

## THE FOREST RIGHT ACT, 2006: VICTORY AND BETRAYAL

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### I Introduction

THE SCHEDULED Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, also called the “*Forest Rights Act*”, the “*Tribal Rights Act*”, the “*Tribal Bill*”, and the “*Tribal Land Act*” saw hardly any opposition in Parliament in the course of its passage. The legislation concerns the rights of forest dwelling communities to land and other resources, denied to them over decades as a result of the continuance of colonial forest laws in India. The government is attacking tribal people by various methods including the following:

1. *Seizing resources through law.* Laws such as the Land Acquisition Act are used against tribal communities, taking their resources while throwing them on the streets. Lands are forcibly taken away from them and handed over to private corporations for their benefit. In Orissa, more than 40 memoranda of understanding have been signed with various big mining companies. This is resulting into huge displacement of people, all in the name of “public interest”.

2. *Privatising the community’s lands and resources.* Where lands or resources are officially owned by the government, they now being handed over to private companies directly – even where it actually belongs to tribal people. Moves are afoot to hand over forests and other community lands, declared government land by fiat, to private companies in the name of “afforestation” – resulting in destruction of the forests and denial of people’s rights in those lands. In many states, promotion of “biodiesel” plants like *jatropha* has involved handing over lakhs of hectares of such ‘government’ land, which people are cultivating or using for pasture, to companies for plantations for biodiesel.

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3. *Special economic zones*: A new form of super-land grab has also begun recently: creation of what are called special economic zones, which are basically areas of company *raj* where private companies will take over not only the land but all functions of the government (including public services and even, indirectly, criminal law). In many areas, these are coming up on adivasi community and forest lands, denying them their basic rights as Indian citizens.

4. *Denial of constitutional protections for adivasi rights*: After a series of adivasi rebellions, the British had provided some protection for adivasi lands, customary laws and traditions. These protections were included in the Fifth and Sixth schedules to Article 244 of the Constitution of India. All adivasi areas in the mainland of India were to be scheduled under the Fifth Schedule and governed as per its provisions. But nearly half of adivasi areas were never scheduled and the Fifth Schedule has been completely ignored by the government, which treats scheduled areas like colonies for exploitation of resources.

5. *Ignoring community control as granted through the Panchayats Act<sup>1</sup>*: This Act is one of the most powerful laws in the country, essentially an extension of the Constitution - for adivasis, guaranteeing that in Fifth Schedule areas, the *gram sabha* will have power to manage community resources and must be consulted on land acquisition, resettlement, etc. This law has been violated by all the states.

6. *Using military and police force to crush people's resistance*: Where all other measures fail, the government has been using police and the military forces, often illegally, to destroy adivasi organisations and evict them by force. In Chhattisgarh, the government has organised armed militias in the name of the *salwa judum* campaign, who burn villages, kill people, rape women and engage in extreme brutality in the name of fighting the maoists. People are being driven from their homes and lands to make it easier to hand them over to mining corporations. More than one lakh people have been displaced in the last two years because of this inhuman violence, thousands of women have been raped, and hundreds of people killed ruthlessly.

7. *Illegal guidelines issued by the Ministry of Environment and Forests which were meant to relocate thousands of people from national parks and sanctuaries*: The

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1. Panchayats (Extension to Scheduled Areas Act), 1996; No. 40 of 1996 (24 Dec. 1996).



guidelines were meant to relocate tribals and forest dwellers from more than 600 protected areas across the country. These guidelines violated the rights of people living in these areas and contravened the provisions of the Forest Rights Act in an attempt to hastily declare the parks and sanctuaries free of people as critical wildlife habitat (CWH).<sup>2</sup>

Forest laws passed and instituted by the British have been used to seize lands, homes and resources of adivasis and other forest dwellers, first for British timber needs, then for “national industry” and government revenue, and now in the name of conservation. In the nineteenth century, the British wanted to undertake unhindered exploitation of timber, which required that the government assert its ownership over forests and suppress the traditional systems of community forest management that existed in the country. This had nothing to do with conservation; it was an effort to take control over trees, timber and vast areas of community land that was not and never had been forest. “Scientific Forest Management” introduced by the British was designed for ‘sustained yield of timber’ and little else. The result was the Indian Forest Acts, a series of which were passed from 1876 through 1927. The Indian Forest Act, 1927, India’s central forest legislation, had nothing to do with conservation. It was enacted to serve the British need for timber. It sought to override customary rights and forest management systems by declaring forest as state property and exploiting their timber. The law says that at the time a “forest” is declared, a single official (the forest settlement officer) is to enquire into and “settle” the land and forest rights people had in that area. These all-powerful officials unsurprisingly either did nothing or recorded only the rights of powerful communities. The same model was subsequently built into the Wild Life (Protection) Act, 1972, with similar consequences. These Acts empowered the government to declare its intention to notify any area as a reserved or protected forest, following which a forest settlement officer supposedly would enquire into claims of rights (to land, forest produce, pasture, *etc.*) and decide whether to record people’s rights or not. Since the primary intention of these laws was precisely to take over lands and deny the rights of communities, this “settlement” process was in a sense destined to fail – which is exactly what has happened.

The Forest Rights Act is a key part of their struggle. The movements and groups who fought this battle had tried to bring about an Act that

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2. These guidelines have since been scrapped.



would give legal recognition and recording of the rights of forest dwellers and adivasis as the first step in bringing control over the forests back to the people. But the Act that was finally passed was not the Act that had been fought for. The government is now trying further to damage it by including changes in the rules to the Act that will undermine it more.

This legislation, aimed at giving ownership rights over forest land to traditional forest dwellers, was vehemently opposed by the wildlife conservation lobby and the Ministry of Environment and Forests which termed it as the ideal recipe to ensure the destruction of India's forests and wildlife by "legalising encroachments". The forest department, together with the timber mafia, too had been blocking it since it would severely erode their stranglehold over forest products. Corporates are also against it since the illegal status of tribals and other forest dwellers makes the process of eviction and land acquisition for industrial projects easier. Therefore, the fact that the Act has finally been passed is at least a significant admission of the historic injustice done to forest dwellers. The Forest Rights Act, which was passed in December, 2006, is one of the first steps towards fighting for the rights of these people.

What are called "forests" in Indian law often have nothing to do with actual forests.<sup>3</sup> Under the Indian Forest Act, areas were often declared to be "government forests" without recording who lived in these areas, what land they were using, what uses they made of the forest and so on. Eighty-two per cent of Madhya Pradesh forest blocks and 40 per cent of Orissa's reserved forests were never surveyed; similarly 60 per cent of India's national parks have till today (sometimes after 25 years, as in Sariska) not completed their process of enquiry and settlement of rights. As the tiger task force of the Government of India put it, "In the name of conservation, what has been carried out is a completely illegal and unconstitutional land acquisition programme".

## **II Background of Forest Rights Act**

During the years 2000-03, systematic "eviction drives" have been conducted all over the country by the forest department to remove the so-called "encroachers" from forest land. Making matters worse, judicial pronouncements under the ongoing Godavarman PIL<sup>4</sup> have extended the Forest Conservation Act's ambit even to lands yet to be finally notified

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3. <http://c:forestrightsact.htm>

4. Writ Petition (Civil) No. 202/95.

under the IFA<sup>5</sup> and to all lands conforming to the 'dictionary definition 'forest' irrespective of ownership. Besides staying regularization of even eligible pre-1980 encroachments and de-reservation of forest land or protected areas (irrespective of whether these have been finally notified after due settlement of rights), the Supreme Court has also banned the "removal of dead, diseased, dying or wind fallen trees, drift wood and grasses, *etc.*" from all national park (NP) and wildlife sanctuaries (WLS): MoEF (Ministry of Environment and Forests) and the Central Empowered Committee (CEC) set up by the Supreme Court interpreted this to mean that 'no rights can be exercised' in protected areas (Pas) and have banned the collection and sale of all non-timber forest produce (NTFP) from them. This is when preliminary notifications declaring only the government's intention of constituting them as NP or WLS have been issued in most cases and people have legally admitted rights in many. In one stroke, between three to four million of the poorest people living inside protected areas have been deprived access to a critical source of survival income without any scientific study indicating that such collection is indeed harmful to wildlife habitat. In Orissa's forest belts, already infamous for its starvation deaths, people are being driven to giving up their children in bondage and resorting to large-scale distress migration. The Supreme Court has shown scant regard to the consequences of its sweeping orders, effectively rewriting the law, for the survival of livelihoods of forest-dwelling communities.

