3 of the Rules that the:

'Gram Sabha [i.e. village assembly] shall be convened by the *Gram Panchayat*' [i.e. elected Panchayat council] ... for initiating the process of recognizing rights ...'

without clarifying that the *Gram Sabha* unit needs to be different for the four different types of villages defined in the Act (i.e. in Schedule V areas; Non Schedule 5 areas; forest villages; traditional villages; see review of chapter IV of the Act above).

Normally in India, the 'village' is taken to mean the revenue village administrative unit. However due to immense variation in the sizes of revenue villages in different states, larger revenue villages can contain several hamlets spread over a large area.

The *Gram Panchayat* (the village council) is the lowest level of local self-government,. As with the (revenue) village, different States have different sized *Gram Panchayats*. While some States have single (revenue) village *Gram Panchayats* with populations of only a few hundred, other states' *Gram Panchayats* can have over 20 (revenue) villages with populations of 20,000 or more, spread over several kilometres. .

The *Gram Sabha* (the village assembly) of the *Gram Panchayat* consists of all the adult voters residing within the *Gram Panchayat's* administrative boundaries. Convening a single *Gram Sabha* in a multi-(revenue) village *Gram Panchayat* is a serious challenge for all concerned, as it may involve thousands converging from across many separate settlements.

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<sup>20</sup> These can be found on the GoI Ministry of Tribal Affairs website:  
<http://tribal.nic.in/index1.asp?linkid=360&langid=1>

In view of the difficulty of convening large *Gram Sabhas* of multiple villages, some states like Orissa have provided that *Gram Sabhas* shall be convened of individual revenue villages falling within the *Gram Panchayat*. Other states continue convening multi-village *Gram Sabhas* of the *Panchayat* but these tend to have poor attendance and so function poorly as forums for participatory decision making.

PESA, enacted in 1996, sought to reinstitute self-governance by socially and culturally homogenous traditional *Gram Sabhas* at the hamlet or multi-hamlet level in tribal majority Schedule V areas. The FRA specifically requires such *Gram Sabhas* to function as the initiating authorities in Scheduled Areas and the Joint Parliamentary Committee which examined the originally tabled bill had recommended that PESA's definition of one or more hamlets as the village should be adopted for the entire country for the purposes of this Act.

But due to the Rules not clarifying the different *Gram Sabhas* to be called for different categories of villages, and simply asking the *Gram Panchayat* to convene the first *Gram Sabha* meeting, the governments of many states interpreted this to mean that the *Gram Sabha* shall be of the *Gram Panchayat*, even where it consists of multiple villages. It is virtually impossible to achieve good attendance in multiple village *Gram Sabha* meetings consisting of several thousand members living in distant villages and their hamlets. Even if good attendance can be managed, such *Gram Sabhas* cannot function as effective forums for carrying out the tasks assigned to them under the Act. This is because these are too large, tend to be heterogeneous with high levels of socio-economic stratification and inequality, are dominated by elites and in which forest dependent STs and OTFDs are often a marginalized minority with least voice.

The Rules further require that the quorum for a *Gram Sabha* meeting shall not be less than 2/3rds of all adult members of the *Gram Sabha*. This has been proving next to impossible to achieve, resulting in officials either collecting attendance signatures of members from their homes to meet the procedural requirement or refusing to permit the process to advance due to non-fulfilment of the quorum requirement.

By not clearly specifying that in Schedule V areas the *Gram Sabha* has to be self defined and consisting of a hamlet or a group of hamlets considered to be a village under PESA, as provided for in the Act, in states like Andhra Pradesh and Chhattisgarh, the tribal residents of remote hamlets of large villages or Panchayats are effectively being deprived of their legal right to make their claims in their traditional village assembly. This is particularly the case in remote and rugged upland forested areas. Even where such claimants learn about the convening of the Panchayat *Gram Sabha* for the purposes of the Act, and walk several kilometres to attend the meeting, they have little opportunity for getting their claims considered if the more powerful and dominant communities within heterogeneous, multi caste villages oppose the recognition of their rights.

The Rules require each *Gram Sabha* to elect a 'Forest Rights Committee' (FRC) of 10 to 15 members with at least 1/3 of members being STs and another 1/3<sup>rd</sup> being women, to undertake the task of receiving, examining and verifying claims on behalf of the *Gram Sabha*. Such committees are expected to be elected in the very first meeting of the *Gram Sabha* without a binding requirement of ensuring that all *Gram Sabha* members (as well as the officials responsible for convening the meetings) are fully aware about the provisions of the Act and the types of rights which can be claimed. In the absence of awareness about the functions of FRCs, village elites with the least interest in the recognition of the forest rights of the poor have been made the members of many FRCs. In many states, (e.g. in Andhra Pradesh) forest departments have manoeuvred to get the JFM committees

controlled by them appointed as the FRCs, in contravention of the provisions of the Act.

A further highly restrictive and pressurizing provision in the Rules is that all claims have to be made to the forest rights committee within a period of 3 months from the day it calls for claims. Although there is a proviso that the *Gram Sabha* may extend this 3 months period after recording the reasons for this, due to most villagers not being made aware of this provision, some state governments have abused this by stopping acceptance of claims after the expiry of the 3 months period. In many states, this provision has been obstructing the implementation of the Act in the spirit it was intended, as the processes of organising evidence often takes much longer than is allowed. Field officials have also abused the resulting panic among villagers over missing their chance to claim rights to extract bribes from poor claimants.

