

THE RIGHT TO LAND: A STUDY ON LEGALITY OF FORCED EVICTIONS

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I. INTRODUCTION

On 13 February 2019, the Supreme Court of India issued an order for evictions of those whose claims under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act ('Forest Rights Act' or 'FRA') have been rejected 'with finality'.¹ On 28 February 2019, this order was put 'on hold' to determine whether due process had been followed in the rejection of claims, and under what law evictions may be carried out since the Forest Rights Act does not provide for evictions.

While presently kept in abeyance, this is not the first time that Indian constitutional courts have contemplated or attempted forced evictions of forest-dwellers from their customary lands and forests. Constitutional courts such as the High Courts and Supreme Court have previously issued eviction orders or, at the minimum, indicated towards the need for evictions translating into eviction drives by the forest department on the ground, twice in 2002² and again in 2009,³ among other instances. In these cases, the presumption is that forest-dwellers occupying forest land in the absence of established title are 'encroachers' on State forests, and as a direct corollary, they are liable to be evicted.

The legal and rights implications of judicial eviction orders against forest-dwellers remains relatively under-studied, even as these historical moments themselves have been catalytic in political movements for legal and institutional reform.⁴ The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 itself emerged out of social and political movements that started in the aftermath of one inchoate

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1 *Wildlife First v Ministry of Forest and Environment* 2019 SCC OnLine SC 238. Later put "on hold" vide order dated 28 February 2019.

2 *TN Godavarman Thirumalpad v Union of India* (2002) 9 SCC 502. This was done through orders dated 07 May 2002 in I.A No. 502 and order dated 29 October 2002 in IA No. 276 with IA Nos. 413, 437, 453 and 454.

3 *Nature Lovers Movement v State of Kerala and others* (2009) 5 SCC 373.

4 Shankar Gopalakrishnan, 'Political Economy of Environmental Questions' (2017) 52(31) Economic and Political Weekly.

eviction order issued by the Supreme Court in 2002.⁵

The need for such scrutiny is particularly relevant in light of established and emerging constitutional jurisprudence relating to the fundamental right to land and autonomy of forest-dwellers, as judicial orders for evictions are frequently issued without statutory backing, and in neglect of the constitutional architecture of self-rule and autonomy over customary land and forests.

This paper, accordingly, analyses the legality of the power of the State to forcibly evict forest-dwellers from their lands and forests, and argues that the Constitution casts a positive obligation on the State to prevent evictions through a recognition of the right to land. To do so, the paper searches for statutory and constitutional bases for the presumed power of the State to forcibly evict through a sample study of forest and revenue laws relating to evictions of forest-dwellers in five *adivasi*-dominated central Indian states. It concludes by finding that not only are forced evictions a negation of the State's positive obligation to uphold autonomy and customary rights of *adivasis* and forest-dwellers, but there is scant statutory support for the power of the State to evict.

The paper proceeds in three sections. The first section establishes a right to land with a content of autonomy and self-rule, as nestled within a holistic reading of Part III in direct nexus with Parts IX and X of the Constitution. The second section places this right to land within a specific historical context of dispossession through the legal category of 'encroacher', and describes the content of State obligation from this contextual reading of encroachers and rightsholders. The last section presents an analysis of the existence and contents of eviction procedures under forest and revenue laws in Maharashtra, Madhya Pradesh, Odisha, Telengana and Tamil Nadu against due process and the foregoing framework on the right to land.

As land, water, forests and other natural resources are part of a composite and inseparable ecosystem, references to 'land' in this paper should be read to encompass the forest ecosystem as well.

II. LAND AS THE BULWARK OF LIFE

"I want to stress from the Adivasi point of view, that land is and must be the bulwark of aboriginal life."⁶

For *adivasis* and forest-dwellers, right to life is inextricably linked to access, control and rights over customary lands, forests and natural resources. Formally identified as

5 Godavarman (n 2).

6 Constituent Assembly Debates, speech by Jaipal Singh Munda on 30 April 1947 <https://www.constitutionofindia.net/constitution_assembly_debates/volume/3/1947-04-30> accessed on 25 February 2020.

Scheduled Tribes (STs) and Other Traditional Forest-Dwellers (OTFDs),⁷ forest-dwellers enjoy a historical relationship with their lands and forests, which are essential to their existence as people itself.

