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A Mahagatbandhan in the Forests is the Need of the Hour

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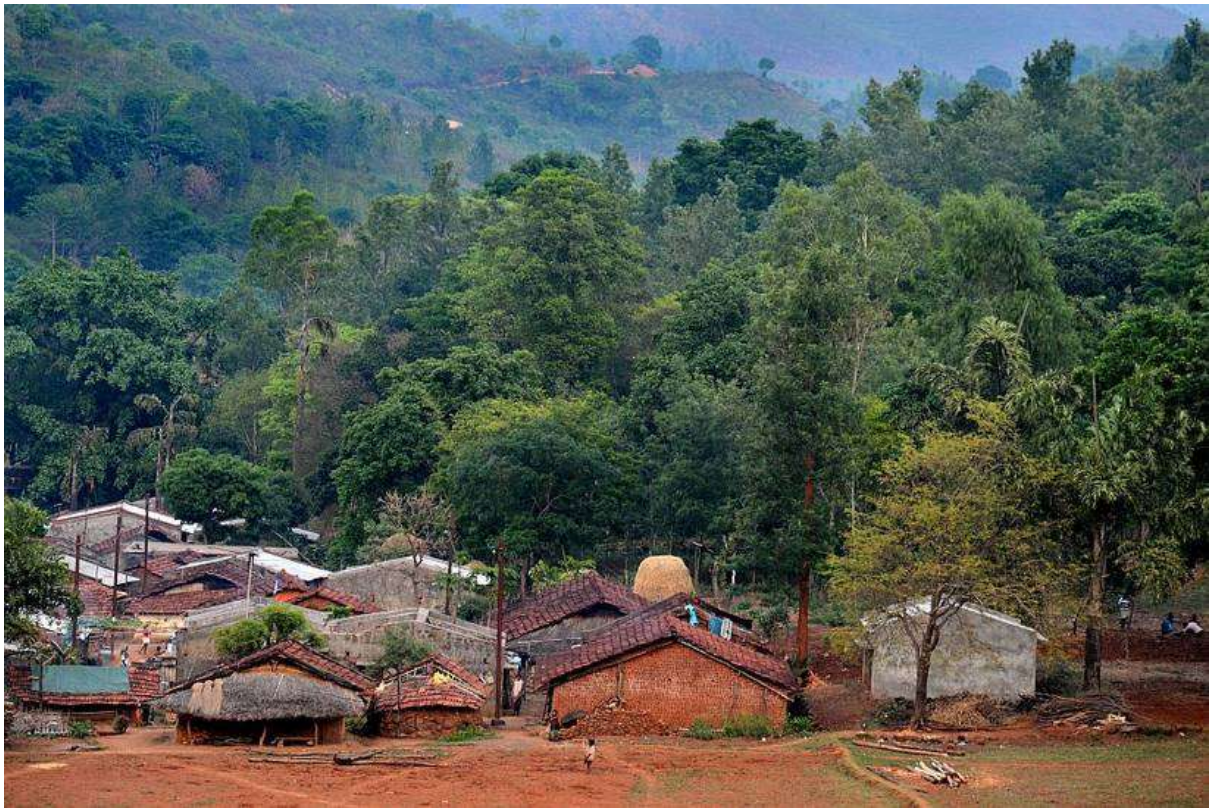

One of the community forests developed and maintained by the scheduled tribes in Gasaba reserve forest of Araku forest range in Dumbriguda mandal of Visakhapatnam district. The scheduled tribes are seeking community pattas under the Forest Rights Act. File photo: K.R. Deepak

Analysing the results of the Lok Sabha elections in 2014 in the 133 scheduled tribes dominated constituencies in the country, the Community Forest Resource-Learning and Advocacy, an NGO network, discovered that the number of voters eligible for land rights under the Forest Rights Act (FRA) was more than the margin of victory in over 95 per cent of the seats. This would suggest that any political party that promises to effectively implement the IFA and other laws protecting land rights of the scheduled tribes could defeat the incumbent Bharatiya Janata Party (BJP) in these constituencies.

