Land Rights of Tribal Communities in India: Analysing Legal Recognition and Challenges

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Abstract

This paper examines the status of land rights accorded to the Scheduled Tribes in India. With a history of dispossession behind them, tribal groups continue to be among the most marginalised sections of the country's population. Recognition of the significance of land resources for tribal communities has grown in the recent decades and this has taken shape in various laws to protect tribal rights. Here, the three most prominent tribal rights legislations have been analysed, namely, the Panchayats Extension to Scheduled Areas Act, 1996; the Forest Rights Act, 2006; and the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Settlement Act, 2013. An evaluation of these three laws using data from government sources as well as qualitative research literature points to several critical issues that have marred their successful implementation, such as poor nodal governance, reluctance on part of States to devolve powers to local bodies and conflicts between different legislations. Having identified these bottlenecks, the paper offers some policy recommendations for the substantive realisation of tribal land rights recognised in these laws.

Introduction: Tribals, Land Rights and Landlessness

The centrality of land to the lives of tribals cannot be overestimated. It is not a mere means of livelihood and social status but is fundamental to the tribal identity and is inseparable from their cultural and spiritual life (Biswas and Pal 2020, 199). Any discussion on tribal land rights must take into account the distinctiveness of the tribals' relationship with their land. Traditionally, they have considered themselves to be an integral part of their land and not existing apart from it (Malik 2020, 38). Indeed, the whole gamut of traditional tribal activities - economic and otherwise - revolves around land, thus making it the chief source of their identity.

As such, they possess the right to protect and preserve it for themselves and for future generations. This is a right that has been recognised in laws such as the Forest Rights Act, 2006(FRA). The Supreme Court has also reaffirmed the right of tribal communities "to maintain their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands"[1]. Above all, the Scheduled Tribes (STs), which constitute 8.6% of India's population, are the only group in the country that enjoy specially recognised land rights under the Constitution. Here, it is also worth noting that the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which

[1] Orissa Mining Corporation vs. Ministry of Environment and Forests & Ors., 38 (Supreme Court, 2013)

India signed in 2007, provides that indigenous peoples "shall not be forcibly removed from their lands or territories" (United Nations 2007, 11).

Yet, the state of land ownership among the STs paints a disappointing picture. Landlessness statistics are nebulous to begin with and recent estimations are lacking[2]. Karat and Rawal (2014) note that as of 2011, 24% percent of tribal households did not own any land. An important cause of tribal landlessness is land alienation, a phenomenon that was spurred in the colonial era and has continued till date. As of 2013, the Ministry of Rural Development data reveals that 3.75 lakh cases of tribal land alienation were registered of which over 40% have been rejected by courts "on various grounds" (quoted in Mitra 2020, 58). In some cases, the courts have cited 'procedural irregularities' in the way restoration of alienated tribal land was carried out as a ground for declaring tribal occupation illegal, compelling the process of restoration to start all over again (for e.g., ENVIS n.d., 3). In yet other instances, the court has held that acquisitions were made with 'earnest objectives' of larger public interest (Pal 2021, 185).

Landlessness in turn is seen as a major contributor to the impoverishment of the STs. Census data puts the average poverty ratio of the STs at 39%, higher than the national rate of 22%[3]. However, the National Family Health Survey 2019-21 found that 46% of ST households are in the lowest wealth quintile in the country (NFHS-5 Vol I 2022, 44).

Securing land rights for tribal peoples is therefore a compelling national imperative. It is necessary not only to vindicate the spirit of the Constitution and the UNDRIP but also to translate into reality the basic provisions of some major legislations enacted for promoting tribal land rights. These include landmark laws like the Panchayat Extension to Scheduled Areas Act 1996, the Forest Rights Act 2006 and the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Settlement Act 2013. Enforcing these laws is not only a legal responsibility of the state but is also essential to make the development process inclusive and sustainable.

This paper examines the legal framework that has evolved for the protection of tribal land rights to identify the issues that have arisen in the implementation of above mentioned laws and offers suggestions on how they can be given sharper teeth.

[2] The Union Minister for Agriculture Shri Narendra Singh Tomar said in response to a question in the Lok Sabha that no specific survey of landless farmers has been conducted so far (Unstarred Question no. 1591, 26th July 2022).
[3] https://tribal.nic.in/downloads/statistics/Statistics8518.pdf

Review of Literature

Land governance in general and laws on tribal rights in particular have been subjects of extensive study and debate for several decades, largely due to the persistent nature of tribal and peasant movements in India. Research on these issues have taken on a new dimension with the liberalisation of the Indian economy which has posed new challenges for tribal communities. *The Land Question in Neoliberal India Socio-Legal and Judicial Interpretations* (2021, Routledge) edited by Varsha Bhagat-Ganguly is a comprehensive collection that spans across several facets of land governance such as real estate reforms, land-leasing, land acquisition for economic development, landlessness and of course, forest rights of tribal peoples. Essays contained in this book treat land as not merely a question of property but also as a community resource and as a subject of environmental responsibility.

Land Alienation and Politics of Tribal Exploitation in India (2020, Springer) by Suratha Kuman Malik has a special focus on Odisha but also offers an elaborate discussion of the legal-constitutional framework that exists for tribal rights and the developmental tracks adopted for tribal welfare before surveying the extent of land alienation in various States. The author traces the process of the disruption of tribal economies which has led to indebtedness, landlessness and displacement. Among the laws reviewed by Malik is the Panchayats Extension to Scheduled Areas (PESA) Act, 1996, which has been the subject of a detailed study by C.R. Bijoy in *Policy Brief on Panchayati Raj (Extension to Scheduled Areas) Act of 1996* (2012, UNDP). This report presents the status of PESA implementation across different States. It identifies the major bottlenecks in delays and factors responsible for diluting the Act's core provisions among which are "lack of clarity, legal infirmity, bureaucratic apathy, lack of political will."