The last straw came with MoEF's circular of May 3, 2002 asking all states and union territories to evict all forest 'encroachers' within five months based on misinterpretation of another court order. These eviction drives were triggered by an order dated May 3, 2002, whereby the inspector general of forests instructed state governments "to evict the ineligible encroachers and all post-1980 encroachers from forest lands in a time bound manner." Diverse coercive means were employed, from setting fire to houses or destroying standing crops to molesting women, trampling people's dwellings with elephants, and even firing. These atrocities are a grim reminder of similar agonies that have been the lot of adivasis faced in India for the last 200 years. History, ruthless and unrepentant, seems to be only repeating itself.<sup>6</sup> The following spate of brutal evictions across the country, in Assam and Maharashtra, with the use of elephants

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5. The Indian Forest Act, 1927.

6. Bela Bhatia, "Competing Concerns", *EPW*, Nov. 19, 2005, p. 4891.

to destroy huts and crops of impoverished tribals during a drought year, led to an uproar of protests. MoEF was compelled to issue a clarification order in October, 2002 that the 1990 circulars<sup>7</sup> remained valid and that not all forest-dwellers were encroachers. Despite this, as the MoEF admitted in Parliament on August 16, 2004 that between May, 2002 and August, 2004 alone evictions were carried out from 1.52 lakh hectares.<sup>8</sup>

In February, 2004, before parliamentary elections were held, MoEF issued two new circulars: one titled “Regularisation of the rights of the tribals on the forest lands” which extended the date for regularization of encroachments by tribals to December, 1993 (instead of October, 1980 under the FCA) and the other was titled ‘Stepping up of process for conversion of forest villages into revenue villages’. These were promptly stayed by the Supreme Court. In an affidavit filed in the court to get the stay vacated, MoEF finally admitted that during the consolidation of forest, “the rural people, especially tribals who have been living in the forests since time immemorial, were deprived of their traditional rights and livelihood and consequently, these tribals have become encroachers in the eyes of law” and that “it should be understood clearly that the lands occupied by the tribals in forest areas do not have any forest vegetation”. It further asserted that its February circulars “do not relate to encroachers, but to remedy a serious historical injustice. It will also significantly lead to better forest conservation”. In now opposing the Bill as a threat to the country’s forest over, MoEF is clearly contradicting itself.<sup>9</sup>

The court has refused to vacate the stay and MoEF has backtracked and informed the court that October, 1980 would remain the cut-off date for regularization of pre-1980 occupations. In the tussle over the cut-off date for regularization, the state’s own culpability in failing to settle forest-dwellers’ rights for a quarter of a century (in fact since independence) and the injustice done to those who have been evicted and displaced during this long period, is seldom discussed.

With the UPA government’s Common Minimum Programme stating that evictions would be stopped, on December 21, 2004, MoEF issued a letter to all states/UTs to stop evictions of forest-dwellers till their rights had been settled. Even this has had no effect. In April, 2005 itself, 180 huts were burned in MP, in one case after pulling out a pregnant woman

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7. Circular No 13;1/90-FP of the Government of India.

8. Madhu Sarin, “Scheduled Tribes Bill 2005:A comment”, *EPW*, May 21 2005, p. 2132.

9. *Ibid.*

in labour who delivered her child in the open. Several cases filed in the Jabalpur High Court list horrendous forest department's atrocities during such operations.<sup>10</sup>

In this background, at a high level meeting held on January 19, 2005, the Prime Minister decided that the Scheduled Tribes and Forest-Dwellers (Recognition of Forest Rights) Bill should be drafted and tabled in the budget session of Parliament. The task of drafting the Bill was assigned to the Ministry of Tribal Affairs (MoTA) instead of MoEF as senior officials argued that tribals could not be expected to get justice within the framework of forestry laws. Contrary to MoEF's claims of being sidelined in the Bill's drafting, the Director General of Forests was a member of the Technical Support Group (TSG) constituted by MoTA, along with representatives of other ministries to help it draft the Bill. Unfortunately, under instructions from higher levels, non-tribal forest-dwellers were subsequently excluded from the Bill's purview.

### III Forest Rights Bill, 2005

Mass eviction of tribals led to a promise made in the Common Minimum Programme of the UPA government, "Eviction of tribal communities and other forest-dwelling communities from forest areas will be discontinued". In pursuance of this commitment, the MoTA prepared a legislation to "protect" the adivasis from forced evictions.

The aim of the Bill was to give legal entitlements to forest land that the adivasis might have been cultivating for long, as well as over forest rights such as grazing rights and access to minor forest produce. For instance, the Bill gave adivasis titles to forest land they had been cultivating since before 1980, up to 2.5 hectares per nuclear family. Similarly, the Bill gave adivasis secure entitlements to minor forest produce such as fuelwood, bamboo, honey, gum, mahua, tendu leaves, roots and tubers. Other forest rights covered by the Bill included right to *nistar* (collection of forest products for subsistence needs), the right to conversion of "forest villages" into revenue village, the right of settlement of old habitations and community rights. The initial draft of the Act, tabled in 2005, while broadly providing for land rights for forest dwellers, was extremely problematic. It set the cut-off date for recognising land ownership as 1980, the year when the Forest (Conservation) Act was passed. This meant that people who occupied forest land post-1980

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10. *Ibid.*

would not come under the purview of the legislation – a significant number, considering that victims of large-scale land acquisition and evictions since 1980 often took refuge in forests. Also, the original legislation was applicable only to tribals and not to non-tribal forest dwellers, who too did not have rights over land they had lived on for years. The land ceiling was set at 2.5 hectares (ha) for each settler family.

#### IV Joint Parliament Committee's recommendations

A Joint Parliamentary Committee (JPC) was constituted to look into the issue in a comprehensive manner and to come up with recommendations for the government to consider. The JPC suggested five major-changes in it, some of which was included in the Act. These changes were: (a) The cut off date for claiming rights to land was changed from 1980 to December 13, 2005; (b) The provision was changed to include non-tribal traditional forest dwellers instead of only STS; (c) The ceiling of landownership was changed from 2.5 ha to 4 ha per nuclear family (though the JPC did not recommend any limit); and (d) The penal provisions for forest dwellers were removed.

The JPC also saw to it that the role of the *gram sabhas* and the *panchayati raj* institutions were strengthened. Significantly, the JPC came up with some important recommendations on the *procedure* of settling land rights. According to JPC, the *gram sabha* was to have a *central* role in all decisions relating to forest dwellers – a recommendation that was aimed at countering the almost infinite power that the forest department has over forest dwellers. The *gram sabha* was to be vested with the responsibility and authority for settling land rights of forest dwellers. The *gram sabha* could veto the decision of first tier of appeal – the sub-divisional committee. However, the decision of the second tier of appeal – the district committee – would be final.<sup>11</sup>

The *gram sabha* was also empowered to make decisions regarding whether or not settlers were adversely affecting forests, wildlife and biodiversity. The JPC also suggested that in the case of land that had been allotted to forest dwellers, provisions similar to the Panchayat Extension to the Scheduled Areas Act (PESA) be applicable. In other words, *gram sabha's* approval for any diversion of forestland for non-forest activity, and for any form of land acquisition, would be mandatory. In addition, the JPC also recommended that the Tribal Bill should define

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11. *Supra* note 2



*core* forest areas unambiguously, from where people *could* be evicted and resettled. Overall, the recommendations were a step towards loosening the vice-like grip forest departments and corporates aided by state governments had over forest dwellers.<sup>12</sup> After the JPC report was tabled, a Group of Ministers (GoM) headed by Pranab Mukherjee looked into the recommendations and the final draft was prepared.

The Forest Rights Act, according to JPC recommendation, accepted the cut-off date for consideration of land rights as December, 2005, rather than 1980. Also, non-tribal forest dwellers have also been brought under the ambit of the Act. Now, all those residing *in* forests for 25 years or more or for three generations prior to 2005 will be eligible to claim land and the ceiling has been set as 4 hectares for each settler family. However, the Act has defined forest dwelling scheduled tribes or other traditional forest dwellers as those who “primarily reside in the forest”. The fact of the matter is that most “forest dwellers” do not strictly dwell *inside* the forests, living *on* forest land – they live on the fringes of forests, but are heavily dependent on the forest land and resources for their livelihood. The Act, therefore, excludes them and an estimated 90 per cent of forest dwellers are likely to be kept out of the Act.

The Act has also excluded large number of non-tribal forest dwellers from its ambit through constrictive definition. The JPC had recommended various categories of people to be included under this category – communities living on, or adjacent to, forestland for at least three generations, communities forced through government policy to live on, or depend on forest land (for instance communities living in forest villages), communities displaced by development projects, communities evicted from wildlife sanctuaries, reserved forests and national parks, and communities forced to live on, or depend on, forest land due to failure of governments to provide sources of livelihood promised to them. The Act shrinks the scope of this broad definition and states that non-tribal forest dwellers were only those who had been continuously residing on forest land for 75 years.

The attempts of the JPC to empower *gram sabhas* have been thwarted – instead of *gram sabhas* being in charge of settling land rights, with the forest department being nowhere in the picture, the Act now mandates that *panchayati raj* officials (*sarpanchas* etc.) would be part of the process

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12. *Ibid*

*along* with officials of the forest department. This is a significant dilution of community control originally envisaged.