*The BJP government, in any case, has been under fire for not protecting the rights of the scheduled tribes during the court hearings that led to the Supreme Court ordering that forest dwellers whose claims had been rejected by respective State governments be evicted. The order was later put on hold. In this article, sociologist and author of several books on issues concerning the scheduled tribes, **Nandini Sundar**, takes a critical look at how the FRA has worked on the ground, and makes a plea for the scheduled tribes in India to be treated as a resource rather than a curse: only then, she says, the Courts, conservationists, and communities can together work wonders for forest preservation.*

In the brave new world that defines India today, if your biometrics fail to match those in the Aadhaar database, you don't get your rations, and could even die.[1] Similarly, if the government fails to recognise your claims on forest land, not only do you not get the title to the land you have been cultivating for generations, but you even stand the risk of being evicted. Again and again, we see that it is the most poor and vulnerable who are at risk of being penalised for government failures.

When the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, generally referred to as the Forest Rights Act (FRA) was passed, there was hope that it would at last usher in some change in the undeclared civil war that has existed between the forest department and forest dwellers over the last century or more. The Act aimed to redress the 'historical injustice to the forest dwelling Scheduled Tribes' by recognising their property rights to land, as well as non-timber forest produce, and the community right of control and management which was appropriated by the forest department. However, recent events show that there is little likelihood of that, with the looming threat of Supreme Court mandated evictions and a highly problematic 2019 Forest Act that is proposed to replace the 1927 Indian Forest Act.

In 2008, soon after the FRA was passed, a range of conservation groups like Wildlife First, Nature Conservation Society, Tiger Research and Conservation Trust (TRACT) as well as former foresters (Orissa Retired Forest Officers' Association) and even ex-zamindars (T.N.S. Murugadoss) filed cases in various High Courts across the country as well as in the Supreme Court. They wanted the Act to be declared unconstitutional; claimed that FRA was beyond the legislative competence of Parliament since land is a State issue; that satellite imagery should be used as evidence of fresh encroachment; that FRA should not extend to sanctuaries and National Parks, and especially, that FRA should not apply to Other Traditional

Forest Dwellers (OTFD). They also objected to the Ministry of Tribal Affairs (MoTA) being given responsibility for implementing the Act as against the Ministry of Environment and Forests (MoEF), a touching concern for the very institution under whose watch wildlife has suffered and forests have degraded.[2]

On February 28, 2019 after the Government lawyers finally turned up in court to defend the FRA after having been absent on previous occasions, the Supreme Court stayed its earlier order of 13 February 2019, in which it had ordered State Governments to evict all those whose claims had *finally* been rejected under the FRA.[3] This could amount to over a million people.[4] The Court has now asked the States to give data on procedures followed for settling claims, the composition of those making claims (whether scheduled tribes or other forest dwellers), and the process to be followed after eviction. The Forest Survey has also been asked to place on record the scale of encroachment based on satellite surveys, a method which is problematic for reasons that will be explained below. The Court has now fixed a date for July 2019. The Government's failure to defend the Act has been systemic – an earlier Bench which heard the matter also issued notice on 29 January 2016, focused on the area over which claims were rejected. If it is now scrambling to restore its credibility on this issue, it is perhaps only because of the potential fallout on elections.[5]

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No doubt the Court is worried that "in the guise of and Other Traditional Forest Dwellers (OTFDs), the land is not occupied by mighty people, industrialists and other persons who are not belonging to the aforesaid category." (sic) (28.2.2019) The Court's desire to protect forests from the powerful and influential is a laudable aspiration but, unfortunately, not one shared by the petitioners – all of whose petitions are conspicuously silent on the diversion of forest land for non-forest purposes or the destructive effect of encroachment by so-called godmen and their organisations.[6]

No one, least of all the anti-forest rights groups, appears to have a problem with the Adanis being given some 2,000 acres of forest land in the heart of the dense Hasdeo Arand forests of Chhattisgarh, and it is telling that it is the forest villagers who are

protesting against this desecration, not the foresters.[7] In fact, soon after the SC order, the MoEF issued a circular saying that compliance with the FRA and gram sabha consent was no longer necessary for projects on forest land.[8] As the Niyamgiri case showed showed (*Orissa Mining Corp. v MOEF 2013 6 SCC 476)*, it is villagers empowered under acts like the FRA or Panchayats Extension to Scheduled Areas Act 1996 (PESA) who are the best bulwark against senseless mining and destruction of forest cover – not forest departments, not authoritarian conservationists, and certainly not corporates who promise compensatory afforestation. Indeed, all sensible conservationists recognise this deep connection between local community rights and conservation and many of them work with communities to keep out predatory forces.[9] While it is true that poachers are a major threat to wildlife and there is a range of new vested interests, only locals can provide the kind of continuous timely information needed to tackle the problem.[10]

