



Legislation Brief

Applicability
of the
**Scheduled Tribes and Other
Traditional Forest Dwellers
(Recognition of Forest Rights) Act, 2006**
(Also called)
The Forest Rights Act (FRA)
To
Protected Areas (PAs)



KALPAVRIKSH



Environmental
Action Group





THE PREAMBLE

An unusual feature of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, (hereafter 'the FRA') is that unlike most modern legislation, it has a long Preamble which provides a succinct statement of the historical context in which the Act has been passed and the manner in which it seeks to address the situation. It therefore describes the FRA as:

"An Act 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."

Further, it goes on to state that the recognized rights of forest dwellers include the *"responsibilities and authority for sustainable use, conservation of biodiversity and maintenance of ecological balance and thereby strengthening the conservation regime of the forests while ensuring livelihood and food security" of the said forest dwellers.*

The Preamble further states the historical context in which the Act has been passed as follows:

"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 who are integral to the very survival and sustainability of the forest ecosystems;"

And hence, it states, this Act is necessary *"to address the longstanding insecurity of tenurial and access rights"* of forest dwellers, including *"those who were forced to relocate their dwelling due to State development interventions"*.

Therefore, from the Preamble itself, certain key principles emerge, which include:

- a. The FRA is a rights vesting statute, and provides for consolidation and recognition of **pre-existing** rights. This means that the **historicity** of the rights under the FRA is fore-grounded;
- b. It **acknowledges** that there has been a failure of the Indian state to recognize the rights of forest dwellers and tribal peoples in the forests where they have historically resided, and that this has resulted in discrimination against these peoples;



- c. For the first time in Indian forest law, a **radical shift** in the approach to the forest eco-system has been articulated: where, earlier, it was perceived that it is necessary to exclude forest-dwelling communities from forests for the purpose of conservation, the Preamble clearly recognizes that forest dwelling communities are not only a part of, but essential to the survival and conservation of the forest ecosystem;
- d. This recognition of the status of forest dwelling people as **"integral to the very survival and sustainability of the forest ecosystem"**, not their exclusion from its conservation, is emphasized further by giving them **"responsibilities and authority"** for **"strengthening the conservation regime of the forests"**;
- e. The debate which posits conservation in opposition to the livelihoods of tribal peoples and forest dwelling communities is sought to be put to rest, with a **clear recognition** that a conservation regime which ensures the livelihood and food security of these communities is, indeed, valid;
- f. Further, there is **acknowledgement** by the state that its development interventions in the past have led to forced displacement of tribal peoples and forest dwellers from their ancestral homelands, arising from insecurity of tenurial and access rights, and the same needs to be remedied.

It is but natural that ever since its implementation began in 2008, numerous provisions of the FRA have resulted in controversy, with different interpretations being advanced depending on the socio-political approach of the party advancing it. Such opposing interpretations are to be expected in the implementation of a statute which seeks to change existing power structures. The above list is only meant to be indicative, and it must be noted that the Preamble to the FRA is a rich source of guidance to interpretation, which will continue to be mined in the coming years.

In situations where a particular provision of the Act or the Rules is ambiguous¹, or a particular meaning given to a particular provision would make the statute unworkable, the Courts have relied upon the Preamble to guide them. It is in this context that some specific queries and incidental issues arising are examined below:

1. See for this purpose **Burrakur Coal Co. Ltd. vs. Union of India & Ors** (1962) 1 SCR 44; **Arnit Das vs. State of Bihar** (2000) 5 SCC 488 @ para 16; **Union of India vs. Elphinstone Spinning and Weaving Co. Ltd.** (2001) 4 SCC 139 @ para 17).