1. Establishing a Right to Land

ST and non-ST forest-dwellers continue to rely directly or indirectly on forests for their primary livelihood needs, including through agriculture, pastoralism and animal husbandry, crafts and cottage industries. As per the Census of India 2011, 66% of STs continue to be engaged predominantly in the primary sector (agriculture and allied activities).⁸ Here, agriculture encompasses not only cultivation, but also collection of forest produce, for which there is significant reliance on common lands. Forest commons continue to be one of the most important sources of health, livelihood and food security, especially for landless forest-dwellers.⁹

The High Level Committee on Socio-Economic, Health and Educational Status of Tribal Communities in India, 2014 ('Xaxa Committee Report') notes that alienation from their traditional resource base, either due to dispossession or ecological devastation has severely affected their traditional livelihood options. 'As a result, the already vulnerable tribes [are] exposed to all kinds of exploitation and marginalization in the new, unfamiliar urban space. Those who continue to live in their original habitats diversified their occupations to ensure their sustenance.'¹⁰

Forests secure not only livelihoods, but also define their histories as peoples, traditions and cultural identities, and has been recognized to be the most important asset for their 'equality... dignity... and means to economic and social justice':¹¹

Land is their most important natural and valuable asset and imperishable endowment from which the tribals derive their sustenance, social status, economic and social equality, permanent place of abode and work and living. It is a security and source for economic empowerment. Therefore, the tribes too have great emotional attachment to their lands. The land on which they live and till, assures them equality of status and dignity of person and means to economic and social justice and potent weapon of economic empowerment in social democracy.

Similarly, the Bhuria Committee on Scheduled Areas and Scheduled Tribes

7 Forest Rights Act, s 2.

8 Ministry of Tribal Affairs, Government of India, *Report of the High Level Committee on Socio-Economic, Health and Educational Status of Tribal Communities of India 197* (May 2014) (Report).

9 *ibid* 96.

10 *ibid* 97.

11 *Samatha v State of Andhra Pradesh* (1997) 8 SCC 191.

Commission, Government of India, reiterated 'the deeply spiritual relationship between indigenous peoples and their land as basic to their existence':

The concept of land among tribal societies is radically different: Land is not something you inherit from your ancestors, rather something you borrow from your children ... It is essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture ...of the most basic human rights - including the right to maintain their ancestral lands, their cultures and their traditional way of life ... Their land is not a commodity which can be acquired, but a material element to be enjoyed freely.

(page 124, Vol.1, Bhuria Committee Report 2002-04)

This multi-dimensional relationship extends beyond forest-dwellers' labour and dependence on forests for nutrition and livelihoods, to historical, cultural and religious ties. In fact, while international instruments such as the UN Declaration on Rights of Indigenous Peoples (UNDRIP) refrain from defining 'indigenous peoples' except through the principle of self-determination, a crucial indicator of indigenous status is the relationship with their land and territories as '*the basis of their continued existence as peoples*', or in other words, a collective civilizational right to life tied to their lands and territories:¹²

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

Thus, the complex, multi-dimensional relationship of *adivasis* and forest-dwellers with customary land and forests is intricately related to the exercise of their rights to life, equality, dignity and culture under Part III, both as a group and as individuals.

2. *The Content of Autonomy and Self-Rule*

In identifying the content of rights guaranteed by the Constitution, it is well-established that 'the isolation of various aspects of human freedom, for purposes of their protection, is neither realistic nor beneficial but would defeat the very objects of such protection.'¹³ In

12 Jose R Martinez Cobo, *Study of the Problem of Discrimination against Indigenous Populations* (United Nations, Vol V, 1987, E/CN.4/Sub.2/1986/7/Add.4) 379.

13 *Maneka Gandhi v Union of India* (1978) 1 SCC 248, 202.

other words, the Constitution must be read as a whole, and not as water-tight compartments, in protecting these fundamental rights guarantees.

A holistic reading of the Constitution in relation to the right to land and forests reveals the inextricable link between Part III, and Parts IX and X related to local self-governance and administration of Tribal and Scheduled Areas. The Fifth and Sixth Schedules, emerging from Article 244 in Part X, provide for the autonomy of customary institutions and primacy to customary laws in matters relating to land and forests either through the specific demarcation of Scheduled Areas, Tribal Areas etc., or generally wherever there is a high density of *adivasi* populations.¹⁴ For those not formally recognized as STs or SAs, Part IX of the Constitution serves to meet the same goals through devolution of decision-making authority to local units of self-governance.

The Supreme Court has noted that:¹⁵

...the Fifth and Sixth Schedule form an integral scheme of the Constitution with direction, philosophy and anxiety to protect the tribals from exploitation and to preserve valuable endowment of their land for their economic empowerment to elongate social and economic democracy with liberty, equality, fraternity and dignity of their person in our political Bharat.