Forest Diversion vs Forest Recognition

If the real concern is destruction of forest cover, it might be worth looking at some statistics provided by the government itself. In response to a Lok Sabha Question of February 8, 2019, the government noted that in the last four years alone (2015-'19), 54,648.54 ha of forest land had been diverted under the Forest Conservation Act. In response to a previous question on September 8, 2016, the government had noted that on average 25,000 ha of land had been diverted annually for non-forest use, including mining, since 1980. This would amount to some 10 lakh ha over forty years. A Parliamentary committee report on the status of forests in India tabled in both Houses in February 2019 cites the following statistics provided to it by the government: "The Committee was informed that the Ministry has granted approval of 3226 number of cases in all categories during the last five years from 2013-'14 to 2017-'18 under the Forest (Conservation) Act, 1980, which involve 70,920.61 ha. diversion of forest land for non-forestry purposes. … From 01.01.2013 to 20.06.2018, an area of 2,39,572.16 hectare forest land has been diverted for infrastructure projects under FCA, 1980."[11] While these figures are not consistent (indeed, government figures are usually quite inconsistent), it is clear that industry and infrastructure are as big a threat, if not more, as encroachment by villagers.

In a status report by the MoTA showing forest rights recognised up to 30 November 2018, the Ministry noted that titles for 17.32 lakh ha had been distributed against individual claims, and 37.26 lakh ha had been conferred with community forest titles.[12] What is essential to note is that neither of these, especially the community forest land titles, involves diversion of forest land to non-forest uses. In giving these community titles, the government has effectively just saved 37.26 lakh ha of forest land. Even when it comes to individual titles, the FRA is not a land distribution exercise — it is a process of recognising *existing* claims up to 4 ha, and only on cultivation that predates 13 December 2005. In principle, all the land that is being recognised under FRA is already under cultivation or was never forest land to begin with.

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Why was FRA needed?

It is important to go into the history that necessitated the FRA. One major reason for the Act is the faulty settlements in place in adivasi areas. When reserve forests were constituted, thousands of adivasis were displaced from their homes and lands, usually without any compensation, and prevented from their customary use of forests. This was also one of the major reasons for the great adivasi rebellions like the Birsa Ulgulan in Jharkhand or the Bastar Bhumkal of 1910.

In many places, lands were never surveyed and later arbitrarily declared forest land, leading not just to disputes between people and the forest department, but also to disputes between the revenue and forest department, and even to interstate boundary disputes. To give just a couple of examples — in 1949, all the *nistari* forests in the Central Provinces were declared Government Protected Forests with the condition that the *nistari* rights of the people would not be affected.[13] This blanket notification meant that many of these forests remained unsurveyed, with control shared uneasily between the revenue and forest departments. These were known as “orange areas” on the basis of the colour assigned in maps. Although the land was claimed by the forest department as protected forest, the revenue department granted title deeds on

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this land, often without informing the forest department. Villagers also continue to refer to these areas as their *nistari* forest. As a consequence of this legal and physical ambiguity, several long term cultivators were declared "encroachers".[14] The Madhya Pradesh Forest Survey 2003 admitted that people's rights had not been settled in 83 per cent of land declared forests, something the forest department was legally bound to do.[15] In Orissa, Kundan Kumar has highlighted how over 50 per cent of the 'forest' areas under revenue department control, several tracts of 'deemed' reserve forests, and lands above a ten degree slope (on which large numbers of adivasi families live and practice shifting cultivation) have never been properly surveyed and settled, thus denying thousands of people, mostly adivasis, property rights.[16]

It is also important to note that there is no necessary correlation between the land under forest department ownership and actual forests. The two overlap, but there are also areas of divergence. The 2019 Parliamentary Committee Report notes that the MoEF follows the Supreme Court's 12 December 1996 order in (C) No.202/1995 Godavarman Thirumulkpad vs Union of India & Ors, which defined forests "according to its dictionary meaning". As interpreted by the MoEF, this means:

> **"As of now, 'forest' means any area that is recorded as forest in any Governmental record irrespective of whether it is having a forest growth or not. .. The second aspect is that it includes any land area, irrespective of whether it is recorded as forest or not, if it is supporting natural forest as per the dictionary meaning of the term."**[17]

