

Historical injustice and “Bogus” claims: Large infrastructure, conservation and forest rights in India

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Abstract

This essay examines the role of India's 2006 Forest Rights Act in the procedures that regulate transfer of forest land to large infrastructure projects. Specifically, it shows the gap between the legally mandated requirements and how these are implemented in project approval processes. This is illustrated through a case study of the coal mining approvals in the Hasdeo Arand forest region in the central Indian state of Chhattisgarh. The essay also outlines the different actors who have influenced the discourses on forest rights of Adivasi and other forest dwelling communities and what they identify as factors that challenge the implementation of this law on the ground. It juxtaposes this analysis in the context of the recent decision of the Supreme Court of India on eviction of forest dwellers and examines whether that would bring in any structural change in the way the law is implemented.

Author's profile

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As the country geared up for the 17th Lok Sabha elections, the first quarter of 2019 saw two decisions that signify the deeply fraught forest governance in India. The first was the Supreme Court’s direction¹ to state governments on evicting families whose legal rights to occupy forest land were “rejected”.

The apex court’s decision came in a case challenging the constitutional validity of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 (FRA). The orders of February 13, 2019, which were revisited two weeks later on February 26, took the view that anyone whose forest rights claims have been rejected could be regarded as an encroacher and therefore liable to be evicted.

The petitioners in this case were leading wildlife NGOs, who argued that several “bogus” claims are being filed in the garb of securing forest rights. They argued that corrective measures including evictions would only protect the legally deserving inhabitants.² In response, forest rights groups campaigned strongly against what they called an attempt to sabotage the FRA process. Social media conversations and other public messages called this to be conspiracy of groups who believe “fortress conservation.” This approach visualises the future of forests without any human presence.

Exactly during this period, the Ministry of Environment, Forests and Climate Change (MoEFCC) approved the diversion of 841.538 hectares of the Hasdeo Arand forests in Central India in favour of Parsa, a coal mine in Sarguja district of Chhattisgarh. For the last four years the tribal village assemblies of the area have asserted their constitutional right to refuse all mining proposals impacting this contiguous forest area important for Gond tribal communities³, wildlife and the water security of the area. In response to their opposition, they received a notice rejecting their legally recognised community forest right under the FRA on the grounds that the exercise of their rights in coming “in the way of mining.”⁴ The villagers

¹ Wildlife First and Ors (WP (C) 109/2008).

² Kishore Rithe (2019), The SC’s February 13 order on FRA was consistent with its earlier stand, Hindustan Times, February 28 2019 (<https://www.hindustantimes.com/analysis/the-sc-s-february-13-order-on-fra-was-consistent-with-its-earlier-stand/story-JNYBxveKIRiTb3FZnVNeuL.html>).

³ Gonds or Gondi is one of the oldest and largest tribal groups in India, belonging to a forest region in central India that was historically known as Gondwana. They are recognised as a Scheduled Tribe in the Fifth Schedule of the Constitution of India.

⁴ Kohli, K. 2018. An unresolved legal question about forest rights, Human Rights Law Journal, Vol.II, May 2018.

have also made several formal submissions pointing to the compromised legal process that allegedly includes forged signatures and manufactured consent, which are discussed further in the essay.

If the Supreme Court's orders had not been restrained, then these villagers could also have been in line for eviction. Now their records will form part of the docket submitted by the state government before the Supreme Court. How the court proceeds on each claim will perhaps be clearer on July 24 when the case is listed again for hearing.

Forest rights and forest diversions

A law for forest rights

The FRA was enacted as an attempt to resolve injustice that tribal and other traditional forest dwelling communities had historically faced at the hands of a colonial forest bureaucracy. Alienation of land, restriction of access, forced evictions and lack of decision making over managing these lands are only a few manifestations. Fabricated arrests on account of trespass, 'connivance' with poachers and timber mafia have been other areas of conflict.

When the law was first envisaged, its primary focus was Scheduled Tribes as recognised in the Fifth and Sixth Schedules of India's Constitution.⁵ The draft law was subsequently revised to include both tribal and other traditional forest dwelling communities who also have long-standing habitation and livelihood dependence on forests.⁶ The mainstream political traction for the FRA came from it being perceived as providing land rights that could help influence vote banks in electoral constituencies.

