Redressing 'historical injustice' through the Indian Forest Rights Act 2006

A Historical Institutional analysis of contemporary forest rights reform*

O. Springate-Baginski,
M. Sarin, S. Ghosh,
P. Dasgupta, I. Bose,
A. Banerjee, K. Sarap,
P. Misra, S. Behera,
M.G Reddy and P.T. Rao**

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IPPG Programme Office, IDPM, School of Environment & Development
University of Manchester, Arthur Lewis Building, 2.023, Oxford Road
Manchester M13 9PL; Telephone 0161 306 6438; ippg@manchester.ac.uk
www.ippg.org.uk

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**
Oliver Springate-Baginski; School of International Development, University of East Anglia
Madhu Sarin; Independent
Soumitra Ghosh; National Forum of Forest People and Forest Workers (NFFPFW)
Purnamita Dasgupta; Institute of Economic Growth, Delhi
Indranil Bose; St. Xavier's College, Kolkata
Ajit Banerjee; Independent
Kailas Sarap; Economics Dept. Sambalpur University
Pradeep Misra & Sricharan Behera; Vasundhara (NGO) Bhubaneswar
M. Gopinath Reddy; Centre for Economic and Social Studies, Hyderabad
P.Trinadh Rao; Independent

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ABSTRACT

The issue of forest rights in India is a major concern by any measure. It affects forested landscapes that cover over 23% of the country, and the livelihoods of perhaps 200 million citizens, as many as 20% of the population in a democratic polity. Forest landscape dwelling populations, located mainly in a tribal belt across central and eastern areas of the country, are amongst the poorest of the poor. Their poverty reflects a history of institutionalised disenfranchisement; having their customary forest land expropriated, and use rights negated by feudal states, by the colonial state and subsequently by the independent Indian government. The issue of forest rights has been highly contentious for at least a century and a half, and has intensified in recent years. This paper analyses the historical origins of forest rights deprivation and contemporary processes through which local people are seeking to restore their forest rights, taking the case of the Indian Forest Rights Act 2006 (FRA hereafter) as an example to illustrate wider issues in historical institutional theory. The paper explores how the colonial state's decision to 'territorialise' forest landscapes in 1864 through formation of the Imperial Forestry Service represented a critical juncture establishing institutional structures depriving forest people of their customary rights which have shown remarkable persistent 'path dependency' despite 50 years of Independence, until the present time. Although the FRA appears to be a fundamental reform, indeed perhaps a new 'critical juncture' in the relationship between forest peoples and the state - the depth and durability of this reform remains uncertain, due primarily to the 'path dependent' behaviour of the powerful existing state forest bureaucracies, which remain a major obstacle to realising the pro-poor potentials.

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1 INTRODUCTION – HISTORICAL INSTITUTIONAL ANALYSIS OF FOREST TENURES

The rights, and in particular tenure rights, of local people in forest landscapes has recently received renewed internationally attention (see for instance Sunderlin *et al*. 2008). The interest stems from the recognition that a large number of the world's poor live in forest landscapes, that they are generally dispossessed in various ways, and that the institutional circumstances around that dispossession are a major contributory factor in their poverty. Yet although rights were typically lost under colonial regimes, there seems to be a paradox here; rights deprivations are persisting where most of the countries concerned are now democracies in which forest peoples typically form major constituencies.

Institutional theory tells us that social political and economic institutions, both formal and informal, shape behaviour and opportunities; define rights and distribute power. They must therefore have major implications for poverty and its alleviation. Historical Institutionalists (e.g. Harriss 2006, Sanders 2006) hypothesise that institutions (i.e. 'the rules of the game') are inevitably framed in the context of power relations, and hence institutional formation and change is essentially a political process which has far-reaching economic implications. This view contrasts with the rational choice approach (e.g. Levi 1997, Weingast 2002) that posits rational actors can and do rationally chose better institutional arrangements, in pursuit of their economic objectives. Historical Institutionalists' insight here is to take a more politically realistic approach to the link between authorship and distributional outcomes, and ask 'best institutions for whom'? Those with the power to prevail in negotiations can organise the institutions best for their interests and can ensure they endure, even if this leads to divisive or dysfunctional outcomes for the wider society or particular sections of it. This analytical angle is conceptually summarised in two central concepts of historical institutionalism which are employed in this paper: critical junctures and path dependency.

The idea of 'critical junctures' suggests that there are moments ('junctures') when sharp institutional changes can be made. Obvious critical examples of this are colonial annexations, revolutions, coups d'etat and so on. These junctures may be more or less major and more sectoral. Of course what is 'critical' is debatable and the extent of its 'criticalness' can clearly vary greatly, as do the precipitating causes. They may be due to environmental, political, or economic crises and may be internal to a polity / economy; or brought about by external events. Fundamental establishment or changes in tenure may well represent a 'juncture'.

How these critical junctures are used, and the implementation of the decisions taken during them are not automatically positive or 'progressive'. Reforms and revolutions can and often do lead to new forms of marginalisation, oppression and instability. Predatory or reactionary regimes can get installed. However, seizing the opportunity and pushing through reforms in the institutional architecture – whether macro or within a sector or in relation to one issue –depend on political processes and the kind and amount of power which different interests can bring to bear. Moreover, the formal institutional structure within which the decisions are taken will also shape outcomes. This is clearly the case in India where the formal federal and parliamentary structure represents the formal context of politics and allows – as we know from many different sectors – great variation across the state.

The second and complementary key idea which Historical Institutionalists use is that of 'path dependency'. This alludes to the regular pattern by which a consolidated institution becomes very hard to shift and that once established, even when regimes change, it may have a profound proclivity to remain in place. The 'sharp' historical institutionalist in political science would recognise two aspects of this 'institutional stickiness'. First, an institution is often embedded in a network of associated and complementary institutions (formal and informal). It is hard to change the one without having effective change in

others; moreover there will be a culture of familiarity with a particular institutional network. Also, there may be strong ideological/political attachments to an institution and what it represents. Second, underpinning the resistance to change - and hence sustaining the path dependency - are questions of incumbent power and politics. Power because there will be deep vested interests committed to defending the institutions ('an organisation's biggest output is itself' to paraphrase Stafford Beer); political because there may be wider electoral considerations which governments don't want to threaten.

So, critical juncture and path dependency stand in tension with each other. There may be critical junctures – a political regime coming to power or major reform – and there is room for manoeuvre. But these attempts at change may be thwarted by path dependent factors, power relations and resistance or diversion by bureaucracies and interest groups. In federal structures like India a critical juncture which gives rise to new policy or legislation will have very different implementation effects across different states, due to the diversity of local institutional arrangements.

This paper applies this Historical Institutional approach to help make sense of the complex historical processes and contemporary contestation over institutions relating to forest rights in the Indian Context.

Uncultivated areas, whether grasslands or forested, have historically supported gathering and hunting, provided fertile land available for conversion to different forms of agricultural use, and also a range of commercial timber and agro-forestry products. They are increasingly recognised to also provide a wide range of 'ecosystem services' in the new parlance (MEA 2004), particularly biodiversity, hydrological and atmospheric carbon sinks.

For as long as social groups have used land, institutional challenges around tenure have presented themselves: a 'no property' open access land use scenario can persist only as long as overuse doesn't precipitate a 'tragedy of the (open access) commons'. In most areas of the world both private and common property regimes have widely emerged as customary institutional innovations to resolve this problem. Customary institutional arrangements around non-cultivated land (e.g. forests and pastures) have been diverse and typically adaptive over time[1].

Tenure rights involve a bundle of different rights over a given resource including some combination of rights of 1. ownership (and right to alienate i.e. sell or give away); 2. control and management; 3. exclusion, and 4. access and withdrawal of produce. These rights themselves are allocated and backed by a prevailing property *regime* (Schlager and Ostrom 2002.) which may adjudicate and legitimate claims and be appealed to for enforcement. It is the rights regime which creates the institutions, the 'rules of the game' to which claims are made and contests are fought. In customary regimes the property regime is typically organised and legitimated by a locally based corporate collective (e.g. the village panchayat or council). However this in turn is likely to depend on a 'higher' regime for its legitimacy, such as a regional chieftain. Customary institutions are typically vulnerable to appropriation from 'outside' (i.e. turf-wars with neighbours) or from 'above' (i.e. acquisitive rulers who may seek to deepen their control). 'Critical junctures' in terms of property rights will relate to changes in the property regime; in terms of who is controlling it and what their policies are. Historical institutional processes have involved land and other resources being appropriated (and regularly re-appropriated) under a range of property regimes, reflecting, as with any other resource, the fluid distribution of political-economic power.

[1] The research programme of the International Association for the Study of the Commons has made extensive documentation – see IASC Digital Library of the Commons.