Yet another provision in the Rules which has been grossly abused is the requirement that prior to field verification of the claims received by it, the forest rights committee must inform not only the claimant but also the forest department. Reports from most states received by CSD suggest that forest officials often do not come for the field verification despite being notified and later raise objections to the recognition of rights by the SDLC or DLC on the grounds that they have not verified the claim on site. When they do come, they often abuse their presence and power to reduce the area claimed by the claimants despite having no authority to interfere in the FRCs' functioning.

### **Functions and constitution of authorities**

The Rules provide details about the functions of the *Gram Sabha* and the composition and functions of the sub-divisional, district and the state level monitoring committees. *Gram Sabhas*, for instance, have to constitute committees from amongst their members for the protection of wildlife, forest and biodiversity, in order to carry out the provisions of section 5 of the Act. Both the SDLC and the DLC are responsible for raising awareness among forest dwellers about the objectives and procedures under the Act and Rules and providing copies of any government maps and other records requested by the *Gram Sabha* or the forest rights committee. The procedure for filing, determination and verification of claims by the *Gram Sabha* and the different types of evidence which may be used in support of rights claims have been spelt out. In addition to oral evidence of elders, claimants can use government records, published documents, physical evidence on the ground and so on as evidence. Each claimant must furnish at least two of the evidences listed in the Rules. Initial drafts of the law had provided for only oral evidence of elders being adequate to free the largely non-literate claimants from areas with poor records from the tyranny of the written word. But the requirement of at least two types of evidence has made the production of at least one documentary evidence necessary for most claimants.

The district level committee is charged with examining whether all claims, especially those of primitive tribal groups, pastoralists and nomadic tribes have been addressed in accordance with the objectives of the Act. Similarly, the forest rights committee is expected to ensure that the claims of the above communities are verified only when they or representatives of their community institution are present.

The Rules also provide a detailed procedure by which persons aggrieved by decisions of either the *Gram Sabha* or the SDLC can petition against such decisions to the higher level of authority.

Separate forms for claiming rights to forest land and community forest rights under the Act are attached to the Rules. A major omission in the claim form for community rights is the right to community forest resource (under section 3(1)i as discussed above) which has resulted in considerable confusion at the field level with many claimant communities not claiming, or not knowing how to claim this important right.

### **Omissions in the Rules**

The Rules also have some major omissions which make them seriously inadequate for their task. They provide no clarifications about the different rights which may be claimed as elaborated earlier in this paper. They do not clarify that the restriction of a maximum area of 4 ha is applicable only to the right claimed under 3(1)a, Nor do they provide the procedures for claiming more complex rights such as community tenures over their habitats by PTGs or claims by nomadic and pastoral communities for whom the single village based *Gram Sabha* procedure is totally inadequate. Consequently, transhumant communities moving seasonally across district and state boundaries are facing immense difficulties in claiming their rights. Further, the Rules are also totally silent on the relationship of the recognised rights with other existing laws or how the management of community forest resources by *Gram Sabhas* will impact existing forest department working plans.

### **Some damaging definitions**

The rules include some definitions which have provided officials with discretionary power to impose additional eligibility conditions on claimants. For instance, Rule 2(b) has defined "*bonafide livelihood needs*" to mean:

"fulfillment of sustenance needs of self and family through production or sale of produce resulting from self-cultivation of forest land as provided under clauses (a), (c) and (d) of sub-section (1) of section 3 of the Act;"

Literally interpreted, this implies that exercise of rights recognised only under sections 3(1)a, b and d may be used for fulfilling *bonafide* livelihood needs. Further, rights under 3(1)b and d relate to usufruct community rights and rights over NTFPs, neither of which can be exercised through 'self-cultivation'. In practice, government officials in many states have used this definition to reject the claims of those who already own some revenue land or earn income through a job or an enterprise or even if they receive a pension, on the grounds that they are not dependent on the claimed land for the fulfillment of their 'sustenance needs'.

Similarly, "*disposal of minor forest produce*" under section 3(1)c of the Act has been defined to

"include local level processing, value addition, transportation in forest area through head-loads, bicycle and handcarts for use of such produce or sale by the gatherer or the community for livelihood;"

Restriction on transportation of MFPs through headloads, bicycle and handcarts will provide forest officials discretionary power to harass organizations of NTFP collectors who may need to collectively transport their produce to the market with the help of vehicles using existing roads in forest areas.

Both these definitions implicitly condemn the right holders to exercise their rights for self-sustenance at subsistence levels using the most basic technology.

## **Summing up**

The rules thus have left their task half done. While they have dealt in detail with some provisions of the Act, they have failed to provide any guidance on the recognition of the more complex rights. Furthermore, by not clarifying the *Gram Sabha* responsible for initiating the process of recognizing rights for different types of villages, they have enabled state governments to violate a critical provision of the law meant to ensure that claims are made in an accessible, transparent and democratic forum. They have made no provision for ensuring that the process of claiming rights does not begin till all potential claimants, *Gram Sabhas* and other implementing authorities are fully familiar with the Act's provisions, something which was included in an earlier draft of the law itself. This has resulted in many claimants and implementing officials remaining unaware of the Act's detailed provisions even two years after implementation began.

## **4. ASSESSING THE POTENTIAL OF THE ACT TO REDRESS RIGHTS DEPRIVATIONS**

This section discusses some of the key aspects of the FRA which will govern the extent to which it's radical mandate of undoing the 'historical injustice' to STs and OTFDs is actually likely to be achieved.