Once enacted the law did three key things. First, it laid out a detailed process through which rights subsisting as on December 13, 2005 could be whetted and recognised by the Gram Sabhas (village assemblies)⁷ and subsequently entered into government records. Second, it distinguished between the grant of individual rights up to four hectares and community forest rights for which there isn't any defined limit. These individual rights can only be inherited and not transferred by sale. Thirdly, it clarified how forests should be

⁵ Areas primarily inhabited by constitutionally recognised Scheduled Tribes have been granted special governance and protection status in India. This is through the Fifth and Sixth Schedule as prescribed under Article 244 of the Indian Constitution. While the fifth schedule covers 10 states in India, special administrative status is recognized in the states of Assam, Meghalaya, Tripura and Mizoram, as the Sixth Schedule Areas.

⁶ Kundan Kumar and John M. Kerr (2012). Democratic Assertions: The Making of India's Recognition of Forest Rights Act, *Development and Change* 43(3): 751–771.

⁷ Gram Sabha" means a village assembly which shall consist of all adult members of a village and in case of states having no Panchayats, Padas, Tolas and other traditional village institutions and elected village committees, with full and unrestricted participation of women.

governed, once rights are conferred allowing for conservation and management roles for rights holders. The law distinguishes between tribal communities and other traditional forest dwellers who are required to show proof of residence for three generations or 75 years.

Conservation groups had expressed concerns that the grant of rights will be a threat to wildlife and break up already vulnerable forest areas that need to be protected. This is especially important for flagship species like tigers that as is argued require undisturbed areas for their survival. The inclusion of conservation duties for rights holders in the law did satisfy organisations and researchers supporting community-based conservation. However, concerns remained for all others who see creation of inviolate areas under laws such as Wild Life Protection Act, 1972 as the most effective way forward for conservation. This model proposes the relocation of human communities for the protection of wildlife.

Use of forests for extractive and infrastructure projects

The implementation of the FRA rests on the Ministry of Tribal Affairs (MoTA) and respective state governments as forests are under concurrent jurisdiction of both central and state governments. However, this law does not specify what process should to be followed in case either community or individual forest need to be used for other uses such as mines, dams, highways, industries, power plants or renewable energy projects. The FRA recognises the Gram Sabha (village assembly) as supreme and vests these decisions with a Forests Rights Committee (FRC)⁸ once rights are recognised.

The Ministry of Environment, Forests and Climate Change (MoEFCC) has jurisdiction to regulate land use change in forests. This process is defined under the Forest Conservation Act (FCA), 1980 under which state governments can file applications seeking prior permissions for non-forest use and felling of trees. This permission is mandatory and subject to several conditions including carrying out compensatory afforestation for the loss of forest land.

The environment ministry clarified the link between the FRA and FCA circular, issued in 2009, which was sent to all state governments. The requirement of consent from Gram Sabhas and the completion of recognition process is mandatory prior to any forest diversion can be given effect. No forest land can be transferred to other uses unless the recognition of

⁸ The Gram Sabha selects a Forest Rights Committee (FRC), which is empowered to verify and authorise the claims presented before them. It is to comprise of 10-15 members, one-third members of which need to be scheduled tribes. One-third is to be women.

rights is complete and the state government submits consent of the affected Gram Sabha(s). This requirement is now clearly laid out in Forest Conservation Rules, 2017.⁹

This clarification also opened the possibility of invoking the FRA compliance in cases where final approvals for forest diversions were pending. In the case of the Thoubal Multipurpose (Mapithel) project in Manipur, villagers invoked FRA compliance for a dam project first proposed in the 1980s. The construction of the project had been carried out without receiving final approval through which 595 hectares the forest land could be used for the project. In 2014, when the state government eventually approved the forest diversion in favour of the Irrigation and Flood Control Department of Manipur government, the FRA was in place, but its provisions not invoked.

The dam's construction at tri-junction of Ukhrul, Senapati and Thoubal districts of Manipur was challenged before the National Green Tribunal (NGT). At first, the NGT concluded that the FRA compliance was a "dead issue" as 80 per cent of the project had already been completed. When this was questioned in a review petition, the state government argued that all rehabilitation measures and compensations have already been paid to the affected people back in 1993, and therefore the post facto compliance of the FRA is not in order.

In December 2017, the NGT overturned its earlier decision related to FRA compliance. Both the project proponent and the state governments were directed to bring the project in line with the legal requirements, including recognition of rights and consultation of the Gram Sabha.¹⁰ As of March 2019, this process was yet to be operationalised,¹¹ even as the Mapithel Dam Affected Villages Organisation (MDAVO) had repeatedly drawn attention to the pendency.¹²

Hasdeo Arand's forests and coal blocks

Hasdeo Arand is celebrated as the largest un-fragmented forests in central India outside the official protected area system. This unbroken forest stretch is an important corridor for movement of flagship species like elephants and tigers. Spread across Korba, Sarguja and Surajpur districts of Chhattisgarh, these are also one of the most pristine sal (Shorea

⁹ Letters of Ministry of Environment Forests and Climate Change dated 30.7.2009 and 1.8.2009 and Forest Conservation Rules, 2017 (Section 6 (3)).