Enclosure involves the assertion of exclusive (usually private or state) property rights, over hitherto open access or common property. The enclosure of open field systems in England as agricultural technology changed over the 16th – 18th Century is a relatively benign example which allowed intensification of production. However historically, enclosure has also often involved property appropriation through coercion or dubious legal convolutions, pro-elite institutional reform, enclosure of wildwoods in England by elites and the highland clearances being examples. (Hoskins 1955; Rackham 2000). Undoubtedly the largest enterprise of territorial appropriation has been the European colonial conquest in the Americas, Asia and Africa, whereby much of the world's land area was claimed by European states and their offspring. European property regimes were imposed, superseding and usurping pre-existing property regimes, and facilitating the appropriation of resources. For instance, expansionist American settlers' coveting of Indians' land had been largely frustrated by British Government 'Proclamation Line' policy of 1763, until the critical juncture of Independence, after which expropriation was gradually enabled, resulting ultimately in cultural genocide:

> *Should any tribe be foolhardy enough to take up the hatchet at any time, the seizing the whole country of that tribe, and driving them across the Mississippi, as the only condition of peace, would be an example to others, and a furtherance of our final consolidation.* (Jefferson, Thomas (1803) to William Henry Harrison, Governor of the Indiana Territory)

Incorporation of hinterlands under state control contributed towards 'territorialisation': the development and spread of governability and state-building. In India territorialisation involved imposing the pre-eminence of the British legal system over a diversity of customary systems of tenure. The authority of local property regimes was no longer legitimate; disputes could only be resolved in court and private or corporate commercial rights were the only rights recognised (Chakravarty-Kaul 1996). The colonial state sought to maximise tax revenues and simplify collection and so promoted settled agriculture as the preferred form of economic activity, and gradually obstructed a range of other material practices such as shifting cultivation and transhumant pastoralism adapted to the ecological niche.

Despite Independence, the enduring consequences of these historical institutional arrangements reflect a high degree of 'path dependency'. Post-colonial reforms have often involved 'high modern' state aggrandisement for state-building and state-led development, rather than re-vivification of customary common property regimes (Bromley 1989).

Orthodox development theory has tended to focus on agricultural and industrial development as the key production systems for achieving economic growth. Yet since the 1980s there has been growing realisation that non-farm activities such as forest use, pastoralism and fisheries remain highly significant for rural livelihoods, often complementing agriculture, and that increasing restrictions on these livelihoods (e.g. from timber-oriented state forestry) have predictably exacerbated rural poverty. In response to growing recognition that persistent rural poverty in many areas is linked to institutionalised marginalisation and due to growing political organisation of these marginalised groups, there has been increased momentum towards overhauling the prevailing institutional arrangements around forest land rights in post colonial countries. In recent years international campaigns have led to several breakthroughs in international and national provisions, most obviously the United Nations Declaration on the Rights of Indigenous People 2007, but also numerous land settlements in the last decade (particularly Australia and Canada).

So, are we seeing in the Forest Rights Act 2006 a fundamental limitation or even reversal in the historical trend towards capital accumulation of forest lands; perhaps a 'commoning of enclosures'? Here we apply the historical institutional approach to consider forest rights reforms in India, in order to put what is currently occurring in a broader analytical frame.

2 FOREST RIGHTS REFORM IN INDIA

The colonial and later post-colonial Indian state's formal appropriation and enclosure of forests, from the late 19thC on, criminalised the normal livelihood activities of millions of local forest-dependent people, giving many the legal status of 'encroachers'. In recent years the Forest Departments sought to complete this enclosure process through eviction. This finally united and mobilised the movements working with forest users across the country to action. Despite severe opposition, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act (or simply 'Forest Rights Act') was passed in December 2006 and came into force in January 1st 2008 with notification of the administrative Rules. The FRA provides for the restitution of deprived forest rights across India, including both individual rights to cultivated land in forested landscapes and collective rights to control manage and use forests as common property. The passing of the Forest Rights Act 2006 undoubtedly represents a seminal moment in India's highly contested forest politics. For the first time an Act has recognised the 'historical injustice' perpetrated by the state:

> … the forest rights on ancestral lands and their habitat were not adequately recognized in the consolidation of State forests during the colonial period as well as in independent India resulting in historical injustice to the forest dwelling Scheduled Tribes and other traditional forest dwellers (FRA 2006)

The Act therefore makes provision for the restitution of rights to forest dependent households. Although not covering all rights deprivations, the livelihoods of perhaps 100 million or more of the poorest of the poor stand to improve. However, the FRA itself is only an enabling legislation, the 'prize' itself, the actual allocation of rights at the local level, depends on implementation. And as with several other recent legislative reforms yet awaiting full implementation, the FRA faces serious challenge. Recognising rights involves shifting resource control away from state Forest Departments, who stand to loose territory and potential revenue streams, both licit and illicit, and who have already exhibited a high degree of autonomy from democratic oversight. However implementation of the FRA, (as with the Right to Information and of National Rural Employment Guarantee Scheme, and PESA) *is* gradually happening.
Does the FRA represent a pro-poor institutional reform? This paper seeks to clarify the theoretical and conceptual issues surrounding the emergence and implementation of the Forest Rights Act, and is based on ongoing research which is addressing the following questions as illustrated in figure 1 below.

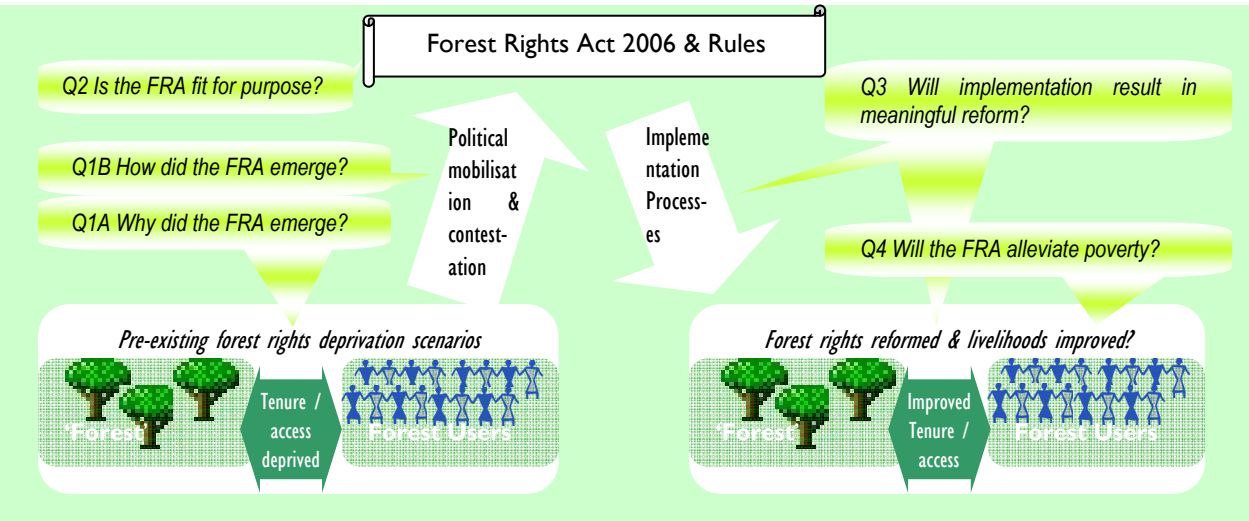


Figure 1: The Forest Rights Act process *and study questions*

Q1. How and why did the FRA emerge, despite powerful opposition?

Here there are two questions. Firstly: *Why* did the FRA emerge? This relates to the historical emergence of the underlying rights deprivation scenarios, and why they have persisted so long – their 'path dependency'. Secondly: *How* did it emerge? This relates to issues of collective mobilisation and contestation, and engagement in policy processes.

Q2. *Is the FRA fit for purpose? Does it really cover the majority of rights-deprived forest dependent poor?*

This question is concerned with understanding the 'output' of the policy process – the Act itself, its content and scope – and understanding the extent to which it adequately addresses the range of forest rights deprivations. The texts have emerged from intensely contested policy development process. Many compromises occurred. In order to understand the overall prospects for pro-poor institutional reform we must understand the Act itself and its adequacy.

Q3. Will the implementation of this Act result in meaningful pro-poor institutional reform at the local level and, if so, under what conditions?

The Act itself is a single text which will be implemented through a range of different institutional structures in different regions of the country, exposed at each level to vagaries of interests

Q4. Will the FRA lead to poverty alleviation and pro-poor growth, and if so how? If the forest-dependent poor gain more secure tenure and access entitlements will it help their sustained poverty alleviation and income growth?
There are undoubtedly a number of ways in which, if local forest people have rights deprivations redressed, their poverty will be reduced. However there are many ifs and buts between the Act and poverty alleviation.

This paper prioritises addressing questions 1 and 2, and more briefly outlines the key issues relating to implementation processes and their anticipated pro-poor impacts (questions 3 and 4), anticipating findings emerging from recent research.