1. What are the different types of Protected Areas (PAs) under Wildlife (Protection) Act, 1972 (WLPA)?

As per WLPA 2002 amendment, "Protected Area" means a National Park, a Sanctuary, a Conservation Reserve or a Community Reserve notified under section 18, 35, 36A and 36C of this Act. The category of 'Tiger Reserve' was added as a kind of protected area through the 2006 amendment to WLPA. The different categories of Protected Areas have been defined in the WLPA 1972 as:

National Park:- Chapter IV Sec 35 (1) of WLPA:- "Whenever it appears to the State Government that an area, whether within a Sanctuary or not, is, by reason of its ecological, faunal, floral, geomorphological, or zoological association or importance, needed to be constituted as a National Park for the purpose of protecting and propagating or developing wildlife therein or its environment, it may, by notification, declare its intention to constitute such area as a National Park."

Wild Life Sanctuary: - Chapter IV Sec 18 (1) of WLPA: - "The State Government may, by notification, declare its intention to constitute any area other than area comprised with any reserve forest or the territorial waters as a

Sanctuary if it considers that such area is of adequate ecological, faunal, floral, geomorphological, natural or zoological significance, for the purpose of protecting, propagating or developing wildlife or its environment." Reserved Forests on the other hand can be declared directly as it is assumed that all rights were settled when these forests were reserved or nationalized by the government.

Conservation Reserve:- Section 36A(I) of WLPA: - "The State Government may, after having consultations with the local communities, declare any area owned by the Government, particularly the areas adjacent to National Parks and Sanctuaries and those areas which link one protected area with another, as a Conservation Reserve for protecting landscapes, seascapes, flora and fauna and their habitat."

Community Reserve:- Section 36C of WLPA:- "The State Government may, where the community or an individual has volunteered to conserve wild life and its habitat, declare any private or community land not comprised within a National Park, Sanctuary or a Conservation Reserve, as a Community Reserve, for protecting fauna, flora and traditional or cultural conservation values and practices."



Tiger Reserve: - Sec 38V (4) of WLPA (2006 amendment):

"A Tiger Reserve includes:-

- i. core or Critical Tiger Habitat [CTH]² areas of National Parks and Sanctuaries, where it has been established, on the basis of scientific and objective criteria, that such areas are required to be kept as inviolate for the purposes of tiger conservation, without affecting the rights of the Scheduled Tribes or such other forest dwellers, and notified as such by the State Government in consultation with an Expert Committee constituted for the purpose;
- ii. buffer or peripheral area consisting of the area peripheral to Critical Tiger Habitat [CTH] or core area, identified and established in accordance with the provisions contained in explanation above, where a lesser degree of habitat protection is required to ensure the integrity of the Critical Tiger Habitat [CTH] with adequate dispersal for tiger species,

2. Acronyms for important terms like Protected Areas, Critical Tiger Habitat etc. are provided to help familiarize the uninitiated reader with their usage. These are used interchangeably or together with the official terms throughout this note.

and which aims at promoting co-existence between wildlife and human activity with due recognition of the livelihood, developmental, social and cultural rights of the local people, wherein the limits of such areas are determined on the basis of scientific and objective criteria in consultation with the concerned Gram Sabha and an Expert Committee constituted for the purpose."

2. Is FRA applicable in all the above categories of Protected Areas (PAs)?

FRA doesn't make any explicit distinction regarding its applicability in forest land belonging to different categories. As per the definition of forest land under Section 2(d) of FRA, "forest land" means *land of any description* falling within any forest area and includes unclassified forests, undemarcated forests, existing or deemed forests, protected forests, reserved forests, *Sanctuaries and National Parks*.

As per the definition of "Community Forest Resource" under Section 2(a) of FRA, unless the context otherwise requires, "community forest resource" means customary common forest land within the traditional or customary boundaries of the village or seasonal use of



landscape in the case of pastoral communities, including reserved forests, protected forests and *Protected Areas such as Sanctuaries and National Parks* (emphasis added) to which the community had traditional access’.

It is clear from the definition that FRA is applicable in National Parks and wildlife Sanctuaries. Other Protected Areas under WLPA such as Conservation Reserves, Community Reserves and Tiger Reserves have not been mentioned explicitly in the FRA. However, since the FRA, in the definition of ‘community forest resource’ mentions “Protected Areas **such as** National Parks and Sanctuaries” (emphasis added) and the WLPA includes Conservation Reserves, Community Reserves and Tiger Reserves in Protected Areas, it is implicit that the FRA is applicable in these other kinds of Protected Areas too.