### **Which Scheduled Tribes and Other Traditional Forest Dwellers are eligible for claiming rights?**

Although the Act's Preamble gives the impression that all the Scheduled Tribes and Other Traditional Forest Dwellers (STs and OTFDs) who have suffered deprivation of their pre-existing rights will be able to reclaim them, the restrictive definition of both the STs and OTFDs eligible for claiming rights under the Act will exclude significant numbers from the Act's ambit. Given the wide diversity of unrecognized rights which may be claimed under the Act, it is difficult to assess how many and which people were deprived of their rights in the past, and how many of them may still remain outside the FRA's ambit. Sections 2(c) and (o) define the eligibility of STs and OTFDs as:

"2(c) "forest dwelling Scheduled Tribes" means the members or community of the Scheduled Tribes who primarily reside in and who depend on the forests and forest lands for bona fide livelihood needs and includes the Scheduled Tribe pastoralist communities."

This has to be read with section 4(1)a which states that rights shall be vested in STs "in States or areas in States where they are declared as STs....."

"2(o) "other traditional forest dweller" means any member or community who has for at least three generations prior to 13<sup>th</sup> day of December 2005 primarily resided in and who depends on the forest or forest land for bona fide livelihood needs."

"Explanation - For the purpose of this clause, 'generation' means a period comprising of twenty five years."

Restricting eligibility to only 'scheduled' tribes, and that too only in the areas where they are declared as STs, may exclude up to 50% of tribal groups who have not been 'scheduled' under the constitutional process. These include the denotified 'criminal tribes' who represent possibly the most marginalised and stigmatised communities in modern India. Although they were denotified as 'criminal' tribes after independence, many of them were not 'scheduled' as tribes for arbitrary reasons because of which they do not benefit from constitutional

protections<sup>21</sup>. Further, only those STs living in the area in which they are scheduled are eligible to claim forest rights as STs. The Rules also require ST claimants to attach a certificate of their ST status, which many are unable to obtain from the concerned official agencies.

The requirement of proving residence over 3 generations of 25 years each for Other Traditional Forest Dwellers (OTFD) is even more stringent and is applicable even to STs compelled to move to areas other than where they were scheduled (either due to displacement for development projects or in search of wage employment). This provision was an outcome of intense resistance by the Ministry of Tribal Affairs to include OTFDs within the ambit of the Act on a number of grounds. The most widely shared concern was that making even non-tribals eligible to claim rights under the Act would open the floodgates for powerful land grabbers to acquire forest land. STs on the other hand, were constitutionally recognised and largely living in scheduled areas, with government records prepared at the time of scheduling available. This would make it easier to identify them and prevent abuse of the law by non-eligible claimants. The Ministry of Tribal Affairs also argued that the STs had been living in forest areas for centuries whereas OTFDs had come in much later. These arguments, however, overlooked the fact that the scheduling process has been uneven and arbitrary, with some communities recognised as STs in one State or district and not in the neighbouring ones and many tribal communities having been left out of the scheduling process altogether. Simultaneously, a number of better off and more powerful communities, whose conforming to the criteria used for scheduling tribes is questionable, have got scheduled as tribes. In any case, the criteria used for scheduling tribes are imprecise and vague, making their use prone to subjective judgements of senior officials. In many areas, tribal and equally marginalised non-tribal communities have also co-existed in the same forest areas for generations.

The requirement of proving three generations of residence for OTFDs (with each generation being of 25 years) is not only unreasonable but possibly legally questionable. They are asked to prove residence in remote forest areas since 1930, long before India's independence as well as long before enactment of the Forest Conservation Act (FCA), 1980, which made the recognition of rights on forest land difficult by requiring central government permission for changing the land to a non-forest category. People can acquire rights over public revenue land after being in occupation for only 10 to 15 years and this was the case even for forest land prior to enactment of the FCA. The FRA has left OTFD claimants far worse off than under MoEF's 1990 guidelines which require them to prove occupation of the land since before October 1980. This requirement can probably be challenged under the constitutional right to equality and the land not being forest land 75 years ago. Although OTFDs can still claim rights at least over forest land under the 1990 guidelines, the state governments have to seek the Supreme Court's approval before being able to recognise them which is a tedious and lengthy process with uncertain outcomes<sup>22</sup>.

Making matters worse, most state governments are demanding that the claimants produce documentary evidence proving 75 years of residence despite not having such old records themselves and despite the Rules permitting oral evidence of an elder as one of the two evidences required. It is difficult to estimate the numbers but press reports from Uttar Pradesh and CSD feedback from states like Orissa suggest that hundreds of thousands of some of the

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<sup>21</sup> Recently, the Government of India had set up a Commission on Denotified Tribes which had actually requested MoTA to make them eligible as claimants under the FRA.

<sup>22</sup> The Supreme Court has banned the 'regularisation of encroachments' and de-reservation of forest land without its permission under the ongoing Godavarman PIL commonly known as the 'forest case'.

poorest tribal and non-tribal claimants are likely to be excluded due to this provision. In UP, large numbers of tribals have never been scheduled thereby making them OTFDs under the law. In Orissa there are large numbers of OTFDs displaced by dams and other development projects after independence whose claims are being rejected as they were forcibly displaced less than 75 years ago. This is also leading to tension within villages with OTFDs not supporting the claims of STs in *Gram Sabhas* unless their own claims are also accepted. In mixed villages of tribals and non-tribals, in many states no community rights are being recognised on the ground that all *Gram Sabha* members are not tribals as such rights are to be collectively vested in the *Gram Sabha*

### **Two major categories of rights.**

Rights to be recognised under the Act essentially fall into 2 categories: rights over land and rights over forests or forest produce. The rights over land may be claimed individually, or by groups or entire communities<sup>23</sup>.