3 'HISTORICAL INJUSTICE': WHY THE FRA EMERGED

Here we consider the context from which demand for this reform originated: the emergence of forest rights deprivations in the colonial period and their consolidation and persistence for almost 60 years beyond Independence.

3.1 Context

India contains a wide range of agro-ecological regions, including many rain-fed upland areas lacking irrigation and with a lower proportion of fertile soil. Livelihood systems here are rarely solely agriculturally based, due to lower productivity and weather-based insecurity. Instead they have therefore required complementing agriculture with forest and other common land for products and services, including grazing, nutrient exchange, fuelwood, medicinal and other non-timber forest products, safety nets in times of poor monsoon rains and so on. N. S. Jodha has made extensive study of these common property based livelihood activities in India. The extent of livelihood forest 'dependence' is a difficult issue to pin down, because firstly, almost all rural households use forests or tree products to some extent and so setting a threshold of what level of use qualifies as real dependence is arbitrary (i.e. should it be those who receive more than 20% of their income from forests or 21%?; secondly, because secondly there is a high level of

variation in forest use across households and across seasons, and thirdly because the forest-livelihood linkage itself has become seen as undesirable to political elites and therefore restricted or criminalised and often furtively conducted (Angelsen and Wunder 2003). That said, estimates include around one quarter of India's population:

> 'Of about 300 million people (or 60 million households) estimated to live below the 'poverty line' in India, about 200 million of the people are partially or wholly dependent on forest resources for their livelihoods (Khare *et al.* 2000).
>
> Roughly 275 million poor rural people in India – 27 percent of the total population depend on forest for at least part of their subsistence and cash livelihoods (World Bank 2006).

These forest dependent groups in India contain both 'tribal' and non-tribal forest users. Of 'tribal' groups the 'Scheduled Tribes' (i.e. those recognized and 'scheduled' under the Constitution of India) include over 84 million people comprising 8.3% of the nation's total population (2001 census) and around one quarter of the worlds indigenous population. An estimated 84% of these tribal ethnic minorities live in forested areas (World Bank 2006). Map 1 below illustrates the coincidence between forest landscapes, poverty and tribal populations in India.

3.2 Historical origins of forest rights deprivation

The colonial state's increased interest in Indian forest lands in the 19thC led to conflict as it sought to appropriate them and introduce an exclusive management regime, in which adaptive livelihood use of forest and grazing land were not tolerated. Through this appropriation process rural populations had their customary forest land use negated (Singh 1986, Sivaramakrishnan 1999, Rajan, S.R., 2006, Ghosh 2007), and thereby forest-adjacent and forest dwelling populations have become amongst the poorest of the poor in India in terms of most socio-economic indicators. The history of this marginalisation process has been thoroughly rehearsed in the literature (Guha 1984, Hobley 1997, Springate-Baginski and Blaikie 2007). Here we will simply summarise the key aspects.

There has been a well established tradition in India of state forest management, but also a recognition and respect for village forest management enshrined in customary practice for well over two thousand years (see for instance Kautilya writing on state craft around 150 AD). Under the Mughals, timber trading expanded and as the early British colonial regime spread forests were opportunistically plundered by commercial enterprises with state support. However it was only after the 1857 uprising that the principle of village forest rights began to be systematically undermined.

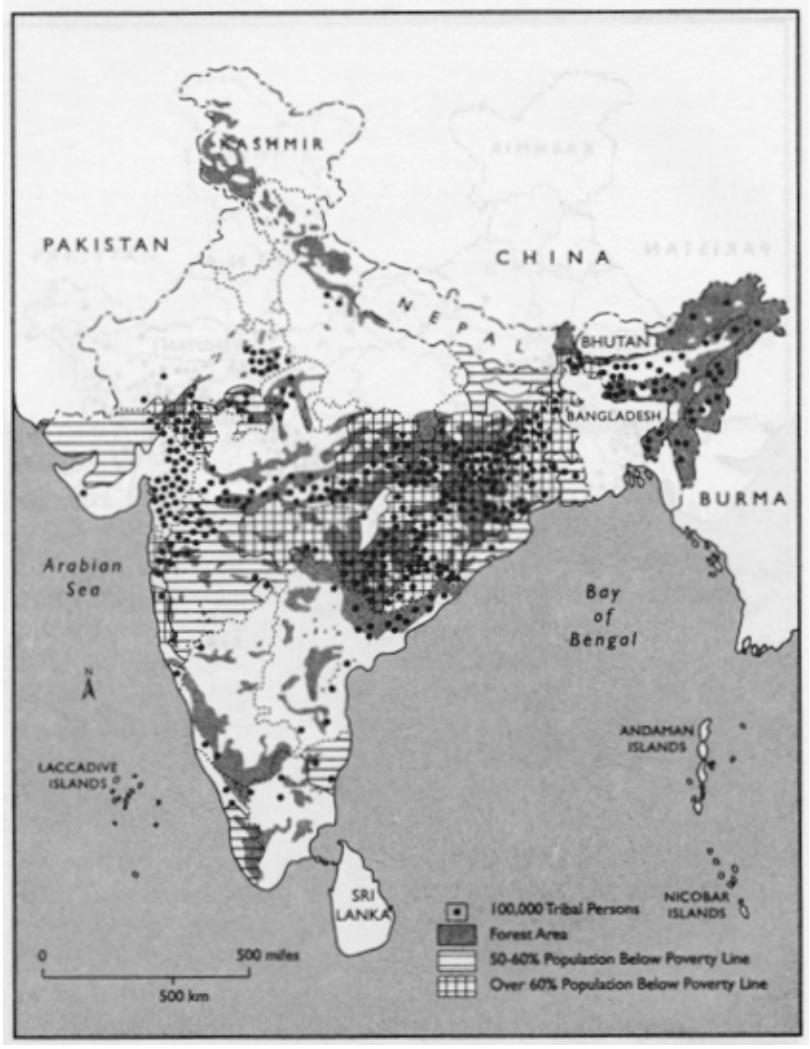
Colonial strategic concerns led to railway-building and therefore the need for a sustainable supply of timber for sleepers. Lord Dalhousie's note of 1855, to establish a forest estate and manage its 'orderly exploitation', leading to the formation of an Imperial Forest Service in 1864. This may be seen as THE critical juncture in forest rights in India. The introduction of a state forest regime involved several concomitant reforms: local people's customary forest use became an obstruction to the enterprise and, after intense debate amongst colonial administrators (much of the debate published in the pages of the 'Indian Forester'), the policy of separating local forest users from valued forests began to be enforced in what amounted to gradual 'ethnic cleansing' in many cases.

> '[I]t was decided to treat the customary use of the forest by the Indian villager as based on 'privilege' and not on 'right'. … The provisions of the

new (1878) act [sought to] assert the absolute control and ownership right of the state…' (Guha 1984)

The successive 1865, 1878 and 1927 Indian Forest Acts, and the Madras Forest Act 1882 provided the legal basis for reservation of forests and 'settlement' (i.e. commuting or extinguishing) and notification of forest rights. Local settlement processes could take a team as long as 10 years to cover a district. This process of 'settling' rights has been treated as a once and for all process (unlike revenue settlements of private land, which are periodically reviewed). Under the properly conducted normal settlement of forest rights local people had virtually no bargaining power. The Imperial Forest Department sought to create either 'Reserved Forests' for the most prized stands, where no rights were permitted, or 'Protected forests' adjacent to settlements, where some use 'privileges' were conceded, (although which could be and often were later extinguished at the pleasure of the Forest Department). In this way whilst some (diluted) rights were conceded, many more were extinguished.

Even these due processes were often circumvented by impatient settlement officers (see Kumar *et al.* 2009 for examples from Orissa where whole villages were left out of settlement process and therefore lost any rights whatsoever). Inevitably 'historical injustices' were created through forest acquisition by the state, both where the due process was neglected, and where it was followed.



Map 1: Coincidence of Forests, Poverty and Tribal Populations
Source: Poffenberger & McGean (1997)

The history of forest reservation involved, predictably, intense conflict and repeated agitations and risings (Arnold and Guha 1997, Grove *et al.* 1998, Sivaramakrishnan 1999, Pathak 2002). Resistance was generally ruthlessly suppressed (e.g. the Gudem / Rampa risings in what is now Andhra Pradesh) although in several notable cases the FD did backtrack to strategically minimise unrest, and community institutions were in some cases allowed to persist (e.g. the Mundari Khuntkattis of Jharkhand, the Nistari jungles of Bastar; the Van Panchayats in Uttarakhand and the Cooperative Forest Societies of Himachal Pradesh (see Springate-Baginski 2001).