3. **What is a Critical Wildlife Habitat (CWH) ? What are the processes involved in delineating a CWH as per FRA?**

Sec 2(b) of FRA:- “Critical Wildlife Habitat [CWH]” means such areas of National Parks and Sanctuaries where it has been specifically and clearly established, **case by case**, on the basis of **scientific and objective** criteria, that such areas are required to be kept as **inviolable**

for the purposes of wildlife conservation as may be determined and notified by the Ministry of Environment and Forests after open process of **consultation** by an expert committee, which includes experts from the locality appointed by that Government, wherein a representative of the Ministry of Tribal Affairs [MoTA] shall also be included, in determining such areas according to the procedural requirements arising from subsection (1) and (2) of section 4” (emphasis added).

All the processes for identification, recognition and vesting of rights under FRA are applicable in proposed CWH areas. Sec 4 (2) of FRA provides for a process for declaring Critical Wildlife Habitats which requires certain conditions to be fulfilled:

“The forest rights recognized under this Act in Critical Wildlife Habitat [CWH]s of National Parks and Sanctuaries may subsequently be modified or resettled, provided that no forest rights holders shall be resettled or have their rights in any manner affected for the purposes of creating inviolate areas for wildlife conservation except in case all the following conditions are satisfied, namely-

- a. The process of **recognition and vesting** of rights as specified



in section 6 is **complete** in all areas under consideration;

- b. It has been established by the concerned agencies of the State Government, in exercise of their powers under the Wild Life (Protection) Act, 1972 that the activities or impact of the presence of holders of rights upon wild animals is sufficient to cause **irreversible damage** and threaten the existence of said species and their habitat;
- c. The State Government has concluded that other reasonable options, such as, **coexistence are not available**;
- d. A **resettlement or alternatives package** has been prepared and communicated that provides a secure livelihood for the affected individuals and communities and fulfills the requirements of such affected individuals and communities given in the relevant laws and the policy of the Central Government;
- e. The **free informed consent** of the Gram Sabhas in the areas concerned to the proposed resettlement and to the package has been obtained in writing;
- f. No resettlement shall take place until facilities and land allocation at the resettlement

location are complete as per the promised package:

Provided that the Critical Wildlife Habitats from which rights holders are thus relocated for purposes of wildlife conservation shall **not be subsequently diverted** by the State Government or the Central Government or any other entity for other uses” (emphasis added).

4. Is FRA applicable in the areas inside PAs which may not come under forest department (i.e. may be revenue or other kind of land)?

As per the definition of forest land under Section 2(d) of FRA: “forest land” means *land of any description* falling within any **forest area and includes** unclassified forests, undemarcated forests, existing or deemed forests, protected forests, reserved forests, *Sanctuaries and National Parks*. Hence the FRA is applicable to all areas which come under this definition of forest land. Considering that the Act does not clarify what forest area means and drawing from the preamble of the FRA, the term forest area needs to be defined broadly, conforming to the expanded definition of forest land as construed by the Supreme Court in **TN Godavarman Thirumalpad vs. Union of India & Ors** (1997) 2 SCC 267 @ para 4. The Supreme Court brought into the definition of forests “all areas



that are forests in the dictionary meaning of the term irrespective of the nature of ownership and classification thereof”.

Any attempt, therefore, to interpret Section 2(d) narrowly for the purposes of FRA, would be contrary to the law as settled by the Supreme Court, and as per well established principles of interpretation. This is important, as the creation of CWH/CTH in any kind of forest land, as widely defined by the Supreme Court, would invite the protective cover of Section 4(2) FRA and/or Section 38V (5) WLPA (specifying that no relocation or modification of rights can take place without the consent of the right holders), as the case may be.