Land rights to be recognised under the FRA differ from the aforementioned 1990 guidelines in two major respects. Firstly, whereas the 1990 guidelines did not differentiate between ST and non-ST claimants, the FRA strongly discriminates in favour of eligible ST claimants. Secondly, whereas the 1990 guidelines did not impose any limit on the area over which rights could be recognised, provided documentary evidence could be shown of occupation since before October 1980, the FRA restricts the maximum area over which rights may be recognised on the basis of only land occupation to 4 hectares. The major addition to the claimable rights over forest land by the FRA has been to recognize the rights of those who can prove that they have been illegally displaced from their lands.

In practice, most State governments are implementing the FRA as if it only provides for the right to obtaining title over a maximum of 4 ha under occupation. There is little awareness among both villagers and government officials about the other rights which can be claimed over forest land under the FRA.

#### *Community forest rights (CFRs)*

Community forest rights, on the other hand, represent the addition of a totally new category of rights which may be claimed under the FRA. These include restitution of customary usufruct rights over forests, rights to produce of water bodies; grazing rights (both for settled and nomadic communities); rights to community tenures over 'habitat' for PTGs; ownership rights over NTFPs and rights over community forest resources. These not only enable the claimants to seek restitution of their usufruct community forest rights arbitrarily withdrawn during the declaration of a wide diversity of common lands as state forests, but also statutorily empower village *Gram Sabhas* to protect, conserve and manage community forests for sustainable use. This implies a major institutional reform in the country's system of forest governance by creating space for democratic decentralization of forest management.

Initially, most state governments totally ignored the community forest rights claimable under the Act. With growing protests and pressure from grassroots movements, these are now beginning to receive more attention. Forest Departments, however, have shown considerable resistance to permitting recognition of the community forest resource (CFR) right as it challenges their exclusive territorial jurisdiction and control over forests. It remains unclear how much more successful the FRA will be in the recognition of this right than the previous PESA legislation which has remained unimplemented. A major difference

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<sup>23</sup> As already mentioned, four of these rights are based on MoEF's September 1990 guidelines which have largely remained unimplemented to date.

with the FRA is that it has removed the ambiguities which PESA suffered from and, at least in many pockets, the communities which participated in the struggle for enactment of the FRA are more assertive in demanding recognition of their community forest rights. In some areas, such as north West Bengal and Tamil Nadu, the villagers have demarcated their community forest boundaries and started asserting this right and the powers vested under section 5 on the strength of the Act having come into force, even before the formal procedures for the recognition of the right have been completed.

Devolution of power to the *Gram Sabhas* and equity within them are the two elements that can improve the well-being of the forest dependant poor and restore dignity in their lives. How equitable and democratic *Gram Sabha* based community forest management regimes will be remains unclear. Neither the Act, nor the Rules, say anything about ensuring that the voices of the most marginalised sections and women within *Gram Sabhas* shall be heard during the framing of collective management rules and that the differentiated needs and rights of different sections of the community will be protected. The distribution of benefits within villages will undoubtedly be affected by local power dynamics.

The issue of pre-existing non-statutory joint forest management (JFM) committees constituted and controlled by forest departments managing forests is particularly contentious. The concerned *Gram Sabhas* can now claim statutory rights to protect, conserve and manage JFM forests as their community forest resource for sustainable use. In principle, in such cases, the *Gram Sabha* should automatically replace the JFM Committee. The secretaries of the tribal welfare departments of both Gujarat and Orissa have already issued orders indicating this change. The large number of self-initiated forest protection groups in States like Orissa no longer need to accept JFM as the only available means of gaining official legitimacy. Yet implementation remains dependent on the villagers being aware that they can claim this right and the state government ensuring that it is recognised when claimed. This is most likely to happen in areas where people still have strong association with and livelihood dependence on customary forest land, are already engaged in self-initiated CFM and are aware and organised.

A problem being faced in areas where JFMCs already exist and villagers are claiming their CFR rights is that customary boundaries of CFRs cut across the areas of different JFM groups. This is because of the ad hoc manner in which the forest departments have been allocating forest land for JFM. In some areas in Orissa, conflict between existing JFMCs fearing loss of their turf has surfaced due to the villagers claiming CFR rights over a part or the whole of that area.

The biggest emerging threat to statutory community forest management is from forest departments and the MoEF whose policy pronouncements have failed to acknowledge the replacement of JFM by CFM under the FRA. If the forest bureaucracy can have its way, it would clearly like to subsume CFR management within its JFM framework. In many areas this is bound to lead to conflict as organised communities will now fight to protect their hard won statutory rights.