This 1996 order of the Supreme Court was deeply problematic since it insisted that working plans drawn up by the forest department should be used to manage even private forests, ignoring the complex variety of tenures on the ground. In much of the North East, forests are privately owned or owned by communities, and the Court's ban on timber felling caused a serious loss of income for many families.[18]

The data provided by the Forest Survey of India through its India State of Forest Report (ISFR) to the Parliamentary Committee further clarifies the difference between forest cover and recorded forest area:

"The term 'Forest Cover' as used in ISFR refers to all lands more than one hectare in area with a tree canopy of more than 10 %, irrespective of land use, ownership and legal status. It may include even orchards, bamboo, palm etc and is assessed through remote sensing. On the other hand, the term 'Recorded Forest Area' refers to all the geographical areas recorded as 'Forests' in Government records as Reserved Forests (RF) and Protected Forests (PF), which have been notified under the provisions of Indian Forest Act, 1927 or its counterpart State Acts. Besides RFs and PFs, the recorded forest area may also include all such areas, which have been recorded as forests in the revenue records or have been constituted so under any State Act or local laws."[19]

The Report goes on to note that "only 16 States/Union Territories have been able to provide details of digitised boundaries of Recorded Forest Area for incorporation in the India State of Forest Report, 2017" (para 4.12) which makes it difficult to test the overlap between actual forest cover and forest land.

In short, what this tell us is that government records are seriously problematic when it comes to recording forest land, that there are large tracts of forest land on which there is no forest in any conventional sense, that there are forests on private or revenue land, and that people have been cultivating in both forest land (which became forests much after they started cultivation) and revenue land (for which they should have been given titles but were not). So the first failure of the government is in its own record keeping, without which it had no right to label people encroachers and take steps to evict them even prior to the passage of the FRA, or to criminalise then under other offences. Across the central states, lakhs of people have been booked for minor forest offences, with many unable to post bail for years.

While faulty revenue and forest settlements are one major cause, another major cause for 'encroachment' in the forest has been land hunger and proletarianisation among adivasis, whose holdings tend to be unproductive and fragmented. As figures collected by the Government of India appointed High Level Committee on Tribal Communities, 2014, revealed, average operational holdings among scheduled tribes declined from 2.44 ha in 1980-81 to 1.53 ha in 2010-11.[20] Displacement by a variety of industrial and hydel projects as well as conflict

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has also pushed people onto forest land. For instance, after 2005 when the Koyas started fleeing from the Salwa Judum in Chhattisgarh and fled to Telangana, the only place they could settle was on forest land. The Forest Department has sometimes allowed them to stay, but equally often they have burnt the huts of the IDPs (internally displaced persons) and destroyed their standing crops.

Immediate History of the FRA

In 1990, the MoEF issued a set of six guidelines to deal with disputes related to forest land and forest villages, but these were never implemented. In February 2002, as part of the ongoing Godavarman case, the Supreme Court asked state governments to declare the extent of encroachments. A Central Empowered Committee constituted by the Court also issued draconian recommendations included banning all future regularisation, allowing for the possibility of 'excessive use of force, un-provoked firing, and atrocities punishable under the SC/ST Atrocities Act' in the process of eviction. Many states treated the Court's request for statistics as a request for action, and evictions started taking place across the country. The current fear of evictions in response to Supreme Court orders, therefore, comes with a sense of déjà vu.

In response, a range of adivasi organisations and individuals came together to form the Campaign for Survival and Dignity (henceforth Campaign); and sustained pressure from both adivasi organisations and the Left ensured that the first Congress-led United Progressive Alliance (UPA) regime passed the Act. It was also seen as a way of countering Naxalism.

The Provisions of the FRA

The FRA is an unusual act in many respects, not only for the range of rights (as well as duties) that it recognises, but for the innovations it makes in what kind of evidence can be summoned which ranges from preliminary offence reports (PORs) issued by the forest department to oral evidence from village communities. While applicable to all scheduled tribes it also covers under OTFD, non-adivasi communities who have historically been living in the forest. While there is a danger that powerful upper castes may use this loophole to claim rights, there are also many small dalit, and OBC communities who have shared space with adivasis across central India.

