

## COMMENTARY

# The Forest Rights Act and the 2023 Amendment to the Forest Conservation Act

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**Abstract:** The 2023 Amendment to the Forest Conservation Act (FCA) has largely been criticised for the loss of forest cover it will cause through diversion of forest land for infrastructure, public utility, and defence requirements. The Amendment makes no reference to the Forest Rights Act (FRA) and its critiques point only to its undermining of the latter. A closer examination of the Amendment from the perspective of the FRA suggests that the Act can not only continue to be used to counter the diversion of forest land, but also that popular mobilisation around it may be the only way to protect both forests and forest-dwellers.

## 1. MISSING THE RIGHTS PERSPECTIVE IN CRITIQUES OF THE 2023 FCA AMENDMENT

Critiques of the 2023 Amendment to the Forest Conservation Act (FCA) have largely focused on the exclusion of categories of forests<sup>1</sup> from the protection of the Act, and the exemption of various categories of projects from forest clearance processes. It has been argued that excluding certain forest categories from the FCA will prevent forest dwellers in those areas from having their rights recognized under the Forest Rights Act (FRA). Further, the consent of *gram sabhas* (village assemblies) will no longer be required for forest diversion even in those areas where rights have already been recognized. These arguments are not correct. Examining the 2023 Amendment from the standpoint of forest rights under the FRA gives a different perspective. In fact, it suggests that the challenge to the Amendment need not only be through a judicial review as some retired

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<sup>1</sup> Most importantly, forests that were recorded as forests prior to 25 October 1980, but not notified as forests under the Indian Forest Act (unclassified forests), which account for over 15 per cent of the country's forest area, and a very large proportion of forest area in select states.

bureaucrats have attempted (Perinchery 2023). Mobilisation around the FRA may indeed be the only way to protect forests and forest dwellers from the growing threat of new, unwritten policies that may undermine their rights.

## **2. A BRIEF HISTORY OF THE FRA AND RESISTANCE TO ITS POTENTIAL TO DEMOCRATIZE FOREST GOVERNANCE**

The colonial and post-colonial “forest estate” was assembled without adequate survey and settlement processes. Lands that had varied communal property uses and community management systems recognized by local customs were brought under the control of state forest departments. Forest-dwelling communities became “encroachers” on their traditional lands almost overnight. From the 1970s, protests against deforestation led to a paradigm shift from production forestry to conservation forestry following the shifting of forestry to the Concurrent List, the passing of the FCA, and the framing of the National Forest Policy, 1988. However, the FCA was increasingly used to divert forest land for infrastructure and mines, which the new post-liberalization economic growth model needed. Between 1980—when the FCA was passed—and 2016, almost 0.9 million hectares of forest land were diverted; almost half of this was for mining, irrigation, hydropower, defence, and roads (MoEFCC 2016). The Supreme Court’s judgment in *T. N. Godavarman Thirumalpad v. Union of India, 1996*, which redefined forests, led to a further increase in the forest estate at the cost of forest-dwelling communities, leading to their eviction and denial of access to forests for livelihood needs. The Parliament passed the FRA in 2006 in response to mobilization by forest dwellers. The Act recognized and vested forest dwellers with forest rights and laid out procedures for recording the rights and demarcating their geographical domain. In 2009, the Ministry of Environment, Forests and Climate Change (MoEFCC) acknowledged that the FRA recognised village-level democratic institutions’ rights to protect 40 million hectares of community forest resources (community forest resource management rights or CFRR) (FAO 2009). At least 15 crore people—including almost nine crore Adivasis—were expected to benefit from recognition of their CFRR (RRI, Vasundhara, and NRMC 2015). Against this potential, as of 1 June 2023, individual and community rights over only 17.79 million hectares have been recognized in the entire country. Further, the MoEFCC does not report on CFRR separately, but clubs it under “community” rights (MoTA n.d.). However, from 2008 to 2019, almost 0.4 million hectares of forest land were diverted under the FCA (Bijoy 2021).

Sections 3(1)(i), 3(2), and 5 of the FRA, the MoEFCC's previous circulars (MoEFCC 2009; FAO 2009),<sup>2</sup> and the Supreme Court's judgment in the Niyamgiri case (*Odisha Mining Corporation vs MOEF*, 2013) together require the consent of the gram sabha for the diversion of forest land. Forest land is defined widely under Section 2(d) of the FRA as: "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." The FCA, and other laws related to forests, have, in fact, to be amended in accordance with the FRA—as the MoEFCC itself had once noted (FAO 2009).

The MoEFCC, the Ministries of Mines and Coal, and various state governments have been consistently trying to bypass gram sabha consent for the diversion of forest land.

- In 2013, the MoEFCC informed all states that gram sabha consent for forest diversion would not be required for 'linear' projects (roads, canals, pipelines/optical fibres, etc.).
- Amendments to the FCA in 2014 and 2017 effectively transferred the responsibility of certifying that FRA implementation was complete, and that the gram sabha had consented to the diversion, from the gram sabha to the district collector.
- In 2019, the MoEFCC downgraded FRA compliance for forest diversion proposals from Stage I (in-principle approval) to Stage II (final approval).
- In June 2022, the MoEFCC notified new FCA Rules. FRA compliance was completely done away with for final forest clearance. States were given the responsibility of ensuring FRA compliance for forest diversion and settlement of rights before handing over land to the user agency.

### **3. USING THE FRA TO PROTECT BOTH FORESTS AND FOREST-DWELLERS**

The FCA Amendment of 2023 does not mention the FRA, the need to record forest rights under it, and the need for gram sabha consent for the diversion of forest land. However, forest rights are recognized in forests as defined by the FRA. In fact, the FRA now becomes more important to

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<sup>2</sup> In Letter No.11-9/1998-FC (pt.), dated 30 July 2009 and 03 August 2009, the MoEFCC issued orders stating that FRA implementation, and the gram sabha's prior informed consent for diversion, were preconditions for forest diversion proposals. These were to be certified by the gram sabha and the state government and included in the proposal.

protect forests, which are defined more broadly in it, than in the 2023 FCA Amendment. In the opinion of forest law experts, the procedure for the diversion of forest land under the FCA is now restricted to forests as defined in the 2023 Amendment. The 2022 FCA Rules are now applicable only to these forests, and they place the onus on state governments to ensure compliance with the FRA before the forest land is handed over to the user agency. For forests left out by the 2023 Amendment, the Ministry of Tribal Affairs (MoTA)—which is the nodal agency that oversees the implementation of the FRA—and state governments are free to define the procedure for forest diversion (C.R. Bijoy, personal communication). The problem that remains, as earlier, is implementing the FRA and recording rights. MoTA should issue legally enforceable guidelines under the FRA to record and settle forest rights and ensure that free prior informed consent of gram sabhas is obtained before any forest land is diverted.

State governments must be urged to amend their state forest laws, necessitating compliance with the FRA for forest diversion proposals. In the case of land that is now outside the purview of the FCA due to the 2023 Amendment—but where the FRA is still applicable—state governments must formulate clear guidelines for forest diversion, in such a way that the gram sabha’s role in allowing or disallowing forest diversion is preserved. State governments must also formulate guidelines for land that is now outside the purview of the FCA, where there are no forest dwellers accessing it, and therefore no possibility of claims being raised under the FRA. Conservationists, forest rights activists, and organizations of forest dwellers across the country must join hands and make these demands of the MoTA and state governments.

**Ethics Statement:** This study complies with requirements of ethical approvals from the institutional ethics committee for the conduct of this research.

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