In 1947 at Independence one might reasonably have expected fundamental reform, particularly as forest-related grievances were a major mobilising factor in the Independence movement. However, the particular nature of the political alliances consolidated the interests of the state bureaucrats in the context of a 'high modernist' developmental state agenda (Bardhan 1984). Deep patterns of institutional 'path dependency' are evident here, as the aspirations of marginalised forest peoples for justice and reform were neglected and the interests of the then imperial, now independent, bureaucrats were served. Rather than recognising the colonial injustice and overhauling structures there was instead a strong re-affirmation of colonial imperatives. Post Independence, state forestry policies and land annexation processes continued little changed, illustrated in the continued use of the 1927 Indian Forest Act (to this day). The 1952 Forest Policy begins:

> '[T]he fundamental concepts underlying the existing forest policy still hold good …'

This reflects a high degree of continuity in the priorities of the new political and commercial power elites and of the 'high modernist' state (Scott 1997). Although the creation and management of the colonial forest estate had been due mainly to strategic imperatives (i.e. construction of rail infrastructure), the justification for state contrl and exclusion of local rights evolved after Independence into 'modernisation', industrialisation and preferential commercial support. Singh observes that a major objective became the facilitation of private industries' access to forest land and products:

> The basic reason for rural and tribal poverty, therefore, is nothing but the privatisation of common property resources in a non-equitable manner … [t]he state monopolises resources so that it can make these available to specific private industries.' (Singh 1986)

Indeed, for tribals the situation in many cases worsened after Independence, as the due processes for settlement of rights according to the 1927 Indian Forest Act were often conveniently forgotten or circumvented. The post-colonial Government of West Bengal, for instance, took over feudal private forests (in which local people enjoyed use rights) without following the due legal process and so extinguished those rights (Ghosh *et al.* 2009). In Madhya Pradesh and Orissa, large areas of the lands of *zamindars* and princely states were declared 'deemed forests' (i.e. rights settlement anticipated). However, the required legal process of settlement of rights has still widely not taken place and so, by default, no rights were accorded. Even community forests legally recognised by the colonial administration in Bastar were declared state protected forests without the due legal processes being followed.

Thus, through lengthy and complex processes a 'legal' forest estate became constructed by the state. Although currently 23.57% of the country's area (about 76.96mha) consists of 'recorded forest area' (Forest Survey of India 2003) it is a myth that all of this land is either legally notified as forest or is under Forest Department control. Of the 'recorded forest area', 51.6% is Reserved Forest where no local people's rights exist (much of this forest *not* formally legally notified after the rights settlement process); 30.8% is Protected Forest (where some rights conceded), and the remaining 17.6%

consists of 'unclassed forest' which is not legally notified but is simply recorded in government records using the word forest (including about 10mha of community shifting cultivation lands in the north-east). The Forest Survey of India (FSI 2005) estimates there is 67.71mha of 'forest cover' (i.e. lands with standing trees) of which about 48mha is considered 'good forest' (i.e. >40% canopy cover). The 'recorded forest [land] area' is not the same nor coincident with 'forest cover' because large areas of the legal 'forest estate' are not forested. This is due to an indeterminate combination of forest degradation and the appropriation and mis-categorisation of non forest lands, including grazing meadows and mountainous land above the tree line in the Himalaya.

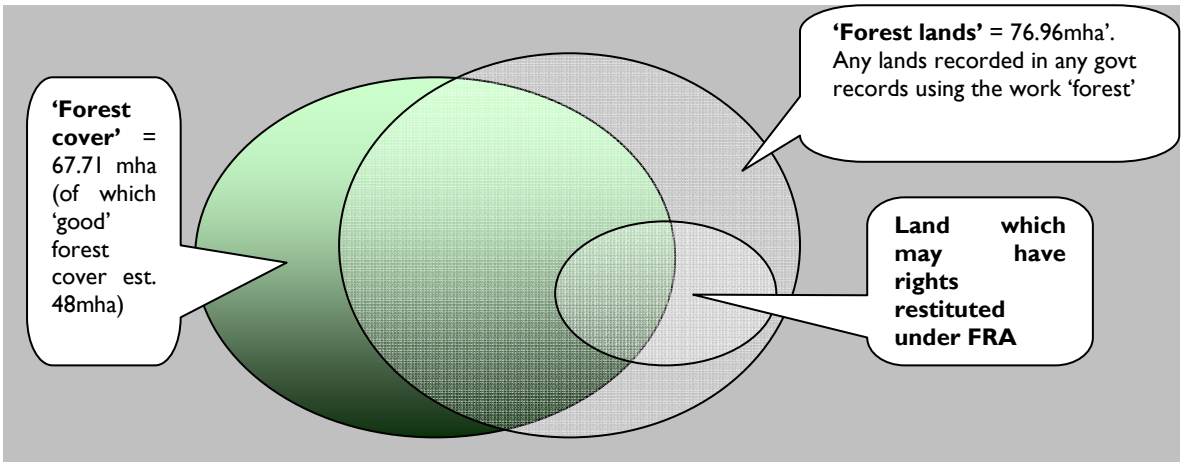


Figure 2: India's divergent 'forest cover' and 'recorded forest area'

3.3 A Taxonomy of Forest Rights Deprivation Scenarios

Through the historical processes discussed above, the rights of forest dwellers and forest adjacent populations, both tribal and non-tribal alike, to control, manage and use hereditary forest lands have not been systematically recognised or allocated, but rather have widely been negated. In this way forest peoples have become 'encroachers' on their own customary land in the eyes of the law (see Ghosh *et al.* 2009 for a review of these processes in West Bengal, and Kumar *et al.* 2009 for a review of Orissa). The range of forest rights deprivation scenarios on the ground is very diverse and location specific depending on the prior situations of these groups, the historical processes through which the state has extended its estate and the local interpretations of rules. The major ones are summarised below:

- *Rights deprived during the regular forest reservation / settlement processes:* As explained above, across India forest people lost rights in 'their' customary property according to due legal processes, under an annexationist regime where local people had little bargaining power.
- *Rights deprived during irregularities in forest settlement/reservation processes and un-surveyed village*: There are a vast number of cases where the forest settlement process were either not properly conducted, not completed or people were not notified, or where all areas were not checked. Some villages have not been surveyed at all and so rights have not been recognised. A particular issue here is the declaration of vast tracts of land as 'deemed' forests where the due legal process of settlement of rights was not subsequently followed and so, with no exercise to record use rights all rights are extinguished by default.
- *Estate acquisition:* In South West Bengal, immediately after independence, the state acquired private forest estates. However, in extinguishing the previous owners rights it also neglected the pre-existing local users arrangements with them. In failing to recognise the continuity of normal livelihood forest use rights that users had enjoyed from the previous owners, it criminalised them.

- *Shifting cultivation:* Shifting or 'long fallows forest' cultivation can be a sustainable livelihood system adapted to the agro-ecological conditions when fallows tenure is secure, as occurs in the North East. In the rest of India, shifting cultivation was stigmatised and such lands were declared state forests without recognising the rights of the cultivators, criminalising the practice and applying punitive treatment to offenders.
- *'Encroachment':* This has become an over-riding category, encompassing those whose lands which were declared state forests without recognising their rights; those displaced from their ancestral lands for 'development' projects without rehabilitation who were compelled to clear and occupy new forest land, and also those who have occupied lands declared state forests either due to land scarcity / poverty or as a consequence of their traditions of moving to new locations due to disease or declining land productivity.
- *'Forest villages'*: Bonded labour settlements were established by Forest Departments, mainly of forest tribal peoples, to provide labour for forestry operations. These villages, still existing in North Bengal, remain an anachronism in which subjects endure severely circumscribed rights and receive no social provisions other than via the Forest Department.
- *'Primitive Tribal Groups'*: Tribes who have been classified as 'primitive' (i.e. original, first, early, ancient) by the state according to anachronistic criteria. This includes 'hunter-gatherers', shifting cultivators and other non sedentary groups. These groups have endured particular deprivation because their livelihoods are inconsistent with the administrative land use categories, as they often avoid contact with outsiders, including administrators, and as they tend to be non-literate. They can more easily fall foul of legal processes which they are less likely to be aware of or contest.
- *Tribals without 'Scheduled Tribe' status:* A large number of tribes were either left out of scheduling altogether or were scheduled in one place but who have moved elsewhere for different reasons and lost the status. Both are deprived of the benefits of positive discrimination (including under the FRA.)
- *Sacred groves:* There has been a widespread traditional practice of conserving local forests as sacred areas. Forest Departments have no special provisions for treating sacred groves differently from other areas of forests, and they have often been incorporated in the state forest estate and felled (destroying the biodiverse ecosystem) as part of 'normal' felling operations. Only some on private land have persisted (Deb 2007).
- *National parks/sanctuaries:* Establishment of national parks and sanctuaries has often led to extinguishment of peoples use rights in protected areas without due legal process. Those who have inadvertently become residents of parks can also suffer from all sorts of service provision and access deprivations. As per information submitted to the Supreme Court, 60% of India's national parks and 62% of wildlife sanctuaries have not completed their process of rights settlement, subjecting hundreds of thousands of people to an extremely restrictive regime without acknowledging their rights.
- *Revenue forest boundary disputes:* The revenue and forest departments maintain separate land records for the areas under their respective jurisdictions. But there are many anomalies between these records. Both Revenue and Forest Departments often have the same land in their respective records. The "forest area" in the country, in the records of the Revenue Department, is 7.66 million hectares less than that recorded as such by state Forest Departments. These 7.66 million hectares (an area twice the size of Kerala) are disputed between the two departments. The government has no idea whether these areas actually have any forests or not. Revenue departments have distributed leases/'pattas' for these which the forest department terms illegal, under the Forest Conservation Act 1980.
- *Joint Forest Management:* There are now more than 100,000 *ad hoc* Joint Forest Management committees formed based solely on administrative provisions with no legal basis. In some cases common forests and cultivated lands with unclear tenure