Also, *gram sabha* approval for forest land diversion and land acquisition is *not* mandatory. The Act in its current form does not give paramount control over forest resources to forest dwelling communities. In other words, the Act has provided loopholes for continued mafia and corporate control over forest land resources. Forest dwellers do have a right to use and sell forest produce. The definition of forest produce, however, does not include crucial products like fish, leaves, fuel wood and stone.

### **V Salient features of the Forest Rights Act, 2006 Eligibility for rights under the Act**

To prove that a person is “forest dwelling” and, therefore, eligible for forest rights, he must prove the following:

*Firstly*, he/she “primarily reside in forests”.<sup>13</sup> The easiest way to prove this requirement is if one has a *jhopdi*/other residence on one’s plot inside the forest land (or one resides in a forest village). In other cases, it should be remembered that “reside” also means to occupy a place, where the occupation not only includes residence but also other forms of occupation for livelihood such as land for cultivation, grazing, collection of MFP, *etc.* Moreover, in the Rajya Sabha, the Minister for Tribal Affairs gave an assurance that people who lived outside forests will be able to claim rights inside them.

*Secondly*, he/she is “dependent on forest land or forests for bona fide livelihood needs”.<sup>14</sup> The second requirement is that the person should be “dependent” on forest land for “bona fide” livelihood needs. Bona fide livelihood needs would mean not mainly for commercial profit or for making money, but for survival. The rules provide that livelihood needs include sale of the crops cultivated on the land, sale of minor forest produce collected in the forest and income from water bodies and grazing.

*Thirdly*, if the claimants are ST, they should be “in the area where they are scheduled”.<sup>15</sup> The list of scheduled tribes includes the area in which each community was living at the time when they were scheduled. This area is sometimes an entire state and sometimes part of a state. For instance, the *bhils* are scheduled in parts of Madhya Pradesh, Maharashtra,

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13. The Forest Rights Act, 2006, S. 2(c),(o).

14. *Ibid.*

15. *Id.*, S. 2(c) and S. 4(1).

Andhra Pradesh, Gujarat, Karnataka, Rajasthan and Tripura. In those parts of these states where they are scheduled, *bhils* can claim rights. Outside these states or outside the parts of these states where they are scheduled, *bhils* cannot claim rights under the Act as STs, but can do so as 'other traditional forest dwellers'. If the claimant is not an ST in the area where he/she is scheduled, he/she must have "resided in" forest land or forests for 75 years, whereupon he/she will be considered "other traditional forest dweller".

Fourthly, non-STs are also eligible as long as they satisfy this requirement.<sup>16</sup> The section states that the person must have resided in forests or forest land for three generations before 2005, where "generation" is defined as twenty five years. This means a total period of seventy-five years, *i.e.* since 1930. There is no requirement in law that the person must have resided on the same piece of forest land since 1930, only that he/she must have resided in forest land from that time. Similarly, a person can still claim eligibility if his/her community resided in the forest from 1930. Since any claim for a right has to be accompanied by two types of evidence, such evidence should include proof of three generations of residence. If the claimant is an ST, he/she need attach a ST certificate to claim rights as ST.<sup>17</sup> In order to claim rights as a forest dwelling scheduled tribe, the claimant needs to attach the ST certificate.

### **Declaring *gram sabhas* and forming forest rights committees**

The very first step in the Act is declaring *gram sabhas* and forming forest rights committees. The Forest Rights Rules require the *gram panchayat* to convene meetings of *gram sabhas* without specifying what kind of *gram sabha* should be called, even though the Act provides for four different types of *gram sabhas*. This will most likely lead to the *panchayats* calling a meeting of the *gram sabha* of the entire *panchayat*. These are not the real *gaon sabhas* of communities but a fiction created by the administration. In most states, they are very large, containing multiple revenue villages and thousands of people. The government's effort is to make it impossible to get rights or to gain control over resources by forcing to work through these *gram sabhas* which would be unmanageable.

Hence, the tribals have to claim their rights and use the real *gram sabhas* in villages. In scheduled areas, a legal right to do this has been provided under the Panchayats (Extension to Scheduled Areas) Act, 1996.

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16. *Id.*, s. 2(o).

17. *Id.* s. 2(c) and Form in Rules.

This right is also recognised by sections 2(p) and 13 of the Forest Rights Act. In states that have no *panchayats*, such as some of the northeastern states, the traditional village institution itself is the *gram sabha* for the purpose of this Act.<sup>18</sup>

### **Constituting the forest rights committee**

At its first meeting, the *gram sabha* is to elect a smaller body of between ten and fifteen people and pass a resolution listing their names. This body is called the forest rights committee. The members of this committee should be ST's and non-ST's in proportion to their populations, with at least one-third ST members, except where there are no ST's, and one-third women members. At the first meeting of the committee, it should choose a chairperson and a secretary (who will record the proceedings and decisions of the committee) and send this information to the SDM. For any meeting of the *gram sabha*, at least 2/3<sup>ds</sup> of the members must be present for passing a valid resolution.

### **Claiming rights**

After formation of *gram sabhas*, the *gram sabhas* should invite claims for rights, keeping in mind the time when seasonal users can also participate. Once the *gram sabha* passes a resolution inviting claims for rights, applications for these rights have to be filed within three months of the resolution (however, the *gram sabha* can extend this time through another resolution, but only if it records reasons for doing so). Each of these rights has to be claimed through an application (many rights can be claimed through one application) to the forest rights committee.

According to rules 11(a) and 13, each application has to be accompanied with two types of evidence. Under each right below, the types of evidence that can be used to accompany the claim are listed, in addition, every claim should include:

1. ST certificate, if claimant is ST, living in the area where he/she is scheduled;
2. If the claimant is not a ST living in the area where he/she is scheduled, some proof of 75 years residence in forest areas, which can include:
  - a. documents/list (a genealogy) showing ancestry from a person listed in the land records or other records in the area from that time;

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18. *Id.*, s. 2(p)(iv).

- b. any other records referring to family ancestors or the community living in forest areas/that village from 75 years before;
- c. statements of elders in the village – preferably as an affidavit – regarding 75 years of residence.

### **How to make a claim to land?**

The main points to be proven regarding a claim to land are:

1. that the claimant is in direct possession of the land (not through someone else) and that the claimant is cultivating/using the land himself/herself; and
2. that the land has been under occupation preceding December 13, 2005.

The forest rights committee is then supposed to visit the site to physically verify that the person is in occupation of the land.

### **Forest rights committee verifies claims**

Each *gram sabha* is to elect a ten to fifteen member forest rights committee. The committee's duties include:

1. Receiving claims from people. The committee has to give a written acknowledgement for any claims it receives.
2. The committee should also on its own consider the claims of the community as a whole over its community resources – such as minor forest produce, access to grazing land, community forest resources, *etc.* For these, the forest rights committee is responsible for making out the application, which has to be passed by the *gram sabha* as a resolution after modification, if necessary.
3. Along with each claim, the person claiming the right attaches the evidence he/she is submitting. There is a wide variety of evidence that can be given, as described above.
4. The forest rights committee will visit the site of the claim (for instance, the plot of land being claimed). Before visiting, the committee has to inform both the claimant and the forest department.
5. The committee can receive additional evidence from the claimant or other witnesses.
6. The forest rights committee can also ask for additional help/assistance from government officials, who are required to provide that help. On any written request from the committee, the

government must provide documents and explain them to the committee members. Also, whether the committee asks for it or not, the sub-divisional level committee has to provide forest and revenue maps as well as voter lists of the area.

7. The committee can then decide whether the claim is correct or not. The committee should not and cannot, accept any claim as correct if it violates any of the conditions given in the previous section (for instance, if a person is claiming land that was encroached after December 13, 2005, or if the claiming person does not cultivate/use the land himself/herself).
8. For each claim that it decides is correct, the forest rights committee will have to make a map with landmarks.
9. the forest rights committee should decide on rights in the presence of representatives of seasonal and pastoralist communities who would be affected by those rights.
10. The committee will make a list of people who have submitted claims before it and state what its conclusion is on each of those claims.
11. Finally, this list and the maps will be presented before the full *gram sabha*. If the *gram sabha* agrees, it will pass a resolution endorsing the list and the maps made by the forest rights committee. If it does not agree, it can make changes it feels appropriate and pass a resolution recommending the modified list and maps.

During these proceedings, the secretary of the *panchayat* serves as the secretary of the *gram sabha*. In case of smaller *gram sabhas*, the secretary should be summoned to the meetings of these *gram sabhas*.<sup>19</sup> This procedure can be done repeatedly – there is no need for the committee to hear all the claims before reaching a decision on some. If rights are being claimed that lie inside another village's boundaries or that lie in an area shared between multiple villages, the forest rights committees of all the villages concerned should meet and together decide on what is to be done. This agreement is placed before both the concerned *gram sabhas* for their approval. If no agreement can be reached, the matter should be referred to the sub-divisional level committee. If any claimant is not satisfied with the *gram sabha's* decision, he/she can appeal to the sub-divisional level committee.<sup>20</sup>

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19. *Id.*, r. 11(6).