The forest rights recognised pertain to both individual and community rights, and it is the latter which the CSD and other groups have sought to emphasise. Apart from pattas that legitimate existing cultivation upto 4 ha, villagers gain ownership rights over minor forest produce, rights over fishing, grazing etc, but not over hunting. Nomadic pastoralists, and particularly vulnerable tribal groups (PVTGs) have been given their own rights. Communities have also been given the right to conserve and manage any community forest resource, as well as rights to intellectual property and their knowledge of biodiversity.

While the rights are expansive, the procedures for adopting these rights are unfortunately quite bureaucratic and go through three levels of committees – the gram sabha, the sub-divisional level committee, and the district level committee. The Gram Sabha is supposed to receive and verify claims and the sub-divisional level committee is supposed to help in the process by providing forest and revenue maps and electoral rolls. If a claim is rejected at the gram sabha or sub-divisional stage, claimants are supposed to be given reasons in writing within 60 days to enable them to appeal to the district committee. The decision of the district level committee is final, but must be explained in writing to the claimant. The district committee is also responsible for ensuring that nomadic pastoralists and PVTGs get their habitat rights. The State Level Monitoring Committee is supposed to meet every three months, and do just that - monitor the progress of claims.

The sub-divisional, district and state committees are all dominated by the bureaucracy. The latter two are chaired by the Sub Divisional Officer (SDO) and Collector respectively and have membership from the forest department and the tribal welfare department apart from the panchayat at the relevant level. The State Level Committee is chaired by the Chief Secretary with representation from all relevant departments. If forest rights are being given to the wrong persons, it can only be by collusion with the administration, as we saw in the infamous *Malik Makbuja* scam of Bastar, where in the name of ensuring that adivasis got a fair price for timber on their private lands, there was mass felling of trees on forest land with the collusion of the forest and revenue departments, who passed off the timber as coming from private sources.

The implementation of FRA in practice

As with every enabling and right-giving Act, the primary problem is that those for whom the rights are intended do not know of the existence of such an Act and here, the forest department is in no hurry to enlighten them. The second major problem is bureaucratic indifference and ignorance of the rules, which leads to a high rate of rejection of claims. The 2018 MOTA status report on implementation of FRA tells us that 44.83 percent of claims were granted. 55% of individual claims were rejected compared to 51% for community claims.

In its affidavit of February 2019 asking the Supreme Court to reconsider its eviction orders of 13 February, the MoTA cites the following implementation problems, as a reason why so many claims have been rejected: wrong interpretation of the Act; appropriate procedure not being followed in filing of claims due to ignorance by the gram sabha; the reason for rejection not being communicated to claimants making it impossible for them to appeal; unrealistic deadlines for filing claims and appeals; the fact that the district administration did not provide forest and revenue maps and the fact that the State Level Monitoring Committee did not meet regularly.

In the 2010 report of the committee set up jointly by the MoEF and MoTA to look into the working of the FRA,[21] we get a fuller sense of what is meant by the 'wrong interpretation of the Act'. For instance, claims were rejected because a person owned other revenue land; when the land claim was not recognised as the land was not officially forest land; or because the higher authorities recognised only land under 'plough cultivation', and not land cultivated by other means. In many cases, the committees insisted on PORs or satellite imagery and did not accept other kinds of evidence. One big problem was that even when claims were recognised, the revenue and forest records were not changed to reflect this.[22]

Recent academic studies on the FRA - in particular, a set published as part of a ten year review of the FRA in the *Economic and Political Weekly* in 2017 - point to continuing implementation problems, including recognition being given to the Joint Forest Management (JFM) committee (in which the forest department has effective control) instead of the gram sabha, and CAMPA funds (for

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compensatory afforestation) being given to the forest department for afforestation without recognising the existing rights of people on the land being afforested.[23]

Mining is emerging as a major reason for community forest rights being denied, along with areas where sanctuaries are to come up. The most notorious example is of Ghatbarra village in Chhattisgarh which was granted community forest rights in 2013 in the Hasdeo Arand forests (over 820 ha out of the 2300 ha claimed) but found its title abruptly cancelled in 2016,[24] when coal mines were being parcelled out. Many other cases can be cited where villagers in mining areas have been prevented from filing FRA applications, such as around Raoghat in Chattisgarh's north Bastar or Surjagadh in Maharashtra's Gadchiroli. The FRA cannot prevent the forest being given for other uses – but it can ensure that villagers have a say and that even if their protests are overridden by the government, they are not displaced without their rights being recognised and compensated.