Another important tribal rights legislation, the Forest Rights Act, 2006 has also been extensively evaluated, with one such comprehensive report being *Promise and Performance: Ten Years of The Forest Rights Act in India* (2016) prepared as a Citizen's Report by the Community Forest Rights-Learning and Advocacy. The report has tried to quantify the potential area that can be recognised as individual or community land under FRA and found that only three percent of this potential Community Forest Resources area has been recognised as of 2016.

The third important land rights law, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 has received relatively less attention from a tribal rights perspective given its broader scope. Nevertheless, Dhanmanjiri Sathe's article titled "Land Acquisition Act and the Ordinance: Some Issues" (2015, EPW) discusses the implications of the law and the attempts by the state to dilute some parts of it. The author also points out the possible pitfalls in the law with respect to Social Impact Assessments and payment of the compensation to affected families.

This paper seeks to contribute to this body of literature by considering these three laws together, for they can be truly effective only if they work in tandem. Most studies have tended to focus on one of these laws with some exceptions such as Wahi and Bhatia (2018). The analysis presented in this paper will illuminate the hurdles common to all the three laws, some of which are rooted in the institutional structures of governance.

Methodology

This paper relied entirely on secondary data obtained from a wide range of sources. The evolution of the legal framework through successive paradigms was based on existing secondary research on colonial forest policy as well as post-independence policy documents such as the National Forest Policy 1952. The discussion of PESA 1996 used data on PESA compliance available at the website of the Ministry of Panchayati Raj and used qualitative data from reports of fieldwork conducted in various states to identify implementation issues. A similar approach was adopted for the FRA 2006 with government data obtained from the dashboard of the Ministry of Tribal Affairs and has been tabulated in this paper for drawing inferences. This was supplemented by the findings of studies that have conducted econometric analyses of FRA claim processing statistics. Vital statistics for the LARR Act 2013 were not available in government portals and this paper made use of news reports and research articles to identify the key areas of concern.

Changing Paradigms of Tribal Land Rights

Legal recognition of tribal land rights is the product of decades of struggle, advocacy and policy debates. The question of land rights for tribal peoples arose, ironically, only when these rights were flagrantly destroyed by the colonial state. Till then, tribal communities had, since time immemorial, enjoyed customary rights over forest lands and their produce (Elwin quoted in Mathur 2009, 173). With the introduction of positive law[4] by the British and its continuance under the independent Indian state, tribal rights became meaningless sans legal recognition. Here, the evolution of tribal rights has been discussed under three phases. As the position and perception of tribals in the eyes of the state changed, there was a gradual movement from outright exclusion, to conditional inclusion and finally, towards pluralistic inclusion.

Colonial Era: Criminalisation and Isolation

The middle of the nineteenth century saw the beginning of the colonial conquest of India's forests. Under the Indian Forest Act of 1865, any land which covered trees or brushwood could be declared

[4] Positive law, as propounded by writers such as Bentham and Austin and favoured in western nations, refers to the law that is promulgated and enforced by the state. This view rejects the notion of customary laws as they have no statutory basis.

'Government Forest', provided it did not interfere with the existing rights of communities[5]. However, many administrators argued that customary rights had no basis and could be exercised only at the mercy of the British monarch (Rao 2007, 69). Accordingly, in the Indian Forest Act of 1878, the state gave itself the power to declare any forest as a 'reserved forest'. The state could now brush aside claims over forests wherever they interfered in their conservation (80). What had once been customary rights were now reduced to 'concessions' granted as per the discretion of the colonial government (Mathur 2009, 195). Punishments were prescribed for violations of these laws which included trespassing reserved forest lands, grazing cattle, collecting any forest produce and even plucking leaves. This in effect, criminalised the entire system of traditional tribal livelihoods.

Criminalisation went even further with the Criminal Tribes Act 1871 which proclaimed the members of certain tribes are habitually criminal simply by birth and subjected them to humiliating restrictions (Wahi and Bhatia 2018, 12). Other tribes, termed as the hill-tribes, were geographically isolated from the rest of the population. The state sought to 'protect their lands from the non-tribals' and enacted the Scheduled Districts Act 1874 which declared the tracts occupied by these hill tribes as 'backward'. The policy was to maintain a degree of isolation of the tribes to protect their primitive identity and ancestral customs (14-15). Yet, these considerations were meant to be always subordinate to the state's right of land acquisition. Isolation of tribes also did not leave any space for improving socio-economic conditions in tribal areas.

Post-Independence: Development Through Integration

The Indian National Congress saw the colonial policy as another attempt to divide Indian society. The policy adopted as the counterpoint to the colonial isolationist stance was that of 'development through integration'. This meant securing political representation in the government, promotion of social and economic infrastructure (Wahi and Bhatia 2018, 15). The independent Indian government walked on a tightrope: it could not openly continue its predecessor's policy of acquiring any land deemed necessary for development. Nor could it allow tribals a more complete autonomy over their lands which might affect the nation's integrity.