20. *Id.*, s. 6(2).

## Appeals and higher committees

### **Sub-divisional level committee**

The next step is a committee that will consist of the following people:<sup>21</sup>

1. Sub-divisional officer, who is the chairperson;
2. Forest officer in charge of a sub-division;
3. Tribal welfare official at the sub-divisional level, or the official who looks after that subject;
4. Representative of block/*taluka panchayat* nominated by the *zilla parishad*;
5. Representative of block/*taluka panchayat* nominated by the *zilla parishad*;
6. Representative of block/*taluka panchayat* nominated by the *zilla parishad*.

Of the last three, two should be Scheduled Tribes (or, where there are no ST's, other traditional forest dwellers) and at least one should be a woman. This committee is supposed to:

- Put together the resolutions of the different *gram sabhas* in its jurisdiction and 'reconcile' them with government records.
- Hear appeals made to it against *gram sabha* decisions. The forest department and other government agencies can also appeal to the committee if they oppose the *gram sabha's* position.
- "Examine" the resolutions of the *gram sabha* and also hear any appeals by people aggrieved by the *gram sabha's* decision. The Act provides only this, but the rules add a provision by which the sub-divisional level committee is also required to check the "veracity" or genuineness of claims. This means that the sub-divisional level committee can, and will, reexamine and reject decisions of the *gram sabha* on its own which means that this committee will have to be watched very closely. Copies of the record of rights as prepared by the sub-divisional level committee should be made available in each village, along with the reasons for any change.
- Settle disputes between two *gram sabhas*. In case there is such a dispute, either *gram sabha* can pass a resolution applying to the sub-divisional level committee to settle the dispute, or the committee can act on its own. In this case, the committee should

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21. *Id.*, s. 6(8), r. 5.

call a joint meeting of both *gram sabhas* to try to resolve the dispute. If such a resolution is not reached, the committee should resolve the matter.

- Where a claim concerns an area outside the sub-division, the committee should approach the sub-divisional level committee of the concerned sub-division for settling the matter.

After this work is complete, the committee “prepares” the record of forest rights for each block/*taluk* and passes that on to the district level committee.<sup>22</sup>

If a claimant is not satisfied with the sub-divisional level committee’s decision on the appeal, he/she can appeal to the district level committee. However, he/she cannot appeal directly to the district level committee after the *gram sabha*’s decision; he/she must appeal to the sub-divisional level committee first. The committee is also responsible for providing publicity and logistics, including providing copies of forms and information to *gram sabhas*.

### **District level committee**

The final step is a committee that consists of the following people:<sup>23</sup>

1. District collector or deputy commissioner, who is the chairperson;
2. Divisional forest officer or deputy conservator of forests;
3. Official in charge of tribal welfare at the district level;
4. Representative chosen by *zilla parishad*;
5. Representative chosen by *zilla parishad*;
6. Representative chosen by *zilla parishad*.

Of the last three, two should be ST’s and at least one should be a woman.

The above committee takes decisions made by the sub-divisional level committees and:

1. “Considers and finally approves” them.<sup>24</sup> This committee may change decisions of the *gram sabhas* (or the sub-divisional level committees) on its own. This too is dangerous and needs to be watched.
2. Hear appeals against orders of the sub-divisional level committee.

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22. *Id.*, s. 6(3).

23. *Id.*, s. 6(8).

24. *Id.*, s. 6(6).



3. Settle disputes between sub-divisional level committees in the manner the disputes between *gram sabhas* are settled.
4. Contacts other districts in case claims are across district boundaries.

Once this is complete, the district level committee issues directions to the government officials to make necessary changes in the revenue and forest records. The committee does not need to wait until all appeals or claims are decided before making these changes in the records for any right that is undisputed.

The district level committee then has to publicise the record of rights and provide certified copies of accepted rights to the *gram sabha* and to the person concerned. It is very important to check the final results of the committee's work. The district level committee is also responsible for providing documents to *gram sabhas*, making sure that publicity takes place and ensuring that *gram sabhas* take place without coercion and with free participation of women.<sup>25</sup>

### **Types of rights**

There are thirteen rights listed but they can basically be categorized into four types of rights:

#### ***Forest management rights***

One of the most important rights in the Act is the right to protect traditional forests.<sup>26</sup> According to section 3(i), under this right, whatever the forest department might say, the community can “protect, regenerate or conserve or manage” any “community forest resource” and is also empowered to protect trees, biodiversity, wildlife, water sources, *etc.* in any forest.

As soon as the Act came into force on January 1, 2008, this right became a power of communities under section 5 of the Act. For the purpose of official recognition, though, the community should also demarcate its boundaries and file a claim for this right. Even if this is rejected, the community has the power to protect its forests. This is the most powerful right under the Act.

According to sections 3(i) and 5, the community has the following rights over community forest resources:

- To protect and/or conserve them;
- To manage them;

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25. *Id.*, r. 8.

26. *Id.*, s. 3(i) and s. 5.

- To regenerate them (*e.g.* through planting of native trees/shrubs/grasses or through natural regeneration);
- To sustainable use of these resources.

In particular, the *gram sabha* (or any other village institution, or even individual forest rights holders) can:

- Protect wildlife, forest and biodiversity;<sup>27</sup>
- Protect adjoining water sources and “catchment areas”;<sup>28</sup>
- Protect the habitat and “cultural and natural heritage” (*e.g.* sacred groves, religious sites, mountains, water bodies, *etc.*) of their community from destruction;<sup>29</sup>

Finally, the *gram sabha* can make rules for regulating access and protecting wild life, forests or biodiversity of community forest resources, and it (or any forest rights holder) has the power to ensure that these decisions are followed.<sup>30</sup> This means that, for the first time, whatever the forest department or government or forest mafia may decide, a community can enforce its decisions and protect its forests.

### **Land rights to land being occupied or cultivated or under customary use**

There are different ways in which the land, that is being occupied, can be claimed under the Act. It should be noted that the word “occupied” should not be limited to cultivation alone and it also includes private land used for grazing or parts of the plot that are left fallow to be used in the next agricultural cycle. Rights to forest land, which can be claimed under the Act, come under the following categories and sections.

*Directly as land under occupation:*<sup>31</sup> If the claimant, either individually or in common with others, has been occupying the land prior to 13<sup>th</sup> December, 2005 and continuously since then, he/she can claim it up to a maximum of 4 hectares (10 acres). The upper limit of 4 hectares applies only to this right. Communities can also claim common title to land for cultivation or occupation. People who successfully prove their claim will receive an individual or common *patta* to this land. Lands under this section can only be claimed for “self-cultivation” - by the claimant – or for residence.

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27. *Id.*, s. 5(a).

28. *Id.*, s. 5(b).

29. *Id.*, s. 5(c).

30. *Id.*, s. 5(d).

31. *Id.*, s. 3(a).

*Conversion of titles/leases/grants*:<sup>32</sup> If the claimant already has a *patta* or lease or grant issued by any local authority or state government to the land which the forest department does not recognise, then he/she has the right to get the existing document converted into an undisputed legal title. The area over which rights under this section are claimed shall be based on the area for which the existing *patta* or lease or grant is held, with no upper or lower limit. Some types of lands that could be claimed under this section include:

- *pattas* or titles that were given for lands that both the revenue and forest departments claim;
- *pattas* granted in the “orange areas” of Madhya Pradesh and Chhattisgarh;
- *ek sali* and *dali* leases in Maharashtra;
- leases given for agro-forestry, agro-silviculture, or fireline plots;
- government leases that were granted and have since expired but the person is still in occupation of the land;
- *pattas* where the *patta* was cancelled earlier without a “due process of law” (meaning without issuing notice, allowing the person a chance to appeal the decision, *etc.*), such as in the case of the Private Forests Act of Maharashtra;
- other *pattas*, titles and leases given by *zamindars* or princely states.

As “*Disputed Lands*”:<sup>33</sup> Under the Indian Forest Act, 1927, whenever any land is to be declared as a reserved or protected forest, it has first to undergo a “settlement process”. This requires that a settlement officer has to issue notices to all the people who live in, or are dependent on that land; these people have to be given a period of time to file objections or claim their rights, and these claims have to be enquired into by the settlement officer. If this does not occur, the forest settlement is faulty, resulting in disputed claims over the land between people and the forest department. In such cases, a person can claim his/her customary rights over such disputed land. This also includes:

- lands that come under so-called “deemed” reserved or protected forests in Orissa, Madhya Pradesh, Chhattisgarh and elsewhere;
- forest lands where the final notification declaring the area as a reserved forest was never issued. Under the Indian Forest Act,

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32. *Id.*, s. 3(g).