have been brought under JFM by the Forest Department leading to evictions of cultivators and provoking conflict between villagers.
- *Self-initiated forest protection (CFM):* Local CFM groups have sought to protect forests on which they depend, yet this has often led to conflict with forest departments due to the protecting communities lacking legal rights over their forests.
- *Earlier evictions:* Many households have been evicted as 'encroachers' because they have lacked tenure for their customary land.
- *Displacement/'diversion' of forest lands:* Millions of forest dwelling and predominantly tribal households have been displaced from forest lands without proper compensation or rehabilitation because they lacked recognised tenure rights (Sarin 2005).

Thus we can see there is a wide range of scenarios, each with very complex specific circumstances.

3.4 Failure to redress forest rights deprivations

The inequitable heritage of mainly pre-democratic state territorialisation of forested landscapes into estates under forest departments 'command and control' regimes, managed for timber production, has been remarkably resistant to democratic reform. The colonial and post-colonial Indian state have provided a range of legislation for the settlement and protection of local rights to forest use. The major ones are:

- The Indian Forest Act 1927 (and previous 1878 Act) particularly Section 28 providing for 'village forests'.
- The Indian Constitution (1949), specifically Schedule V and VI providing special Constitutional protection to the resource rights of tribal communities.
- Ministry of Environment and Forests guidelines of September 18, 1990 for resolving conflicts with tribals and other forest dwellers related to forest land as well as the 1988 national forest policy.
- The Panchayats (Extension to The Scheduled Areas) Act 1996 (PESA) which provided for self-governance in accordance with their customs and traditions in Schedule V areas including management control over community resources and ownership of NTFPs by Gram Sabhas.

These provisions, however, have hardly been respected by many in the political or administrative elites or proved effective in practice. The highly centralised and bureaucratic forest departments have instead displayed a remarkable autonomy from them. This may partly be explained by their 'state-within a state' structure, comprising a revenue generating land estate, staff with quasi-judicial and para-military powers, and their own knowledge creation and training arm generating a legitimating epistemology (Springate-Baginski and Blaikie, 2007).

The growing crisis of forest loss and related rural poverty, which was precipitated by the 'command and control' bureaucratic model, did lead to some concessions, although not an overhaul. Forest Departments, with donor encouragement, launched Joint Forest Management policies by the end of the 1980s as a means to induce local people to help in the protection of their faltering plantation efforts. JFM agreements legitimated local people's NTFP collection and offered them a share of the revenue from 'final' timber felling in return for help in protection. Wage labour opportunities were sometimes also provided (from donor funds). However formal rights were *not* provided and Forest Departments have often used the JFM programmes as instruments to further extend their authority structures through, firstly, imposing their management plans on village forests (even taking more lands from local people through planting trees on cultivated plots), and secondly, generating funding support from donors to shore up and even expand their staffing and salary structures. Over 100,000 JFM groups have been formed across the country, (likely to include at least 25% pre-existing community forest

management and protection institutions), and the total number that are actually active may be less than half of the original figure. It is apparent that there is growing village-level disillusionment with JFM, both because of the *ad hoc* temporary scheme basis, the perceived arrogance of many FD public servants and the general perception of a 'confidence trick' being played with no rights accorded.

3.5 Intensifying Oppression: The 'Forest Case' Process and State Evictions

At the same time as the 'participatory' drama has been playing out across the country, controversy over the unresolved issue of local people's forest *rights* reached a new level of crisis. From 1996 public interest litigation brought by the previous owner of a nationalised forest challenging the lack of enforcement against commercial encroachers (*TN Godavarman vs. Union of India*) resulted in unprecedented action by the Supreme Court. Based on a misinterpretation of court orders on the 3rd May 2002 the MoEF issued a directive to Forest Departments to evict all so-called 'encroachers' in a time-bound manner. The letter estimated the forest area under encroachment to be 1,250,000ha across eight states, and asked the states to remove all encroachments ineligible for regularisation by 30th September, 2002.

Many millions of forest dwellers and forest adjacent populations have not had their rights recognised and therefore they are viewed under this order as illegal 'encroachers' to be evicted. Evictions were attempted in many states leading to intense conflict and public outrage. According to the Minister of Environment and Forests (in a Parliamentary reply), between May 2002 and August 2004 an estimated 152,000 ha of forest land was cleared of 'encroachments'. Estimating at 1 ha/household, this would involve 152,000 families or about 750,000 impoverished people, brutally evicted:

> As a result of the 2002 eviction orders issued by the Ministry of Environment and Forests, more than 300,000 families across India were forcibly evicted. More than a hundred villages were burned in Madhya Pradesh, eight people killed in police firings and 40,000 families left homeless in Assam, and elephants used against villagers in Maharastra and Assam. In many cases those evicted had been cultivating from prior to 1980 - and hence were legally entitled to their lands …. The justification for this brutality was the need to remove "encroachers" and protect forests. *Campaign for Survival and Dignity November 2007 – from depositions made at a public hearing*

Ultimately this eviction process became a political liability and had to be stopped, by command at the highest political level. In October 2002, the MoEF itself issued a clarification order that *not* all those in occupation of forest land were illegal encroachers and hence should not be evicted till their rights were recognised. The MoEF also later issued two orders in February 2004 (under political pressure prior to national elections), one for the states to convert all 'forest villages' into revenue villages within 6 months, and a second to recognise forest rights of tribals within one year. However these were stayed by the Supreme Court.

The acute livelihood insecurity of hundreds of millions of citizens in a democracy at the hands of a semi-autonomous administration, with the Supreme Court looking the other way, had become politically intolerable. The FRA emerged from the inconsistency, in a democratic polity, between the bureaucratic attempts to perpetuate a management model of forested landscape 'ethnically cleansed' of populations and those subjugated citizens' seeking political articulation for their persistent grievances.

4 COLLECTIVE ACTION: HOW THE FRA 2006 EMERGED

The general point here is that institutional reform in favour of a particular group is likely to require mobilisation and concerted action by that group. Whilst the dispossessed are not organised it is unlikely their grievances will be dealt with effectively. The fact that the FRA emerged after concerted campaign illustrates this point well. Detailed analysis is needed to understand the issues surrounding the collective action of hitherto politically-economically marginalised groups. How is it that they have been able to articulate their aspirations though the imperfect but nevertheless democratic constitutional polity. The passage of the Forest Rights Act 2006, along with other much recent restitution of land rights to indigenous groups internationally, seems to illustrate that marginalised groups can use the democratic political apparatus to defend the material basis for their 'moral economy' against enclosure and capitalist (and state) accumulation, and even reverse it.

It is unusual for democratic processes, especially in India, to have such a direct and reversing effect on the kind of enclosure which goes on in the presumed 'normal' development of capitalism. Indeed it has emerged at the same time as the state's close support for corporations, both Indian and foreign, have been becoming more extreme, involving coercive land acquisition relaxation of environmental impact assessment requirements and ignoring labour relations abuses. (Alternative Economic Survey, 2007).

Yet whilst India has been experiencing a dramatic urban oriented economic boom in the past decade, it has at the same time been experiencing an 'agrarian crisis' with stagnating farming production and rural incomes. The inability of the rapidly growing industrial and service sectors to absorb the rapid population growth is reflected in massive levels of rural un- and under-employment. Malnutrition has also persisted at a very high level despite gradually rising mean incomes. Continuing land and resource degradation as well as resource transfers to capitalist enterprises have had negative impacts on rural livelihoods. In the poorest areas, often upland tribal regions' poverty levels have hardly benefited from the boom, yet have been subject to further predations by both the state (forest evictions) and corporations (seeking mining and other concessions including plantations on tribal land).

'Powerful opposition' involves a few related interest groups: conservative elements in the forest bureaucracy at Ministry level; conservationists keen to perpetuate exclusive approaches, and industrial interests motivated to protect the opportunity to access state forest areas for mining and land.

Here we consider how the campaign for the Act became effectively mobilised and the nature of the negotiation process that led to the Act being passed in its final form.

