

More Rights, Less Justice: Tribal Communities and the Indian Republic

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The recent judgment of the Indian Supreme Court announcing the eviction of over one million forest dwelling and tribal communities from their ancestral lands sent shockwaves across the world. The order was directed at individuals and groups whose claims for property rights over inhabited lands were rejected under the contested Scheduled Tribes and Other Traditional Forest Dwellers Act (2006), commonly referred to as the Forest Rights Act (FRA). As per Section 3 of the FRA, forest rights are guaranteed to ‘forest dwelling Scheduled Tribes and other traditional forest dwellers.’ While the Court has stayed the judgment, over one million persons from forest dwelling Scheduled Tribes continue to face a legal protection black hole in India. This article explores the marginalising effects of the claim adjudication process under the FRA and the ensuing displacement crisis affecting tribal communities in India. This article also brings to the foreground an oft-ignored kind of displacement: forced displacement resulting from denial of tenure security and land access rights of forest communities.





Photo Credit: Sabrang India.

Introduction

Approximately 45.6% of tribal communities in rural India suffer from absolute poverty and with tribal communities constituting 47% of the entire displaced population, displacement - often resulting from infrastructure development projects - is accepted as one of the reasons for the poor socio-economic indicators (Ministry of Statistics and Information 2011; Mander 2018).

While development projects are known to induce widespread internal displacement of the tribal population in India, other lesser-known factors also contribute to displacement, but have not been subject to the same scrutiny as development-induced displacement. Eviction of tribal communities from forest areas has continued since the colonial regime, when the British government enacted the Indian Forest Act in 1927 to capitalise on timber production. The legislation empowered the British government to rescind the land rights of these communities and has been an important cause of internal displacement since then. In essence, the legislation allowed the government to declare forests as 'state property' and consequently excluded the tribal communities from their homeland. By virtue of this law, the tribal communities were turned into encroachers and were left at the mercy of the colonial government (Prabhu 2010). This law continued to serve as the

legislative basis for forest management even after India gained independence. The later Forest Conservation Act of 1980, for example, did not break away from this regime, but rather maintained the Central government's supremacy in controlling forest resources (Goyal 2005).

In 2006, this legal regime changed with the introduction of the Forest Rights Act (FRA). The FRA aimed to restore the rights of the forest dwelling communities in India by empowering *Gram Sabhas*[1] to decide the nature and extent of the claim of land rights. While this law was hailed for its normative articulations, the implementation on the ground left much to be desired as tribal communities have continued to be at the risk of being displaced on account of being denied their title claims under the FRA. This article first considers the implementation shortcomings of the FRA before analysing its adjudication before the Supreme Court in the recent *Wildlife First v. Ministry of Forest and Environment, Government of India* case. The article ultimately finds that the implementation and adjudication of the FRA has resulted in more rights and less justice for tribal communities in India.

Lack of procedural fairness under the new regime

The FRA was enacted to correct the historic injustice done to forest dwellers through the Indian Forest Act of 1927 and the Forest Conservation Act of 1980 by securing their right over forest land. Section 3 of the FRA entitles them to forest rights, which effectively includes the right to own, hold, protect, and settle on forest lands in addition to recognising their right to forest resources and biodiversity. In essence, the FRA is a rights-based legislation which recognises the rights of communities over their forests and lays down a procedure by which these rights can be secured. The procedure has been provided under Section 6 of FRA, which appears to have accommodated due process requirements.

- Firstly, it recognises *Gram Sabha*, i.e. the village body itself, as the primary authority which decides the claims under the FRA. The Act provides a very clear verification procedure that considers statements by elders, physical evidence of houses and other residential structures, and even traditional structures, like wells to ascertain land claims.

- Secondly, it lays down a clear appellate structure to ensure a reasonable opportunity to the person aggrieved by the decision of Gram Sabha. A committee has been formed at the Sub-Divisional level, District level, and the State level. Any person aggrieved the decision of Gram Sabha may petition to the Sub-Divisional Committee and then finally to the District Level Committee. These committees are thus constituted to decide on the claims denied by the subordinate authority. The State Level Committee has also been constituted to monitor the progress of these claims.
- Lastly, the FRA ensures that at every step the claimant is given a reasonable opportunity to present his case and that no claim be adjudicated upon without his presence.

The failure of the FRA in achieving its aim lies in the fact that the due process requirements as discussed above are seldomly followed. The lack of procedural fairness is a result of several institutional and structural challenges, such as a lack of political will of state governments in standing up for rights of forest citizens, a lack of coordination between the committees set under the Act, and the constant undermining of *Gram Sabha* by politicians. In 2010, a committee appointed by the Ministry of Tribal Affairs found that due to an unnecessary rush to clear cases, a large number of claims were being rejected without even measuring the land. Further, the report also stated that the claimants were not given adequate grounds for rejection of their claims. Moreover, the report highlighted the lack of representation of some sections of the communities in the Forest Rights Committees which was a clear violation of FRA (Joint Committee 2010). Due to budgetary constraints, the government has been ineffective in spreading awareness about the FRA. In the worst cases, the claimants were uninformed of the rejection of their claims, leaving them with no option to exercise their appellate rights under the FRA (Socio Legal Information Centre 2016). A report also found that a majority of the claims were rejected as a result of forest officials' [2] insistence on documentary evidence, which is not mandatory as per the FRA (Socio Legal Information Centre 2017).