33. *Id.*, s. 3(f).

two notifications have to be given before an area can be notified as a reserved forest: one under section 4, which is the announcement of the government's intention; and the other under section 20, which states that the settlement of rights is complete and the reserved forest is actually being finally notified. If the second notification was never issued, the settlement is faulty. Any land claimed by an individual or a community under any part of the Act should have been under his/her occupation since before December 13, 2005,<sup>34</sup> and should still be in his/her possession at the time of making the claim. Any *pattas* received under the Act cannot be sold or transferred to any other person, but the owner's children or heir can inherit these lands.

### **Use rights**

*Minor Forest Produce.*<sup>35</sup> The forest dwellers can claim rights over minor forest produce under the Act. Minor forest produce includes “bamboo, brush wood, stumps, cane, tussar, cocoons, honey, wax, lac, tendu or kendu leaves, medicinal plants and herbs, roots, tubers” and so on.<sup>36</sup> The right to minor forest produce includes those minor forest produce that have been “traditionally collected” from within or outside village boundaries.<sup>37</sup> Fish and other produce of water bodies are covered under a separate right.<sup>38</sup>

These rights should normally be claimed by the community as a whole or by a sub-group within the community. In case the community as a whole is claiming, rule 11(4) requires that the forest rights committee itself make the application for the right, which is then passed by a resolution to the *gram sabha*. The committee should draw up this application during a meeting of the *gram sabha*. The resolution should list the types of MFP collected and the areas from which they are collected.

The right to minor forest produce includes the following:<sup>39</sup>

- a. Ownership of minor forest produce;
- b. Collect minor forest produce;
- c. Use minor forest produce;

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34. *Id.*, s. 4(3).

35. *Id.*, s. 3(b)/3(c).

36. *Id.*, s. 2(i).

37. *Id.*, s. 3(1)(c).

38. *Id.*, s. 3(1)(d).

39. *Supra* note 36.

- d. “Dispose” (*i.e.* barter or sell) minor forest produce (with some restrictions on transport).

Finally, minor forest produce can be collected from any forest area from where it has been traditionally collected falling both within and outside village boundaries.<sup>40</sup> Where collection of minor forest produce was a part of traditional *nistari* rights, the community can also claim that traditional right and have it recorded.<sup>41</sup> This includes rights that were once recorded under princely states or *zamindars*, but in many areas have been treated as ‘extinguished’ or ‘vested’ in the state since government take-over. The rules have been framed regarding transportation of the minor forest produce. The rules say that minor forest produce can be transported in forest areas by head loads, handcarts or bicycles. Motorised transport is not allowed in forest areas.

#### **Grazing, water and other community rights<sup>42</sup>**

Forest dwellers and forest dwelling tribals have a right to graze livestock.<sup>43</sup> Pastoralist communities (both settled and nomadic) have a right to access forest land on a seasonal basis for similar uses. Claims can be filed for this right by individuals or by the traditional institution of the concerned communities, and should be verified by the *gram sabha* at a time when representatives of that community are present.

The right to access forest land on a seasonal basis will be a right of the community and its members. Where the village itself is making the claim, the forest rights committee should prepare the application, preferably making the application before a meeting of the *gram sabha*; where pastoralist/nomadic communities, or sections of a village, are making the claim, the application should be signed by all their members or by a representative body.

“*Habitat*”<sup>44</sup> (applies only to pre-agricultural and primitive tribal groups).

Under the Act, “primitive tribal groups” (such as the *Juangs*, the *Chenchus*, the *Baigas*, etc.) and “pre-agricultural communities” (such as shifting cultivators and hunter/gatherers) have the right to “habitat and habitation.” This is a community right; the application for it should either be prepared by the forest rights committee (in case the village itself is claiming the

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40. *Ibid*

41. The Forest Rights Act, 2006, s. 3(1)(b).

42. *Id.*, s. 3(1)(d).

43. *Ibid*

44. *Id.*, s. 3(1)(e).

right) or by a representative body of the PTG/pre-agricultural community concerned. The application would include a map of the area being claimed as the habitat of the community. “Habitat” here is defined to mean the traditional area in which these communities have lived, even if that should be inside reserved/protected forests.<sup>45</sup> A right, including community tenure, to a habitat and habitation, though not defined in the Act or the rules can mean:

- The community right to reside inside these forest areas in accordance with their traditions and customs;
- The right to prevent these forests from being destroyed (since that would deprive these communities of their habitat);
- The right to continue socio-cultural, religious and livelihood social activities in these forest areas that made them into a “habitat.”

### **Conversion of unrecorded settlements and forest villages to revenue villages<sup>46</sup>**

Any unrecorded settlement or forest village on forest land has the right to be converted into a revenue village. This is a community right, so the forest rights committee should prepare the application for this right, preferably during a meeting of the *gram sabha*; the *gram sabha* of the village must pass a resolution stating that this village must be converted into a revenue village.

### **Relief and development rights**

There is a right to rehabilitation in case of illegal eviction or forcible displacement.<sup>47</sup> The Forest Rights Act also provides for rights to *in situ* rehabilitation and alternative land in case of illegal eviction or forced displacement.

Eviction is illegal if no notice is served prior to eviction, or if the forest settlement in an area is not complete, or if the settlement is faulty. Secondly, the claim must show that no compensation or rehabilitation is provided. This is to be stated in the claim and then it is the responsibility of the forest department to prove that compensation is being provided. Displaced persons have a right to land for rehabilitation, but only if the land that was taken was not used for its purpose within five years of being acquired, and they were not provided any land at the time of being displaced.

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45. *Id.*, s. 2(h).

46. *Id.*, s. 3(1)(h).

47. *Id.*, s. 3(1)(m) and s. 4(8).



As the forest rights rules do not provide any method by which this rehabilitation/compensation should be provided, the kind of rehabilitation that will be provided is not clear. At the very least, however, these rights should be taken to mean that once they have been evicted/displaced once and occupied forest land for livelihood after that, they cannot be evicted from the land they have occupied as they have a right to on site rehabilitation under section 3(1)(m) and to land compensation under section 4(8).

### **Any other traditional right**

Section 3(1)(l) of the Act provides that “any other traditional right” of forest dwelling communities can be claimed as a right under the Act excluding hunting. This section can be used to claim rights such as:

- shifting cultivation, both individual and collective;
- customary individual or community claims over territory;
- right to use religious sites/burial sites;
- right to collect timber for housing or types of produce not covered under minor forest produce, *etc.*

### **Sanctuaries and national parks: special rights against being moved out by force**

The Act contains special provisions for protected areas. Until now, it was the practice of the forest department to resettle people out of national parks and sanctuaries – especially from tiger reserves – by claiming that they were hurting wildlife. Even where the actual resettlement did not take place, the forest department would use it to threaten people and to prevent the construction of roads, schools, *etc.* inside these villages. This is what happened in places like Sariska tiger reserve. With the Act, this has now changed. The Act provides protection against forcible relocation of people living in protected areas. Notwithstanding the claims by the government and the press, forest dwellers cannot be forced to move out of even tiger reserves in the name of wildlife conservation except with the free, informed consent of the *gram sabha*.<sup>48</sup> The following other conditions apply:

- a. No one can be shifted until the process of recognizing forest rights in that area is complete.<sup>49</sup> For that reason, it is important to keep the government from declaring the process complete until all persons have had their rights recognized.

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48. *Id.*, s. 4(2)(e).

49. *Id.*, s. 4(2)(a).

- b. The areas from which people are to be moved out have to be notified as “critical wildlife habitats.” The central government has to do this through the Ministry of Environment and Forests. However, the Ministry also cannot take this step on its own – it has to convene an expert committee, which should include local experts, and hold public consultations about whether or not the area should be called a critical wildlife habitat.<sup>50</sup> The state government then has to prove (through this committee or otherwise) that unless people are moved out, there will be irreversible damage to wildlife, and there is no other way that this problem can be addressed. This has to be proven for each protected area through scientific and objective investigations. The forest department cannot make that decision on its own any more.<sup>51</sup>
- c. The government (it is not clear whether the central or state government will be responsible) has to prepare a package for rehabilitation of the people who agree to go out. This package has to “provide a secure livelihood” acceptable to them and conform with the national rehabilitation policy, the policy of that state and any other applicable laws and policies.<sup>52</sup> The national policy requires that land should be offered “if available.” Since a secure livelihood has to be provided, cash compensation is not enough. They have to provide land, other resources or at least employment.
- d. After this package is ready, the *gram sabhas* of the area have to give their consent in writing, after they have been informed of all of its provisions. If the government lies to the *gram sabhas*, or tries to pressure them, that makes the resettlement illegal as per the Act.
- e. Finally, nobody should be moved until the land and other facilities at the place they are to be moved to is fully ready.

But what is the scientific basis for reaching the conclusion that coexistence between people and wildlife is not possible, and that relocation is necessary. Forest rights are not about getting *pattas* or rights alone. The fundamental question is who will control forests, and how that control

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50. *Id.*, s. 2(b).

51. *Id.*, s. 4(2)(b).

52. *Id.*, s. 4(2)(d).



will be exercised. The law is but one tool. The Act is like a bargain – the government will give *pattas* and, in exchange, the forest will remain *de facto* under government control. A *patta* is just a piece of paper, and the government will be happy to take it away whenever it wishes. Tribals have to fight for control of the jungle itself. The Act is not for one *patta* or one plot alone – it is for democracy, freedom and justice for India's forests and forest people.

The Act apparently seeks to rectify a “historical injustice to the forest dwelling STS and other traditional forest dwellers who are integral to the very survival and sustainability of the forest ecosystems”. It would seem that the state is finally talking the language of “participatory forest management”, in vogue among some conservationists over the last decade, interlaced with the language of the tribal rights activist. The Act, along with the Rules, 2007, is an excellent attempt at trying to appease two warring parties.

## VI Opinions supporting the Act

Supporters of the Act claim that it will redress the “historical injustice” committed against forest dwellers, while including provisions for making conservation more effective and more transparent. The demand for the law has seen massive national demonstrations involving hundreds of thousands of people.

The Act grants the “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’ ST or other traditional forest dwellers The Act granted the “right of ownership, access to collect, use and dispose of minor forest products that have been traditionally collected within or outside village boundaries” to the STS and traditional forest dwellers, even in the areas deemed protected areas. This was a great relief, as most forest dwellers live in perpetual fear of being booked for forest offences Supporters of the Act take the position that the Act is not a land distribution measure, and further that the Act is more transparent than existing law and so can help stop land grabbing. Regarding wildlife conservation, they have argued that the Act actually provides a clear and explicit procedure for resettling people where necessary for wildlife protection, but also provides safeguards to prevent this being done arbitrarily. Supporters of the Act and others also argue that the provisions in the Act for community conservation will in fact strengthen forest protection in the country. This is said to be because it will provide a legal right for communities themselves to protect the

forest, as thousands of villages are already doing in the face of official opposition.

While supporting the principles of the law, forest rights supporters are not entirely satisfied with the law as finally passed. The recommendations of a Joint Parliamentary Committee on the law were partly rejected, and supporters of forest rights have claimed that some of the rejected clauses were important. In particular, the final form of the law is said to make it easier to exclude some categories of both tribal and non-tribal forest dwellers, to have undermined the democratic nature of the processes in the Act and to have placed additional hindrances and bureaucratic restrictions on people's rights. The law is described as "both a victory and a betrayal".

One year delay in the notification of the Act and the Rules was the subject of considerable parliamentary and political uproar in the winter session of the Parliament in 2007. There were also mass protests across India demanding that the Act be notified in October, 2007 and in November, 2007, a week long sit down protest took place in Delhi with the same demand. On December 31, 2007, the Act was notified and on January 1, 2008, the Rules made under the Act, which provide the procedures for implementing its provisions, were notified.

The people welcoming the Act have a three-pronged argument:

- (a) In India, the STs and forest dwellers have traditionally occupied the lands for centuries and the recognition of their rights to the lands were long overdue. It is estimated that, at present, about 40 lakh tribal and forest dwellers have no legal status to their land.<sup>53</sup> Without any legal documents to the lands they occupy, cultivate, graze their cattle on, use for their '*nistar*', they are extremely vulnerable, for any development purpose or industrial project, they may be evicted without compensation, as has happened several times before.
- (b) The government's thrust on conservation, with the Forest Conservation Act, 1980 (FCA) and the antique and archaic Indian Forest Act, 1927, has not led to the protection of forests. In fact, it is estimated that since 1980, 40,000 hac. of land has been diverted annually for non-forestry purposes,<sup>54</sup> in the period 2001-

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53. Sonu Jain, "Green Light for Tribal Bill Changes", *Indian Express*, Dec. 3, 2006.

54. Smitha Gupta, "Limited Rights", *Frontline*, April 8, 2006.

06 alone, 5.73 lakh hac. were diverted for non-forestry projects. These figures are worth comparing to the fact that when the FCA came into force, 1.41 lakh people occupying 1.81 ha of forest land became encroachers in Madhya Pradesh. Many of them were engaged in prolonged court battles, which itself caused an extensive drain on forest resources<sup>55</sup> and

- (c) The fact that secure tenurial rights for land is known to encourage sustainable management of the land.

Forests around villages practising community forestry in Mayurbhanj, Orissa, are in a far better position than those managed by the state.<sup>56</sup> Sacred groves in several parts of tribal India have been traditionally protected by communities; *vice versa*, degraded groves are usually a symptom of local communities intruded upon by outside government influences.<sup>57</sup> Even if such examples of people caring for their land are not so obviously visible, the opposite is striking and common. People without *pattas* to their land – the bulk of tribal people in large parts of Madhya Pradesh, Chattisgarh, Orissa, Maharashtra and Jharkhand – who work on other people's lands or clear small patches of forest to cultivate, do not show any affinity to sustainable use of resources.

## VII Opinions against the Act

The Act has met with much concern and opposition from environmentalists and wildlife conservationists. Some of this opposition has been motivated by those who see the law as a land distribution scheme that will lead to the handing over of forests to tribals and forest dwellers. But the strongest opposition to the Act has come from wildlife conservationists who fear that the law will make it impossible to create “inviolable spaces”, or areas free of human presence, for the purposes of wildlife conservation, tiger conservation in particular has been an object of concern of Tribal Affairs to supplement the procedural aspects of the Act.

Some people and organisations fear that the Act will undermine the

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55. M. Ramnath, “The Role of Law in Tropical Deforestation”, NC – IUCN, Amsterdam, 2001.

56. M. Ramnanth, “Surviving the Forest Rights Act: Between Scylla and Charybdis”, *EPW*, Mar. 1, 2008, p. 37-42.

57. M. Ramnath, and Savyasaachi, “What is Sustainable Development” Encyclopedia of Sustainability, Both ENDS, Amsterdam; [www.@bothends.org](http://www.@bothends.org)

state of India's fast dwindling forests and wildlife or create other forms of social turmoil. They point out that:

- According to some calculations, giving away even 2.5 ha of land to the STs and forest dwellers will add up to 15 per cent of India's forest area,<sup>58</sup> which we cannot afford to lose.
- If the Act holds true for the NPS and WLS, what then? As most of the NPS and WLS are not yet notified, these cannot be constituted in areas with traditional rights where the *gram sabha* will be the governing authority. Conservation, in terms of increasing inviolate areas, will diminish all over the country, except for the areas declared as "critical wildlife habitat".
- In forest areas, where the Act will be in force, the non-tribal forest dwellers will dominate the tribal population,
- Within villages, social tensions may arise if certain communities are not granted the status of a ST or forest dweller, despite similar histories and livelihood practices in the region.
- In the case of communities that practice *jhum* cultivation, on lands that are regarded as a common property, any limit to land (whether 2.5 or 4 hac.) will be impossible to monitor; similar problems will arise in the case of pastoral communities that return seasonally to the same lands.

Some of the potential drawbacks of implementing the Act are:

- The condition that only those families that can prove residence in an area for over three generations (where generation means "a period comprising of 25 years") before December, 2005 may be difficult for some tribal families/especially if they have moved often within their traditional forest zone for whatever reason (cultivation, bad spirits, clan feuds).
- The Act applies primarily to those who depend on forests or forest lands for bona fide livelihood needs; the term bona fide is explained in the rules as "fulfillment of sustenance needs of self and family through consumption and/or sale of produce from forest land or forest-based uses, and stones and fuel-wood for house or household purposes"; this does away with the status and sustainability of a product in various regions of the country.

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58. H. Dang, "The End of Conservation", *Seminar* 552, Delhi, 2005.

- The Act confers upon the forest dwellers the right to protect, regenerate or conserve or manage any community forest resource, but does not provide them any powers to do so.
- The most disturbing feature of the Act is that it is susceptible to interference by the judiciary and by other authorities. Section 15 of the Act states that this Act “shall be in addition to and not in derogation of any other law in force.” In other words, this provision may lead to a bizarre situation - though forest dwellers will be provided land rights, they might still not be able to exercise their right over their land – since this right will be subject to the provisions of the Indian Forest Act! Also, the judiciary can withdraw the rights provided by the Act. The solution for this is obviously to put the Act under the Ninth Schedule to the Constitution of India.
- It is noteworthy that the Act strictly bans hunting. No writer on this subject has questioned the clause that explicitly excludes the “...traditional right of hunting or trapping or extracting a part of the body of any species of wild animal”. At the same time, the Act does grant “entitlements such as fish and other products of water bodies...”. The water bodies apparently are in no danger of being overexploited. In reality, in many parts of tribal India, as elsewhere, the traditional fishing (with plant poisons, dyke-ing and bailing shallow streams, nets and lines) have been replaced by insecticides, leading to a complete elimination not only of the fish, but also of all the other forms of aquatic life. The Act could have stressed on allowing traditional modes of fishing, which are less detrimental to the wetlands ecology. Similarly, the traditional hunting with bow and arrows, at least of small game and animals that locally multiply and become a nuisance - hare, wild boar, rats and monkeys, to name a few - could still continue without harm to the larger environment. If such small measures are overlooked, people are bound to set poisoned baits and may eventually finish off other unintended animals, as has happened in most protected areas (PAS) with laws forbidding all fishing and hunting. Considerations of how forest people respond to any legislation affecting their lifestyle may provide space for conservationists and tribal rights activists to win together.
- Another point that goes unmentioned is that communities with a strong tradition of hunting, such as the *Koitoors* and *Durwas* of central India, mark their territories with specific hunting routes.