#### *Non Timber Forest Products (NTFPs) (called 'Minor Forest Produce' in the Act)*

Recognition of the right to own, collect and dispose clearly defined MFPs should supersede many state-level NTFP monopoly control and marketing arrangements which assume the state to be their owner. For example, the state should no longer have the right to charge royalties on NTFPs like *tendu* leaves and bamboo which are widely managed as state monopolies. In Orissa, for instance, the state charges a royalty of between Rs.8000 to 12,000 per tonne for *tendu* leaf, (far higher incidentally than the Rs. 30 per tonne charged for bauxite (Saxena, 2001)). The draft rules prepared by MoTA's Technical Support Group had said

clearly that royalty could no longer be charged by the government on such NTFPs. However, the finally notified Rules are silent on the matter. The ambiguity this has created has resulted in most state monopolies continuing as before. This is partly also because few rights over NTFPs have been recognised till now. Once they are, the right holders are likely to demand changes. Women's NTFP cooperatives in Orissa have already started demanding the right to collect, process and market *tendu* leaves.

However, NTFP collectors will still need government support in the market. Perhaps instead of a monopoly, the state could encourage competitive purchasing to push up price while offering a minimum support price. Structures in AP, West Bengal, Karnataka and other states, will similarly require overhauling or replacement by totally new institutional arrangements. Many existing state laws, rules and regulations governing the collection, transport, processing and marketing NTFPs will also need to be changed to enable exercising of this right. There has been total official silence on this matter at the time of writing.

### **Wildlife Conservation issues**

The FRA requires that all rights must be recognised in all wildlife sanctuaries and national parks. However, the Act has introduced a new legal category of 'Critical Wildlife Habitats' (CWH) in order to ensure that habitats of particularly threatened species can be made inviolate through modification or acquisition of rights recognised in such areas. Section 2(b) defines CWH as:

"2(b) "critical wildlife habitat" means such areas of National Parks and Sanctuaries where it has been specifically and clearly established, case by case, on the basis of scientific and objective criteria, that such areas are required to be kept as inviolate for the purposes of wildlife conservation as may be determined and notified by the Central Government in the Ministry of Environment and Forests after open process of consultation by an Expert Committee, which includes experts from the locality appointed by that Government wherein a representative of the Ministry of Tribal Affairs shall also be included, in determining such areas according to the procedural requirements arising from sub-sections (1) and (2) of section 4;"

Only after identifying such habitats through the transparent, consultative and fact based process described above, can recognised rights only in CWHs be modified or relocation undertaken:

"4.(2) The forest rights recognized under this Act in critical wildlife habitats of National Parks and Sanctuaries may subsequently be modified or resettled, provided that no forest rights holders shall be resettled or have their rights in any manner affected for the purposes of creating inviolate areas for wildlife conservation except in case all the following conditions are satisfied...:-"

The conditions include the prior recognition of rights in them and only if the state government has concluded that co-existence between wildlife and people is not possible in those areas. The free informed consent of the concerned *Gram Sabhas* to a resettlement or alternative package that provides a secure livelihood for the effected individuals and communities has also been made mandatory. Further, no relocation can take place until the promised facilities and land allocation in the new place have been completed.

Recognition of rights in wildlife sanctuaries and national parks was one of the most contested provisions of the Act, with a powerful and elite lobby of conservationists as well as the Ministry of Environment and Forests demanding that all protected areas be kept out of the Act's ambit. Subscribing to the exclusionary 'guns and guards' approach to conservation, they argued that all the people living within such areas needed to be relocated outside them. Rights activists, on the other hand, pointed out that many of the protected areas had been notified arbitrarily without any concern for, or consultation with, the people living within them and there was no scientific evidence that co-existence of people and wildlife was not possible in most cases. They also pointed out that MoEF did not have any accurate data about the number of people living within protected areas and the only available estimate suggested that their number could be between 3 to 4 million. Arguing the practical impossibility of relocating such a large number of people, they highlighted the trauma of physical and socio-cultural dislocation caused by relocation, combined with the loss of cultural diversity and indigenous knowledge. The rights of a large number of the people living inside protected areas had never been recognised which would leave them vulnerable to eviction without any compensation or rehabilitation.

The initial bill tabled in Parliament had incorporated a compromise solution of providing temporary titles to claimants within protected areas which would be made permanent if they had not been relocated within 5 years. This, however, resulted in wildlife authorities preparing plans for rapid relocation of people living in PAs without robust safeguards to ensure their proper rehabilitation with secure livelihoods in the new locations. Rights activists and conservationists in favour of combining conservation with livelihood security then lobbied with the Joint Parliamentary Committee set up to examine the tabled bill to incorporate the current provision.

All the same, conservationists and the forest bureaucracy attempted to subvert this legal requirement. The MoEF issued guidelines for the early identification of CWHs (and Critical Tiger Habitats, or CTHs) before the Act had come into force, and therefore, technically in violation of the law. The MoEF had to abandon the notification of CWHs due to an MP charging the secretary with breach of Parliamentary privilege as CWH has been defined only in the FRA and such areas could not be notified before the law had come into force. Practically all tiger reserves, however, were notified as CTHs with new areas added to them in most cases without the mandatory 1) recognition of rights, 2) scientific studies indicating that co-existence was not possible and 3) informed consent of *Gram Sabhas*, as required even under the Wildlife Protection (Amendment) Act, 2006, prior to the FRA coming into force.

### **Summing up**

To sum up, the Act gives extensive provision for major reforms in tenure and governance of forests. There are indeed issues with precise wording; however the bigger issue is whose interpretation of the Act will prevail. Whether it will be taken up and implemented according to its spirit, or rather whether the terms will be interpreted narrowly to divert the intent. Evidence from implementation to date suggests that while the state is attempting the most narrow interpretation, with MoTA doing little to prevent blatant violations of the law by many state governments, particularly by state forest departments, grassroots movements are continuing to demand implementation as per the spirit of the Act.

## **5. WILL IMPLEMENTATION LEAD TO INSTITUTIONAL REFORM THAT RESULTS IN POVERTY ALLEVIATION?**

The FRA is undoubtedly a major landmark of enabling legislation, irrespective of the debates over its details. However, whether it will actually succeed in leading to meaningful pro-poor institutional reforms at the local level will depend on how successfully its provisions are implemented. Unless the diversity of rights are recognised, recorded in government land and forest records, and the right holders enabled to exercise them in the spirit of the law, they will remain ephemeral.

### **The necessity of complimentary reforms**

There are inevitably a large number of inconsistencies between the new Act and pre-existing laws and policies at national and state-level which need to be resolved. The FRA and the Rules are totally silent about this<sup>24</sup>. Daniel Brinks (2006: 225) in a study of institutional change in Brazil observes:

“Institutional change ... requires a series of changes in related areas before it can produce the desired effect”.

The Act supersedes previous laws as far as recognition of rights is concerned. Thus rights have to be recognised irrespective of the Indian Forest Act 1927, the Wildlife Protection Act 1972, the Forest Conservation Act 1980, as well as several Supreme Court orders under the Godavarman Public Interest Litigation case. However, the Act is ambiguous about how these existing laws may impact *the exercise* of those rights by saying that

“save as otherwise provided in this Act and the PESA, the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.”

Different lawyers seem to interpret these provisions differently but to date, the ambiguities have remained unaddressed. A number of petitions have been filed against the constitutional validity of the entire Act in the Supreme Court and some state High Courts by conservation organisations and associations of retired forest officers. Their basic plea is to maintain the existing centralised, autocratic and enclosure approach of the forest bureaucracy as the best means for wildlife and forest conservation. The petitions filed in Tamil Nadu, Andhra Pradesh and Orissa did succeed in getting the State High Courts to temporarily stay the issuing of any titles under the Act. Two of these have since been withdrawn and grant of titles has begun. However, none of the court orders stopped the process of claiming and investigating rights. In fact, there have also been a number of High Court orders stopping evictions from forest land until the process of rights recognition under the Act has been completed, and one order of the AP High Court requiring recognition of the community forest rights of the *Chenchu* PTG under the Act. The process of recognition of rights is now well under way in many states despite many aberrations, while some States are yet to begin. According to MoTA's update till 28th February 2010, more than 2,716,000 claims have been filed and more than 759,000 titles have been distributed. More than 36,000 titles were ready for distribution<sup>25</sup>.

However, the issue is not only how existing forest and conservation laws may impact the exercise of rights after they are recognised, but the major contradictions in the parallel continuation of existing laws and practices. For

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<sup>24</sup> Interestingly, PESA requires that state governments amend related laws to make them compatible with its provisions. However, implementation of the Act has been subverted by state governments not framing any rules for its implementation.

<sup>25</sup> <http://tribal.nic.in/writereaddata/mainlinkFile/File1210.pdf>, accessed on 14.3.2010

instance, state forest departments are continuing to prepare 10 to 20 year working plans for all forest areas and management plans for wildlife sanctuaries and national parks, and these inevitably conflict with the community rights being claimed for some of those areas. *Gram Sabhas* of some villages in North West Bengal have actually begun obstructing the planned felling by the FD in forest areas over which they have started asserting their rights. Similarly, villagers in Gujarat have stopped the FD from harvesting bamboo from the community forests they have claimed.

There is little evidence of MoEF incorporating the changed situation arising from the FRA in any of its policies or programmes. Despite its administrative, non-statutory nature, JFM is continuing to be supported as the Ministry's flagship programme of participatory forest management. In AP, the FD has attempted a coup of sorts by getting JFM committees to claim community forest resource rights under the Act, which would permit it to retain its control over community institutions despite JFMCs not being eligible claimants under the law. Organised groups of villagers have protested against this move and want it revoked.

In the same vein, wildlife authorities such as the National Tiger Conservation Authority (NTCA) and the National Board of Wildlife are continuing with the policies and management plans for tiger reserves and other protected areas as if the FRA does not exist. Major conflicts have started emerging in different tiger reserves due to illegal relocation of villagers from them without recognising their rights and following the other conditions laid down in the law.

Sustained protests by forest rights movements and supportive MPs against the MoEF continuing to divert forest land for non-forest uses such as mining and dams without recognising forest rights in those forests has resulted in the first major complementary reform in the FCA. On July 30, 2009, the MoEF issued an order to all state governments that no permission for forest diversion would be granted unless they submitted evidence that the process of recognition of rights in the concerned forest area had been completed under the FRA. Particular evidence of the recognition of PTG and community forest resource rights and *Gram Sabha* resolutions giving informed community consent must be attached<sup>26</sup>. This order has enabled communities to prevent diversion of forest land for 2 large investment projects in Orissa for mining bauxite in Niyamgiri by Vedanta Alumina Ltd and for POSCO's steel project<sup>27</sup>. Both of these have become test cases to see whether rights of the most marginalised can challenge the patterns of predatory capitalist resource appropriation and extraction spreading in tribal areas, which are clearly anti-poor in their immediate effects.

Similar complementary reform will be required in the laws and policies governing collection processing and marketing of NTFPs. The pressure for this has not yet surfaced in a significant manner largely as few NTFP rights have been recognised to date.