4.1 Origins of the Bill: the 1990 BD Sharma note

The drafting of the FRA actually emerged from the struggle for implementation of orders issued by the MoEF in 1990. Dr. B. D. Sharma, a highly respected civil servant then Commissioner for Scheduled Tribes and Scheduled Castes (a constitutional authority), gave recommendations in 1990 based on his 1989 review of the conditions prevailing in tribal areas (which particularly focused on the underlying causes of unrest due to lack of settlement of land and forest rights). A Committee of Secretaries and the Cabinet approved these recommendations, based on which the MoEF (three months after the JFM notification) issued guidelines for regularisation of forest land rights and for resolving conflicts related to forest land. These recommendations aimed at four main issues:

1. To regularise the pre-1980 'encroachment' of forest land by giving land titles to the settlers.
2. To settle disputed claims over forest land arising out of faulty forest settlements.

3. To recognise leases/'*pattas'* [i.e. provisional tenure documents] issued by revenue departments under due government authority on land recorded in its records as revenue land which was also recorded as forest land in forest department records. Dr BD Sharma argued that there is no reason why people should be penalised because of faulty government land records when revenue departments had issued leases/'*pattas'* under due government authority.
4. To convert 'forest villages' into revenue villages.

These MoEF guidelines, which did not distinguish between tribal/non-tribal claimants, included compensatory afforestation requirements despite the SC/ST Commissioner's objections (which the FRA has now dispensed with). They also restricted eligibility to those able to prove pre-1980 occupation by producing offence reports issued by the FD (the latter against the SC/ST Commissioner's recommendation). However implementation of these orders was neglected. Two states issued directions for their implementation but in the absence of systematic follow up by MoEF, and in view of the inability of the potential beneficiaries to demand implementation, the guidelines were all but forgotten, barring the guideline for pre-80 encroachments. Public attention from 1990 onwards shifted to JFM while the critical issue of securing formal rights escaped attention.

4.2 Mobilisation of Marginalised Groups

After the attempted evictions in 2002 the ensuing uproar radicalised and mobilised popular movements and a new common cause was recognised between forest dependent groups across the country. This coalesced into the Campaign for Survival and Dignity (CSD), a loose federation of grassroots organisations and people's movements spread across the 10 states where the issues were most widespread. Representatives met periodically to review emerging issues and develop strategies of action, including organising demonstrations, marches, *jail bharo* campaigns and lobbying with local, state and central political leaders.

The CSD's initial demand was time bound to the implementation of the 1990 orders, although this gradually became converted into a demand for a new law due to the apprehension that the orders may remain unimplemented as in the past. The procedural guidelines developed by CSD for implementing the 1990 orders were developed into the first draft of the FRA incorporating the major change that instead of the MoEF, the Ministry of Tribal Affairs should be the nodal agency for tabling and implementing the law.

4.3 Political Contestation and the Passage of the Act through Parliament

There were almost 3 years of heated debates and political lobbying between the preparation of the first draft of the new law and its final coming into force on January 1, 2008. Initially, lobbying for the Act was done through contacts in the National Advisory Council (NAC) chaired by Sonia Gandhi, Chairperson at the United Progressive Alliance (or UPA: the present ruling national coalition). In the early days of the Congress coalition the NAC was pushing for reform, and at the NAC's recommendation, the matter reached the Prime Minister who asked the Ministry of Tribal Affairs (MoTA) in January 2005 to draft the law. The MoTA set up a Technical Support Group which included 3 CSD representatives to assist it in drafting the law. The Technical Support Group prepared the first draft of the FRA in just over two weeks in February 2005 as the Government wanted to table the Bill in Parliament in the coming budget session. Vehement opposition from the hard core 'fortress conservation' wildlife lobby, however, delayed tabling of a by then much diluted version of the draft in Parliament until December 2005. This was followed by a Joint Parliamentary Committee (JPC) of 30 MPs examining the bill over six months during 2006 and recommending a major changes and improvements in

the version tabled in Parliament. The present FRA is a considerably diluted version of the law recommended by the JPC.

Politicians often needed to be provided with information and analysis of a poorly understood issue concerning people on the margins before becoming motivated to pursue it. This process ultimately led to the Communist Party (Marxist) and other left parties taking up the issue both within and outside Parliament. However, this should not be interpreted solely as a United Progressive Alliance (UPA) coalition policy, as prior to the UPA the BJP-led coalition (National Democratic Alliance) had also recognised the need to appease the forest dweller 'vote bank'. Ameliorating civil unrest in tribal areas definitely seems to have been a significant consideration in enacting the law, as the lack of recognition of forest rights has been a major factor in mobilising support for the extensive Maoist movements across India's forested tribal regions.

Opposition to the Act had mainly come from the forestry administration and their 'fortress conservation' allies. Conservationists claimed that wildlife conservation requires inviolate 'wilderness' areas, as they felt that co-existence between humans and wildlife was not possible. They also feared that the recognition of rights in forest and wildlife areas would lead to intrusion of development in interior areas, yet in some cases this seems to be contradictory and an issue of a conflict of interest, as many conservationists have evident interests in commercial wildlife tourist enterprises. There was a certain inconsistency in the selective opposition to the Act at a time when industrial, mining and infrastructural 'development' projects were easily gaining permission to exploit some of the most ecologically fragile and biodiversity rich areas, and certainly not experiencing the strong and highly emotional opposition reserved for the rights of the most marginalised.

The MoEF and state FDs may have hoped to prolong debate over the Bill until the UPA coalition backing it either collapsed or ended its tenure. Furthermore, at every stage the initial aspirations for the Act have been diluted in order to be politically acceptable and accommodate the MoEF, Forest Departments and the fortress protection wildlife lobby. There were many further provisions in the draft bill recommended by the Joint Parliamentary Committee which were cut by the bureaucrats at the last minute, such as right to timber and minerals from community forest resources.

The Act was finally passed in December 2006, forming a third prong of legislation empowering to the poor and oppressed, in concert with the Right to Information and the National Rural Employment Guarantee Acts.

4.4 'Turf-war': The interregnum before the pronouncement of the rules.

After the Act was passed by Parliament there was an interregnum while the Rules, which would bring the Act into force, were drafted. During this period a number of contests played out as actors sought to make pre-emptive manoeuvres, despite the fact that there are provisions in the Act against the legality of many such manoeuvres.

Whilst many forest rights-deprived people still live in or adjacent to the forest and so urgently need their rights settled, many have already been evicted either in the past or more recently. Under the Act only those residing in the forest are eligible to claim recognition of their rights (although there is also provision for those illegally evicted, the main problem is likely to be producing evidence of illegal eviction). During this period however, there was a rush by many Forest Departments to enforce evictions of forest peoples, in the expectation that when the Act came into force it would be too late to evict them. In AP, the High Court even had to issue an interim stay order against Forest Department evictions.

FDs also made a renewed push for implementation of JFM in some tribal areas in order to extend their control of forests. A new draft law already tabled in the Rajya Sabha and promoted by the Ministry of Environment and Forests requires that all compensatory afforestation work to be done by JFM groups. This seems to be an attempt to strengthen the now very tenuous position of JFM groups but it is in direct contradiction to the rights of *gram sabhas* in the FRA, and of course JFM groups are not even statutory bodies.

Even *after* the rules had been finalised, it seems their coming into force was again delayed because of behind the scenes manoeuvres apparently by the wildlife lobby, seeking to use the Act's provisions for notification of 'Critical Wildlife/Tiger Habitats' by Forest Departments. FDs have been pre-emptively trying to notify as many as possible by expanding existing 'core areas'. However, the FRA lays down a clear procedure for notification, which MoEF is apparently violating through such hurried notifications. The Rules were finally issued 1st January 2008, thus bringing the Act into force.

5 IS THE FRA 2006 FIT FOR PURPOSE?

We are concerned to understand here whether what has emerged from the policy process adequately responds to the major rights deprivation scenarios. Again, there is a wider historical-institutional analytical issue at stake – is it reasonable to expect that a reform without a greater 'critical juncture' can really overcome the path dependency of existing institutional structures and interests? It may be hypothesised that the text that emerged, in seeking to compromise, may not adequately fulfil the function aspired to by the campaign. This reflects a wider issue of democratic aspirations becoming moderated and diffused through the bureaucratic and politixal processes. Is the FRA a durable juncture, or merely a symbolic victory, whilst the fight goes on and the door is left open for diffusion elsewhere.

The Forest Rights Act does not provide for the state somehow magnanimously 'granting' rights as a welfare measure, but rather it seeks to recognise pre-existing rights which were never recognised due to the unsound processes of state appropriation. Here we consider the extent to which the Act adequately addresses the range of forest rights deprivations scenarios which exist. A key challenge in drafting the Act has been to target these scenarios without focussing too narrowly (and thereby excluding legitimate groups) nor too broadly, in order to include opportunists.

