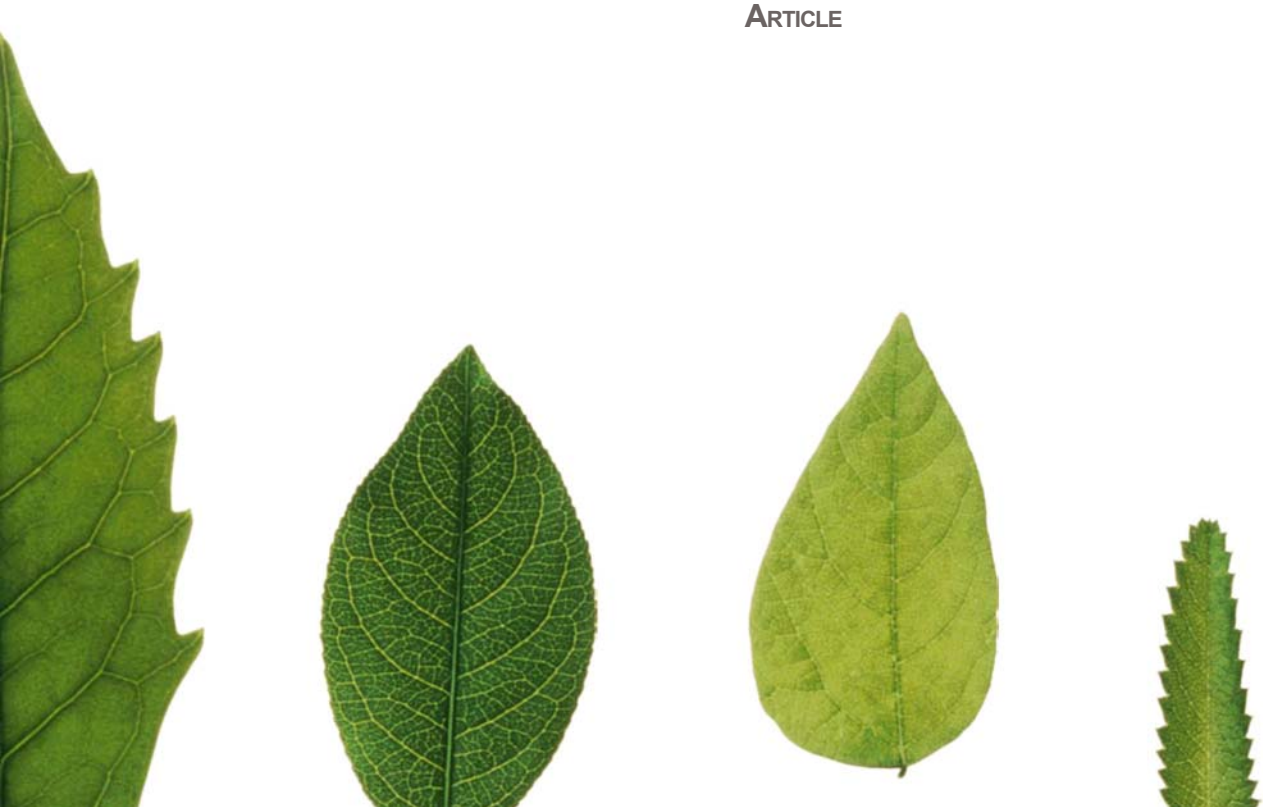
LAW
ENVIRONMENT AND
DEVELOPMENT
JOURNAL
LEAD

DEMOCRACY IN THE FORESTS: THE GOVERNANCE THAT IS TO BE

C.R. Bijoy

ARTICLE



VOLUME
17/1

LEAD Journal (Law, Environment and Development Journal)
is a peer-reviewed academic publication based in New Delhi and London and jointly managed by the
Law, Environment and Development Centre of SOAS University of London
and the International Environmental Law Research Centre (IELRC).
LEAD is published at www.lead-journal.org
info@lead-journal.org
ISSN 1746-5893

Article

DEMOCRACY IN THE FORESTS: THE GOVERNANCE THAT IS TO BE

C.R. Bijoy

This document can be cited as
C.R. Bijoy, 'Democracy In The Forests: The Governance That Is To Be',
17/1 *Law, Environment and Development Journal* (2021), p. 20,
available at http://www.lead-journal.org/content/a1702.pdf

C.R Bijoy, 21 Sri Sakthi Nagar, Vilankurichi Post, Saravanampatti, Coimbatore, Tamil Nadu – 641 035, INDIA,
Email: cr.bijoy@gmail.com

TABLE OF CONTENTS

1 INTRODUCTION

Forest governance in India is in transition; from a colonial regime that hegemonised vast areas post independence to finally a democratic forest governance regime, amidst the push of neoliberal forces, in at least over half of India's recorded forest area. The Ministry of Environment, Forests and Climate Change (MoEFCC) reckoned in 2009 itself that 'The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 assigned rights to protect around 40 million ha of community forest resources to village level democratic institutions. The fine-tuning of other forest-related legislations is needed with respect to the said Act'.[1] Six years later, another study[2] confirmed this figure, with 32.198 million ha located within village boundaries as reported in the State of Forest Report, 1999[3] and at least another eight million ha in the northeastern States. FRA became operational 13 years ago in 2008.

The preamble of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) declared that the law is to rectify the 'historical injustice to the forest dwelling Scheduled Tribes and other traditional forest dwellers who are integral to the very survival and sustainability of the forest ecosystem', a result of not adequately recognising 'forest rights on ancestral lands and their habitat during the colonial period as well as independent India'. The unprecedented nationwide eviction drive triggered by the 3 May 2002[4] MoEFCC order alleging that as 'approximately 12.50 lakh ha of forest land is under encroachment', 'all encroachments which are not eligible for regularisation should be summarily evicted in a time bound manner, and in any case not later than 30th September 2002' resulted in evictions from 152,400.110 ha between May 2002 and March 2004[5] of about 3 lakh forest dwellers. The nationwide struggle triggered by this culminated in the FRA.[6] MoEFCC conceded that there has been 'historical injustice' due to the government's failure to recognize the traditional rights of the tribal forest dwellers which 'must be finally rectified'.[7]

2 FOREST GOVERNANCE: THE RISE OF THE MEGALITH

Forests, a state subject, got elevated in stature and importance when brought under the concurrent list in 1976 by the 42nd Amendment to the Constitution. 'Forests' and 'Protection of wild animals and birds', embedded within the Ministry of Agriculture, came to their own when the full-fledged Ministry of Environment and Forests was constituted in 1985. Climate change was added to its portfolio in 2014. The MoEFCC is to protect and conserve the country's natural resources – its biodiversity, forests and wildlife – and control pollution.

Built upon the colonial edifice, the Indian Forest Act 1927 and a plethora of state level legislations, rules and executive instructions, the forest bureaucracy expanded its dominion over wildlife through the Wild Life (Protection) Act 1972 (WLPA), and over forest diversion through, the Forest Conservation Act 1980

1 Ministry of Environment, Forest & Climate Change (MoEFCC), Government of India (GoI), 'India Forestry Outlook Study' (2009) Asia-Pacific Forestry Sector Outlook Study II, Working Paper No. APFSOS II/WP/2009/06, 75-76 <http://www.fao.org/3/am251e/am251e00.pdf>.

2 Rights and Resources Initiative, Vasundhara and Natural Resources Management Consultants, 'Potential for Recognition of Community Forest Resource Rights Under India's Forest Rights Act: A Preliminary Assessment' (Rights and Resources Initiative, Washington, DC 2015)14, 17.

3 Forest Survey of India (FSI), MoEFCC, 'State of Forest Report 1999' (2000) 19.

4 Letter from Inspector General of Forests to all states and UTs, No 7-16/2002-FC (3 May 2002).

5 Lok Sabha, 'Starred Question No 284: Regularisation of Encroachments on Forest Land' (16 August 2004).

6 CR Bijoy, 'Forest Rights Struggle: The Making of the Law and the Decade After' (2017) 13 (2) Law, Environment and Development Journal 73-93.

7 IA No 1126 in IA No 703 in Writ Petition (C) No 202 of 1995 dated 21 July 2004.

(FCA). The Compensatory Afforestation Fund Act 2016 (CAFA) followed to manage the funds in lieu of forest destroyed through forest diversion to create tree plantations in an equivalent area of revenue land, and if not available, then twice the area in degraded forest land.

The monopoly of MoEFCC over 'forests' came to an end on 17 March 2006 when the Government of India (Allocation of Business) Rules, 1961 was amended[8] designating MoEFCC to 'be responsible for overall policy in relation to forests, except all matters, including legislation relating to the rights of forest dwelling Scheduled Tribes on forest lands' and transferring 'all matters including legislation relating to the rights of forest dwelling Scheduled Tribes on forest lands' to the Ministry of Tribal Affairs (MoTA). With this, MoTA became the nodal ministry for FRA. MoEFCC decision-making since 2006 is limited to only those where forest rights do not feature or are not impinged upon, in which case, the advice of MoTA prevails. Forestland diversions, forest land-use change through afforestation and forest conservation for keeping a forest area inviolate are all matters clearly pertaining to both forest and forest rights, their respective laws read together, and both ministries.

Yet, MoEFCC issued the draft 'National Forest Policy'[9] in 2018 ignoring MoTA and FRA in policy formulation and when, by its own reckoning, over half the forests would fall within the realm of Gram Sabha governance. MoTA, asserting its authority, communicated its objections.[10] Continuing its belligerent march, the MoEFCC proposed an amendment in 2019[11] overhauling the Indian Forest Act 1927, which the Ministry hastily disowned a few months later when faced with widespread opposition for its draconian provisions[12] unheard of in a democracy.[13]

Parallely, retired Forest officials and hard-line conservationists challenged FRA in various High Courts[14] and the Supreme Court[15] in 2008, challenging the authority of the Parliament to enact such a law which the Court declined to concede, and the constitutional validity of FRA which the Court is yet to hear. Inexplicably departing from the issues before it, the Court, in February 2019,[16] directed the finalisation of the list of 'rejected claims' instead, conflating these with the criminal offence of 'encroachment' and ordered their eviction from forest lands.[17] This has been kept on hold[18] with the States conceding flawed implementation, and therefore all the rejected claims required review for FRA compliance.

8 GoI (Allocation of Business) Rules 1961 (as amended up to 5 February 2019) 54, 151.

9 The draft National Forest Policy is plantation-centric investment-seeking forest management through privatisation of forests under private-public participation to increase tree cover and productivity for industrial and other needs.

10 Kumar Sambhav Shrivastava, 'Tribal Affairs Ministry Opposes Centre's Draft National Forest Policy for its "Privatisation Thrust"' (Scroll.in, 17 July 2018) <https://scroll.in/article/886708/thrust-on-privatisation-tribal-affairs-ministry-opposes-centres-draft-national-forest-polic>.

11 Proposed Indian Forest (Amendment) Act 2018 (7 March 2019).

12 Nitin Sethi and Kumar Sambhav Shrivastava, 'Modi Government Plans More Draconian Version of Colonial-Era Indian Forest Act' (The Wire, 21 March 2019) <https://thewire.in/rights/modi-government-plans-more-draconian-version-of-colonial-era-indian-forest-act>.

13 Press Information Bureau, GoI, 'Government Clears Misgivings of Amendment in the Indian Forest Act 1927. Rights of tribals & Forest Dwellers to be Protected Fully: Shri Prakash Javadekar' (15 November 2019) <https://pib.gov.in/PressReleasePage.aspx?PRID=1591814>.

14 Subsequently transferred to the Supreme Court.

15 For a brief on the Court Cases, see <https://forestrightsact.com/court-cases/>.

16 Campaign for Survival and Dignity (CSD), 'Centre Again Totally Silent in Anti-FRA Case, Supreme Court Asks for Reports on Forest Rights Act' (13 February 2019) <https://forestrightsact.com/2019/02/13/centre-again-totally-silent-in-anti-fra-case-supreme-court-asks-for-reports-on-forest-rights-act/>.

17 CSD, 'Centre's Silence Means Millions May Face Eviction Threat After Supreme Court Order on Forest Rights Act' (20 February 2019) <https://forestrightsact.com/2019/02/20/centres-silence-means-millions-may-face-eviction-threat-after-supreme-court-order-on-forest-rights-act/>.

18 CSD, 'SC Puts Eviction Order on Hold: Centre Finally Does Its Job After Nationwide Protests and Anger' (28 February 2019) <https://forestrightsact.com/2019/02/28/sc-puts-eviction-order-on-hold-centre-finally-does-its-job-after-nationwide-protests-and-anger/>.

Meanwhile the recorded forest area increased to 7.67 million ha covering 23.34per cent of the land area from 59.8 million ha in 1949. This includes reserved forests, protected forests and land classified as 'unclassed forests'. However, only 21.67 per cent land area reported actual forest cover. The area under protected area regime[19] of National Parks, Wildlife Sanctuaries, Conservation Reserves and Community Reserves is 16,501,259 ha covering 5.02 per cent of the total land area (or 21.52 per cent of the forests). National Parks with no rights (as all rights are vested in the State government under WLPA) increased from 5 in 1970 to 101 covering 4,056,403 ha, and the Wildlife Sanctuaries with restricted rights increased from 62 in 1970 to 553 covering 11,975,697 ha. The ban on rights in the former and their restriction in the latter are no longer legally valid as FRA overrides these provisions with full recognition of rights, except hunting, on all forestlands. Conservation Reserves, uninhabited government land but accessed by people, increased from 4 in 2007 to 86 covering 385,825 ha while Community Reserves which include private land increased from 7 to 163 covering 83,334 ha during the period.

Carved from within the National Parks and Wildlife Sanctuaries are the high priority Tiger Reserves, an administrative category since the launch of Project Tiger in 1973 with 9 reserves of 911,500 ha, that increased to 31 reserves of 2,925,202 ha in 2007 when it became a statutory category with the 2006 amendment to the WLPA 1972.[20] Tiger Reserves have rapidly increased to 50 covering 71,027.10 ha of which 56.80 per cent area is the Critical Tiger Habitat (CTH) or Core Area which is to be kept inviolate. Of the recorded 2,808 forest villages, 334 are located within these CTHs.[21] The remaining 30,686.98 ha is the Buffer Area. Clearly FRA has not prevented the increase in recorded forest area, nor the Protected Area but has redefined forest governance regime in completely new ways, a total departure from the colonial exclusionary governance approach to an inclusive democratic governance.

3 FOREST GOVERNANCE: THE TIDE TURNED

FRA was applicable to all States and Union Territories (UTs) except the then State of Jammu & Kashmir, but now made applicable with the bifurcation of the State into two UTs, Jammu & Kashmir, and Ladakh, by the Jammu and Kashmir Reorganisation Act, 2019.[22] With this, FRA is now applicable to all the 28 states and 8 UTs without any exception. However, Nagaland under Article 371 (A) and Mizoram under Article 371(G) of the Constitution require their respective State Legislative Assemblies through resolutions to extend the application of any Act of the Parliament related to land and its resources to apply to these States. FRA falls within the ambit of these provisions. As on August 2020, only 20 States and 1 UT reported FRA implementation.

3.1 FRA Implementation Status: Non-implementing States and UTs

The stated official reasons for not implementing FRA[23] in 8 states and 7 UTs, viz. Arunachal Pradesh,[24] Haryana, Manipur, Meghalaya, Punjab and Sikkim,[25] and the UTs of Andaman & Nicobar Islands, Chandigarh, Daman & Diu, Delhi, Jammu & Kashmir,[26] Ladakh and Puducherry are not tenable.

19 Environment Information System (ENVIS) Centre on Wildlife & Protected Areas, Wildlife Institute of India, 'Protected Areas of India' <http://wiienvis.nic.in/Database/Protected_Area_854.aspx>.

20 The Wildlife Protection (Amendment) Act 2006 (WLPA 2006) (IND).

21 Lok Sabha, 'Unstarred Question No 816: Village in Forest Areas' (2018).

22 Jammu & Kashmir legislative assembly did not enact a law similar to FRA.

23 Ministry of Tribal Affairs (MoTA), Monthly Progress Report, August 2020 (2020) 6-8. Punjab, Haryana, Chandigarh and Delhi are not reporting.

24 Arunachal Pradesh government affidavit dated 9 August 2018 to the Supreme Court in WP(C) No 109 of 2008.

25 Sikkim Government affidavit to the Supreme Court dated 7 April 2018 in WP(C) No 109 of 2008.

26 FRA made applicable to the UTs of Jammu & Kashmir and Ladakh on 9 August 2019 through the Jammu and Kashmir Reorganisation Act 2019; FRA included as item 97 of Fifth Schedule to the Act.

Without the clear informed declarations by the concerned Gram Sabhas,[27] the statutory authorities under FRA to determine forest rights, whether located inside or adjoining the recorded forest areas, the reports from the concerned governments alone cannot be taken as final.

All these states and UTs, except for the UT of Lakshadweep, have recorded forest area. All of them, except Lakshadweep and Puducherry, also report forest as land use in many of their villages (see Table).

Of the eight northeast States, only Assam and Tripura are implementing FRA; the remaining are not. Both Nagaland[28] and Mizoram have not extended FRA to their respective States. Mizoram resolved to extend FRA from 31 December 2009 on 29 October 2009, notified into force on 3 March 2010, but then backtracked and revoked this on 19 November 2019.[29] Nagaland is yet to decide. Of these northeast States, except for Manipur and Sikkim where Scheduled Tribes (STs) constitute a third of the population, all the others are overwhelmingly tribal majority states and forested. Despite over three-fourth of Mizoram being actually forest, its recorded forest area is below a third. The 'unclassed forests', a part of the recorded forest area, though not notified as reserved or protected forest, constitute the bulk of the forest with Nagaland at a high 97.29 per cent followed by Meghalaya (88.15 per cent), Manipur (67.63 per cent), Arunachal Pradesh (60.38 per cent), and Mizoram (20.53 per cent).[30] These traditionally community-controlled forests are de facto enjoyed, and continue to be enjoyed unreservedly by communities, a political consequence of their past history of assertion of autonomy. Sikkim is the only State in this region that does not have unclassed forests. However, all these States also have notified forests, the least in Nagaland and the most in Mizoram which might also be accessed by people. All these states without exception report villages using a significant percentage of forestlands (See Table).