Conflict with forest departments will almost certainly increase as people start asserting their power vested under section 5 to protect wildlife, forests and biodiversity and start trying to manage their community forests according to their own rules and community management plans. Not unexpectedly, MoEF has already attempted to influence MoTA to let it develop guidelines for how these rights should be exercised by initially constituting a committee headed and dominated by forest officials to assess implementation of the FRA and its impact

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<sup>26</sup> The new order is available here: [http://envfor.nic.in/mef/Forest\\_Advisory.pdf](http://envfor.nic.in/mef/Forest_Advisory.pdf)

<sup>27</sup> At the time of finalization of this paper, the Orissa government has sent 40 platoons of armed police to forcibly take over the forest land being cultivated by the villagers since decades without recognizing their rights to hand over the land to POSCO.

on forests. Vehement opposition to this by forest rights movements arguing that implementation of the FRA is outside MoEF's mandate and that MoEF should first ensure that state forest departments stop their illegal and widespread obstructions in the recognition of rights has resulted in some changes in the committee's composition and terms of reference. But serious concerns about MoEF's intruding into MoTA's jurisdiction remain. The only area in which MoEF is specifically empowered to intervene under the Act is for the identification of critical wildlife habitats within national parks and sanctuaries from which relocation may be undertaken by modifying the recognised rights. As already discussed, the attempted abuse of that power was initially curbed with MoEF's secretary being served a notice for breach of parliamentary privilege for issuing guidelines and instructions for identifying critical wildlife habitats before the Act had come into force. In many tiger reserves, the villagers are resisting and protesting against efforts to forcibly relocate them without following the due process of law.

Donor adaptation is another important area requiring complimentary reform. Donor funded forest related projects typically go to forest departments but they are clearly not the appropriate agency for taking up tribal development through department constituted and controlled JFMCs. The World Bank and the British Department for International Development are both involved in forest / rural livelihood issues and will need to re-examine how to achieve their objectives while working with empowered forest right holders. The Japanese International Cooperation Agency (JICA) is lending huge funds for forestry projects through Forest Departments and forest development agencies, but under the Act many of the Joint Forest Management Committees (JFMCs) which such projects are supporting will be superseded by self-organised village groups. In Orissa, where JICA has recently funded a large forestry project through the forest department, villagers are repeatedly protesting against illegal plantations with JICA funding being undertaken in cultivated lands over which the occupants have filed claims for rights. They are demanding suspension of the JICA project until the process of recognition of rights has been completed and there is legal clarity over the changed jurisdictions over the land classified as forest.

In sum there would clearly need to be subsidiary reforms to support the full and proper implementation of the Act.

### **Challenging the status quo political economy of rights deprivation**

The political marginalisation of the poor and the poverty of the politically marginalised are two sides of the same coin. Political and economic control can be renegotiated by them through concerted mass political mobilisation for institutional reform. The FRA itself is an outcome of such mobilisation. However institutional reform alone has not in the past been sufficient to empower the politically marginalised poor to significantly improve their economic positions. Indeed established power structures have been very obstructive to marginal groups securing their rights, and to the implementation of progressive legislation like PESA (involving resistance from bureaucratic organisations like FDs). On the other hand some recent legislation is being successfully implemented despite resistance and is helping change entrenched power structures (National Rural Employment Guarantee Act, Right to Information Act). Although the FRA falls in the same category of pro-poor laws, it has received less pan-Indian support due to its relevance only for forest dwelling communities and their having the least voice in national politics.

Although initially it appeared that the political establishment viewed the FRA as a means of controlling the Maoist insurgency in forested tribal areas, recent

developments indicate a change in government strategy. As the tribal forest belt is also home for the country's rich mineral resources, the latest government strategy is taking the shape of regaining control over such areas with the use of paramilitary forces. Rather than recognition of their rights, two to three hundred thousand tribals have been displaced from their villages in Chhattisgarh initially through *Salwa Judum* (a state-supported private militia) and recently under 'Operation Green Hunt'. With this operation now being extended to the forest-tribal areas of Orissa, Jharkhand, West Bengal and Maharashtra, the institutional reform embodied by the FRA and its contested implementation needs also to be seen in the larger context of the politics of resource control for capitalist accumulation.

### **Will the FRA lead to poverty alleviation and pro-poor growth, and if so how?**

Given wide variations in the levels of awareness and organisation among those deprived of their rights, the benefits from the recognition of rights are likely to be variable. In areas with lesser conflict and where people are able to gain rights, the anticipated improvements to livelihoods and livelihood security through the FRA may be summarised as follows:

- Freedom from regular harassment, rent seeking, destruction of assets and extortion resulting from lack of tenure. The Act should alleviate these serious problems for hitherto rights-deprived groups
- Reduced livelihood vulnerability, resulting from secure tenure and rights. thereby preventing a deepening of poverty
- Community forest rights should secure access to forest products and ecosystem services, providing improved income streams.
- Secure land and forest rights should incentivise investments in land and forest improvements
- Legal forest rights should allow access to credit although, due to the titles being inalienable, special arrangements will be required to facilitate access to formal credit.
- Recognition of cultivation and use rights over forest land should permit the right holders to gain access to development inputs from other departments which they are currently deprived of. Such instructions have already been issued in Orissa.