By and large, the state tended to move along the former course. The National Forest Policy of 1952 prioritised 'national interest' over the community rights of tribals, stating that "the accident of a village being situated close to a forest does not prejudice the right of the country as a whole to receive the benefits of a national asset" (GOI 1952). Three decades later, the Forest Conservation Act 1980 which was meant to arrest the rapid loss of India's forest cover, not only denied forest dwellers the right to collect forest produce by diverting forests towards 'protection' but also discouraged the participation

[5] Indian Forest Act 1865 (Act no, VII of 1865), §2. "Existing rights" referred to customary rights of forest dwellers.

of tribals in conservation activities (Mollick 2022, 50; Gadgil and Guha 1993, 170). The policy of assimilation undertaken at independence only perpetuated the exclusion and dispossession of tribals.

Substantive Recognition of Tribal Land Rights

The National Forest Policy 1988 marked the turning point in the Indian state's treatment of tribals' customary relationship with forest lands. The policy pursued till then was that of centralism with respect to exploitation of natural resources as well as their conservation. The NFR 1988 recognised the traditional attachments of tribal people with forest lands and also that "minor forest produce provides sustenance to the tribal population" and hence should be protected (GOI 1988). It also envisaged cooperation between the tribals and forest dwellers and state in conservation of forests. However, it was a long time before this policy was translated into laws in various states. Eight years after NFR 1988 came the PESA Act 1996 which empowered local self government institutions in the Scheduled Areas (having large tribal populations) to approve or reject proposals for land acquisition and to prevent land alienation. The policy shift originating in NFR 1988 culminated in the Forest Rights Act 2006 which sought to realise the spirit of legal pluralism by recognising community rights of tribals over forests.

Three key legislations and their implementation

The Constitution authorises the President to designate areas in the country with a tribal majority as Scheduled Areas (called so because their administration is as per the 5th and 6th Schedules of the Constitution). The 5th Scheduled Areas are administered by the Governor of the state in consultation with Tribal Advisory Councils. The 6th Scheduled Areas lie in the northeastern states of Assam, Meghalaya, Mizoram and Tripura. They are administered by Autonomous District Councils and Autonomous Regional Councils. These bodies, unlike the Tribal Advisory Councils mentioned above, are democratically elected and have wide ranging powers.

After the Constitution came into effect, a number of States enacted laws to protect tribals from land alienation by prohibiting transfer of lands from tribals to non-tribals. However, these laws were rendered weak by laws on land acquisition and mining. Here, three landmark legislations on tribal rights have been discussed. All three were enacted by the Parliament but the charge of implementation is upon the state governments, for 'land' is a State subject in India's federal scheme.

Panchayats Extension to Scheduled Areas Act, 1996

Background

In 1992, the 73rd and 74th Constitutional Amendments were passed giving constitutional recognition to the powers of local self government bodies in rural and urban areas. However, these Acts were expressly not to be applied to the Scheduled Areas. As mentioned above, the 6th Scheduled Areas have

greater autonomy than 5th Scheduled Areas and there was a longstanding demand in the latter to be given autonomy at par with the former (Wahi and Bhatia 2018, 21). Moreover, the Bhuria Committee Report of 1995 noted that decades of dispossession have led to a loss of faith among tribals in the politico-bureaucratic apparatus (Bijoy 2012, 13). The Committee recommended, therefore, the devolution of power to the local level so that tribals could take charge of their resources and development.

Relevant Provisions

The Parliament enacted the Panchayats Extension to Scheduled Areas (PESA) Act in 1996. As the name suggests, the Act empowered local self government institutions in the Scheduled Areas, particularly the Gram Sabha (assembly of all voters in a village). Section 4 of PESA Act details the powers of the Gram Sabhas. State governments are required to ensure that all their respective Panchayati Raj laws are compliant with this section. The provisions relevant to our discussion on land rights are as follows:

The Gram Sabhas of tribal villages shall be competent to preserve the local customs, practices and community resources. The approval of the Gram Sabha is necessary before implementing any development programme. The Gram Sabha must be consulted before undertaking any land acquisition as well as any rehabilitation of project-affected tribals. Its recommendation is mandatory for granting licences/leases for mining minor minerals. It also has the power to take action against any unlawful instance of land alienation. Gram Sabhas must also be granted ownership over minor forest produce.

Implementation by the States

By granting sweeping powers to the Gram Sabha, PESA seeks to enable tribal communities to protect their land and other community resources, and regulate their use for developmental purposes. An evaluation of PESA would have to determine the extent to which state governments have made their laws consistent with the provisions of PESA. A period of one year was fixed for the states to enact laws giving effect to PESA.

By now, all Scheduled Area states have enacted compliance legislations for PESA. However, this was done in a very irregular fashion and faced a high degree of resistance from the administration. Despite passing state acts, rules were not framed on time. Rajasthan framed these rules only in 2011, 15 years after PESA came into effect.

In many cases, the Act was diluted by giving the power of the Gram Sabha to other, higher level local self government bodies at the Block or District level (Bijoy 2012, 30-33). For example, Orissa gave the right to be consulted before land acquisition (arguably among the most important provisions of this

law so far as land rights are concerned) to the Zilla Panchayat whereas in Gujarat, this role was given to the Taluka Panchayat; in both cases, the Gram Sabha was evaded. In case of the mandatory recommendation of Gram Sabhas before granting mining leases, states like Maharashtra and Madhya Pradesh have simply dropped this provision in their state laws whereas in Himachal Pradesh the government altered the wording from 'shall be made mandatory' to 'shall be taken into consideration'.