The FRA implementation has been particularly poor with respect to community rights. While it is estimated that the FRA has the potential to secure the rights of over 200 million forest dwelling communities in over 170,000 villages, it has reached only 4% of its potential (Samarthan 2012). The poor implementation of the FRA, coupled with the low awareness of its provisions among marginalised tribal communities and difficulties in understanding the procedural technicalities, has enabled the creation of a regime where the tribal population has more rights but less justice.

Forest conservation v. forest Rights: A false debate

The internal displacement caused by the poor implementation of the FRA had not received significant scrutiny until it finally took centre-stage on 13 February 2019, with the judgment of the Supreme Court in *Wildlife First v. Ministry of Forest and Environment, Government of India* (hereinafter referred as ‘judgment’). The petitioner, an NGO focused on wildlife protection, brought forward the issue of rejection of over two million claims for exercising forest rights, as recognised under Section 3 of the FRA. The petition highlighted that no eviction had yet taken place even after the rejection of the claims. Accepting the arguments of the petitioner, the court in first instance ordered the eviction, by July 2019, of those with rejected forest rights claims. This eviction order was later upheld by the Supreme Court.

The premise of the petitioners’ argument was that the forest rights regime is antithetical to forest conservation, protection of wildlife, and biodiversity. It is interesting to point out here that the petitioners specifically pleaded for eviction of communities. However, the legislative scheme of the FRA provides that even in case of rejection of claims, the communities can only be disallowed from exercising the right of self-cultivation[3]. As such, the concern for forest conservation could have been effectively addressed by taking the legal recourse under the FRA, which provides for denial of cultivation rights but not for eviction. Eviction and displacement of millions of forest dwellers is not a proportionate response to address the issue of conservation.

In view of the above, it is clear that the regulatory discourse around the FRA is marred by a false dilemma between forest conservation and forest rights, leading a section of conservationists to connect the FRA implementation with environmental harm, as was raised by the petitioners in this case. Contrary to this notion, however, the tribal areas in India have seen a recorded increase in forest cover. The forest cover report credits the increase to the conservation measures undertaken by forest communities themselves (MoEFCC 2017). In 2016, 40 international conservation organisations and experts wrote to the government calling for effective implementation of the FRA, noting that ‘disregarding the Forest Rights Act or undermining it will greatly damage environmental protection in the country’ (Group of Indian Conservationists 2016). Researchers also claimed that the FRA ‘has the potential to recognize the diversity of use, access, and conservation practices and traditional knowledge of forest communities’ (Dash 2010).

The ‘tyranny of distance’ between India’s forest dwelling communities and the Supreme Court

The Supreme Court has played a proactive role in introducing dynamism to the Indian Constitution with respect to human rights by expanding the scope of the right to life under Article 21 (Basu 2008). The judgment presented a similar opportunity before the Court to advance the cause of forest rights and review the arbitrary administrative actions

that undermine the rights granted under the FRA. Indeed, in considering how the eviction order risks resulting in the displacement of millions of tribal persons, the Court could have found a violation of the fundamental right of livelihood guaranteed under Article 21.

Yet, while hearing the case, the Supreme Court was not made aware of the lack of procedural fairness that caused the rejection of most claims in the first place, as discussed in the previous section. This is because the government did not present the case of the tribal communities at the Supreme Court and tribal communities were left without legal representation. Hence, the court ruled only on the basis of the account presented by the forest conservationist organisation petitioner.

Furthermore, the judiciary erred in inferring that the statutory consequence of upholding the rejection of claims under the FRA is necessarily the eviction of forest dwelling communities. However, the provisions of the FRA are silent on the required course of action in cases of rejection of claims. This created a situation of legal ambiguity in which the Court should have, according to the rules of interpretation, inferred a meaning that upholds the rights of forest dwelling communities and not vice-versa. The case of the communities was further weakened by the apathy of the state, which did not defend the law or challenge this eviction before the court. The court's failure to recognise the lack of representation of the forest dwelling communities is a blatant disregard of the due process of law. In its latest order, however, the Supreme Court sought to rectify the judicial apathy shown in the earlier order by asking the state to respond to the lack of implementation of the FRA. It can be only hoped that this new development will end decades of institutional impunity for these forest dwellers.

Conclusion

The violation of human rights resulting from denial of forest land rights and ensuing displacement of tribal communities still remains unacknowledged. As a constitutional court, the Supreme Court of India had the opportunity to address issues related to lack of procedural fairness. However, the argument raised by the petitioner blaming the FRA for deforestation became the vehicle of analysis for the Supreme Court. Historically, the discourse surrounding forest rights remains contested by conservationists and forest rights activists. The Court overlooked the conclusions drawn by recent studies, which highlight the role of industrial projects in deforestation rather than the exercise of forest rights by tribal communities. Going forward, the government should draft a better defence of the law during future litigation on this issue.

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[1] Section 2(g) of the The Forest Rights Act, 2006 provides that ‘Gram Sabha’ means 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.

[2] The term ‘forest officials’ here is used generically to refer to the officers of the department of Revenue, Forest and Tribal Affairs of the State Government and three members of the Panchayati Raj Institutions, who form the composition of Sub Divisional Committee, District Level Committee and State Level Committee. They are appointed to these committees by the respective State Government.

[3] Forest Rules Clause 12 A (8) defines self-cultivation as including activities ancillary to cultivation such as keeping cattle, winnowing and other post-harvest activities, rotational fallows, tree crops, and storage of produce.

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