In December 2017, I attended a meeting organised jointly by the Campaign for Survival and Dignity and the CPI in Gadchiroli to mark ten years of the FRA and twenty years of PESA. It was an amazing meeting where villagers, primarily from different parts of Maharashtra but with representation from other parts of the country, discussed the details of the laws and the problems they faced in implanting these acts. A more informed legal constitutional decision would be hard to imagine, but the main organiser, a young man called Mahesh Raut has been arrested for so-called Maoist links in the Bhima Koregaon case. Presumably, today, anyone who makes adivasis and others aware of their legal rights must be a Maoist.

One group from Yeotmal said that they had been issued a letter saying the villagers couldn't call their own gram sabha meeting, only the *sachiv* (appointed by the government) could summon the gram sabha. And since the *sachiv* was refusing to do so, they had a problem. Another villager from Bhamragarh said that the government was refusing to provide the village *misal bandobast* (record of rights) to enable people to file claims for community forest rights. A representative from Rajasthan said that they had got 36,000 ha of the 71,000 ha they had claimed under community forest rights, but the claim papers for the rest had been lost; both the revenue and forest departments were disclaiming any knowledge of these. In sanctuary areas, the forest department was not accepting any claims, saying they were waiting for guidelines from the government. Where villagers have been able

to get income from tendu and bamboos in Surjagadh (Gadchiroli), they have put it to innovative uses, such as building a community house for women during their periods so that they could relax in comfort.

The anti-FRA petitioners have asked for the use of satellite imagery to show that mass encroachment has taken place after the FRA was enacted in anticipation of getting titles. In their order of 28 February 2019, the Supreme Court bench has also called for a satellite survey by the Forest Survey of India. However, the Forest Rights rules (12 A.11) are very clear that satellite imagery and technology may only supplement other forms of evidence, and cannot be treated as a replacement. One of the major problems with satellite imagery is that it does not take into account the practice of keeping land fallow or under tree cover, especially but not only in areas of shifting cultivation. Technology is useful but it should be in keeping with the ground truth that only local communities can provide. Undoubtedly, there will be some false claims and fresh encroachments, but these cannot be used to jettison the Act altogether. Indeed, the 2010 Joint Committee Report on the FRA says "(o)n the whole, however, we were presented with limited evidence, even by the Forest Departments, of false or bogus claims."[25]

What is to be done?

If the government and the Courts are at all serious about preserving the forest cover in this country as well as guaranteeing justice for forest dwellers, it would do well to take community forest rights seriously, apart from other features of the FRA like habitat rights for PVTGs and pastoralist rights. So far the government has tended to concentrate on individual forest titles. While these are important, they are also potentially open to powerful interests subverting them. However, community forest rights are almost entirely about conservation. Kundan Kumar et al estimate that

> **"In terms of area, potentially, up to 85.6 million acres or 34.6 million hectares of forests could be recognised as CFRs in the country….In terms of potential beneficiaries, an estimated 200 million Scheduled Tribes (STs) and other traditional forest dwellers (OTFDs) in over 1,70,000 villages are the users of this potential area, and could, therefore, gain collective rights over forests under the CFR provisions of the FRA."**[26]

Sharad Lele argues that this potential should be recognised and used to rewrite the IFA instead of the current proposed IFA 2019 which pretty much replicates the colonial forest act in its demarcation of reserved and protected areas, albeit with more powers to foresters:

> **"All reasonable estimates of the potential CFR area (area used by local communities) suggest that PFs and most RFs should simply be replaced by CFR Forests, which should be recognised as the main legal forest category. If any RF outside of NPs and WLSs remains unclaimed as CFR, it could be re-designated as a 'Conservation Forest'. Correspondingly, the CFR Gram Sabhas should be recognised as the main manager/custodian for the CFR Forests by the forest law, and an agency (possibly hived off from the current FDs) created for providing technical and protection support to them."**[27]

Since the late 1980s, forest policy across the world has changed towards a recognition that locals must be treated as important stakeholders and not just cast aside on the grounds that forests are a national resource. The current moves to backtrack on the FRA and bring in an old style forest act ignore the depth and breadth of material that has been generated on this subject, as well as on the importance of customary tenurial rights. If the people of this country are treated as a resource rather than a curse, the Courts, conservationists and communities can together work wonders for forest preservation. A mahagathbandan in the forests is the need of the hour.

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