Researchers have also noted instances where businesses, in collusion with administrators, have tried to falsify the consultation process (Choubey 2015a, 250) before land acquisition. State government officials have been known to cite the conflict of PESA provisions with those of laws such as the Forest Conservation Act 1980 and insisting on the latter's supremacy (257).

Table 1 summarises the compliance of state laws with PESA provisions on the powers of Gram Sabha with respect to land acquisition, mine leasing and forest produce. It shows that of ten Scheduled Area states, five still have laws which run contrary to the right of the Gram Sabha to be consulted before land acquisition. Three states have mining laws that violate the powers of Gram Sabhas to regulate mining activity. Andhra Pradesh and Telangana have non-compliant laws in all three parameters.

State	Land Acquisition	Forest Produce	Mining
Andhra Pradesh	N	N	N
Chhattisgarh	Y	Y	Y
Gujarat	Y	Y	Y
Himachal Pradesh	Y	Y	Y
Jharkhand	N	Y	N
Odisha	N	Y	Y
Maharashtra	Y	N	Y
Madhya Pradesh	Y	Y	Y
Rajasthan	N	N	Y
Telangana	N	N	N

Table 1: *Compliance of important state laws with PESA provisions*
Source: *Ministry of Panchayati Raj*[6]

[6] https://panchayat.gov.in/document/compliance-of-important-subject-laws-with-pesa-act/

Note: *Y means the relevant law is PESA compliant, N means it is not*

It is also noteworthy that the Bhuria Committee whose recommendations were followed in the PESA Act 1996 also recommended a similar extension of local self government to towns located in Scheduled Areas (Choubey 2015b, 21). The PESA Act, however, applies only to rural areas. Wahi and Bhatia (2018, 22) have estimated that nearly 41% of the Scheduled Areas contain one or more urban centres. The people living here have not received the benefits of the PESA Act. Furthermore, state governments have been misusing this legislative gap. They have resorted to 'upgrading' many Panchayat areas in Scheduled Area districts to municipalities, thereby taking them out of the purview of PESA Act (Bijoy 2012, 15).

Forest Rights Act, 2006

Background

As noted earlier, the passage of the Forest Rights Act, 2006 was the culmination of a departure from the policy of treating forest dwelling communities as encroachers, a departure which began with the National Forest Policy 1988. Despite the NFR 1988, eviction of tribals by forest departments accelerated in the late 1990s (Kumar and Kerr 2012, 755) and continued well into the early 2000s (Bhattacharya et al 2017, 181). Between 2002 and 2004, the Ministry of Environment and Forests (MoEF) reported that people had been evicted from nearly 150,000 hectares of land. These evictions led to an outcry, with grassroots-level movements across the country making forest rights an electoral issue in the 2004 general elections. After protracted deliberations, the Parliament passed the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act (henceforth the FRA 2006).

Key Provisions

The FRA 2006, in its preamble, states that the rights of the forest communities on ancestral lands were not recognised during the colonial as well the post-independence period, "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 ecosystem." It seeks to provide a framework for recognising forest rights but also vests certain responsibilities in the tribals for the conservation of forest resources.

Under Section 3 of FRA, forest dwellers have been given fourteen kinds of rights. Their rights have been made free from any encumbrance caused by the Forest Conservation Act, 1980[7]. They may be broadly classified as:

[7] FRA 2006 §4 (7)

1. Individual rights: which include the rights of self-cultivation and habitation
2. Community rights: such as rights to grazing, fishing and access to water bodies, access to and ownership of minor forest produce[8] as well as the right to protect community forest resources (CFRs). Section 3(l) extends these to "any traditional right customarily enjoyed" by the forest dwellers except the right to hunt animals.

These rights need to be claimed by individuals and communities. The condition upon the claimants is that they should have occupied the lands over which they claim rights before 13th December, 2005.

The Gram Sabhas have been made competent to initiate these claims by collecting, consolidating and verifying them before passing a resolution recommending verified claims to the Sub-Divisional Level Committee which in turn must examine and forward these resolutions to the District Level Committee which shall be the final decision making authority. Thus, the processing of claims goes through three levels. The State Government is responsible for constituting the Sub-Divisional Level and the District Level Committees. It must also set up Forest Rights Committees which are meant to assist the Gram Sabhas. Section 7 of the Act makes the violation of any of the law's provisions by any official a punishable offence.

Issues in implementation

When FRA 2006 was passed, it was widely hailed as ushering in a new era of tribal rights (Prasad and Menon 2018, 6). Evaluating the efficacy of the law should focus on the efficiency and reasonableness with which forest rights claims have been handled by those responsible for implementing it. In 2015, the Ministry of Tribal Affairs (MoTA) published the minutes of a meeting held to review the implementation of FRA. Among the several concerns it noted are the following:

1. The high rate of rejection of claims and not informing claimants of the reasons for such rejections, prevents them from filing appeals;
2. The "monopoly of State agencies over Minor Forest Produce" has continued and is a flagrant violation of the basic tenets of FRA;
3. The recognition of the rights over Community Forest Resources (CFRs) has been very slow in most States (MoTA 2015, 10).

Table 2 shows the percentage of claims distributed and rejected in states with significant tribal population. While Andhra Pradesh leads with the maximum percentage of claims distributed, Odisha is close behind notwithstanding the fact that it has received more than 2.5 times as many claims as Andhra Pradesh, suggesting a proactive approach on part of its State Government. Maharashtra has a very high pendency rate (42%) among Scheduled Area states, pointing towards inadequacies in the

[8] This excludes the right to fell trees to acquire timber. Forest produce is limited to non-timber produce.