Confusion however arises because of letter No. 23011/28/2008-SG-II dated 3.12.2008 addressed by the Ministry of Tribal Affairs (MoTA) to the government of Gujarat, rejecting applicability of FRA on revenue land (even if the revenue land may fall within the dictionary definition of forest). According to this,

‘The term ‘forest land’ is defined in section 2(d) of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and the said definition does not include revenue land. Therefore, the revenue land under the occupation of forest dwelling Scheduled Tribes

and other traditional forest dwellers is not to be taken into account for determining the limit of an area of 4 hectares of forest land for habitation or for self-cultivation, referred to in Section 4(6) of the Act. The area of encroachment of forest land shall, however, be included in the limit of 4 hectares, prescribed in Section 4(6) of the Act.’

However, the interpretation of the term ‘forest land’ by the Supreme Court seen together with the definition under FRA cannot be displaced by a letter from the MoTA. The Ministry therefore needs to further clarify its stand.

5. Is the FRA applicable in PAs that do not have a forest ecosystem (e.g. marine/desert areas)?

FRA will be applicable in all areas which geographically fall within an area defined as “forest land” under Section 2(d) (See point 2 above for definition of “forest land” and “community forestry resource”), which includes National Parks and Sanctuaries.

The rights described in Section 3 (d) include “other community rights of uses or entitlements such as fish and other products of water bodies, grazing and traditional seasonal resource access of nomadic or pastoralists communities”. Clearly, the law recognizes that rights to use water bodies, including fish and



other products emerging from there, are forest rights. Further, Section 5 of the FRA empowers the holders of forest rights to not only protect the wildlife, forest and biodiversity in the areas where they hold these rights, but also to “ensure that adjoining catchment area, water sources, and other ecological sensitive areas are adequately protected.”

6. Are the provisions of FRA for claiming and granting rights different for PAs as compared to non-PAs?

The provisions for claiming rights and vesting rights are the same for PAs and non-PAs. However in case of Sanctuaries and National Parks there is a possibility of modification or settlement of rights for creation of CTH or CWH. No alteration or settlement of rights, however, can be done without the free, informed consent of the concerned community (Sec 38(5) of WLPA; Sec 4(2) of FRA).

7. Does FRA apply in PAs where settlement of rights has been carried out earlier, under the WLPA, before the enactment of FRA?

In villages where the process of recognition of rights under FRA has not happened, even if settlement of rights under WLPA has been carried out, the villagers are eligible to claim rights under FRA.

This is clear from the preamble to the FRA. The settlement of rights under the WLPA does not provide a clear and detailed process for recognition of rights and is, more often than not, based on existing records of rights which are often incompletely documented and are not a true reflection of the land tenure and customary occupation and use. Settlement under the WLPA has therefore been a **part of the processes causing historic injustice** mentioned in the preamble. The recognition of rights under FRA, therefore, can be initiated by the gram sabha in any village where they think that the rights have not been appropriately settled.

Under the WLPA, however, the final notification for a Protected Area cannot be issued unless a process of settlement of rights has already been carried out. It is not clear whether a final notification can be issued after the rights have been recognized under FRA or the settlement will still need to be carried out under WLPA for issuing the final notification.

In case of villages where relocation had already taken place prior to the enactment of the FRA, villagers can claim rights over the original forests only if they were either in occupation of the said land as on 13th December 2005 or are able to prove that their village had



been illegally evicted or displaced from occupied land without legal entitlement before 13 December 2005.

8. Can all rights under Sec 3(1) of FRA be claimed in PAs?

All rights under Sec 3(1) of FRA can be claimed in PAs.

9. Can all community facilities under Sec 3(2) be given in PAs? What conditions may apply if any?

All rights under section 3(2) can be claimed inside PAs. The process of claiming these rights, as specified by Ministry of Tribal Affairs (MoTA) in its letter dated 18th May 2009, is the same for communities both inside and outside the Protected Areas.