In conflict ridden areas under Maoist insurgency, the reverse of these points already applies. With the government deciding to send thousands of para-military forces into the forested insurgency effected districts, instead of having their rights recognised, impoverished tribals in their thousands are joining the ever increasing army of the 'internally displaced'. Rather than gain rights, they've lost even the little they had with no certainty of their being able to return to their homes, lands and forests. As 'operation green hunt' is extended to new districts, the numbers of people as well as the area effected is set to increase bringing in its wake further misery and destitution to the already deprived.

## **6. CONCLUSIONS**

How precisely the Act will play out in different parts of the country is going to depend on several political, policy and ground-level factors, including the level of mobilization and cohesion of forest-dwelling communities in a particular area, the sensitivity of state government officials administering the Act given India's federal structure, the ecological fragility of the area, and increasingly, whether the area is considered a Maoist stronghold to be pacified through para-military force.

Going back to the paper's key question whether the FRA is fit for purpose, one needs to look at the law itself and the macro political-economic context in which it is being implemented.

The FRA itself is undoubtedly a landmark legislation providing the legal framework for major pro-poor institutional reform in the governance of the country's forests. Providing a remarkably comprehensive coverage of redressal of rights deprivations, the Act gives extensive provision for major reforms in tenure and forest governance. There are indeed issues with precise wording; however the bigger issue is whose interpretation of the Act will prevail. Whether it will be taken up and implemented according to its spirit, or rather whether the terms will be interpreted narrowly to divert the intent. Evidence from implementation to date suggests that while the state is attempting the most narrow interpretation, grassroots movements are demanding implementation as per the spirit of the Act. Given India's federal structure, there is also wide variation in how the Act is being implemented between different states.

The wording of the text is critical for determining the scope of interpretation of inclusions and exclusions in implementation. Non-tribal forest dwellers are clearly likely to be amongst the biggest category of the excluded due to the unreasonable requirement of having to prove 75 years of residence. Many others suffering from the deprivation of rights are also likely to be excluded due to not being able to marshal evidence of their eligibility.

The rules have left their task half done with major omissions. They have failed to provide any guidance on the recognition of the more complex rights. By not clarifying the *Gram Sabha* responsible for initiating the process of recognizing rights for different types of villages, they have enabled state governments to violate a critical provision of the law meant to ensure that claims are made in an accessible, transparent and democratic forum.

It is also clear that even if implemented in the best possible manner, complementary institutional reform in a host of other laws and structures is required to achieve the full pro-poor mandate of the law. To date, there is no evidence of this taking place.

In the meantime, the larger political-economic context has changed dramatically from the time when the law was enacted. Instead of the political space then available for appeasing discontent in mineral rich tribal areas through the recognition of rights, the Indian State's strategy has changed to dealing with Maoist insurgency with armed intervention. A law meant to promote equity and democracy has little meaning when it's intended beneficiaries become 'collateral damage' between two armed parties. In increasing areas, rather than gaining rights, large numbers of tribals are joining the already large army of the internally displaced due to the armed conflict. This is possibly because both domestic and multi-national corporations eyeing the mineral resources of the areas have become the fourth major force influencing implementation of the Act. The forest bureaucracy is continuing to sabotage the law to defend 'its' turf while wildlife conservationists are able to promote violations of the law in relocating people from tiger reserves. Tribal and other forest dwellers organizations are continuing to protest against violations and demanding proper implementation but risk being labelled 'maoist sympathisers' or Maoists even for participating in activities of peaceful dissent. The emerging outcome in different areas varies depending on the balance of power between the different social forces in each area.

It is too early to say what the long term outcome of the law which effectively aims to overturn an entrenched institutional structure for enclosing the forested commons established during colonial rule will be. With over three quarters of a million titles already issued, the FRA has already had some pro-poor impact and forest governance in India is unlikely to be able to revert to its pre-FRA status.

India's Forest Rights Act provides a clear case study of an institutional reform originally intended to be pro-poor, and indeed demanded by the poor to be so, but which, through the political contest over its specific content, and that of the implementation rules, has turned out to be much more ambiguous, diluted and constrained in its ultimate form and implications. This illustrates how both formal and informal political processes can work to subvert the intent for institutional reform, mitigating threats to the prevailing status quo patterns of political-economic inequality, which favours some groups at the expense of others.

A 'window of opportunity' for reform was created due to contingent coincidence of a number of conditions; general radicalisation of forest peoples through intensified oppression across the country, at the same time as a new more sympathetic political alliance professed to work on their behalf and additionally sought palliatives for unrest in forest areas. However the inertia of pre-existing institutions (here particularly the colonial-origin forest bureaucracy, the associated forest corporations, urban conservationists) working through informal institutional arrangements and networks (particularly the corridor politics around drafting of both the Act and the Rules) acted to constrain the comprehensiveness of institutional innovation.

We can observe from the problems the poor are currently experiencing to secure their legal rights under the act, illustrating that pro-poor institutional reform not only requires formal institutional change, but it also requires ongoing political commitment and will to ensure the status quo institutions are pushed through the lengthy and detailed change process, whether they like it or not. Without compulsion and pressure from above as well as below, implementation traction is unlikely.

However sectoral institutional reforms on their own may have only limited scope, without being part of a more comprehensive overhaul. The inconsistencies between the Act and other legal provisions can become new domains for obstructing reform.

We can see from this case that pro-poor institutional reform is fundamentally important for improving the conditions of the marginalised, but it can only succeed through, and in conjunction with, ongoing concerted political organisation over the long term.

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