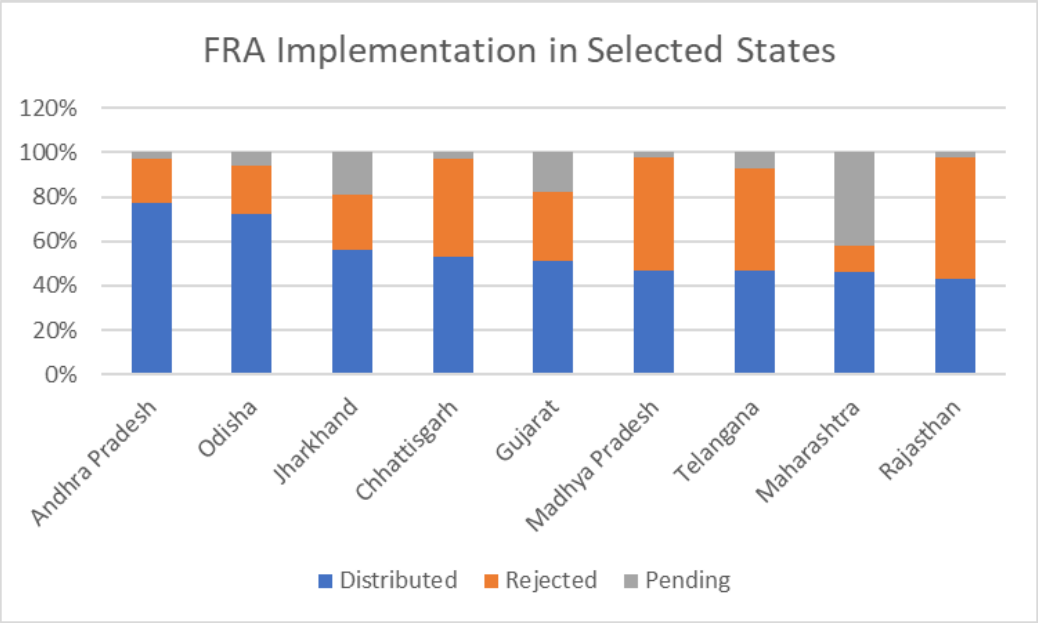
claim processing mechanism. In contrast, Chhattisgarh, despite having a whopping 900,000+ claims, has only a 3% pendency rate.

To a great extent, the concerns flagged in the MoTA review meeting have been echoed and elaborated upon by researchers. Individual rights have received greater recognition whereas community rights over CFRs have been neglected (Sarangi 2020, 78). This can be explained by the fact that while individual rights claims (for cultivation) are limited to an area of four hectares[9], such a limit does not apply to CFRs.

States	Total Claims	Distributed	Rejected	Pending
Andhra Pradesh	248,725	77%	19%	3%
Odisha	645,343	72%	22%	6%
Jharkhand	110,756	56%	25%	19%
Chhattisgarh	922,346	53%	44%	3%
Gujarat	190,056	51%	31%	18%
Madhya Pradesh	627,513	47%	51%	2%
Telangana	206,984	47%	46%	7%
Maharashtra	374,716	46%	12%	42%
Rajasthan	113,367	43%	55%	2%

Table 2: *Status of FRA implementation in selected states (as on 1st December 2022)*
Source: *https://dashboard.tribal.gov.in/*

[9] FRA 2006, §4 (6)



***Graph 1**: Status of FRA implementation in selected states (Source: Table 2)*

High rate of claim-rejection (almost 40%[10] as of December 2022) is partly the result of a very strict understanding of 'evidence' in verifying claims. In many cases, evidence for settling claims is restricted to official documents (often insisting on satellite imagery), rejecting any other informal evidence offered by tribal claimants (Srivastava 2019). This is in contravention to Rule 13 under the FRA Rules framed in 2007 which permit the use of evidence[11] such as (a) the presence of traditional structures like wells, sacred shrines etc, (b) tracing ancestry using genealogical records and even (c) reducing oral statements from village elders to writing.

Lee and Wolf (2018, 842) have suggested a possible relationship between the rate of claim rejection and forest cover in the states. They argue that the states with a large forest tended to recognise claims more easily. This was because of heavy costs of forest management incurred by them which made giving away some of the forest land to tribal communities financially attractive. The opposite is true in states which had lower forest cover and hence hesitated to cede rights to tribals. This possessive tendency may well be part of a larger problem: the stonewalling of FRA implementation by forest departments across most states. Forest officials have been found to refuse co-operation in verification proceedings, raising frivolous and even illegal objections to claims and refusing to sign on claims approved by District Level Committees (CFR-LA 2016, 19). MoEF has also made rules diluting FRA, such as a clarification issued in 2019 which removes the need to take the Gram Sabha's consent for forest diversion (for conservation) except at the final stage (Bijoy 2021, 89).

[10] https://dashboard.tribal.gov.in/

[11] FRA Rules, 2007, Rule 13(g), (h) and (i)

All this has been happening despite a 2006 amendment to the Government of India (Allocation of Business) Rules, 1961 which made the MoEF responsible for the "overall policy in relation to forests, except all matters, including legislation, relating to the rights of forest dwelling Schedule Tribes on forest lands" which was transferred to the MoTA instead (quoted in Bijoy 2021, 84).

Even where claims are being decided favourably, claimants face hurdles in benefitting from the Act. In Gujarat and Chhattisgarh, nearly half the claimants whose claims have been approved are yet to receive the titles from the authorities (Sarangi 2020, 81). Reports have arisen of titles being issued with illegal conditions such as the Gram Sabha having to follow the forest department's working plans with respect to CFRs (CFR-LA 2016, 21). The MoTA has also warned states against evictions that are being illegally carried out immediately after the first stage of claim-rejection, without waiting for the decision on their appeal or without allowing time for filing an appeal (MoTA 2018, 2).

Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013

Context to the Act

A study by the Land Rights Initiative estimated that there are at least 102 land acquisition laws in India, 15 of which are Central laws and 87 are state laws (Wahi and Bhatia 2018, 23). For 119 years, the main land acquisition legislation in the country was the Land Acquisition Act, 1894 which was extended to the entire territory of India after independence. Land acquisition laws, along with mining laws, have been cited as the leading legal instruments to effect the dispossession of tribal peoples (23). Sustained land alienation led to protracted resistance movements from tribal people and peasants and also added fuel to the violent Maoist insurgency[12], which posed serious security as well as developmental challenges . In response to these struggles, the Parliament enacted the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (LARR Act).

Relevant Provisions

Section 41 of the LARR Act contains special provisions for the Scheduled Castes and Scheduled Tribes. As far as possible, no land shall be acquired in the Scheduled Areas. When such an acquisition cannot be avoided, it must be proven as the last resort available. Before issuing a notification for such acquisition, the taking the consent of the Gram Sabha, Gram Panchayats or the Autonomous District Councils (as the case may be) is mandatory. Taking consent is essential even in 'urgent' cases. In cases where land acquisition will lead to 'involuntary displacement' of tribal families, a Development Plan

[12] "Of Lands and Livelihoods." *Economic and Political Weekly* [Editorial], January 4, 2014, https://www.jstor.org/stable/24478444

must be prepared which will contain the procedure for restoring the land titles of the tribals, which have been lost on the alienated land. The affected families should preferably be resettled in the same Scheduled Area "so that they can retain their ethnic, linguistic and cultural identity."[13]

The affected families shall be paid one-third of the compensation initially as the first instalment. If they are being relocated outside their home district, they shall be paid an additional 25% of the resettlement package to which they are entitled. The rate of compensation for the alienated land was determined to be twice the market value for urban areas and four times the market value in rural areas[14].

Another important feature of the Act was the role of 'Social Impact Assessments' (SIAs). These assessments must be conducted before any land acquisition. In each case, it is to be conducted by an independent body and is meant to ascertain the necessity of the acquisition and its socio-economic implications for the local population. The SIA must suggest measures to ease the impact of the acquisition on the affected people and must be completed within six months.

Issues in Implementation

The LARR Act received criticism from several quarters for being unreasonably complex and for stalling large amounts of investment in developmental projects (ADB 2017, 4). The newly elected NDA government sought to remedy this through an ordinance[15] which exempted five categories of projects from the clauses on SIAs and consent-taking. They include projects of rural infrastructure, industrial corridors, national security and defence production etc. These changes were opposed as running against the spirit of the Act. However, this ordinance lapsed after six months and the Government was unable to get its amendment bill passed to give effect to these changes.

Instead, several state governments have diluted the Act either by making amendments or by framing rules in order to do away with the need for SIAs and/or even consent-taking. Such states include Tamil Nadu, Telangana, Gujarat, Rajasthan, Maharashtra and Jharkhand (Wahi and Bhatia 2018, 23). Recently, the State Government of Odisha introduced a bill to do away with the SIA requirement but was compelled to withdraw it later after facing considerable opposition (Barik 2023). Tamil Nadu went even further to bypass the LARR Act entirely by revalidating older land acquisition laws, a step which was approved by the Supreme Court in 2019 (Gokhale 2021).

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[13] LARR Act, 2013, §41(7)

[14] This provision is not specific to SC/ST families

[15] Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act (Amendment) Ordinance, 2014, §10A

Removal of the consent clause will work to the detriment to the core purpose of the Act which is to provide for a "participative, informed and transparent process for land acquisition"[16]. It is bound to increase the bargaining power of government authorities and private companies (Verma 2015, 20) vis a vis tribal populations.

Moreover, the Act defines public purpose too broadly to include even infrastructure projects to be carried out by private companies, subject to taking consent from the affected families[17]. With the growing thrust on Public Private Partnerships and private-financed infrastructure development, any use of land for a project which is considered to have the potential to create jobs is being seen as a 'public use' (Sathe 2015, 91). For instance, 'affordable housing' or 'tourism development' as public uses of land may be used to disguise expensive real estate development (91). In such cases, even SIAs will be ineffective in calling out non-public use of the land to be acquired.

With regard to compensation, the competent authority for determining the market value of affected families' landholdings is the District Collector (ADB 2017, 3) who has been given the discretion to discount the value of the land if, in his/her opinion, it is not indicative of the prevailing market rate[18]. This makes under-estimation of such value by the implementing authorities a very distinct possibility. State governments of Haryana and Tripura have also reduced the 'multiplying factor' for arriving at the final award of compensation (Wahi 2018).