The legal fact since a quarter of a century ago is that the 'unclassed forests' too are 'forests' where all the laws pertaining to forest are applicable. This resulted from the 1996 Supreme Court ruling in the Godavarman case that the term 'forest land' in Section 2 of the FCA 'will not only include "forest" as understood in the dictionary sense, but also any area recorded as forest in the Government record irrespective of the ownership'.[31] The legal ambiguity of 'unclassed forests' now stood clarified though the ground reality has not yet changed.[32] The inclusion of 'unclassified forests' in the definition of 'forest land'[33] in FRA along with undemarcated forests, existing or deemed forests, protected forests, reserved forests, Sanctuaries and National Parks reflect this new legal reality. Further, the argument that people anyway enjoy rights, customarily or through state laws, is not a substitute for not complying with FRA. FRA included a specific provision for the northeast, namely 'rights which are recognised under any State law or laws of any Autonomous District Council or Autonomous Regional Council or which are accepted as rights of tribal under any traditional or customary law of the concerned tribes of any State' in the list of forest rights.[34] As community lands, including unclassed forests, are increasingly diverted for various infrastructure projects, not being brought under the relevant laws would make these forestlands ineligible for compensation or resettlement leading to increased disaffection and conflicts. This is so when the States assert its eminent domain over the lands resorting to the use of either FCA or land acquisition laws, or even when the community actually gives prior informed consent.

3.2 FRA Implementation Status: Implementing States and UTs

Performance in implementing FRA can be determined only from the extent to which the objectives of FRA are achieved. The preamble of the Act unambiguously states its goal: To recognize and vest the forest rights

27 FRA, s 2(g) read with 2(p).

28 Nagaland government affidavit dated 16 April 2018 in the Supreme Court in WP(C) No 109 of 2008.

29 Ishan Kukreti, 'Mizoram Revokes Forest Rights Act'(Down to Earth, 20 November 2019) <https://www.downtoearth.org.in/news/forests/mizoramrevokes-forest-rights-act-67829>.

30 FSI, 'India State of Forest Report 2019' (2019) 4.

31 TN Godavarman Thirumalpad v Union of India & Ors (1997) 2 SCC 267.

32 CR Bijoy, 'Forest Rights in the North East. Inching towards Exclusion' (2019) 54(45) Economic & Political Weekly 17-19.

33 FRA, s 2(d).

34 ibid s 3(1)(j).

and occupation in forest land in forest dwelling Scheduled Tribes and other traditional forest dwellers who have been residing in such forests for generations but whose rights could not be recorded. It declares its operative part: FRA is an Act 'to provide for a framework for recording the forest rights so vested and the nature of evidence required for such recognition and vesting in respect of forest land'.

The performance of States and UTs in implementing FRA can be determined only from the extent of forestlands recognized and titled to the habitations concerned. This area is the 'Community Forest Resource' (CFR) defined as the 'customary common forest land within the traditional or customary boundaries of the village or seasonal use of landscape in the case of pastoral communities, including reserved forests, protected forests and protected areas such as Sanctuaries and National Parks to which the community had traditional access'.[35] This area vested in the Gram Sabha is what the Gram Sabha, as the statutory authority under FRA, is 'to protect, regenerate or conserve or manage'[36] by exercising its power[37]

- to protect wildlife, forest and biodiversity,
- to protect adjoining catchment area, water resources and other ecologically sensitive areas,
- to ensure preservation of their habitats from destructive practices and
- to regulate access to the community forest resources.

The CFR area[38] includes the area recognized as individual forest rights of the members of the Gram Sabha,[39] and as community rights,[40] fully or partially as the case may be.

Institutional mechanism: FRA provides an institutional mechanism consisting of the Gram Sabha and its Forest Rights Committee to determine the rights, a Sub-Divisional Committee to examine the Gram Sabha decisions for their compliance with the law and the District Level Committee to finally approve and issue the title of rights to the individuals and to the Gram Sabha while incorporating them in the record of rights.

FRA stipulates that two-thirds of the Forests Rights Committee members of 10-15 are to be STs if there are STs and a third of them shall be women. Half of the six-member Sub-Divisional Committees and District Level Committees are nominated by the concerned District Panchayat who are STs, preferably forest dwellers, of whom one is to be a woman or forest dwellers if there are no STs. The State Level Monitoring Committee is to have three STs nominated from the State Tribal Advisory Council of whom one is a woman, and in its absence, nominated by the state government. The Gram Sabha decisions require 50 percent quorum of whom a third are to be women.

The transparent open access democratic bottom-up process of this multi-institutional structure with complementary roles is a distinct departure from the all too familiar opaque hierarchical undemocratic centralized command and control decision making. The Gram Sabha is to constitute a committee[41] to execute its decisions to protect, conserve and manage the CFR area that falls within its jurisdiction and develop a Gram Sabha approved management plan. This plan is to be incorporated into the Forest Department's forest working plan.[42] The State Level Monitoring Committee is to monitor the implementation. The number of villages that have completed this process fully marks the culmination of FRA implementation and the commencement of forest governance as envisaged by FRA.

Despite over a decade of operationalisation, this indicator of FRA performance, is completely missing, i.e. democratization of forest governance by establishing Gram Sabha as the legal authority to govern forests.

Potential CFR Area: MoEFCC had indicated that 'around 40 million ha of community forest resources

35 ibid s 2(a).
36 ibid s 3(1)(i).
37 ibid s 5.
38 ibid s 3(1)(i).
39 ibid ss 3(1)(a), (f), (g), (h), (m) and 4(8).
40 ibid s 3(1)(b)-(e), (g), (h), (j)-(l).
41 FRA, r 4(1)(e).
42 ibid r 4(1)(e), (f).

to village level democratic institutions' are to be transferred to about 1.79 lakh villages (See Table). FSI State of Forest Report 1999 reports 32.198 million ha and Census 1991 records 32.348 million ha as forestland inside revenue boundaries in villages. These exclude forestlands in Arunachal Pradesh, Manipur, Meghalaya, Mizoram, and Sikkim, and the UTs of Jammu & Kashmir, Ladakh, Puducherry and Lakshadweep. Census 2001, on the other, records 30,241 million ha, but excludes data from Arunachal Pradesh, Manipur, Meghalaya, and Mizoram and the UTs of Lakshadweep and Puducherry. These forestlands within village revenue boundaries when added to the figures for (a) the forestlands falling outside the village revenue boundaries over which communities have claim and (b) the missing data of the states and UTs not accounted for in these estimates, makes the MoEFCC estimate of 40 million ha a very conservative estimate of the minimum potential CFR area.

As of August 2020,[43] FRA recorded 5,252,328.17 ha, just 13.1 per cent of this minimum potential area and 6.84 per cent of recorded forests. Of this, 67.84 per cent or 3,563,385.77 ha is community rights, while the remaining (1,688,942.17 ha) is titled to individuals.

The Table provides the State and UT wise potential number of villages, the minimum potential CFR area, area recognised under FRA and corresponding percentage performance in the descending order. In the absence of better data, this at best is a crude indicator of performance. The area that is recognized or mandatorily to be recognized as CFR rights is not known. Very few CFR rights are recognized; where recognized, it is not reported separately but merged with community rights area which are partially or fully part of CFR area. Moreover, community rights may overlap with each other. While CFR area is the forestland within the traditional or customary village boundaries, the community rights pertain to accesses to various resources within this CFR area, and sometimes outside it as well. Therefore, the area recognized as community rights is not CFR area; in reality the total area is considerably lower than reported. Nor is it known how many villages have received CFR titles. Given all these limitations, Chhattisgarh, Gujarat, Maharashtra, Tripura and Madhya Pradesh are the top five performers, while Andhra Pradesh, Telengana and Odisha are in the middle category and the rest have hardly implemented FRA. In terms of percentage of the State's forest area recognised under FRA, Tripura, Gujarat, Maharashtra and Chhattisgarh tops the list, while Telengana, Madhya Pradesh, Andhra Pradesh, Odisha, Jharkhand and Uttar Pradesh are in the middle category, and the rest are laggard.

Status of FRA: Performance by Area and Claims

S. No	State	Forest Rights							
						Claims under FRA			
		Potential No of Villages[44]	Potential area[45] (ha)	Area recognised (ha)[46]	Percentage recognition	Number of claims	Titles distributed	Claims rejected	Claims disposed off
All India		**179,230**	**40,000,000**	**5,252,328.17**	**13.1**	**4,253,089**	**1,85,911 (46.69%)**	**1,755,705 (41.28%)**	**3,741,616 (87.97%)**
1	Chhattisgarh	9,727 (2001)	1,003,195 (2001)	1,165,999.23	116.23	890,240	423,218 (47.54%)	461,590 (51.85%)	884,808 (99.39%)
2	Gujarat	4,815 (2001)	1,255,856 (2001)	530,524.38	42.24	190,056	94,283 (49.61 %)	62,256 (32.76%)	156,539 (82.36 %)
3	Maharashtra	16,610 (2001)	3,613,880 (2001)	1,266,499.90	35.05	374,716	172,116 (45.93%)	45,525 (12.15%)	217,641 (58.08%)

43 Available as on December 2020, see MoTA (n 23) 3.

44 Villages with forest land within village boundary are as per census 2001; where not available, the figures from 'State of Forest Report 1999' are provided. Adapted from Rights and Resources Initiative (n 2)14, 17.

45 ibid.

46 MoTA (n 23) 3.

4	Tripura	652 (2001)	540,912 (2001)	186,266.11	34.44	200,973	127,986 (63.68 %)	68,657 (34.16%)	196,643 (97.85%)
5	Madhya Pradesh	18,953 (2001)	3,230,528 (2001)	923,732.47	28.59	627,453	257,964 (41.11 %)	358,767 (57.18%)	116,731 (98.29%)
6	Andhra Pradesh[47]			280,422.06		181,508	98,049 (54.02%)	75,927 (41,83%)	173,976 (95.85%)
7	Telengana	5,616 (2001)	2,596,732 (2001)	305,270.16	22.56	186,679	94,360 (50.55%)	83,757 (44.87%)	178,117 (95.41%)
8	Odisha	28,777 (2001)	2,302,706 (2001)	360,422.31	15.65	636,805	446,013 (70.04%)	147,698 (23.19%)	593,711 (93.23%)
9	Jharkhand	16,452 (2001)	1,994,387 (2001)	104,066.87	5.22	110,756	61,970 (55.95%)	28,107 (22.67%)	90,077 (81.33%)
10	Uttar Pradesh	16,649 (2001)	1,535,232 (2001)	56,516.80	3.68	93,644	18,555 (19.81%)	74,945 (80.03%)	93,500 (99.85%)
11	Kerala	320 (2001)	911,299 (2001)	14,041.08	1.54	44,249	26,430 (59.73%)	12,703 (28.71%)	38,503 (87.01%)
12	West Bengal	10,124 (2001)	630,135 (2001)	8,735.66	1.39	142,081	45,130 (31.76%)	96,587 (67.98%)	141,717 (99.74%)
13	Rajasthan	9,441 (2001)	2,579,446 (2001)	24,574.09	0.95	75,855	38,110 (50.24%)	36,299 (47.85%)	74,409 (98.09%)
14	Karnataka	7,450 (2001)	2,659,318 (2001)	19,817.16	0.75	281,349	16,073 (5.71%)	180,956 (64.32%)	197,029 (70.03%)
15	Tamilnadu	1,808 (2001)	1,582,693 (2001)	3,483.24	0.22	33,988	6,387 (18.79%)	11,742 (34.55%)	18,129 (53.34%)
16	Himachal Pradesh	9,079 (2001)	1,390,704 (2001)	1,921.35	0.14	2,903	164 (5.65%)	47 (1.62%)	72 (2.48%)
17	Goa	137 (2001)	84,031 2001)	35.15	0.04	10,136	25 (0.25%)	47 (0.46%)	72 (0.71%)
18	Uttarakhand	6,536 (2001)	691,488 (2001)	0	0	6,665	155 (2,33)	6,510 (97.67%)	6,665 (100%)
19	Bihar	NA	438,598 (2001)	NA	NA	8,022	121 (1.51%)	4,215 (52.54%)	4,336 (54.05%)
20	Assam	3,693 (2001)	253,683 (2001)	NA	NA	155,011	58,802 (37.93%)	NA	58,802 (37.93%)
Union Territories									
1	Dadra & Nagar Haveli[48]	61 (2001)	21,132 (2001)	NA	NA	5,317	2,535	NA	NA (at least 2,535)

47 Telengana became a separate state only on 2 June 2014. Pre-2014 Andhra Pradesh data includes Telengana.

48 Dadra and Nagar Haveli affidavit of 11 April 2018 in WP(C) No 50 of 2008.

Not implementing									
States									
1	Haryana	92 (2001)	10,546 (2001)	0	0	0	0	0	0
2	Punjab	399 (2001)	39,815 (2001)	0	0	0	0	0	0
3	Arunachal Pradesh	2,367 (2001)	NA	0	0	0	0	0	0
4	Manipur	1850 (1999)	NA	0	0	0	0	0	0
5	Meghalaya	3927 (1999)	NA	0	0	0	0	0	0
6	Sikkim	305 (1999)	66,428 (2001)	0	0	0	0	0	0
Union Territories									
1	Andaman & Nicobar Islands	144 (2001)	31,010 (2001)	0	0	0	0	0	0
2	Chandigarh	6 (2001)	180 (2001)	0	0	0	0	0	0
3	Daman & Diu	5 (2001)	525 (2001)	0	0	0	0	0	0
4	Delhi	16 (2001)	4,733 (2001)	0	0	0	0	0	0
5	Jammu & Kashmir	1,872 (2001)	659,532 (2001)	0	0	0	0	0	0
6	Ladakh			0	0	0	0	0	0
7	Lakshadweep	0	0	0	0	0	0	0	0
8	Puducherry	0	0	0	0	0	0	0	0
Not applicable									
1	Nagaland	669 (2001)	63,136 (2001)	Not applicable	Not applicable	0	0	0	0
2	Mizoram	683 (1999)	NA	Not applicable	Not applicable	0	0	0	0

NA: Not available

Demarcation of the area that constitutes the jurisdiction of the Gram Sabha, which ought to have been the first step in the implementation of FRA, is missing or at best relegated as the last step if at all.

Claims: Significantly, the claims-centric narrative is made the official mainstream FRA performance narrative as though FRA is about submitting applications, their processing, approval and issue of titles when FRA is about demarcating area to be brought under the governance of the villages.

As of August 2020,[49] 87.97 per cent (3,741,616) of the 4,253,089 claims have been disposed off, 41.28 per cent (17,557,05) rejected and titles issued to 48.69 per cent claims (1,985,911) leaving just 12.03 per cent claims pending. Of the 20 states implementing FRA, Uttarakhand disposed off all the claims, while 12 states are slated to dispose off all claims with above 80 per cent disposal of claims. Another 5 States are in the

49 MoTA (n 23) 10.

middle category having disposed off 30 per cent to 70 per cent claims; only 2 are laggard. Yet FRA implementation is widely considered to be quite poor due to high rejections, and drastic reduction in the area recognized and titled when compared to what were claimed and approved by the Gram Sabha.

The claims of the Other Traditional Forest Dwellers (OTFD) have almost been totally ignored. The popular belief that this is a tribal rights law notwithstanding, the proof of three generations of residence in the region equated to 75 years prior to 2005 (before 1930) instead of actually three generations that Gram Sabhas can easily vouch being the problem. OTFDs, besides non-tribals, also include Adivasis not included in the ST list, or those included but not in the area where they reside (area limitation). The FRA stipulation that the titles for individual rights are to be 'in the name of both the spouses in case of married persons', a major step at gender justice, has not been taken notice of as important in FRA performance.

The States informed the Supreme Court in the ongoing challenge to FRA that large number of claims was wrongly rejected[50] raising the specter of tardy FRA implementation.

The 10 States that have disposed off above 90 per cent of claims are also the ones that have the highest rejection rate, ranging from 97.67 per cent in Uttarakhand to 34 per cent in the case of Tripura. Odisha is the odd State with 23.18 per cent rejections when 93.25 per cent claims are disposed off. Bihar, Karnataka and Tamilnadu in that order have rejected more than half of the claims they have disposed off. Jharkhand, Gujarat and Maharashtra have relatively lower rejection rates.

50 Debayan Roy, 'Eight States Tell Supreme Court they Wrongly Rejected Claims of Tribals Over Forest Land' (The Print, 13 September 2019) <https://theprint.in/judiciary/eight-states-tell-supreme-court-they-wrongly-rejected-claims-of-tribals-over-forest-land/291041/>.

4 FOREST GOVERNANCE: LOCATING THE BREACH

Implementing a law successfully requires dealing with two critical factors. The first is locating and addressing those that run counter to the very intent of the law itself in order to create a conducive environment to implement the law. The second is addressing the impediments observed to implement the law smoothly.

MoTA held a number of regional and national review meetings and consultations.[51] State and non-state actors have identified and assessed implementation problems.[52] Studies have critically examined the law and its interpretations, its application and issues arising from them.[53] MoTA has been issuing directions, clarifications, guidelines and advisories[54] besides amending FRA Rules in 2012,[55] all of which dealt with a plethora of misinterpretations and

51 Ministry of Tribal Affairs, 'Archives' <https://tribal.nic.in/archiveFRA.aspx>.

52 eg Council for Social Development, New Delhi, 'Summary Report on Implementation of The Forest rights Act' (2010); MoEFCC and MoTA, 'Manthan: Report of the National Committee on Forest Rights Act' (2010); Community Forest Rights-Learning and Advocacy Process (CFR-LA), 'Promise and Performance: 10 Years of the Forest Rights Act in India' (2016); T Haque, 'Securing Forest Rights and Livelihoods of Tribals: Challenges and Way Forward' (2020) National Institute of Rural Development and Panchayati Raj, SRSC Policy Paper – 2/2020 <http://nirdpr.org.in/nird_docs/srsc/srsc310820n.pdf>.

53 eg Geetanjoy Sahu, Tushar Dash and Sanghamitra Dubey, 'Political Economy of Community Forest Rights' (2017) 52(25-26) Economic & Political Weekly 44-47; Neema Pathak Broome, Nitin D Rai and Meenal Tatpati, 'Biodiversity Conservation and Forest Rights Act' (2017) 52(25-26) Economic & Political Weekly 51-54.

54 MoTA, Forest Right Act (2006-20) <https://tribal.nic.in/fra.aspx>.

55 MoTA, Notification dated 6 September 2012 <https://tribal.nic.in/FRA/data/FRARules.pdf>.

misinformation[56] and clarifying some of the ambiguous terms and provisions. The obstructions to FRA implementations can be broadly categorized into:

(a) Institutional resistance: Resistance from the forest bureaucracy, from MoEFCC to that of the local forest officials, Revenue Department abrogating responsibility and disinterested Tribal Department;

(b) Misinterpretation of and ambiguity in some provisions in the law: Most have been addressed while some such as demarcation of habitat rights of Particularly Vulnerable Tribal Groups and Critical Wildlife Habitats are in progress;

(c) Institutional issues in the structure and functioning of the Gram Sabhas, Forest Rights Committees, Sub-Divisional Level Committees, District Level Committees and State Level Monitoring Committees: This includes wrong constitution, lack of awareness and training, malfunctioning and nonfunctioning, lack of monitoring and supervision, non-allotment of resources, and weak functioning of the nodal institutions, MoTA and the State Tribal Department;

(d) Application of the law: Violations, misapplication or non-application of the provisions of the law, incompleteness and delays in processing;

(e) Litigations:[57] Challenge to the constitutional validity of FRA and the eviction order of claimants whose claims are rejected now kept on hold by the Supreme Court; numerous cases related to the application of FRA such as violations of specific provisions, non-implementation, wrong implementation or challenges to implementation at the lower courts;

These are to be seen within the context of colonialism, post-independence continuance of colonial forest regime transforming the forested region into an internal colony[58] brimming with repression, violence, displacement and struggles.[59] FRA culminated from a nationwide democratic struggle to decolonize and establish democratic governance. However, neoliberalism attempts 'to supplant the fledgling democratisation of forests by a virtual coupe with State assistance for the takeover of forests and its governance to serve the interests of capital, the business, and investors'.[60] This specifically takes the form of -

(a) forest diversion for infrastructural development and development projects - mining, energy, irrigation and dams, quarrying etc.

(b) afforestation for carbon sequestration aimed at the global carbon market boom in the future once country obligations are in place, and

(c) the leisure industry's march into the protected areas with recreation, entertainment, sports, and tourism products for the burgeoning affluent with the tiger singularly targeted depopulating Critical Tiger Habitats for creating inviolate area.

All of these are executed by MoEFCC and the forest bureaucracy who de facto also control the forest rights recognition process given their hegemony over the forests. MoTA and the state tribal departments, though the nodal institutions to implement FRA, are

56 See Lovleen Bullar, 'The Indian Forest Rights Act 2006: A Critical Appraisal' (2008) 4(1) Law, Environment and Development Journal 20-34.

57 Shomona Khanna (ed), 'Compendium of Judgements on the Forest Rights Act 2007-2015' (MoTA 2015) <https://tribal.nic.in/FRA/data/CompendumofJudgementson-FRA.pdf>.

58 K Siripurapu and others, 'The Political Ecology of Forest Rights Act, 2006 - Internal Colonialism, the Main Challenge for Democratic Decentralization of forest resource governance in India' (2016) <https://www.researchgate.net/publication/294420766>.

59 CR Bijoy, 'Forest Rights Struggle: The Adivasis Now Await a Settlement' (2008) 51 American Behavioral Scientist 1755.

60 CR Bijoy, 'The Forest Rights Struggle and Redefining the Frontiers of Governance: Dismantling Hegemony, Restructuring Authority, and Collectivising Control' in Varsha Bhagat-Ganguly (ed), The Land Question in Neoliberal India - Socio-Legal and Judicial Interpretations (Routledge 2020) 75-100.

the weakest in the administrative hierarchy involved with FRA.

4.1 Forest Diversion

4.1.1 Diversion for Non-forestry Purposes

Under pressure from the rights holders,[61] MoEFCC issued an advisory in 2009[62] to the States listing the mandatory requirements for any proposal to be eligible for forest diversion for non-forestry purpose under the FCA. The Gram Sabhas within whose jurisdiction the forest area that is proposed to be diverted is located are to certify the completion of FRA and consent to the forest diversion. The State Government is to certify the completion of FRA; that diversions for development facilities,[63] and the rights recognition of Primitive Tribal Groups (Particularly Vulnerable Tribal Groups or PVTGs) and Pre-Agricultural Communities[64] including habitat and habitation rights are completed; that the project proposal for diversion is placed before Gram Sabha and consent obtained with 50 per cent quorum. These are to be attached to the proposal along with a letter from each of the concerned Gram Sabha indicating that all formalities/ processes under the FRA have been carried out. However, this advisory was not incorporated as amendments to FCA Rules until years later.

The Supreme Court in Orissa Mining Corporation Ltd. vs. Ministry of Environment & Forest & Others ruled in 2013[65] that full implementation of FRA and Gram Sabhas' consent for forest diversion were mandatory amongst others to consider the proposal itself. With 12 villages denying consent, this proposal was shelved. The Court reiterated that the 'Gram Sabha is also free to consider all the community, individual as well as cultural and religious claims'. The Supreme Court affirmed MoTA Guidelines of 2012[66] reproducing it in paragraph 49 of the judgement thus: 'In case, any evictions of forest dwelling Scheduled Tribes and other traditional forest dwellers have taken place without settlement of their rights due to such major diversions of forestland under the Forest (Conservation) Act, 1980, the District Level Committees may be advised to bring such cases of evictions, if any, to the notice of the State Level Monitoring Committee for appropriate action against violation of the provisions contained in Section 4(5) of the Act'.

Since operationalisation of FRA in 2008 to 2019, 399,411 ha[67] have been diverted for non-forest activities according to e-Green Watch of MoEFCC. The Ministry provided far lower figure of 251,727.22 ha[68] in the Rajya Sabha based on data available at Parivesh[69] of MoEFCC which now is updated as 253,179.66 ha.[70] All the 20 States and 1 UT implementing FRA have diverted forests during this period. Of the non-implementing 8 States and 7 UTs, forest diversion took place in Arunachal Pradesh, Haryana, Punjab, Manipur, Meghalaya and Sikkim and in the UTs of Andaman & Nicobar Islands, Chandigarh, Daman & Diu, and Delhi. Punjab stands out with about a fifth of its forests being diverted. In the two states where FRA is not made applicable, forest diversion took place in Mizoram during the brief period 2009 to 2019 when

61 Bijoy (n 6) 85.

62 Letter from Sr. Assistant Inspector General of Forests to all states except J&K, and all UTs (3 August 2009) <http://forestsclearance.nic.in/writereaddata/public_display/schemes/981969732$3rdAugust2009.pdf>.

63 FRA, s 3(2).

64 FRA, s 3(1)(e).

65 Orissa Mining Corporation Ltd v Ministry of Environment & Forest (2013) 6 SCC 476.

66 Letter from MoTA to all state governments except J&K, and all UTs (12 July 2012) <https://tribal.nic.in/FRA/data/Guidelines.pdf>.

67 e-Green Watch, MoEFCC, 'FCA Projects, Diverted Land, CA Management: State-Wise Summary of FCA Projects' <http://egreenwatch.nic.in/FCAProjects/Public/Rpt_State_Wise_Count_FCA_projects.aspx>.

68 Rajya Sabha, 'Unstarred Question No 2445: Diversion of Forest Lands' (2020).

69 This 'single window hub' of MoEFCC 'automates the entire tracking of proposals' for all clearances by the environment ministry including forest clearance, see MoEFCC, 'List of Proposals submitted Online by User Agencies' <http://forestsclearance.nic.in/OnlineReport.aspx>.

70 This includes 17,480.86 ha diverted for defence projects and another 2,746.40 ha not uploaded in addition to the 232,952.4 ha in the site. See CR Bijoy, 'How Land Diversion Laws Threaten Forests and Forest Dwellers' (IndiaSpend, 25 September 2020) <https://www.indiaspend.com/how-land-diversion-laws-threaten-forests-and-forest-dwellers/>.

FRA was made applicable but not implemented, while no diversion took place in Nagaland. There was nil diversion in Jammu & Kashmir, Ladakh and Puducherry. There are no forestlands to divert in Lakshadweep. Most have diverted less than one percent of their recorded forest area during this period. Goa, Himachal Pradesh and Uttarakhand have diverted more forestland than they recognised under FRA.

Considering widespread non-recognition of CFR areas and the studies reported,[71] most diversions are in gross violation of FRA, MoEFCC advisory of 2009 and the Orissa Mining Corporation judgement of the Supreme Court. The District Collector is to ensure FRA implementation and obtain prior informed consent from the Gram Sabhas, and certifies compliance with these conditions. The District Level Committee under FRA, headed ironically by the same District Collector, is to inform the State Level Monitoring Committee if any evictions of forest dwellers have taken place without settlement of their rights due to diversions of forestland under FCA where the District Collector is complicit. This conflicting interest and role placed on the District Collector vitiates both the laws.

Contrary to the law, MoEFCC permitted Himachal Pradesh in 2012[72] to submit forest diversion proposals with a District Collector's certificate stating that there are no FRA claims, though factually incorrect,[73] on the basis of the State government's false argument that forest rights have been settled long back under the colonial government. In 2013[74] MoEFCC exempted linear projects like construction of roads, canals, laying of pipelines/optical fibres and transmission lines etc. unless PVTG's recognised rights are affected, from obtaining Gram Sabha consent despite forest rights not falling within its purview and FRA not providing any exemption whatsoever. MoTA affirmed this in 2014[75] and clarified that 'no agency of the Government has been vested with powers to exempt application of the Act in portion or in full'.[76] In 2014[77] MoEFCC exempted the application of FRA on forests notified less than 75 years prior to 13 December 2005 in villages with no STs for purpose of forest diversion requiring only the District Collector's certificate certifying this as such. When forests are notified is simply not relevant; FRA only requires that non-tribal forest dwellers prove their residence in the region for 75 years prior to 2005.[78] MoTA reiterated[79] that FRA 'does not provide any scope to any executive agency for any kind of relaxation of the applicability' of the FRA, that this 'conveyed a message that the Government is against fair implementation of the Forest Rights Act' and 'this is not desirable in the interest of peace and governance in forest areas'. Following in the footsteps of MoEFCC, the Ministry of Mines issued a circular on 5 January 2017 misinforming all the State governments and UTs that MoTA is not 'insisting on FRA compliance for grant of lease' but instead it is enough that conditions for FRA compliance be incorporated into the mining lease deeds for forest clearance by MoEFCC. This violates both FRA and the 2009 MoEFCC order.

FCA Rules amended in 2014[80] incorporated the 2009 MoEFCC forest diversion order entrusting the District

71 eg Mridhu Tandon and Rakesh Singh, 'Analysis of Forest Diversion in India, 2019, January-June' (2019) 3(1) Legal Initiative for Forest and Environment <https://thelifeindia.org.in/upload/files/LIFE%20-%20Forest%20Diversion%20Recommendation%-202019%20%28Jan-June%29_%20Web.pdf>.

72 Letter from Assistant Inspector General of Forests to Principal Secretary (Forests), Himachal Pradesh (20 September 2012) <http://forestsclearance.nic.in/writereaddata/public_display/schemes/1876895711$-guideline%2020%20sept%202012.pdf>.

73 Himachal Pradesh issued 164 titles out of 2,903 claims for 1,921.35 ha, see MoTA (n 23) 3.

74 Letter from Assistant Inspector General of Forests to all states and UTs (5 February 2013) <http://forestsclearance.nic.in/writereaddata/public_display/schemes/666873934$Diversion%20of%20forest%-20land05022013.pdf>.

75 Letter from Director, MoTA to all states and UTs (7 March 2014) <https://tribal.nic.in/FRA/declarations-Clarificati-ons/25PositionoflawagainstMoEFCC-circular-dated3rdAug2009dated07March2014.pdf>.

76 Letter from Deputy Secretary, MoTA (21 October 2014) <https://tribal.nic.in/FRA/declarationsClarifications/22Guidelinefordiversionofforestlandfornon-forestpurposerdated21Oct2014.pdf>.

77 Letter from Director, MoEFCC to all states and UTs (28 October 2014) <http://forestsclearance.nic.in/writereaddata/public_display/schemes/1717277111$Guideline.pdf>.

78 Letter from the Under Secretary, MoTA to all states (9 June 2008) <https://tribal.nic.in/FRA/declarations-Clarifications/Clarification.pdf>.

79 MoTA, DO No 23011/18/2014-FRA (12 November 2014).

80 MoEFCC, Notification dated 14 March 2014.

Collector with completing the recognition and vesting of forest rights, obtaining Gram Sabha consent for the proposed forest diversion and forwarding them to the Conservator of Forests recommendation. With this, the District Collector's compliance certificate replaced the actual original list of certificates from the Gram Sabhas in the proposal. Rather than completing the FRA implementation and obtaining Gram Sabha consent, the focus turned to the manufacture of the District Collector's certificate within the time frame stipulated by FCA Rules.[81] The Rules were further amended in 2016[82] elaborating what the District Collector is to ensure. MoEFCC further clarified in 2019[83] that 'as per FCA Amendment rules 2016, compliance under FRA is not required for consideration of 'in-principle approval', instead FRA compliance is required only for final and formal approval (Stage 2).[84] MoTA countered[85] that 'this would prove to be a fait accompli' and 'it has not been endorsed to MoTA who is the competent Ministry relating to FRA' while also pointing out that this would be an offence. MoEFCC, quick to harmonise FCA when it comes to forest diversion for non-forest activities, within days of enactment of Mineral Laws (Amendment) Act, 2020[86] that permitted continuance of 'all valid rights, approvals, clearances, licenses and like' vested with the previous lessee to the new lessee for a period of two years, notified that this would include forest clearances under FCA.[87]

When the Gram Sabha is the authority under FRA to protect and manage the forests under their jurisdiction, MoEFCC attempted to negate the law through amendments to the rules of an earlier law (FCA) to obfuscate the paper work by pressuring the bureaucracy to manufacture certificates to fulfill a timeline. Provisions in law cannot be overruled or negated by amending rules. This open defiance indicates the MoEFCC's determination not to give up its hegemonic control over the forest despite FRA, under the belief that allegiance with the dominant economic interests would provide a cloak of protection.

4.1.2 Diversion for Compensatory Afforestation

Compensatory afforestation[88] was introduced through an amendment to the Forest (Conservation) Rules 1981 in 1992,[89] and replaced by FCA Rules in 2003. This came into focus in the proceedings in the TN Godavarman Thirumulpad vs. Union of India & Ors. Loss of forest was to be compensated by securing an equal area of non-forest land and, if not available, then double the land in degraded notified forests. This was to be afforested through tree plantation and regeneration of forests using compensatory afforestation fund created by extracting the monetary equivalent from the user agency, the net present value, for loss of biodiversity content and environmental services, ranging from Rs. 4 to 10.43 lakh per hectare (2008). Scientific, biometric and social parameters based site-specific value taking into account its bio-geography is used to arrive at the monetary value. The Supreme Court insisted that this fund be operated through a statute. Accordingly the Compensatory Afforestation Fund Act, 2016, and Rules, 2018 were put in place. The law covered not just compensatory afforestation, artificial regeneration (plantations), and assisted natural regeneration, but also forest protection, infrastructure development, wildlife protection and other related activities, relocation of villages from Protected Areas and rejuvenation of forest cover on non-forest land

81 Within 30 days for forest land up to 40 ha, 45 days for 40-100 ha and 60 days above 100 ha, see FCA Rules 2014, r 3(g).

82 MoEFCC Notification dated 6 February 2017.

83 Letter from Deputy Inspector General of Forests to all states and UTs (26 February 2019) <http://forestsclearance.nic.in/writereaddata/public_display/schemes/1191986937$26_2_19_FRA%20reg.pdf>.

84 'Frequently Asked Questions (FAQs) Related to the Forest (Conservation) Act, 1980', 3 <http://forestsclearance.nic.in/writereaddata/Frequently%20Asked%20-Questions.pdf>.

85 Letter from Under Secretary, MoTA to Deputy Inspector General of Forests (5 April 2019) <https://tribal.nic.in/fra/data/ComplianceoftheSTnOOTFDRecognition-ForestRightsAct2006regarding05042019.pdf>.

86 The Mineral Laws (Amendment) Act 2020 (IND).

87 Letter from Assistant Inspector General of Forests to all states and UTs (31 March 2020) <http://forests-clearance.nic.in/writereaddata/public_display/schemes/1045037159$guidelines%20dated.pdf>.

88 Soumitra Gosh and others, 'Compensating for Forest Loss or Advancing Forest Destruction? A Study of Compensatory Afforestation in India,' (2019) World Rainforest Movement <https://wrm.org.uy/wp-content/uploads/2019/09/WRM-Compensatory-Afforesation-in-India-2019.pdf>.

89 Forest (Conservation) Rules 1981 (as amended up to May 1992).

falling in wildlife corridors. There was no reference to FRA though governance over half of the recorded forests are now under Gram Sabha jurisdiction and not the forest bureaucracy for which the actual demarcation of area was in progress. The Fund rose from Rs 1,200 crores in 2006 to Rs.74,824 crores[90] by October 2019 of which Rs.65,377.77 crores were released to the States by August 2019.[91]

FCA empowered the State governments to appropriate forestland without any reference to forest rights, and non-forest lands, mostly the commons over which people have customary rights, for compensatory afforestation using funds regulated under CAFA. To speed up forest diversion, MoEFCC ordered the State governments in 2014[92] and again in 2017[93] to pre-identify non-forest land and degraded forestlands for creating land bank for compensatory afforestation. Over 2.68 million ha were identified in Andhra Pradesh, Chhattisgarh, Madhya Pradesh, Jharkhand, Odisha, Tamilnadu, Rajasthan, and Uttar Pradesh.[94]

The 2009 procedure for forest diversion for non-forestry activities in compliance with FRA got watered down to a mere formality of District Collector's certificate. The diversion of double the forest area in degraded forest for compensatory afforestation is done without any FRA compliance. MoEFCC has not rectified this blatant anomaly. The Forest Department entrusted with afforestation, and those entrusted with FRA implementation, the State Tribal Department, State Level Monitoring Committee, and District Level Committee are required to monitor this. FRA and compensatory afforestation guidelines are violated resulting in forcible land grab.[95]

The 'serious shortcomings in regulatory issues related to diversion of forestland, the abject failure to promote compensatory afforestation, the unauthorised diversion of forestland in the case of mining and the attendant violation of the environmental regime' and the Forest Department's lack of planning and implementation capacity reported by the Comptroller and Auditor General of India[96] are other gaping discrepancies on the ground.[97]

Of the 82,817.789 ha diverted[98] for compensatory afforestation during 2008 to 2019,[99] 25.95 per cent or 47,435.56 ha was degraded forestland while the remaining was revenue land, presumably village commons that communities might be customarily accessing for various needs but without a law to recognize rights as FRA. In the absence of FRA compliance in FCA for compensatory afforestation, these forest diversions can safely be concluded to be in contravention of FRA.

90 Rs 66,298 crores by March 2019, see Lok Sabha, 'Unstarred Question No 3938: Compensatory Afforestation Fund' (2018); Rs 8,526.35 during 2018-19 up to 31 October 2019, see Lok Sabha, 'Unstarred Question No 3150: Compensatory Afforestation Management and Planning Authority' (2019).

91 Rs 14,418 crores till 31 March 2018, see Lok Sabha, 'Unstarred Question No 3938' (n 90); Rs 3,523.59 crores during 2018-19 and Rs 47,436.18 crores in August 2019, see Lok Sabha, 'Unstarred Question No 3150' (n 90).

92 Letter from Director, MoEFCC, Forest Conservation Division to all states and UTs (8 August 2014) <http://forestsclearance.nic.in/writereaddata/public_display/schemes/686571466$guide.pdf>.

93 Letter from Assistant Inspector General of Forests to all states and UTs (8 November 2017) <http://forestsclearance.nic.in/writereaddata/public_display/schemes/553905943$11%20423%202011.pdf>.

94 Bhasker Tripathi, 'As States Create Land Banks for Private Investors, Conflicts Erupt Across India' (The Wire, 19 September 2017) <https://thewire.in/banking/states-create-land-banks-private-investors-conflicts-erupt-across-india>.

95 For instance, 17 cases from eight States along with other reports in 'Compensatory Afforestation', see 'Analysis of Findings' (Compensatory Afforestation, 2018) <https://indiacaf.wixsite.com/mysite/findings>.

96 Comptroller and Auditor General of India, 'Executive Summary: Compliance Audit on Compensatory Afforestation in India (Report No 21of 2013, GoI 2013) x.

97 Kumar Sambhav Shrivastava, 'Ghost Plantations: The 17 Million Hectare Hole in India's Green Cover' (Ecologise.in, 6 July 2016) <https://www.ecologise.in/2016/07/06/ghost-plantations-the-17-million-hectare-hole-in-indias-green-cover/>.

98 e-Green Watch, MoEFCC, 'e-Green Watch of MoEFCC is a "completely transparent, reliable and accountable" "integrated system" "accessible to all stakeholders and public at large"'. See <http://egreenwatch.nic.in/Public/About_Iccmes.aspx>.

99 e-Green Watch, MoEFCC, 'Details of Diverted Forest Land, Land (Degraded Forest, Non Forest) Received for CA, and Area Being Covered Under Plantation' <http://egreenwatch.nic.in/ProgressReporting/Public/FCAProjectsPlantationReports.aspx>.

All the FRA implementing States and UTs have diverted forestlands for compensatory afforestation except Kerala. Diversion of degraded forestland continued year on year since 2008 peaking in 2010. Of the 6 States and 7 UTs not implementing FRA, Haryana, Punjab, Arunachal Pradesh, and Sikkim and the UTs of Chandigarh and Delhi have diverted forestlands. Manipur has not diverted forestland (though diverted non-forest land) and no compensatory afforestation has been carried out in Meghalaya, and in the UTs of Andaman & Nicobar Islands, Dadra & Nagar Haveli, Daman & Diu, Jammu & Kashmir, Ladakh, Lakshadweep and Pondicherry. Amongst the two states that have not extended FRA, Nagaland did not carry out any compensatory afforestation while Mizoram diverted forestlands.

MoEFCC, referring to e-Green Watch, confirmed that 'a significant percentage of data being uploaded…is either incorrect or incomplete'.[100] It also pointed out the non-uniformity of data related to diversion and compensatory afforestation available at e-Green Watch portal and Parivesh.[101]

4.2 Inviolate Areas

WLPA provides for extinguishing all rights[102] in National Parks and curtailment of rights in Wildlife Sanctuaries.[103] FRA overrides these provisions, and recognised and vested rights except hunting, on forestlands including National Parks and Wildlife Sanctuaries. With this, the recognition and full exercise of traditional rights became part of the protected area regime. The WLPA Amendment Act 2006,[104] four months before FRA was enacted, incorporated the provisions of Critical Wildlife Habitat (CWH)[105] of FRA into Core or Critical Tiger Habitat of WLPA 2006 amendment.[106]

With FRA Rules scheduled to be notified on 1 January 2008, the National Tiger Conservation Authority (NTCA) of the MoEFCC constituted under the WLPA 2006 amendment, in an act of defiance, issued an order to the Chief Wildlife Wardens on 16 November 2007[107] for submitting proposals for Tiger Reserves by 29 November 2007, within barely two weeks. 31 Tiger Reserves were notified swiftly securing 2,925,202 ha, ironically disregarding even Sec.38 V of WLPA under which these are defined, demarcated and notified.[108] In many cases, the existing core and buffer area were simply notified together as Critical Tiger Habitat (CTH) without any Buffer Area.

The Tiger Reserve notification requires the demarcation of its CTH and the Buffer Area. The CTH area is identified based on the 'scientific and objective criteria…to be kept as inviolate for the purposes of tiger conservation',[109] to be protected from being harmed by limiting access and regulating human activities to prevent irreversible damage. Where the forest dwellers are unable to coexist with the tigers by any means whatsoever, then they are to be voluntarily relocated and rehabilitated on mutually agreed terms and conditions without adversely affecting their rights[110] providing 'livelihood for the affected individuals and communities'[111] and 'secure livelihood' at that.[112] Neither WLPA nor FRA mandates relocation from CTHs just because the CTHs are to be made inviolate. This consultative process is to be carried out by an expert committee[113] who examines the scientific evidence of irreversible damage to wildlife from human activities,[114] consults with 'an ecological and social scientist familiar with the area'[115]

100 Letter of Inspector General of Forests to all states and UTs (10 August 2020) <http://forestsclearance.nic.in/writereaddata/public_display/schemes/292754865$11_-79_2020_FC_1_sw.pdf>.

101 MoEFCC portal for online submission and monitoring of the proposals seeking Environment, Forest, Wildlife and CRZ Clearances from Central, State and district level authorities.

102 Wildlife Protection Act 1972 (WLPA), s 35(3).

103 ibid s 24.

104 WLPA 2006.

105 See FRA, ss 2(a) and 4(2).

106 See WLPA, s 38V(4)(i) and (5).

107 National Tiger Conservation Authority (NTCA), MoEFCC, 'Compendium of Guidelines, Advisories & Orders' (NTCA January 2020) vol 2, 76-77.

108 CR Bijoy, 'The Great Indian Tiger Show' (2011) 46(4) Economic & Political Weekly 36-41.

109 WLPA, s 38V(4)(i).

110 ibid s 38V(5).

111 ibid s 38V(5)(iv).

112 FRA, s 4(2)(d).

113 WLPA, s 38V(4)(i).

114 WLPA, s 38V(5)(ii) and (iii); FRA, s 4(2)(b) and (c).

115 WLPA, s 38V(5)(ii).

and demarcates the CTH with the mandatory informed consent of the concerned forest dwellers and Gram Sabhas on the irreversible damage by their activities as well as their inability, if any, to co-exist by any other means with the tigers in that area. The Buffer Area is to be demarcated along with the demarcation of CTH where the forest dwellers can coexist along with the recognition of their livelihood, developmental, social and cultural rights.[116] Invariably, all these are swept aside at the altar of expediency.