¹⁰ Themrei Tuithung & Ors v/s State of Manipur & Ors (Review Application No. 46/2016 & M.A. No. 46/2016/EZ in Appeal No. 4 of 2014 EZ National Green Tribunal).

¹¹ Dutt, Bahar, Failing the Forest, The Hindu, 4 March 2019.

¹² The People's Chronicle, Undated. Govt defying NGT directive on Mapithel Dam: MDAVO, accessed from <http://www.thepeopleschronicle.in/daily/english/1089> on May 23 2019.

robusta) and teak forests in the country. Many other recorded species officially recorded by the forest department confirms that the area extremely rich in biodiversity.

Hasdeo Arand is also coalfield of covering 180,800 hectares comprising 18 coal concessions. A total of 150,200 hectares of this is very good quality forests. Studies have recorded that approximately 117,600 hectares have a canopy cover of over 40 per cent while an additional 11,600 hectares have a canopy cover of over 70 per cent.¹³ In a joint policy mapping by India's coal and environment ministries in 2010, the entire area was officially recorded as a no-go area for mining. In 2007, the environment ministry approved proposal to declare 45,000 hectares of Hasdeo Arand as the Lemru Elephant Reserve, as an official recognition that conservation of species needs to be prioritised, and all measures taken to reduce threats. These conservation proposals hit the backburner once the plans for tapping the coal mining potential took primacy.¹⁴

The forests are home to Gond tribals who farm and depend on the forests for their livelihoods. Their rights are not just protected under FRA but also the Panchayat Extension to Scheduled Areas (PESA), as the administrative districts are constitutionally protected Fifth Scheduled Areas as discussed earlier. This gives special governance status to the Gram Sabhas in Hasdeo's forest, including the legal right to be consulted prior to the implementation of developmental projects including mining.¹⁵ The forests also form the catchment area of Bango Dam built on the Hasdeo river back in the 1960s, which irrigates over 300,000 hectares of farmland. This river is on the main tributaries of the Mahanadi, one of India's major rivers.

At present there are only two operational coal mines in the area: Chotia which is on the periphery and the Parsa East Ketan Besan (PEKB) well within these forests. Parsa, which is also strongly contested by the Hasdeo Arand Bachao Sangharsh Samiti (Save Hasdeo Struggle Committee) is only the third coal mine threatening to break up the forest contiguity and impact local livelihoods. PEKB's operations have already added to human-elephant

¹³ Greenpeace India. 2012. How Coal Mining is Trashing Tigerland, accessed from <https://www.greenpeace.org/india/en/issues/environment/984/how-coal-mining-is-trashing-tigerland/> on 23 May 2019.

¹⁴ Priyanshu Gupta and Arnab Roy Chowdhury (2017), Harnessing Gram Sabhas to Challenge State Profligacy in Chhattisgarh, Economic and Political Weekly, Vol. LII, No. 49, December 2, 2017.

¹⁵ Section 4 (e) (i) of the PESA Act says every Gram Sabha shall "approve of the plans, programmes and projects for social and economic development before such plans, programmes and projects are taken up for implementation by the Panchayat at the village level".

conflicts with several reported incidents of elephant movements around tribal settlements, agricultural fields and the railway track transporting coal from the PEKB mine.¹⁶

The big debates

The orders of the Supreme Court and the coal mining case lend themselves to a deeper review of how the forest rights regime interacts with the demand for land for infrastructure projects. It also allows us understand how the unresolved concerns of wildlife conservation groups were reiterated in the interpretation of the apex court's orders.

There are three big debates that bring together infrastructure, conservation and forest rights.

Community ownership and forest diversion

A central challenge for forest rights is whether forest rights re-distributes ownership of forest land or is limited to use rights. This has been one of primary conflicts related to forest governance in India. Forests are in the concurrent list of India's constitution, which means both central and state governments have jurisdiction over how these areas are being used. Prior to 2006, a substantial administrative control over forests vested state governments, except for Sixth Schedule Areas in North East India that had special constitutional privileges.¹⁷ There were also areas where historical records community rights like nistar (community use rights) existed, where recognising ownership was a relatively easier task.