Realising Tribal Land Rights: Major Challenges

A critical look at three important legislations, each of which was hailed as 'progressive' steps towards the realisation of tribal land rights, makes it amply clear that legislative promises made in the Parliament have not been able to reach their intended beneficiaries without being severely diluted by those in charge of implementing them - the State Governments. The traditional dilemma between development and tribal land rights and livelihoods has only been complicated further with the emergence of the climate action agenda. These imperatives are increasingly difficult to reconcile. While each law faces a different set of challenges on the road to implementation, certain challenges common to the three laws have been identified as follows:

Lack of nodal governance

The question 'who is responsible for supervising the implementation of tribal rights laws?' has a complicated answer. Implementation of the PESA Act, 1996 is monitored by the Ministry of Panchayati Raj. The Forest Rights Act, 2006 comes under the purview of the Ministry of Tribal

[16] Preamble to LARR Act, 2013
[17] LARR Act, 2013, §2(2)(b)
[18] LARR Act, 2013, §26(c)

Affairs. The nodal agency for implementing land acquisition legislations (such as the LARR Act, 2013) is the Department of Land Resources, Ministry of Rural Development[19]. The Ministry of Environment and Forests, as noted earlier, has been relieved of matters relating to tribal welfare but continues to hold sway in how the FRA is administered. In such a scenario, there is no single nodal agency for monitoring and strengthening the implementation of laws relating to tribal land rights. It is imperative that the PESA Act, FRA and LARR Act work in tandem to produce substantive results for tribal people and to ensure their coordinated implementation, it is important to have a common nodal agency for oversight.

Non-devolution of powers to Local Self Governments

In all three legislations analysed above, the Gram Sabha is supposed to play a significant role to safeguard traditional rights and community resources. The very essence of PESA is founded on an empowered Gram Sabha. The FRA vests rights to community forest resources in the Gram Sabha. Again, it is the Gram Sabha that must give its consent to land acquisition in tribal areas under LARR. However, States have resorted to various methods to avoid empowering Gram Sabhas, as seen in case of PESA. MoEF has continued to permit forest departments to divert forest lands without needing the consent of Gram Sabhas and consent provisions have simply been eliminated in state amendments of LARR. In other cases, Gram Sabhas are being called at the Panchayat Level and not the village level where they are legally supposed to function. As long as higher level bodies, rather than Gram Sabhas, have the decisive say in tribal land governance, the substance of these progressive laws will remain amiss.

Complex and lengthy procedures for land acquisition/rights-claims

This is a problem intrinsic to the laws and affects not only the seekers of rights but also administrative authorities. In case of FRA, each claim has to go through three stages of scrutiny - the Gram Sabha, the Sub-Divisional Level and the District Level Committees. Commenting on the LARR Act, the then Vice-Chairman of NITI Aayog Shri Arvind Panagariya said it would take five years to acquire land under the Act (ADB 2017, 4). Therefore, it is unsurprising that the MoEF as well State Governments have sought to circumvent these procedures to the detriment of the Gram Sabhas. They are often anxious to prevent the stalling of high-value projects which are facing grassroots level opposition (such as the Metro Rail Project in Chennai).

Too many laws to reconcile? Redundancy and Conflict

A formidable challenge to implementing progressive land laws is the sheer number of conflict legislations that need to be reconciled. As noted earlier, there are at least 87 state laws on land acquisition. Consequently, five of the ten Fifth Scheduled Area States are yet to make their land

[19] https://pib.gov.in/PressReleasePage.aspx?PRID=1595498

acquisition laws compatible with PESA. Laws on forest conservation and mining also come into conflict with laws that empower Gram Sabhas or protect tribal rights to community resources. The Compensatory Afforestation Fund Act, 2016 has taken the place of FCA 1980 as the main instrument to justify actions that violate tribal rights legislations (Bijoy 2021, 91). The primary mining legislation in India, Mines and Minerals (Development and Regulation) Act, 1957 declares the state's ownership over all mines and has frequently been used to evict the 'occupier of the surface' (Pandey 2020, 7) even as Gram Sabhas' recommendations were made mandatory before granting mining leases under PESA.

Inadequate capacity-building at the local level

While this is doubtlessly a challenge for countless Indian laws, it assumes special significance for tribal populations given their relative lower levels of literacy and education, and the geographical isolation of some tribal communities. For instance, in Odisha it was found that tribal people were largely unaware of rules relating to Minor Forest Produce (MFPs) which their Gram Sabhas have been empowered to regulate under PESA (Patnaik 2015, 57). In Jharkhand, Sarangi (2020, 86-87) points to a similar situation. Here, many tribal families were under the incorrect notion that filing a claim under FRA would mean implicitly accepting that their land belongs to the forest department. Lack of training among implementing officials is also a pressing concern. As we have seen, they have often demanded strict documentary evidence, in contravention to the Rules governing evidence under FRA.

The Way Forward

Based on the analysis of the three major tribal land rights laws, the following recommendations are being offered. While strengthening the institutions in charge of implementation remains an important task, efforts must also be taken to prevent the circumventing of these laws by state laws that are often in conflict with them. Above all, functionaries administering these laws need to be sensitised as to their roles, right from the central till the local levels:

Strengthening nodal governance

As pointed out in the previous section, a common nodal agency is necessary for a well-coordinated implementation of tribal land rights laws. It is inevitable that the implementation of laws is an exercise that involves multiple ministries but issues of the Scheduled Tribes cannot be dealt with in a scattered manner that lacks coherence. Accordingly, it is suggested that the Union Ministry of Tribal Affairs be made competent to monitor all the three laws analysed above, so far as their provisions apply to tribal people. MoTA is already in charge of implementing FRA 2006, but here its role must be strengthened by reducing the interference by the MoEF. MoTA should be consulted by the MoEF before passing any order that is likely to affect tribal lands. As far as PESA is concerned, monitoring by the MoTA must supplement the implementation carried out by the Ministry of Panchayati Raj. Finally, with

regard to LARR 2013, the MoTA should review the implementation of such sections that apply to STs, most importantly Section 41 of the Act which requires that land acquisition in tribal areas must be the last resort.