Tiger Reserves have now increased to 50. It required the Supreme Court to order notification of Buffer Area within three months in 2012 when, contrary to the law, only CTHs were notified in 10 States.[117]

NTCA rather than ensure that Tiger Reserves are notified as per WLPA including recognition of all rights as per FRA in all Tiger Reserves, instead issued a ban on rights recognition in 2017[118] in all CTHs citing the absence of MoEFCC guidelines for establishing CWH[119] under FRA. Neither is NTCA authorized to issue such an order, nor was it legal as FRA does not exempt Tiger Reserves in its application. This had also become a bone of contention when the National Commission for Scheduled Tribes took it up with NTCA, but to no avail. This ban was withdrawn only 2018[120] when MoEFCC notified the Guidelines for determination and notification of Critical Wildlife Habitats within National Parks and Sanctuaries, 2018.[121]

CWHs are to be notified in National Parks and Wildlife Sanctuaries[122] just as CTH but with a significant difference. Once notified, CWH 'shall not be subsequently diverted by the State Government or the Central Government or any other entity for other uses'.[123] CTH can be and is diverted under WLPA.[124] MoEFCC, statutorily mandated by FRA to determine and notify CWHs, drafted CWH guidelines in 2007 and again in 2011, but did not comply with FRA and hence withdrawn amidst opposition.[125] MoEFCC has neither notified any CWH nor ensured rights recognition which should have been done prior to the notification of Tiger Reserves. Instead, relocation is pursued with vigour. As on 12 July 2019, there were 57,386 families in 50 Tiger Reserves[126] of which 18,493 families in 215 villages[127] have been relocated 'voluntarily' despite their protests under the now legally untenable Rs.10 lakh package per family Centrally Sponsored Scheme of Project Tiger.[128] The funds available for compensatory afforestation are also now available and used for 'voluntary relocation'. The widespread promotion of the falsehood that 'inviolate' means removal of human habitations and denial of access, instead of evolving ways to prevent harm to the area and its protection, is a violation of WLPA, FRA and Right to Fair Compensation and

116 ibid s 38 V (4)(ii).

117 The 10 States were Andhra Pradesh, Arunachal Pradesh, Bihar, Jharkhand, Karnataka, Maharashtra, Rajasthan, Tamil Nadu, and Uttar Pradesh. See Ajay Dubey v National Tiger Conservation Authority & Ors (2012) 13 SCC 779.

118 Letter from Assistant Inspector General of Forests to all tiger range states (28 March 2017) <https://tribal.nic.in/FRA/declarationsClarifications/CRTigerHabitats28032017.pdf>.

119 FRA, s 4(2)(f).

120 Letter from Assistant Inspector General of Forests to all tiger range states (12 March 2018) <https://tribal.nic.in/FRA/declarationsClarifications/ConferringrightsCriticalTigerHabitatsofTigerReserve12032018.pdf>.

121 Letter from Deputy Inspector General of Forests to all tiger range states (04 January 2018) <https://tribal.nic.in/FRA/declarationsClarifications/CWHGuidelines04012018.pdf>.

122 FRA, s 2(b).

123 ibid s 4(2)(f).

124 Prerna Singh Bindra, 'India's Fast-Tracked Wildlife Clearances Threaten Last Wild Areas, Water Sources and Hasten Climate Change' (IndiaSpend, 22 September 2018) <https://www.indiaspend.com/indias-fast-tracked-wildlife-clearances-threaten-last-wild-areas-water-sources-and-hasten-climate-change/>.

125 Ishan Kukreti, Shruti Agarwal, 'Critical Wildlife Habitat Guidelines Issued; NTCA Order Superseded' (Down To Earth, 17 August 2018) <https://www.downtoearth.org.in/news/governance/critical-wildlife-habitat-guidelines-issued-ntca-order-superseded-59934>.

126 Lok Sabha, 'Unstarred Question No. 3405: Tiger Projects' (2019).

127 Ishan Kukreti, 'Tigers and Tribals: Conservation Project Displaced 18,493 Families in 48 yrs' (Down to Earth, 9 October 2020) < https://www.downtoearth.org.in/news/wildlife-biodiversity/tigers-and-tribals-conservation-project-displaced-18-493-families-in-48-yrs-73732>.

128 For instance in Achanakmar and Bhormadeo in Chhattisgarh, Kanha and Panna in Madhya Pradesh, Sariska and Ranthambore in Rajasthan, Tadoba and Melghat in Maharashtra, Simlipal in Odisha and Kaziranga in Assam and Mudumalai in Tamilnadu.

Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (LARR) as well which brought forest rights under FRA within its ambit.

To conclude, FRA violations have become the norm when such violations by any official is an offence[129] for which the concerned Gram Sabha[130] is to issue notice through a resolution to the State Level Monitoring Committee giving sixty days to take action against the offender. Further, dispossession from or interference with forest rights of STs and Scheduled Castes as defined under FRA is an offense under the 2016 amendment to the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. Unaccustomed to being in authority and exercising powers, the Gram Sabhas are yet to internalize that by law they are no longer the servile subjects of the State when it comes to forests under FRA; similarly the bureaucracy too is yet to reconcile that they are no longer the masters of the forests. The general impunity from prosecution for violation of laws that the bureaucracy enjoys adds to the lawlessness.

5 THE WAY FORWARD

FRA has already recognized and vested forest rights on forest dwellers. The law only provides for recording them and demarcating the geographical contours of this non-centralized democratic forest governance structure. Forests are no longer the exclusive preserve of the State and its forest bureaucracy but of the Gram Sabhas in over half of the India's forests. The disregard, antipathy and resistance to this historic path-breaking Act of the Parliament exacerbate the conflicts that put conservation and livelihoods in peril. There is no way that the clock can be set back fully or even partially as the tide has turned.

Institutional actions by MoTA: Issue directions,[131] clarifications, guidelines and advisories with regard to the law and its provisions on the implementation issues that is by now well-known and reported. A decisive shift away from a claim-centric monitoring and assessment to village-centric community forest resource rights demarcation and governance.

Institutional reforms in the structure under FRA: Operationally, the Sub-Divisional Level and District Level Committees are headed by the Revenue Department[132] whose jurisdiction does not extend to the forests. But the Forest Department's writ holds sway over the forests despite the domain of forest rights is not with them but with the Tribal Department since 2006 and that over half the forests is now under the jurisdiction of the Gram Sabhas and their institutions. The Tribal Department representative could be re-designated to head the Sub-Divisional and District Level Committees and the forest department representative made the ex-officio member. This would require amendment to the existing FRA Rules.

Legal reforms: Community Forest Resource areas are to be constituted as a 'new category of forest area' as directed by MoTA in 2015[133] and reflected appropriately in all forest related legislations. The responsibility of ensuring FRA implementation and informed consent of the Gram Sabhas for forest diversion for non-forestry activities and for compensatory afforestation under FCA could be transferred to the tribal department representative from the District Collector through amendment in the FCA Rules. Forest diversion is to fully comply with the provisions of the LARR 2013 compensating those affected and/or rehabilitated including share of the compensation in monetary terms to the affected family for the loss of community rights if any. Forest rights under FRA explicitly fall within the purview of LARR.[134] Even though it is mandatory to comply with LARR, suitable amendments to the FCA Rules

129 FRA, s 7.
130 ibid s 8.
131 ibid s 12.
132 FRA, rr 5 and 7.
133 Letter from Under Secretary, MoTA to all states (23 April 2015) <https://tribal.nic.in/FRA/declarationsClarifications/GuidelinesregardingvestingofCFR230420-15.pdf>.
134 LARR, ss 3(c)(ii), (r)(ii), (x)(ii) and 42(3).

need to be carried out to make it even more explicit. Denotify all Tiger Reserves that have not complied fully with WLPA and FRA; FRA compliance and consent provisions while notifying Tiger Reserves under WLPA[135] and for voluntary relocation need to be elaborated. Compliance with LARR when forest rights are acquired is again mandatory for voluntary relocation from CTHs under WLPA and CWHs under FRA and therefore brought into the Rules as rights are acquired by the State.

Parallely, the larger economic forces of neoliberalism are to be politically resisted to contain their expropriation, especially for their accumulation of capital through dispossession which could take the form of state facilitated or acquiesced outright resource grab with or without legal cover to that of the much eulogized tripartite agreements between the extremely unequal parties: the government, private and local community. The challenge is also in understanding and using FRA as was conceived originally by the struggle that led to FRA formulation: for the greatest public good, justice and long term intergenerational equity.

135 s 38(v) inserted by the WLPA 2006 amendment deals with Tiger Reserves.

LEAD Journal (Law, Environment and Development Journal) is jointly managed by the
Law, Environment and Development Centre, SOAS University of London
soas.ac.uk/ledc
and the International Environmental Law Research Centre (IELRC)
ielrc.org