The FRA changed this dynamic. In individual rights, the land ownership is transferred to a claimant and the formal title, or patta officially entered in government record. In instances of community forest rights (CFR), the land remains under the 'jurisdiction' of the state forest department. The CFR can be granted for extracting forest produce without any restrictions or it can be to conserve and manage large tracts of land, as has historically been a practice.

It is this conflict, which is at the center of the environment ministry's approval for the Parsa coal mine in Sarguja district of the central Indian state of Chhattisgarh. In order to use of 841.538 hectares of forests for the Parsa coal mine, the individual rights of four villages Salhi, Hariharpur, Fatehpur and Ghatbarra would either need to be acquired or surrendered by claimants.

¹⁶ Chitragada Choudhury (2019), If we give the Hasdeo forest, where will we go?: Jainandan Porte on mining protests in Chhattisgarh, The Caravan, February 25, 2019.

(<https://caravanmagazine.in/communities/coal-mining-hasdeo-forests-protests>)

¹⁷ See Note 5.

The Chhattisgarh government's letter based on which the forest diversion is approved claims that all the Gram Sabhas have consented surrendering over 614.219 hectares in lieu of ameliorative measures. The residents of Hariharpur village who are members of the Hasdeo Arand Bachao Sangharsh Samiti deny this, as there is no record of any Gram Sabha where such as consent was recorded.¹⁸ They have sent letters to the district authorities and the environment ministry until as recently as January. The ministry has, however, stood by the state government's position.

For the community forest rights, where consent was hard to come by, the state administration revoked the community forest right title. Through an order dated January 8 2016, the district level committee (DLC) under the FRA which informed the CFR holders of Ghatbarra village that their rights stand cancelled as it was disruptive of mining activity. The district collector, divisional forest officer (DFO) and district level representative of the tribal development department, signed the order. The village had received this CFR title to access 811 hectare of forests.¹⁹ This area overlaps the coal concessions of both the PEKB and the Parsa mines.

This decision came under intense scrutiny within the tribal affairs ministry and as the DLC took this step even though the legal framework of FRA does not envisage revocation as an option. The legal validity of this decision is yet to be confirmed within executive records and through a case pending before the Bilaspur high court.²⁰ Meanwhile, the forest diversion for the Parsa coal concession was given effect by the environment ministry.

Recognition of rights or settlement of claims

The forest rights question is stuck somewhere in between the political recognition of existing habitation and use of land and the bureaucratic exercise of filing and settling claims. For the drafters of the law, the existence of rights was never a debate; it was setting right the historical alienation. What needed attention was the government record keeping where all previously subsisting rights were reconciled. Once that was done, rights holders would be

¹⁸ Letter to district collector, Sarguja dated 21.8.2018 by residents of Hariharpur villages pointing to repeated rejection of forest diversion proposal for the Parsa coal block and submission of papers by user agency to the environment ministry.

¹⁹ The Ghatbarra CFR recognised three specific rights for the villages: Section 3 (1) (b) community rights such as nistar, by whatever name called, including those used in erstwhile princely states, zamindari or such intermediary regimes; Section 3 (1) (c) right of ownership, access to collect, use, and dispose of minor forest produce which has been traditionally collected within or outside village boundaries; and rights to grazing (both settled or transhumant) as per Section 3 (1) (d) of the FRA, 2006.

²⁰ Forest Right Committee Ghatbarra Versus Union of India (WPC No.1346 of 2016).

able to politically assert their choices on how individual and community forest areas should be governed and managed.

The administrative implementation of the law has been mostly about the filing and settling of claims, just as it would be done for access to government schemes. At different points of time, the highest offices have pushed governments to settle forest rights in “campaign mode” or in an expedient manner.²¹ Milestones, timelines and record sheets have been emphasised more than a push for fair and deliberative processes so that recognition is not turned into mere administrative formality.

This contradiction continues to influence the manner in which forest rights are perceived, demanded and understood by both government and non-governmental actors. As part of Parsa coal mine’s approval condition, the state government permitted double the amount of degraded forest land for mandatory compensatory afforestation. This land was handed over in Korea district on the assurance of the forest department, where villagers are waiting for the paper work on their forest rights to be completed. It is not clear whether these rights have been rejected in official record, but the residents of Dhanpur village have been caught unawares.²²

This will be yet another instance that may be in the records submitted to the apex court. Would the court be interested in or be in a position to corroborate documents on a case-by-case basis? Will this process not reverse the decentralisation of forest governance that the FRA sought to out in the first place? For Dhanpur in Korea and Salhi, Hariharpur, Fatehpur, Ghatbarra, it is not their village assembly but a national court that may land up determining the rightfulness of their claim.

Wildlife and tribal people

One of the oldest divisions on forest rights are those related to wildlife conservation and tribal livelihoods. The conventional top down models of conservation envisaged enclosures for wildlife without any human interference, therefore all rights need to be extinguished or only partially allowed. This model continues to exist both in law and in wildlife practice, though other frameworks that encourage the leadership, wisdom and partnership of tribal and local communities in conservation have also evolved. Similarly, human rights groups have not

²¹ Mayank Agarwal (2015). Government asks nine states to implement Forest Rights Act immediately, Mint, June 19 2015
(<https://www.livemint.com/Politics/Rh9S8NYRnVfhoBfWDAm5yO/Govt-asks-nine-states-to-implement-Forest-Rights-Act-immedia.html>).

²² Ishan Kukreti, Uprooted for the sake of compensatory afforestation, Down to Earth, April 30 2019
(<https://www.downtoearth.org.in/news/forests/uprooted-for-the-sake-of-compensatory-afforestation-64268>).

always accepted the scientific arguments that some areas may need to be isolated for a threatened species to survive or revive. Those who have, speak about due process of decision making, only after full recognition of rights and no forced relocations in the name of creating conservation enclosures.

The question of whether forests should be for tribal communities or wildlife was also one of the key drivers for the case challenging the validity of the FRA in the Supreme Court. In their press release, the petitioners Wildlife First, Nature Conservation Society and Tiger Research and Conservation have argued that parceling forest areas into individual rights would lead to habitat fragmentation which has been “scientifically established as the most serious threat to long-term conservation of forests and biodiversity” that includes wildlife.²³

In response, groups such as Campaign for Survival and Dignity (CSD), instrumental in the enactment of the FRA, have called the petitioners’ claims as misleading and argued for the positive role of the forest rights act in encouraging community based conservation.²⁴ Over three hundred conservationists signed a petition against the evictions, asking for the recall of the SC order as it was both anti conservation and against forest rights.²⁵

In the forests of Hasdeo Arand, both tribal communities and wildlife remain vulnerable. A government that has decided to pave the way for coal mining would want both tribals and wildlife out of the way. The official documents submitted for seeking diversion of forests for the mine, spring no surprise. The site inspection by the forest department only records the “occasional” presence of elephants even though Hasdeo Arand was once about to be declared an elephant reserve. Villagers routinely report the movement of elephants, and increased instances of human-elephant conflict due to forest disturbance. They remain organised against the opening of the Parsa coal mine, questioning the documents that record their willingness to give up their rights. The decision on executing forest diversion following the environment ministry’s approval now rests with the Chhattisgarh state government.

²³ Press Release: The Recent Supreme Court Order on Forest Rights Act (FRA) Does Not Affect Genuine Claimants, accessed from <http://www.conservationindia.org/articles/fra-sc> on May 13, 2019.

²⁴ Campaign for Survival and Dignity. Whose Bogus Claims? Anti- Forest Rights Petitioners Again Make Misleading Arguments, accessed from <https://forestrightsact.com/2019/02/21/whose-bogus-claims-anti-fra-petitioners-again-make-misleading-arguments/> on May 14 2019.

²⁵ Conservationists Speak Out Against Evictions, Say This Is Not Pro-Conservation, <https://forestrightsact.com/2019/02/27/conservationists-speak-out-against-evictions-say-this-is-not-pro-conservation/>, February 27, 2019.

Negotiating outcomes with FRA

These three debates may be seen as manifestations of poor implementation of the FRA, but there is much more at stake. The FRA is a new legal tool, which is being used by a range of actors in various socio-political contexts. In each of these, it seems to have strengthened different people's hands. In some cases, the forest bureaucracy has been able to utilise it more effectively to achieve its goals. In other places, campaign and community groups are able to use it to strengthen their case to resist extractive and infrastructure projects. Rights holders have also attempted to use the FRA to reopen pending issues of consent and compensations as was seen in the Mapithel Dam case.

It is because of this one can only come to a very dynamic assessment of the effects of FRA implementation on the ground. The FRA provides an opportunity for rights holders and governments to negotiate conservation strategies, socially relevant and economically gainful projects. But the Supreme Court's decision has little place for the local. It has taken charge of the law, devoid of its multifaceted and site specific contexts and may proceed to assess the implementation deficit against a standard set of parameters. The FRA had taken several strides into institutionalising democratic decision-making centred on the Gram Sabha. This is what may be completely lost if the space of approving and rejecting forest rights claims shifts to the closed doors of a national court.

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