Institutional support within States

With regard to PESA, it is recommended that each state where the law is applicable set up a special committee for making state laws compatible with PESA. The mandate of such a committee should be to identify such state laws on land acquisition, mining, minor forest produce etc. which run contrary to the rights of the Gram Sabha as provided in the PESA Act. In case of FRA, it is suggested that an FRA Cell be constituted in every district to assist the working of Gram Sabhas and the Sub-Divisional and District Level Committees with respect to handling FRA claims. Such a cell should also organise training sessions for local functionaries, resolve technical queries about the application of rules, and Gram Panchayats carry out awareness campaigns in villages. In this context, States could consider emulating Odisha's strategy of instituting FRA Cells (beginning with selected districts/tehsils) and using data from empirical studies of the Scheduled Castes and Scheduled Tribes Training Institute to fill gaps in the implementation (Barik 2022).

Carving out fiscal space

In the Union Budget 2023-24, an outlay of ₹118.64 crores has been made under 'Support to Tribal Research Institutes' which are involved, among other things, in training and capacity building of officials with respect to FRA, PESA and other tribal rights laws and tribal welfare schemes[20]. Specific allocations for the implementation and monitoring of PESA and FRA have not been made. Considering the need for regular capacity building at the local level (and not only in research institutes), awareness campaigns, technical assistance, clarifying village boundaries, and staffing of FRA Cells, it is recommended that separate budget allocations be made for FRA and PESA implementation at the Union as well as State levels. Odisha and Maharashtra have been making specific allocations for the implementation of FRA. Odisha was the first state to make a separate allocation for FRA in 2021-22 and has been able to extend Forest Rights Committees to the entire state in 2022 (Barik 2022). MoTA data, as noted earlier, places Odisha ahead of most states in FRA implementation.

Suggested Amendments to the LARR Act, 2013

The following amendments are suggested to the LARR Act, 2013:

a. All the thirteen laws pertaining to land acquisition in the Fourth Schedule of the LARR Act which had been exempted from its provisions[21] should be brought under the purview of the Act through a single amendment Act. These include: the Railway Act ,1989, National

[20] Expenditure Budget 2023-24, Demand For Grants, Ministry of Tribal Affairs (25.03), pp. 345-47.
[21] LARR Act, 2013 §105(1)

Highways Act, 1956, Coal Bearing Areas Act, 1957 etc. While some of the concerned Ministries have issued notifications to bring land acquisition laws under their jurisdiction within the scope of this Act, these efforts have been non-uniform. Moreover, only provisions regarding compensation, rehabilitation and resettlement have been extended to these Fourth Schedule laws. Consent and SIAs provisions are still not applicable, which should also be done in the proposed amendment.

b. The Social Impact Assessments (SIAs) are to be completed within six months[22] under the current Act. It is recommended that the same be reduced to four months. This will expedite the process of SIAs and will encourage more state governments to adopt SIAs rather than omitting them in their state legislations. It is further recommended that central and state research institutes be involved in SIAs to improve their pace and thoroughness.
c. The definition of 'public purpose' under Section 2 of the Act should be narrowed down to exclude 'tourism'[23] and 'housing for such income groups, as may be specified'[24] as both of these purposes can be interpreted to include projects that disproportionately benefit the wealthy such as resorts, expensive real estate.

Time-bound handling of claims under FRA

As noted earlier, many claimants whose claims have been accepted are not receiving their titles from the concerned authorities and in the absence of such a document, it is difficult for the tribals to protect their lands from being diverted for afforestation. It is therefore suggested that a time-limit of thirty days be set for giving a copy of the title to the concerned claimant. In 2022, MoEF, in a letter to the States, directed that FRA titles, among others, should be digitised on Central and State portals. It is suggested that this digitisation should be carried out at the earliest.

Conclusion

This paper has critically reviewed the legal framework that exists for the protection of land rights of tribal people: the PESA Act, 1996; Forest Rights Act, 2006 and the LARR Act, 2013. These legislations have been individually analysed elsewhere but it is evident that they must operate in conjunction to be truly effective in helping tribal communities realise their long-due rights. State Governments responsible for implementing these laws have diluted them through amendments mainly to safeguard high-value projects, lucrative mining operations and to meet ambitious afforestation targets. Tribal land rights are also the victims of legal-institutional tangles involving, on the one hand, different ministries and on the other, different (and clashing) laws. Institutional changes such as strong

[22] LARR Act, 2013 §4(2)
[23] LARR Act, 2013 §2(1)(b)(vi)
[24] LARR Act, 2013 §2(1)(d)

nodal monitoring at the central as well as state level and placing support structures at the local level are major administrative exigencies. India represents a peculiar case of a nation that has legally *recognised* tribal land rights but the tribal population is yet to *realise* them in a substantive fashion. For this to happen, our paradigm of tribal land rights must not view tribal rights in opposition to infrastructure development and climate action but as one of three imperatives to be balanced. Arriving at a pluralistic legal system where tribal rights coexist with the state's right to acquire land is doubtlessly daunting, for it calls upon us to rethink the fundamental ways in which land governance is carried out in India.

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