The Act has preliminary sections and then seven chapters. The stated aim of the Act is:

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

5.1 Key aspects of the FRA

Overall there are two main sets of rights to be gained in the FRA:

1. Private and/or communal land ownership rights, including restitution for past illegal eviction / displacement.
2. Community resource use rights, including collective management of common (or community) forest resources; rights over common property resources such as produce of water bodies; grazing rights (both for settled and nomadic communities); rights over 'habitat' for 'Primitive Tribal Groups'; other customary rights and usufruct (actually 'ownership') rights over Non Timber Forest Produce (although there is some ambiguity over whether these shall be 'community' or individual rights).

It is difficult to clarify just how many and which people suffered from the lack of recognition of rights in the past, and how many of them are likely to remain outside of the FRA's ambit. The definitions in the Act are vague on this issue and cover only those dwelling in the forest as a pre-condition for restitution.

> "[F]orest dwelling Scheduled Tribes" means the members or community of the Scheduled Tribes who primarily reside in and who depend on the forests and forest lands for bona fide livelihood needs and includes the Scheduled Tribe pastoralist communities,

and

> "other traditional forest dweller" means any member or community who has for at least three generations prior to 13th day of December 2005 primarily resided in and who depends on the forest or forests for bona fide livelihood needs.
> (FRA Chapter I: Preliminaries)

This may be used to exclude the majority of tribal poor people who may not be actually dwelling 'in' the forest but are dependent on it. Using the category of 'scheduled tribes' may exclude up to 50% of tribal groups who have not been 'scheduled' under the constitutional process. Furthermore the section '..who primarily reside in and depend on the forest …' is critically important for defining who is eligible. The 'and' was changed from 'or' just before the bill was passed by parliament and if narrowly interpreted in implementation, whilst defending against land grabbers, may exclude most rightful claimants. The definition of 'Other traditional Forest Dwellers' is even more stringent and would apply to Scheduled Tribes compelled to move to areas other than where they were scheduled, if proving residence over 3 generations of 25 years each.

Beyond the text of the Act there is also the text of the Rules, which fails to clarify the precise implementation of many provisions of the Act, leaving them to the discretion of the state level implementing agencies. These grey areas include the definition of the Gram Sabha, provisions for community tenure and interpretation of the eligibility criteria of 'primarily residing in forest and forest lands'.

5.2 Community use rights

The Act is not just a forest *land* rights act but also an Act recognising rights over forest *resources* (i.e. also for collective management and use) and as such lays the basis for renewing decentralised, community based natural resource governance. This is a controversial area for Forest Departments as it challenges their exclusive territorial control. It remains unclear how much more successful the FRA will be than the previous PESA legislation which has remained unimplemented. In particular, the new management regime is as yet unclear:

- How will 'user groups' be formed (e.g. size and entry requirements)?
- Will management be simply passive/conservative or active, and will it take advantage of technical opportunities for production of desired forest products?
- Will management planning be democratic?
- What will happen to pre-existing JFM committees, given their weak legal standing?

The issue of pre-existing JFM committees is particularly instructive. Rights to protect, conserve and manage the community forest resource for sustainable use are now to be vested in the *gram sabha*. JFM committees are generally based on FD administrative orders with no formal legal standing. In principle, therefore, where a JFM forest is claimed by a community, the *gram sabha* should automatically replace the JFM Committee. The Gujarat tribal secretary has already issued orders to that effect. In

Orissa, self initiated forest protection groups will no longer need to accept JFM as the only available means of gaining official legitimacy. Yet implementation will depend on how many villages will be organized enough to claim. This is most likely to happen in areas where the people who still have association with customary forest land are already engaged in self-initiated CFM, and are aware and organised.

5.3 Non Timber Forest Products

Minor Forest Products (MFPs) is an old fashioned and prejudicial term for Non-Timber Forest Products implying that timber is the major forest product. The FRA clearly defines MFPs:

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

There is currently extensive state legislation and administrative regulations governing NTFPs and their marketing, involving state monopolies for many products and transit rules. For instance in Orissa, Kendu leaf is nationalised: the Orissa Forest Development Corporation has monopoly rights and pays royalty to the government, reflecting the assumption that the state is the owner. But here in 3(1) c. it asserts the 'right of ownership to MFPs' including in areas beyond village boundaries, which effectively supersedes such current structures and practices. Things will need to change due to the fact that the government is no longer the 'owner'. However, there will still be a need for government support in the market. Perhaps instead of a monopoly, the state could encourage competitive purchasing to push up price but offer a minimum support price. Structures in AP West Bengal, Karnataka and other states, will similarly require overhauling or replacement by totally new institutional arrangements. Typical state royalty rates are also too high for NTFPs and will need to be reviewed. For tendu leaf in Orissa, for example, it is around ~Rs.300/ tonne, far higher than bauxite at ~Rs. 30 / tonne.

5.4 Conservation and wildlife issues

All rights must be recognised in all Protected Areas. Only after that can any process of relocation or modification of rights take place. 'Critical Wildlife Habitats' (CWH) is a new legal category introduced by the Act in order to ensure that areas that are particularly essential for conservation of threatened species or habitats can be made inviolate through modification or acquisition of rights recognised in such areas. The Act requires that the process of identifying such habitats be transparent, consultative and fact based. However, conservationists and the forest bureaucracy have been trying to subvert this by declaring all protected areas as CWHs in the name of wildlife protection (as mentioned above). The MoEF issued its own CWH guidelines before the Act came into force (and therefore, technically it was in violation of the law). Critical Tiger Habitats (CTH) have been notified without the mandatory recognition of rights and informed consent of *gram sabhas*. This seems to be an attempted 'confidence trick' but which communities in a number of Protected Areas are beginning to challenge.

To sum up, the Act gives extensive provision for major reforms in tenure and governance of forests. There are indeed issues with precise wording; however, the bigger issue is how and by whom the Act will be interpreted. Whether it will be taken up and implemented according to its spirit, or rather whether the terms will be interpreted narrowly to divert the intent.

6 WILL IMPLEMENTATION OF THE ACT LEAD TO INSTITUTIONAL REFORM AND RESULT IN POVERY ALLEVIATION?

Having reviewed the origins of forest rights deprivations and the extent to which the FRA provides enabling legislation as a basis to redress them, the central concern must be whether the advent of the FRA will actually signify a real and durable 'pro-poor' reform in practice. Poor and marginal groups are undoubtedly increasingly mobilised and influential, as reflected their engagement in the electoral process, for instance alliances in the recent election in Uttar Pradesh. However, whether this means they are becoming better able to defend and extend their interests within India's political economy and perhaps even negotiate pro-poor distribution of the benefits of the national economic growth, is a more tenuous issue. A more pessimistic view would be that the Act will ultimately represent only a symbolic concession which may ultimately, through evasion or mal-implementation, amount to little significance, serving to temporarily mitigate discontent and raise expectations but not challenging elite control of valuable resources and powers to evict.

After less than two years since the Act came into force it is too early to answer this question conclusively. The FRA is undoubtedly a major breakthrough of enabling legislation (despite debates over the details). However, its success and whether it will actually lead to meaningful pro-poor institutional reform at the local level, stands or falls on whether it is successfully implemented and whether it leads to institutional reform in the bureaucracy so accustomed to limited restrictions on its powers. Unless the rights are recognised and actually recorded in government land and forest records, they will remain ephemeral. An institutional change of this order undoubtedly requires detailed implementation processes under public oversight, and the new provisions don't automatically 'fit' with other local and state-level institutions and distributions of power. The implementation process itself is therefore a key issue. This section of the paper seeks only to set out the contextual framework. Subsequent papers, based on field research, will elaborate how the process is actually proceeding.

6.1 Mechanisms for implementation envisaged?

The implementation mechanism envisaged in the Act and Rules involves four levels:

1. The village *gram sabha.* This will elect a Forest Rights Committee to identify, verify and recommend claims through a gram sabha resolution which will be sent on to the Sub-divisional Level Committees
2. These Sub-divisional level Committees, involve staff from Revenue, Tribal and Forest Departments and three elected representatives of the district government. They are there to oversee and facilitate this process through raising awareness, clarifying the rights and responsibilities, providing necessary information resources and monitoring the process to ensure it is free and fair. These committees are also to verify and consolidate the claims received from gram sabhas, hear appeals and send their recommendations to the http://www.sussex.ac.uk/education/profile1591.html.
3. District level committees, which are to examine and finally approve the rights and get them entered in official records.
4. The State committee, which will oversee all the District committees.

There are a number of concerns here. One is that resourcing this level of activity would need to be substantial but no funding has been provided so far. The Central govt has simply passed the buck to the state governments who are finding it difficult to allocate funds for the kind of support required. The second is that in most states, the process is mainly oriented toward granting private land rights, and the complex issues of common land rights and management structures are not being adequately addressed. Another issue here is the village level inequalities and the extent to which hierarchical relations

can be overcome. Lastly, the Act does not provide for *how* the rights shall be exercised. This will become clear only after the process of recognition has been completed when forest departments are likely to continue trying to assert their authority.