Hunting territories signify a people's ancestral domain, and are respected by all neighbouring tribes in an area: there are instances when a community has moved away from their domain but continue to hold control over it by coming annually to perform the necessary sacrifices and offerings to their Gods, and leading that particular hunt.<sup>59</sup> Despite banning hunting *per se*, which in itself is not in a sound decision, it might be necessary to use the hunting framework to explore the ancestral domains and territories of some of the STs and the traditional forest dwellers. These are not the areas the forest dwellers regularly or traditionally use for *nistar*, but usually beyond them; such spaces are akin to the pastoralists' seasonal journey to a particular spot, claimed but not settled upon.

### VIII Drawbacks in implementation of the Act

Quite a few social activists and conservationists have pointed out that there may be some danger if the Act excludes certain groups of people within a region on the grounds that they do not satisfy all the conditions necessary. The Act would then, unfortunately, become an instrument of eviction and unrest among the very people whom it seeks to help legitimise.

There are cases when the same tribal community is granted a ST status in one state and a Scheduled Caste status in another. Most of the tribal people of the central India belt – *Gonda, Durwas, Khonds, Konda Reddys, Dorlas, etc.* are non-literate, especially in legal affairs and do not easily speak the state language imposed upon them. They would all need competent and sensitive translators who can listen and interpret their claims with sympathy and understanding; considering that we cannot even find enough primary school teachers who perform this much needed role, it is doubtful whether the state is able to perform this challenging task.

The Act needs several safeguards for effective implementation. Some of these measures have been taken into consideration such as keeping “critical wildlife habitats” inviolate. Moreover, it later goes on to add that such critical habitats from which people may be relocated “shall not be subsequently diverted by the state government or the central government or any other entity for other uses”. However, despite the FCA, forest

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59. Ramnath, *supra* note 55.

lands may be diverted by the government for several other purposes such as schools, community census, minor irrigation canals, roads, electric and communication lines, non-conventional source of energy, *etc.*, the only condition for such diversions being that felling of trees should be within 75 per ha (in each case) and it should be recommended by the *gram sabha*.

In most cases, the rules (June, 2007) clarify and often strengthen the clauses in the Act. The *gram sabha* is on the whole given the authority to initiate processes determining the “individual or community forest rights or both...within the local jurisdiction of this Act by receiving claims, consolidating and verifying them and preparing a map delineating the area of each recommended claim...and the *gram sabha* shall, then, pass a resolution to that effect and thereafter forward a copy of the same to the sub-divisional level committee. For the people aggrieved by the resolution of the *gram sabha*, there is the sub-divisional level committee, to whom they may appeal within 60 days; that failing, there is the district level committee, whose decision “on the record of forest rights shall be final and binding”. There is also a “state level monitoring committee to monitor the process of recognition and vesting of forest rights.” Various committees “consist of officers from the departments of revenue, forest and tribal affairs of the state government and three members of the panchayat institutions, of whom two shall be members of the scheduled tribe members and at least one shall be a woman...”

The *gram sabha* that has been given such a huge responsibility in initiating the process of claims, *etc.* is not as trustworthy an institution as it needs to be. Studies in Madhya Pradesh have shown that “accountability is by and large poor in the Panchayat systems in all the districts studied”. It has been remarked that the *sarpanch* is all powerful in the present system and no other person has any say in Panchayat matters. The present system is termed not panchayat raj but *sarpanch raj*. In some districts of Chhattisgarh, where the *sarpanch* seat was reserved for tribal women, many non-literate women friends of the earlier *sarpanch* have been elected; the men are conveniently elected *upsarpanch* (deputy *sarpanch*) and nothing has changed in the power structure.<sup>60</sup> The study goes on to add that “on the basic questions dealing with the awareness of the villagers regarding the existence, functions and the rights of the gram sabha, a very high majority of the people seemed completely ignorant”. If such a body is vested with powers of settling land claims and diverting lands for

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60. *Supra* note 55 at 39.

development projects, it is anybody's guess what the possibilities of misappropriation are.

The government's intention with this Act, to settle the land claims up to December, 2005, does have some other dangers. In the earlier instance, when the Ministry of Environment and Forests (MOEF) set the cut-off date for settlements as the FCA, tribal people were forced to prove occupancy of their land before that date. In Chhattisgarh, there are examples of villages springing up within the core area of a NP well after 1980 but claiming, with political support, that they have been there from long before the cut-off date. The clause demanding residency for at least three generations might be able to save some such spaces from instances of encroachment, but local political clout cannot be dismissed. The cut-off dates have been extended from 1980 to 1993's to 2005 and are known not to be sacrosanct; this might tempt power-hungry leaders to instigate more forest encroachments, with the promise or hope that settlement dates can be extended; this trend has already begun in parts of central India.

With these differing roles between the people and the forests they inhabit, come also the variations in their willingness and ability to protect the natural resources that they collectively inherit. The argument that tenurial security may lead to resource conservation may not necessarily hold true for all groups of people: have we not been through forest areas where no bird calls are heard? For India,<sup>61</sup> Singh describes 461 STs, occupying the most varied of forest and mountain tracts, some sharing the same resources, and some at (implicit) war with one another. These differences translate into how aggressive or passive different tribal groups are, and how willingly they merge with the (dominant) non-tribal community.

Another issue that strikes one at the ground level is the fact that tribal people, like the rest of us, are different from one another. Despite the obvious danger of generalising, reference can be made about the tribal groups' affinity and relationship to forest environments as such.

In the Nilgiris, there are *kurumba* villages that have been re-settled by the forest department in neat rows of houses and given employment in tea plantations; these people have broken off their links with their ancestral forests, differing little from any wage labourer. There is little of the tribal spirit left in these settlements (or "colonies") but much of the ailments

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61. K.S. Singh, *The Schedule Tribe of India* (New Delhi: Oxford University Press, 1994).



and miseries of a big-city slum life. In the Pune district of Maharashtra, the *mahadev kolis* look and behave similarly to the Hindu farmer and raise neither pigs nor eat beef; in the eastern part of the state, some of the *gonds* are so heavily under the spell of puritan non-governmental organisations (NGOs) that they drink their *mahua* secretly! Is the status of ST and forest dweller only a technical and an administrative one, rather than one that pertains to how life is lived and perceived.

### IX Conclusion

It has been stated in the Act that the traditional forest dwellers are “integral to the very survival and sustainability of the forest ecosystem”. This is quite a *volte face* to the previously held views of the government, which decried the destructive tribal cultivation practices, suggesting that it was necessary to “wean the tribals away from shifting cultivation” and a forest dependent way of life. It is curious that along with India’s rise as an economic power today, the government feels need to show that it is conscious of plight of its marginalised people. This is apparently important for India’s image abroad, especially in its relations with other countries, that must be convinced that they are dealing with a modern country that also values human rights.

Combining the tribal rights and an environmental agenda, the government has even recognised that the STs and other traditional forest dwellers have a primary role in sustainability of our ecosystem. Our government also wants “to address the long standing insecurity of tenure and access rights of forest dwelling STs and other traditional forest dwellers including those who were forced to relocate their dwelling due to state development interventions”. According to the 1991 census, the ST population of 67.8 million is 8.1 per cent of the total population.<sup>62</sup> Of the total number of displaced people in India, the STs constitute more than half, a fact that shows that development projects habitually displace tribal people in our country. Between 1961 and 1991, the census also shows that the amount of tribal people owning land declined from a half to a third.

It is remarkable that in none of these myriad cases of displacement of tribal people has the government been able to adequately redress the situation, by giving them an alternative patch of land that has some

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62. Suhas Chakma, “Forest Rights Bill V/s Environmental Extremism”, Asian Centre for Human Rights, Delhi May 4, 2005.

semblance to their original home. This is understandable as such lands are not easily available. Instead, what they have usually been given is “cash compensation” and an opportunity to work as lowly priests in these temples of modern India. That displacement induced by development is on the rise is now corroborated by sufficient research.<sup>63</sup> The Indian government is planning more of such projects all over the country for mining, dams and as special economic zones.