Process of claiming rights under section 3 (2)

1. Any user agency (government agency) that wants to divert forest land for any developmental work mentioned in Sec 3(2) of FRA must submit the project proposal (as specified under Form A) and place it before the general assembly of the village (with a quorum of at least half the members) of the concerned gram sabha.
2. The user agency will then send the proposal along with the

- gram sabha resolution to the Range Forest Officer (RFO), who will carry out site inspection of the proposed area.
3. Within three weeks of receiving the report from user agency, the RFO will send the proposal along with the attached gram sabha resolution and his own observations (as specified in Form B) to the Divisional Forest Officer (DFO).
4. If the DFO approves, then the decision will be communicated to the RFO within two weeks. The RFO will then demarcate the area of forest land approved for diversion, and hand over same to the user agency under gram sabha supervision.
5. If the project is not approved by the DFO he shall forward it to the District Level Committee (DLC) (Rule 7 of FRA Rules 2008). The DLC shall take the final decision and convey it to the DFO.

The land is accorded to user agencies on condition that it shall not be used for any purpose other than the one mentioned in the proposal; and if the land is not used it will be taken over by FD after one year. The Nodal officer must monitor the progress and record the diversion of forest lands which it must convey to the Ministry of Tribal Affairs (MoTA) and Ministry of Environment and Forest (MoEF).

10. Are the institutions involved in the process of claiming rights in PA the same as in non- PAs? What is their membership?

The institutions involved in process of claiming rights in PAs are the same as those for claiming rights outside of Protected Areas. The institutions established for claiming rights are³:-

- (i) The Gram Sabha is to be convened at each village by the Panchayat in its first meeting for creation of Forest Rights Committee (FRC). The Gram Sabha of a village passes a resolution and constitutes the FRC.

What is a gram sabha?

Sec 2(g) of FRA states that a Gram Sabha is "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".

Village is defined in FRA in Section 2(p) as (i) a village referred to in Section 4 (b) in Panchayat Extension to Scheduled Areas (PESA) 1996, (ii) any area referred to as a village in any State law relating to Panchayats other than the Scheduled Areas; or (iii) forest villages, old habitation

3. 2008; Notification of FRA issued by Ministry of Tribal Affairs; Gol; New Delhi.

or settlements and unsurveyed villages, whether notified as a village or not; or (iv) in the case of States where there are no Panchayats, the traditional village, by whatever name called.

- (ii) Forest Rights Committee (FRC): The FRC should have 10 – 15 members of the gram sabha, with 1/3rd members being women and 1/3rd being individuals belonging to Scheduled Tribes.

The FRC will facilitate the process of filing the claims.

- (iii) The Sub-divisional Level Committee (SDLC): The State Government will constitute the committee with the following members,
 - Sub-divisional officer or equivalent officer as chairperson,
 - Forest Officer in charge of a sub-division or equivalent officer,
 - Three members of block or tehsil level Panchayats, of whom two shall be members of Scheduled Tribes (preferably forest dwelling tribes/primitive tribes/other traditional forest dwellers) and one will be a woman, and
 - An officer of Tribal Welfare Department in-charge of sub-division.



The function of the SDLC is to verify the claims and forward them to the District Level Committee.

- (iv) The District Level Committee (DLC): The State Government shall constitute it, with the following members,
- District Collector or Deputy Commissioner - Chairperson
 - Divisional Forest Officer/ Deputy Conservator of Forest
 - Three members of District Panchayat of whom two shall be members of Scheduled Tribes (preferably forest dwelling tribes/primitive tribes/other traditional forest dwellers) and one will be a woman
 - Officer of Tribal Welfare Department in-charge of District

The function of the DLC is to take a final decision on the claims.

- (v) The State Level Monitoring Committee (SLMC): The State Government shall constitute it with the following members:
- Chief Secretary - Chairperson
 - Secretary, Revenue Department
 - Secretary, Tribal or Social Welfare Department
 - Secretary, Forest Department
 - Secretary, Panchayati Raj

- Principal Chief Conservator of Forests
- Three Scheduled Tribe members of Tribes Advisory Council
- Commissioner, Tribal Welfare - Member Secretary

The function of the SLMC is to monitor the process, ensuring that legal provisions are not violated by anyone concerned.

(vi) Section 11 of the FRA requires that "The Ministry of Central Government dealing with Tribal Affairs, or any officer or authority authorized by the Central Government on its behalf, shall be the nodal agency for the implementation of the provisions of this Act."