6.2 Are complimentary reforms required?

There are inevitably a large number of inconsistencies between the new Act and pre-existing administration policy at national and state-level, which need to be resolved. Daniel Brinks (2006: 225) in a study of institutional change in Brazil observes:

> "Institutional change … requires a series of changes in related areas before it can produce the desired effect".

The Act supersedes previous laws as far as recognition of rights is concerned, but it is ambiguous about the role of existing laws in *regulating the exercise* of those rights. Section 4 of the Act dealing with the recognition of rights begins with the words:

> "Notwithstanding anything contained in any other law for the time being in force ... The central government hereby recognises and vests forest rights."

Thus, rights have to be recognised irrespective of the Indian Forest Act, the Forest Conservation Act, the Wildlife Protection Act and so on. However, section 13 confuses the picture by saying that :

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

Different lawyers seem to interpret these two sections differently, but, what is clear to date is that virtually no one is challenging the process of recognition of rights which has already got going (except a number of somewhat frivolous petitions filed against the Act in the Supreme Court and some state High Courts).

But there is definitely likely to be conflict with forest departments, especially when people start asserting their power vested under section 5 to protect wildlife, forest, biodiversity etc. and start trying to manage their community forests according to their own rules. It may reasonably be expected that the MoEF will try and compel MoTA to issue guidelines for how these rights should be exercised. However, one saving grace is that the only area in which MoEF is specifically empowered is for the identification of critical wildlife habitats within national parks and sanctuaries. The game they have tried playing with that power is already evident and MoEF's secretary has received a notice for breach of parliamentary privilege for issuing guidelines and instructions for identifying critical wildlife habitats before the Act had come into force.

One area already mentioned relates to NTFP trading provisions. If state Forest Corporations are no longer the monopoly body it would be better if they still maintained some market support role.

Another important area for complimentary reform will be donor adaptation. Donor forest related projects typically go to forest departments but they are clearly not the appropriate agency for taking up tribal development. The World Bank and DFID are both involved in forest/rural livelihood issues and will need to look again at how to achieve their objectives under the new conditions. JBIC is lending huge funds for forest projects through Forest Departments and forest development agencies, but under the Act many of the JFMCs will get superseded. In Orissa, where JBIC has recently funded a large forestry project through the forest department, villagers are already protesting against

plantations with JBIC funding being undertaken in lands being cultivated by tribals before their rights have been recognised. They are demanding suspension of the JBIC project till the process of recognition of rights has been completed and clarity of changed jurisdictions.

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

6.3 Challenging the status quo political economy of rights deprivation

The political marginalisation of the poor and the poverty of the politically marginalised are two sides of the same coin. Political and economic control can be renegotiated by them through concerted mass political mobilisation for institutional reform. However, institutional reform alone has not, in the past, been sufficient to empower the politically marginalised poor to significantly improve their economic positions. Indeed, structures have been very obstructive to marginal groups securing their rights and to the implementation of progressive legislation like PESA (including resistance from bureaucratic organisations like FDs). On the other hand, some recent legislation is being successfully implemented despite resistance and are helping change entrenched power structures (National Rural Employment Guarantee Act, Right to Information Act).

Devolution of power to the reformed institution (that will lead to forest development) and equity within the new institution are the two elements that can make the forest dependant poor richer and provide more dignity to their life. Attaining the first may be a matter of legislation; the second element will need outside support. The distribution of benefits in villages will undoubtedly be affected by local politics. Who that 'outside' is, is a difficult question to answer and field work in the villages may solve this question.

Political issues are clearly implicated in the local and state institutional ones, to do with local informal and formal sources and forms of power and influence. Who will be for it, politically, and who against it? Can the purpose of the Act be emasculated by implementation delay and obfuscation? How will/does this work out in the different states? What does this tell us of the local political processes in those states? Informal power relations and illegality may be a key factor here. Timber mafias would be likely to be affected and they are believed to have high level political influence.

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

The anticipated improvements to livelihoods and livelihood security through the FRA may be summarised as follows:

1. Freedom from regular harassment, rent seeking, destruction of assets and extortion resulting from lack of tenure. The act should alleviate these serious problems for hitherto rights-deprived groups.
2. Livelihood vulnerability, which is very high where households lack secure tenure and rights. Vulnerability to eviction and legal sanction will be removed thereby preventing a deepening of poverty.
3. An improved range of rights to control and manage forests and secure access to their harvests should provide improve income streams.
4. Secure forest rights give an incentive for investing in land and forest improvements. Land-based investment depends on the security of tenure and therefore the FRA may help.
5. Legal forest rights may allow access to credit on basis of patta as collateral (although, since the titles will be inalienable, special arrangements will be required to facilitate access to formal credit) The benefit of land reform may be increased with credit or other complimentary inputs (e.g. water). But, this is likely to vary with context. In many cases, people have irrigated paddy fields

notified as reserve forests and tenurial security should enable people cultivating such land to substantially enhance their returns even without credit and other inputs.

6. Recognition of cultivation rights over forest land through its conversion to revenue land should permit the right holders to gain access to development inputs from other departments which they are currently deprived of.

However for many villages complimentary development support mechanisms will be essential. With the FRA some villages such as 'forest villages' and protected areas should become eligible for normal service provision such as agricultural extension and clean drinking water sources which currently FDs are often objecting to.

7 CONCLUSIONS

The forest rights restitution process in India reflects an international process of marginalised indigenous and other forest dependent groups seeking to defend rights in their customary lands, most clearly stated in the *UN Declaration on Rights of Indigenous People 2007,* which acknowledges the importance of recognising and protecting indigenous peoples' land rights. This paper has used a historical institutionalist approach to discuss the origins of forest rights deprivations, the emergence of the Forest Rights Act 2006 and its prospects. The Indian Forest Rights Act has begun to change the institutional 'playing field' in terms of undermining the historical basis for state enclosure of forest lands and puts many aspects of the contemporary forest land administration on the wrong side of the law, therefore requiring reform.

The account has illustrated the extent to which the formation and change of institutions, in this case in relation to forest rights, is a profoundly political process with substantial implications for poverty and its alleviation. That forest rights deprivations have been persistent cause of grievance for forest peoples reflects their continuing political marginalisation. The breakthrough of the Forest Rights Act to an extent implies increasing political inclusion in democratic processes. However the political processes and compromises necessary for securing reform have inevitably narrowed and diluted the scope of the reform, in relation to the breadth of the problem.

Furthermore passing an Act which establishes new rules is far from being the end of the story for institutional reform. The *politics* of implementation are as important as we have seen in the case of the FRA. The challenges of implementation reflect several factors. Firstly implementation of any reform involves effort and commitment to change established procedures and practices. This likely goes against the 'path of least resistance' and so without dynamic leadership, consistent lobbying and substantial resourcing implementation is inevitably a gradual process of change. Secondly, however, incumbent administrations are likely to have significant divergence of interests from the interest groups favoured by reform, acutely so in the case of the FRA, and therefore may be actively hostile to full and proper implementation, at least where discretionary opportunities to do so exist. In India's federal polity we can observe a range of different patterns of response due to the varying constellations of power and interest. However, comprehensive assessment of actual implementation processes remains needed if we are to understand the extent to which the FRA may become a 'pro-poor institutional reform' in practice, a critical juncture of sorts, rather than a symbolic consolation. The research project on which this paper is based is currently completing detailed research on implementation processes in three states in India (West Bengal, Orissa and Andhra Pradesh) in order to understand how these processes are unfolding.

Whilst implementation is an essential condition for success, there is also need for cognate institutional changes to enable implementation. In the case of the FRA local people need to know and understand the basis for accessing their rights, and if and

when they secure them they will need to be able to defend them and take full advantage of them. The pro-poor impacts of implementation are not yet apparent as the implementation process is only really just getting under way. However it is reasonable to expect major poverty impacts in the fullness of time as forest peoples improve their livelihood security through secure tenures and are able to take advantage of it.

Finally we would recommend a number of key actions in order for the Act to be properly implemented and to achieve the maximum pro-poor impacts:

- The implementation process will inevitably be long term. Hastily pushing through coarsely simplified tenure reform, without major resourcing to ensure local specificities and the full legislative provision are properly addressed (perhaps with an eye to on electoral timetable) is likely to lead to more complications for the future and should be discouraged.
- At the national and state level forest departments must be recognised to be interested parties in the reform who stand to loose territory, and so their role in adjudication should be minimised and balanced.
- Handing over rights should be accompanied by capacity-building support to help forest peoples take full advantage of those rights in order to sustainably manage their resources.
- The gradual implementation of the FRA 2006 is likely to expose its limitations in redressing the full scope of rights deprivations, and it may be that in due course a more comprehensive Act is needed and becomes more politically acceptable.

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