In recent times, we have witnessed the violence of land procurement in Nandigram, Bengal; the ongoing violence surrounding the bauxite mines of Niyamgiri, Lanjigarh, Orissa; land grabs for a steel plant of Posco in Jagatsinghpur in Orissa, steel plant of steel authority of India (SAIL) in Jharkhand, in Lohandiguda, Chhattisgarh and the possible displacement of more than 250 villages due to the Indira Sagar Dam at Polavaram, Andhra Pradesh, to name but a few. All these areas are predominantly inhabited by STs and traditional forest dwellers and have, for the most part, lived in these regions for more than the stipulated three generations required by the Act. Much of these regions will also come under the category of “critical habitats”, some including the WLS and other PAS. However, despite the Act and the Constitution, it is a foregone conclusion that none of these development projects are going to be reconsidered, even if they affect the livelihoods of tribal people or may destroy forever fragile cultures that may be the only link to our distant past: instead, there will be new ways to negotiate such obstacles, with the now familiar combination of a few carrots and lots of stick.

Recently, there are two controversial mining projects in Orissa and both involve diversion of forest land for non-forest purposes. How was forest diversion in Posco’s case allowed when just the opposite was done five months earlier? The contrast has a lot to do with jurisdictional violations where one entity strayed into the domain of another for clearing the mining projects. In Vedanta’s case, the trespasser was the Supreme Court itself. While dealing with a challenge to the alumina refinery set up by the UK-based company in Lanjigarh, the Supreme Court granted forest diversion clearance to the bauxite mining project on the nearby Niyamgiri hills from where the refinery was proposed to get its raw material. The Supreme Court’s order flew in the face of the Forest

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63. Subhas Mahapatra, “Development Reduced Displacement on Rise”, *Asian Tribune*, Sept. 8, 2007.



Conservation Act, under which it was the central government alone that was competent to assess the merits of the proposal to divert forest land for non-forest purpose and decide whether to grant clearance for the project concerned.

The Supreme Court, strictly speaking, could have intervened only after the government had exercised its discretion one way or the other, that too in the event of a challenge to the executive decision. But since the apex court jumped the gun in the Vedanta case, it resulted in the unusual situation in which the government actually overruled the Supreme Court's clearance.

There was no tribal angle to the Posco proposal of diverting 1,253 hectares of forest land for the purpose of mining iron ore as part of an integrated steel plant, which is hailed as the largest foreign direct investment (FDI) anywhere in the country. This is despite the fact that the Meena Gupta Committee set up to examine all issues related to the diversion of forest for Posco came up with conflicting findings on whether it violated the statutory rights of forest dwellers. The issue in contention was not whether any tribal groups resided in the Posco-acquired forest land and, therefore, came under the protection of the Forest Rights Act. Rather, it was about another category of people protected by FRA called "other traditional forest dwellers" (OTFD).

The Gupta Committee was divided on whether any of the non-tribal residents of the affected forest qualified to fall in the category of OTFD. Anybody claiming to belong to the OTFD category will have to fulfill three prescribed criteria:

- They should have primarily resided in the forest for at least 75 years prior to December, 2005.
- They should at present be dependent on the forest or forest land for bona fide livelihood needs.
- They should have been in occupation of forest land in December, 2005.

So, when clearance was granted to Posco on January 31, it was subject, among other conditions, to a "categorical assurance" from the Orissa government that at least one of the three criteria was not fulfilled by those claiming to be dependent on the land in the project area. Since the Ministry of Tribal Affairs is the nodal agency, the issue of enforcement of that law should have been left to the Tribal Affairs Ministry. Thus, if the Supreme Court had overreached itself in the Vedanta case, the

Environment Ministry committed the same jurisdictional lapse in the Posco<sup>64</sup>

In retrospect, it is difficult to imagine that a new legislation granting so many advantages to tribal people will actually be effectively implemented. We have had land surveys since before 1927 when forest dwellers were displaced by the forest department – as it required land for conservation as well as non-forestry activities – to deal with the claims of settlement that are yet to be completed. In stark contrast, the incredible pace at which the development projects are being approved in the past few years, and the forest lands denotified and allotted for creating industrial zones makes one wonder. Often within six months to a year of a proposal, even the reserved forests are denotified and handed over to private companies and industries that shoulder the burden of India's economic growth. The MoEF was not in favour of the Act as it claimed that it would be detrimental to the state of India's forests, and estimates that up to 16 per cent of the country's forests would be lost. This is a commendable stance but one suspects - seeing the diluted form of the environment impact assessment (2006) - that the MOEF is worried about something more tangible: but for the Act, they could have sold the land for development projects for a far better price. India's wildlife is already a vanishing asset as has been proved by the absence of tigers even in the protected areas. The MoEF suggests that the government is going ahead with such an Act mainly to cover up its failure on the development front; handing over the power to settle claims to the *panchayat raj* institutions and various committees may only lead to the local vested interests getting hold of the land resources.

It would almost seem that by handing over so much of land to STs and traditional forest dwellers, the government is moving in the right direction. The Act has appeased the social activists who, despite being well intentioned and concerned about the marginalised communities, have no clue about the intricacies of ecology; as a result, they reflect tribal opinions rather inaccurately and lack a long-term vision of forest management, which is a necessity for the survival of the forest people. Likewise, the Act has been much of the power away from the hardcore conservationists – leaving them only the “critical wildlife habitats”, a minuscule part of the total forest area – and placed the *gram sabha* as a guiding authority, with a little help from our bureaucratic friends. Most

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64 Manoj Mitta/TNN <http://epaper.timesofindia.com>

importantly, the jurisdiction of the central government over its resources has been sidelined, leaving the state government and the more local *gram sabha* to make decisions. This would make it easier for lands and resources to be “negotiated” out of control by any non-tribal (or non-tribal controlled) vested interests.

As mentioned earlier, even in the best of times, an honest bureaucracy, a good and evenly distributed forest cover, a peaceful and vibrant civil society, political leaders concerned about the welfare of others, the implementation of the Act, at least in spirit, is a formidable task. But these are not the best of times and, in fact, the situation in most parts of tribal India is dismal. The red corridor and the maoist threat prevails over all of central India, the security forces fighting a war that is scarcely reported in the media; the people, despite their will, are caught in the midst of this nightmare, even as the government and private companies speculate on their lands. The Act allows the government to explicitly and legally pursue its agenda, which of necessity is dependent on extracting and selling its natural resources at competitive rates, measured in terms of economic growth and not people’s, especially marginalised people’s well-being. It is quite an ingenious way of shaking off all environmental constraints and simultaneously appeasing the tribal rights activists, while keeping India shining image in place.

With the rules notified, one has to take cognisance of the powers vested in the *gram sabha* and village level functionaries. The diversion of lands by the government for several (developmental) purposes needs the approval of the *gram sabha*; in addition, the responsibility of initiating the claims of the STs and forest dwellers rests upon this institution. Due to pit-falls of working with a sub-functional *gram sabha* in most of the *adivasi*-dominated districts, it is imperative that both the government and the NGO sector develop methods to make this institution a vibrant one, one that reflects the will of the people. Simultaneously, various tribal people and forest dwellers need to be explained about the Act and what it entails; their rights as well as their duties in forest lands over which they may now get a legal status; and to enhance and rejuvenate some of their traditions of forest management that have been lost due to their status as “encroachers” for many years. The process of working with the concerned people to explain the long-term implications of the Act is formidable, considering the myriad languages required, apart from a thorough grasp of the technicalities. If this is planned well and executed satisfactorily, there is a possibility that the forest dependent people will have a meaningful future. There should



be scope for stocktaking and bringing in corrective measures during this process of implementing the Act.

A recent newspaper report concludes that India has lost half its tiger population over the past five years. One of the factors that was raised against the Act was that, except for some of the critical wildlife habitats, most of WLS and NPS have not been notified which could be separately notified, much of the protected areas will remain under the governing authority of the *gram sabha*. The exclusion of tiger sanctuaries from the purview of the Act would be welcomed by conservationists but the same is an ambiguous decision, considering the continuously dwindling tiger population in most of the protected areas in the country (except Tamil Nadu). It remains to be seen whether new models for tiger protection will be developed in conjunction with the local communities.

Recently, the decision of the environment ministry to relocate thousands of people out of the 600 plus national parks and sanctuaries has been thwarted as being violative of Forest Rights Act. Guidelines issued were scrapped which was an attempt to short circuit the process of turning protected areas into ‘inviolable areas’.

The Forest Rights Act gives communities a political space in forest governance. For movements, this is an important weapon to assert them and challenge both the present forest authority and forces of capital who move into forests in a big way. Other anti-people forces active in the forests ‘hard-line’ wild life groups, feudal forces, traders, *etc.* need to be challenged.