11. What role does the Forest Department have to play in the process of claiming forest rights and verification of claims?

There is no special or separate role envisaged for the forest department in the process of claiming rights under FRA within a PA. The forest department is represented in the SDLC and DLC and is required to discuss the merits of the claim as part of these institutions. The forest department is also expected to participate in the process of on-site verification of claims carried out by the FRC.



12. Once rights are vested under FRA in PAs, can they be modified in PA areas other than CWH using WLPA provisions?

It is clear from the definition of CWH (section 2 (b)) and section 4(2) that modification of rights in National Parks and Sanctuaries can happen only for the creation of CWH, and only with the consent of the gram sabhas. WLPA can be used for modification of rights for creating a CTH as per section 38 V (4) and (5), which also mandates recognition of rights and obtaining consent from the gram sabha before modification of rights and/or relocation.

13. What happens to Community Forest Rights (CFRs) that have been claimed inside the PA? Do PA laws still apply to such areas?

No distinction is made by the FRA between Community Forest Rights within Protected Areas and in non-protected ones. It is clear from the definition of 'community forest resource' in Section 2(a) that the emphasis is on the 'customary boundaries' of the forest dwelling community, which can be both inside and outside of a PA.

The provisions under Section 13 of the Act are in addition to, and not in derogation of, any other law. As

per section 4 (1) of the FRA, many activities which would have been considered illegal in the past, will now be recognized as legal rights after titles have been granted under the FRA. Section 3 1 (i) and section 5 of the Act mandate the rights holders to protect, regenerate and manage the forests within their jurisdiction. Objectives of the village forest protection committee formed under the FRA are the same as those of the forest department. The conflict, however, could arise in a situation where the management practices of the village committee contradict those of the forest department, such as forest fires, shifting cultivation, and extractive use for commercial purposes and so on. How this situation will be resolved is not clear from the existing provisions of the Act and will require further clarification.

14. Is the FRA applicable in PAs from where relocation has already been planned? Can FRA be used against relocation from PAs, and if yes, how?

FRA is applicable in all PAs including areas where relocation was planned or was ongoing prior to the FRA. The FRA specifies a process in Section 4(2), applicable only to CWHs, by which relocation from such areas can take place under specific



conditions (as mentioned in point 3 above). It doesn't provide for modification of rights (which would be necessary for relocation) in any other areas. It does mention, under Section 4(5): "Save as otherwise provided, no member of a forest dwelling Scheduled Tribe or other traditional forest dweller shall be evicted or removed from forest land under his occupation till the recognition and verification procedure is complete."

For relocation from CTHs, procedures and conditions given in WLP 2006 Section 38V (5) read along with FRA will be followed (see point 12 above).

While there is a need for more clarity on procedures, a reading of the provisions of the FRA along with its preamble would indicate that no further relocation from forest lands (within or outside Protected Areas) can take place, at least not without prior recognition of rights, and gram sabha consultation and consent.

15. Can the provisions for the Land Acquisition Act be used for relocation from PAs, including that for the creation of a CTH?

Under Section 4(5) of the Act, there is a statutory bar on eviction or removal of a forest dweller from forest land under his/her occupation until the process of recognition of rights is complete. Once the process is complete, the law for the acquisition of forest rights, as applicable in the specific situation, would have to be followed.

It is not entirely clear at this point in time whether the rights vested under FRA are different from other land rights. The former have been called "inalienable rights"; does this then mean that even the government cannot take over these rights using the principle of eminent domain? This issue needs clarification and can be resolved either if a precedent is set in a Court of Law or a clarification is issued by the government.

Note compiled by Neema Pathak Broome and Shiba Desor with legal advice from Shomona Khanna, Advocate, Supreme Court of India, and inputs from Meenal Tatpati, Ashish Kothari, Tushar Dash, Kanchi Kohli and Milind Wani.

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Edited by:

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Editorial Assistance: Anuradha Arjunwadkar

Funded by:

MISEREOR, Aachen, Germany.

For Private Circulation

Printed Matter

To: