Comments on BNHS et al petition against Forest Rights Act

Key aspects

1. Challenges the constitutional validity of the Act; asks for it to be struck down on various grounds including that Parliament does not have jurisdiction to legislate on land matters and that forests as a concurrent subject do not include forest land.
2. Alleges that the Act will "destroy the integrity of the last remaining forests by enabling alienation in perpetuity of vast tracts of forest lands", and "will result in the destruction of wild life, wild life habitats and will seriously erode the ecological integrity of the last remaining forests in India". (*23vii)*
3. Seeks enforcement of state laws that prohibit transfer of lands by/among STs, and return of lands illegally alienated from STs.

Specific arguments in the petition, and comments on these

(The petition's arguments are given in normal font, with the relevant section number of the petition, appearing in brackets). My comments are in italics).

1. Argues that the FRA is beyond the legislative competence of the Parliament, as land and rights over land are state subjects (Entries 18, 35, 45 of List II of 7th Schedule). (*24i) Comment: The Parliament has legislated on the issue of land, including forest land, on many occasions. For instance, the Forest Conservation Act (FCA), which is credited by environmental groups (including some of the petitioners) as having been instrumental in slowing down the diversion of forest land for non-forest purposes, was promulgated by Parliament in 1980, and says (in Section 2):*

> "Notwithstanding anything contained in any other law for the time being in force in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing- …
>
> (ii) that any forest land or any portion thereof may be used for any non-forest purpose."

Note that while the FRA's provisions are mostly to be carried out by state governments, in the case of the FCA, the central government explicitly takes a controlling function to itself, and would therefore constitute an even greater constitutional violation, as per the petitioners' argument. Other related laws which deal with land, that have been enacted by Parliament, include the Wild Life (Protection) Act (WLPA), which dictates how lands and rights on lands within protected areas are to be dealt with (e.g. in Sections 19-25 dealing with the settlement of people's rights), and notifications under the Environment Protection Act (EPA) such as Coastal Regulation Zone (CRZ), which deals with coastal lands, or the declaration of ecologically sensitive areas by the central government.

The petitioners' challenge to Parliament's legislative jurisdiction over land matters, if accepted by the Court, would seriously jeopardize a number of central environmental legislations! Using this, others could challenge the FCA, the WLPA, CRZ/ESA and

other notifications or orders under the EPA, as being constitutionally invalid….this is a veritable Pandora's box that the petitioners have opened up!

2. Argues that the term 'forest' (Entry 17-A, List III of 7th Schedule), which gives the central government concurrent jurisdiction over forests with state governments, does not include 'forest land', and that therefore the Parliament's enactment of FRA is a "colourable exercise of said power". (*24ii)*
Comment: Again, the Forest Conservation Act (quoted above) is a precedence where Parliament has legislated on forest lands, using the above mentioned entry in the concurrent list. ***If the above argument is accepted by the Court, anyone could use this to challenge the FCA! Is this what the petitioners want?***

3. Argues that giving forest rights would impinge upon the fundamental rights of all citizens to natural heritage and ecology, and is therefore violative of Article 21 (right to life and liberty). (*24iii,iv)*
Comment: This is a debatable point. Certainly the existence of healthy and adequate forest cover must be considered part of the fundamental rights of citizens. But why should this be challenged when giving forest land rights to forest-dwellers, but not when giving forest land to industry, especially when the former are mostly already without actual forests, while the latter are actual (in some cases untouched) forests being diverted?The petitioners are surely aware that the diversion of forest for non-forest purposes, mostly dubious 'development' projects, has significantly increased in the last few years…..yet they have not gone to court challenging every such diversion on grounds of fundamental rights. This seems to show a clear elitist mindset…and perhaps even panders to the mindset of some of the Supreme Court judges who have in recent times shown clear discrimination and inconsistency in often allowing destructive mining and dam projects (Vedanta, Narmada), while stopping people's rights to forest resources (the Godavarman case). What should of course be argued is that the FRA's provisions, which do not provide for clearing any new forest to give land rights, must be strictly enforced (there is nevertheless a concern regarding forest to be diverted for developmental rights given to villagers under the FRA, which is dealt with below).

4. Asks whether the FRA will force tribals to live at 'subsistence' levels, with no access to public health, education, power, sanitation, PDS, etc. (*9v)*
Comment: this is a deliberate attempt at misleading the judges, for it omits to mention that the FRA itself provides, for the first time, rights to such facilities to forest-dwellers under Article 3(2). The FRA in fact removes what has often been considered one of the hurdles towards providing such facilities, the need for clearance under the Forest Conservation Act which was often hard to get due to cumbersome procedures and dependence on governments (though of course this does create concerns about the environmental impact, but that is an independent issue, see Point 15 below). The petition itself later (section 24 of the petition) talks about the rights to development in the context of their potential impact on forests, so it is clear that the petitioners are aware of these provisions, but have conveniently omitted to mention them here. (Interestingly, though, this argument is not repeated in the later section (no. 24) on "Grounds" for the petition, where the development rights provisions are mentioned).

5. Argues that the FRA allows forest-dwellers no source of income other than selling/transferring land allotted to them under the Act. (*9v)*
Comment: this is also deliberately mischievous, for it omits to mention (a) that the allottees cannot sell the land (alienation of land is not permitted in the Act), and (b) that the Act grants access and sale rights to forest produce which for millions of forest-dwellers is one of the key sources of livelihoods, but has so far been difficult to secure because of lack of rights to such produce. It is unfortunate that the petitioners are resorting to deliberate distortion to make their points. Again, interestingly, this point is not mentioned in the 'Grounds' section (24) of the petition.

6. Argues that recognition and granting of forest rights, and empowering gram sabhas to protect forests (Sections 3 to 5) are arbitrary and excessive in nature, and violative of the "Precautionary Principle, Public Trust Doctrine, and Structure of the Constitution" (*24v-ix)*
Comment: the use of recognized principles such as the Precautionary Principle, and the Public Trust Doctrine, cannot be done mechanically. The comment made in Point 3 above is valid here too.

As for the sections being "arbitrary" and "excessive"….it is unfortunate that the petitioners should be arguing against duties imposed on gram sabhas to protect forests and wildlife, in which the Act's basic provisions in Section 5 have been supplemented (though not adequately) by the Rules made under the Act, specifically Rule 4(1)e; it should also be noted that whereas the Act in Section 5 talks about the gram sabhas being 'empowered' to protect forests, etc, the Rules do not actually provide for specific powers or authority to do so, so what is 'excessive' about this Section is not clear .

Moreover, the petitioners have nowhere shown that the potential of the Act to undermine the public interest is greater than its potential to provide for public good, keeping in mind that there are likely to be both negative and positive impacts (see Point 12 below), and given the fact that the notion of 'public good' must also include pro-active steps taken for those sections of the public who are otherwise facing injustice of any kind.

The 73rd and 74th Amendments to the constitution, and various policy pronouncements since then, are based on the spirit of decentralized governance; giving the gram sabha the functions of protecting forests and wildlife, determining and forward claims to rights (but not being the final authority in granting them), and other such functions, is well within the spirit of such decentralization without being excessive. The petitioners are betraying their fundamental distrust of the ordinary citizen, and implying that it is only 'higher' authorities who can govern every aspect of a citizens' life. It must be noted that the gram sabha only has powers to "initiate the process for determining" rights, and that final decisions on the claims will be made at the district committee level, not at the gram sabha level.

Finally, the allusion to the "Structure of the Constitution" is vague and misleading. Courts have recognized a "basic structure" doctrine, but in the course of several cases concerning the definition of basic structure, have not sought to place wildlife concerns over those of the livelihoods of tribal or other communities (or vice

versa). In the absence of this, it could be presumed that the Constitution and the Courts place equal emphasis on conservation and on the livelihoods of poor people.

7. Argues that Sections 3(1)(a,f,g) (rights to forest lands under occupation, rights to lands under dispute, and rights to convert existing pattas etc on forest land into titles) read with Section 4(6) (such lands are to be currently under occupation, and not more than 4 ha), are discriminatory against non-forest landless, also in view of the fact that upto 4 ha of encroached land is allowed in addition to what the claimants already legally possess. (*24x)*
Comment: the intent of this argument is unclear. There are laws and policies regarding land reform, to provide land to the landless, and it should certainly be argued that these should be implemented or strengthened. This however cannot be an argument against providing rights to those who live in forest areas. Our constitution and several laws promulgated under it, provides for 'positive discrimination' of various kinds, to compensate for what may be considered historic/existing injustices, or to 'level the playing field'. The point about the grant of upto 4 ha in addition to what is already legally owned by the claimant, is however worth considering; the Act should perhaps have had a caveat about such situations, to ensure that no-one gets excessive lands that could be claimed to be iniquitous in comparision with others who do not have existing legally owned lands; presumably, of course, land ceiling laws will apply in all such situations.

8. Argues that "grant of forest land is impermissibly required to be determined by persons who are to enjoy these entitlements", which could be considered a conflict of interest. *(24xii)*
Comment: this deliberately and mischievously omits to mention that people claiming rights are not the ones to determine the validity of these rights, or to "determine" the "grant of forest land"; this will be done by the district level committees. Making claims to rights is a basic part of any legislation related to rights (it has been there, for instance, regarding claims to regularize encroached lands of various kinds including forest lands under the Forest Conservation Act, or with regard to the settlement of rights in the Wild Life Act), and as in other cases, here too it is not the claimant but other authorities that will determine the actual grant.

9. Argues that the function of determining rights (Chapter 4 of the FRA) cannot be delegated to non-judicial, non-legal, and non-administrative bodies. *(24xiii)*
Comment: this argument is unclear, either the petitioners have not understood the FRA, or are again deliberately misleading the court. Rights will finally be determined only by the district level committee….is this not an administrative body, empowered by the FRA to take on this function? The district level committee is headed by the District Collector or Divisional Commissioner, and it should be noted (as the petitioners are well aware) that under the Wild Life Act too, it is the District Collector or other officer appointed by the state government, who determines the rejection or acceptance of rights claimed within a protected area.

10. Pleads that "it is extremely essential for the survival of man to co-exist with nature", "and to preserve and protect wildlife and the habitat, which unfortunately today constitute the only reasonably safe havens for the long-term survival of biodiversity, *the* faunal and floral species, and *the* local communities" (*17vi).*
Comment: this is most interesting. In a previous petition (relating to the WLPA), BNHS et al argued that wildlife and humans cannot co-exist together, for if they did, wildlife would have been domesticated; here they argue, contradictorily, that it is essential for "man to co-exist with nature". Clearly the petitioners make arguments as it suits them, without consistency.

Contradictions also emerge in the rest of the sentence. If "the habitat" (what habitat, is not defined), constitutes the last haven for biodiversity/fauna/flora/local communities, then should not all these entities, including "local communities", have rights to continue living inside these habitats and to continue accessing their resources for survival and livelihoods? The petitioners in fact show that forest-dwelling communities have very significant dependence for survival and livelihoods on forests (21iii,iv), but do not seem to believe that these communities should have a right to such resources, even though they must be aware that Article 21 of the Constitution has been interpreted by the Supreme Court to include right to livelihood.

11. Provides figures for the economic value of forests (Rs. 8 to 36 lakhs / ha.), and argues that rather than giving forest lands to tribals, there are "cheaper solutions to solve tribal poverty", and that the FRA by giving such lands is a "double whammy" against the public interest for it stops us from gaining credits against possible new "avoided deforestation" carbon credits (*21i,viii)*
Comment: this omits to mention that forest lands being given under the Act are already under cultivation/occupation, hence the Act does not for this purpose mandate any fresh clearance of forests (though it does for the purpose of giving development facilities, which point is dealt with below; also there is legitimate concern that there may be some misuse of the Act to incite fresh encroachment, but there is little evidence that this can happen over any large-scale area, and is only an argument for governments and citizens to be alert). Moreover, the comment in Point 3 above, regarding the discriminatory way in which the petitioners approach forest-dwellers' land rights vs. the diversion of actual forest for so-called 'development' projects, is valid here too. Additionally, the petition says nothing about the potential of the Act to protect forests, by providing a greater stake and legal backing to communities who have shown themselves capable of both regenerating and protecting forests across several million ha of land (through self-initiated forest protection committees such as in Orissa, Uttarakhand, and Maharashtra, and through Joint Forest Management), and by providing communities a possible tool to stop the destruction of forests around them for mining, dams, or other such purposes. The petitioners provide no arguments or evidence that the 'deforestation' to be potentially caused by the FRA is higher than the additional protection it may give against 'deforestation'. This 'avoided deforestation' potential of the FRA needs to be taken into account while talking of climate change issues, rather than a one-sided portrayal of the FRA's impacts.

12. Points out that forest-dwellers themselves often cause degradation of forests, and that adivasis have been used as fronts by non-adivasis in capturing land; moreover that the "privatization of lands is against the adivasi way of life", "enabling alienation in perpetuity of vast tracts of forest lands". (*23v-vii)*
Comment: These are valid concerns, for indeed such alienation has taken place, and in some or several adivasi communities, private land-holding is non-existent. By no means however is private landholding alien to all tribal communities; many have mixed forms of land use, including lands held by families to those held by the entire tribe. What is crucial is that very often even those held by families are under some form of control or guidance by the community as a whole. This makes it essential for the Act or Rules under the Act to include provisions against the sort of privatization that could lead to divisions and conflicts within the community, and for the strengthening of both the community and the relevant government authorities to prevent alienation of the lands allotted, to non-forest-dwellers. Once again, the failure of the government to protect adivasi lands from being alienated, cannot be an argument against the granting of rights to lands; it should lead to demands for the government to be more responsible and accountable. Note that the petitioners expect the governments to be responsible enough to implement other non-alienation laws; if they can reasonably expect governments to do this (under Court orders sought in this petition), surely they can also reasonably expect governments to enforce the non-alienation clause of the FRA? It is inconsistent and simply a matter of convenient argument, to expect one and not the other.

13. Argues that the transfer of "control and management of the country's natural heritage to gram sabhas and individuals", under Sections 3(1)(i), 4(1)(b) and 5(a & d) is "violative of Articles 21 and 14 of the Constitution". (*24xvi)*
Comment: again, the petitioners display an unfortunate distrust for the abilities of the common citizen to carry out conservation duties, and imply that such functions can only be carried out by unspecified others. This is contrary to the entire spirit of the 73rd and 74th Amendments to the Constitution, and several policy pronouncements, all of which are based on or promote decentralized governance. It must also be noted that these provisions of the Act do not make the mandate and functions of the Forest Department or other relevant government departments redundant; there is no reason that mechanisms of joint or collaborative management of forests and protected areas, which is a global trend and has had successes in many countries, cannot be built into the working of the Act. It is certainly true that the Act or its Rules do not make provisions for such institutional mechanisms by which gram sabhas along with these government departments will carry out forest conservation and management functions, and these need to be urgently build into the Rules. Also important are clear safeguards against any kind of misuse of powers by any institution, whether within or outside the government (especially in view of the fact that many gram sabhas or other local bodies, including local forest officials, may not immediately have the necessary capacities and skills to conserve and manage forests, which need to be built up). The petitioners could certainly have made a plea for such mechanisms and safeguards, but to take a stand against decentralized governance of natural resources per se, is unfortunate and contrary to the spirit and letter of democratic functioning that India has clearly embarked upon.

Such a view is also contrary to a series of international agreements that India is party to (and legally bound to follow), including the Convention on Biological Diversity (CBD). Various work programmes of the CBD explicitly require governments to fully recognize the rights of local communities and fully involve them in management and conservation. The Programme of Work on Protected Areas, for instance, commits India to achieve the following:

- *By 2008, full and effective participation of indigenous and local communities, in full respect of their rights and recognition of their responsibilities in the management of existing, and the establishment and management of new, protected areas*
- *By 2008, established mechanisms for equitable sharing of both costs and benefits arising from the establishment and management of protected areas.*

14. Argues that the conditions laid down by the FRA in the case of Critical Wildlife Habitats, prior to relocation, are "arbitrary and unimplementable", and would "frustrate the objectives and purpose of the Wild Life Protection Act".

Comment: these provisions make the task of notifying Critical Wildlife Habitats (CWH) rigorous and democratic, and therefore certainly more difficult than provisions for setting up protected areas under the WLPA. But it must be noted that CWH are to be declared in an existing PA, so there is no immediate threat to the site as it is already protected under WLPA, and the rigorous process to be followed for notifying a CWH is for one more layer of protection to be provided. So why should this not be more rigorous?

In any case, it is strange to say that the FRA provisions on CWH are "arbitrary" and "unimplementable". In fact previous processes of notifying wildlife sanctuaries and national parks have been highly arbitrary, often based on very inadequate information, without clear objectives and goals, and extremely conflict-ridden because they have not taken into account social aspects such as the dependence of local communities on the area's resources. In several examples (Keoladeo National Park, Karera Bustard Sanctuary, etc), they have not even helped to protect wildlife, because they were based on mere assumptions and uniform approaches to conservation. It is well recognized that the boundaries of many protected areas are highly arbitrary and without scientific basis; this is why the Government of India has had to set up two processes of "rationalization" of the boundaries of PAs across the country, and exercise that is still nowhere near completion.

The provisions of the FRA now seek a more rigorous, science-based process of identifying and notifying Critical Wildlife Habitats, and also require a more consultative and democratic process, which is only fair given that such a step is impacting the lives and livelihoods of people living within/around these areas. Past processes of displacement of people have usually been devoid of due ecological justification being given for the relocation being necessary, they have been devoid of any consultative process, people being displaced have never been adequately explained about the reasons and justification for this, the authorities concerned have not been accountable to the affected populations, and strangely enough, there has been hardly any ecological monitoring after the relocation! Arguing against the science-based and democratic

process that the FRA now demands, betrays a mindset which seeks to continue the arbitrary notification of protected areas without adequate thought to its conservation and social implications.

It should also be noted that the WLPA's supposedly simple provisions for setting up protected areas and settling people's rights in them have not worked across much of India, so that for years and sometimes decades, there remains a situation of confusion regarding the legal, conservation and social status of the area. Existing provisions of the WLPA have frustrated the final notification of hundreds of protected areas, partly because they have not been clear about the process to be followed.

Finally, it should be noted that these provisions of the FRA apply only to those areas that are to be notified as Critical Wildlife Habitats, and do not apply to the rest of the areas within protected areas. In all cases where the WLPA has already resulted in successful settlement of people's rights, there should be no problem in proceeding with the notification of Critical Wildlife Habitats; where it has failed in such settlement, the procedures under the FRA will in fact promote the urgent finalisation of the settlement process, and can hardly be said to be frustrating the "objectives and purpose of the WLPA".

It is, however, true that these provisions require much more rigorous work by conservationists within and outside government; we will need to be alert to inaction or shortcuts by governments as also pro-actively offer assistance to governments in carrying out the provisions.

15. Points out that rights to developmental facilities under Section 3(2), would lead to forest fragmentation and damage.
Comment: This concern is valid. Other groups have also pointed to the possible fragmentation or other kinds of damage that this provision could lead to, and have sought that such development facilities should be subject to the provisions of the Forest Conservation Act as it applies to other development projects in the country, albeit with an appropriately decentralized clearance procedure so that small-scale essential projects necessary for basic survival and livelihoods of villages are not held up by lengthy bureaucratic procedures of state or central governments.

16. Points out that the FRA arbitrarily excludes the application of the Forest Conservation Act and the operation of requirements such as 'net present value' and 'compensatory afforestation', which are applicable to diversion of forest land.
Comment: Most rights provided under the FRA, other than the provision of developmental facilities (mentioned above in Point 15), do not entail any fresh clearance of forests, and therefore the intent of these requirements which are meant for projects in which fresh clearance is being allowed, does not hold for such rights. It should also be noted that when forest land is given for the rehabilitation of people displaced from protected areas, requirements of NPV and compensatory afforestation do not apply. If forest rights are being given in recognition of the fact that not granting these historically has been an act of injustice, and that their grant is for sections of society that are severely marginalised, then this could be seen as a social objective on par with the ecological objective of conservation, and it is therefore not justified to require NPV and compensatory afforestation for granting such rights.

NPV and compensatory afforestation could, however, remain valid requirements for development facilities granted under the FRA, with the onus on the state governments to make the payment and carry out the compensatory afforestation, since communities would not be in a position to take these up.

17. Asks for a full EIA of the FRA, and claims that if carried out, it would "clearly show the adverse impact of the statute". (*24xxi)*
Comment: this is an interesting suggestion. Some NGOs had in submissions to the Government during the formulation of the Act, asked for a 6-month period in which the implications of the FRA in various regions of the country could be assessed, and provisions made for site-specific implementation that could avoid damaging consequences and maximizing positive ones. What is however interesting is that while asking for a EIA, the petitioners have already concluded what the results of such a EIA would be, but not provided any evidence or substantiation for such a conclusion. Not very scientific!

18. Seeks detailed information on various aspects of tribal lands, their alienation and restoration, extent of ST/OTFD lands within RFs, PFs, and protected areas, status of final notification of protected areas, number of livestock within such areas, and so on. (*25)*
Comment: such detailed information will be welcome! It could of course also have been obtained through a RTI application.

19. Argues that there has been non-enforcement of ST land alienation laws of states, and that this should not be a justification for transfer of forest lands. Seeks implementation of state laws that prohibit alienation of tribal lands, and restoration of such lands alienated in the past. (*24xxiv-xxvii)*
Comment: This is a welcome plea in itself. However, there is no convincing argument how these steps will solve the problems of tenurial and economic and social insecurity of forest-dwelling communities who currently don't have the rights needed for their livelihood, unless it can be shown that most or all of such forest-dwelling communities are facing insecurity because of the non-implementation of land alienation laws by states, or it can be shown that the implementation of such laws will remove such insecurity. Such links are not provided in the petition.

Overall comment:
Much of the petition is taken up by very broad and flimsy general arguments against the FRA, including some that open up possibilities of challenging most of the central laws that are crucial for wildlife and environmental protection. Within the rambling arguments, some of the more specific concrete points that are valid concerns about the FRA (such as those regarding the right to development facilities), get almost lost. Some other grounds, such as the over-generous cut-off date for STs, do not come up clearly. Any legal or other strategy could have been used by the petitioners to seek amendments to those specific parts of the FRA that are of concern, and to demand that institutional mechanisms for safeguards, against misuse, and for monitoring the ecological impacts, be put into place. This opportunity has been lost, and the petitioners have only

ensured that the polarized debate and public posturing on the FRA will continue, to no-one's benefit.

Worse, they may have opened up a Pandora's box by challenging the constitutional grounds on which Parliament legislates on land issues. It will be supremely ironical if conservation groups are found guilty of inadvertently endangering many of the central laws such as Forest Conservation Act, the Wild Life Protection Act, and the Coastal Regulation Zone notification.

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