Within the meaning of the Fifth and Sixth Schedules, autonomy implies that the use, access and control of land and forests are to be determined under the rubric of self-rule over land and resources through customary institutions and customary laws. In the Sixth Schedule, Autonomous Councils are empowered to legislate over land and forests to the exclusion of central and state laws, while in the Fifth Schedule, the Governor under the advice of the Tribes Advisory Council is empowered to specifically exclude the application of certain laws.¹⁶ These exclusions of formal law pave the way for the *quasi*-legislative and *quasi*-executive powers of customary institutions such as *gram sabhas* to govern land and forests as per customary laws relating to ownership, use and access, and to ensure the protection of their rights and resources.¹⁷

The guarantee of autonomy is the key that unlocks the wide spectrum of fundamental rights of *adivasis* and forest-dwellers, most notably to their land, liberty, equality and dignity. The Supreme Court also recognized the centrality of local self-governance and autonomy for the protection of life, lands and culture of the Dongria Kondhs in *Orissa*

14 CR Bijoy (eds), *India and the Rights of Indigenous Peoples: Constitutional, Legislative and Administrative Provisions Concerning Indigenous and Tribal Peoples in India and their Relation to International Law on Indigenous Peoples* (Asia Indigenous Peoples Pact Foundation 2010).

15 Samatha (n 11) [71].

16 Asia Indigenous Peoples Pact Foundation 2010 (n 14).

17 Maneka (n 13).

Mining Corporation v Ministry of Environment and Forests.¹⁸ Here, the Supreme Court of India set aside clearance for a proposed mining project in the Niyamgiri hills in Kalahandi absent approval from the *gram sabha*, as the *Dongria Kondhs* argued that the mine will destroy the rich Niyamgiri hills that are of cultural and spiritual relevance to them.¹⁹ The Court upheld the decision-making power of *Gram Sabhas* for preserving tribal autonomy, culture, economic empowerment and social justice. Accordingly, the state government was directed to hold *Gram Sabha* meetings in all affected villages in a free and transparent manner to seek their decision on the diversion of forests for mining purposes.

Thus there is a direct and overarching nexus between the life, liberty, equality, culture and dignity of forest-dwellers, and their right to land and autonomy under other parts of the Constitution. This constitutional mandate extends beyond a negative obligation to refrain from violations of rights, to a positive obligation on the State to actively take steps to secure the full enjoyment of fundamental rights.

Such a scheme casts a positive obligation on the State to respect, protect and fulfill the land and forest rights of forest-dwellers through the recognition of their autonomy and customary rights by way of law. The burden lies on the State to ensure that pre-existing customary rights of *adivasis* and forest-dwellers to their land and autonomy are duly recognized through appropriate legislation and executive action.

III. EVICTIONS AS A VIOLATION OF THE RIGHT TO LAND

The foregoing analysis demonstrates that the right to land and forests is a fundamental right, and there is a positive obligation on the State to ensure that these pre-existing rights are translated into formal recognition under the framework of autonomy of customary institutions and customary laws.

1. 'Encroachments' in Historical Context

Rights do not exist in the abstract in a vacuum, but emerge in response to historical and continuing deprivations. Placing the right to land and forests within its historical and present legal context enables a clearer identification of corresponding State obligations. The context of the right to land encompasses a wide spectrum of legal, political, economic and cultural processes of dispossession and destruction of identities.²⁰ However, this section focuses specifically on the legal construct of 'encroachment' as one of the foundational colonial actions rupturing customary land rights of forest-dwellers, which also presently sets the stage for attempted and actual evictions by way of law.

The order of 13 February 2019 follows a long line of other judicial orders, executive action and statutes which operate on the logic that any use of forests and forest resources

18 (2013) 6 SCC 476.

19 *ibid* [66].

20 Report (n 8).

by forest-dwellers to meet livelihood needs is an ‘encroachment’ under law. Consider, for instance, the definition of ‘forest offences’ laid down under the paradigmatic law, the Indian Forest Act 1927 (IFA). The IFA criminalizes collection of forest produce (leaves, barks etc.), cultivation, burning of fuel collected from the forest, cattle-grazing etc., for different categories of forests respectively.²¹

This criminalization of forest-based livelihoods emerges from the colonial project of appropriating land, forests and natural resources of indigenous populations. This was pursued through the simultaneous strategies of establishing State dominion over land, forests and resources, while extinguishing the lawful customary rights and regimes of use of forest-dwellers.²² Guha and Gadgil have extensively documented the incremental appropriation of forests by the colonial government from the late nineteenth century, finally culminating in the paradigmatic IFA in 1927.²³ This law creates three categories of forests, namely reserved, protected and village. All three come into existence only by way of executive action, and establish the sovereign prerogative of the exclusive use and distribution of forests and forest resources. The three categories differ not in substance but only in the degree of livelihood activities that may be permitted within those forests. Customary rights and autonomy of forest-dwellers over land now stood reduced to mere ‘rights, privileges and concessions’ granted by the State within a narrow window for their settlement.²⁴ Rights not settled within this narrow window stood extinguished by default, neglecting the complete inaccessibility of the colonial legal and administrative apparatus to forest-dwellers.

Consequently, forest-dwellers came to be dispossessed through unimplemented state-driven settlement of ‘rights and privileges’, criminalization of livelihoods, expropriation of forests towards commercial and industrial purposes, accompanied by atrocities and human rights violations.²⁵

It is the cumulative effect of these processes that rendered forest-dwellers as encroachers on their own lands. The logic is that pre-existing rights gain visibility in law only through

21 IFA 1927, s 32.

22 Lavanya Rajamani, ‘Community Based Property Rights and Resource Conservation in India’s Forests’, Aileen McHarget (eds), *Property and the Law in Energy and Natural Resources* (OUP 2010) 455-457.

23 Madhav Gadgil and Ramachandra Guha, *This Fissured Land: An Ecological History of India* (OUP 1993) 108-128.

24 *ibid* 110.

25 People’s Union for Democratic Rights, ‘Undeclared Civil War: A Critique of Forest Policy’ (1982) 6 <https://puodr.org/sites/default/files/2019-02/undeclared_civil_war.pdf> accessed 1 September 2020; Ramachandra Guha, ‘Forestry in British and Post-British India: A Historical Analysis’, 18 *Economic & Political Weekly* 1882-1896 (1983); Christoph von Fürer-Haimendorf, *Tribes of India: The Struggle for Survival* (University of California Press 1982) 79-96; Walter Fernandes and Sanjay Barbora, ‘Tribal Land Alienation in the Northeast: An Introduction’ in Walter Fernandes and Sanjay Barbora, *Land, People and Politics: Contest over Tribal Land in Northeast India* 5 (North Eastern Social Research Centre and IWGIA 2009).

narrow State-driven processes of settlement of rights. Forest-dwellers are presumed encroachers under these laws, unless they are able to establish that they hold some forms of limited rights, privileges or concessions granted by the State. This presumption of encroachment, absent formal recognition, is in itself a violation of the historical right to land of forest-dwellers.

The extinguishment of customary regimes of ownership, use and access, in favour of formal law was in itself a crucial step in the establishment of colonial sovereignty over indigenous land, as it extinguished the authority of customary institutions.

The same logic extends beyond the IFA, to both colonial and postcolonial laws relating to land and forests, including the Land Acquisition Acts in their various iterations, Forest Conservation Act etc., that are geared towards the dispossession of forest-dwellers from their customary lands for the re-allocation of resources from livelihood to commercial and industrial purposes. It further permeates the legal architecture governing conservation and wildlife protection, further criminalizing livelihood uses of forests as the cause behind destruction of forests. Such causation not only contradicts established evidence that livelihood uses in fact regenerate forests destroyed by commerce and industry,²⁶ but also re-entrenches the extinguishment of autonomy, a move globally considered as a bad practice in climate change mitigation.²⁷ Increasingly, evictions of forest-dwellers is justified under the guise of conservation through the establishment of ‘inviolable’ areas,²⁸ or through judicial action.

Pertinently, the IFA itself does not provide for evictions as lawful action that may be taken against encroachers, but provides a range of other punishments. The absence of a penalty of eviction under the IFA 1927 is indicative of the fallacy of the argument that rejection, or non-settlement of rights, is a *de facto* ground for evictions. As the final section of this paper shows later, there is very limited statutory basis for evictions even in cases of encroachments. This is an exceptional power limited to narrow circumstances in few states, pursuant to laws enacted after the enforcement of the Constitution. As the last section also shows, the constitutionality of these laws is also suspect.

Nevertheless, it does bear mentioning that eviction drives undertaken by the forest or other executive departments are often not supported by law, and the same issue also plagues judicial orders for eviction issued in the absence of law. This issue came to the forefront pursuant to the order of the Supreme Court on 28 February 2019 placing the 13 February eviction order on hold, where the Supreme Court sought clarifications from state

26 Council for Social Development and Vasundhara, *Forest Dwelling Communities and Forest Rights Act 2006: Evidence From 24 States* (2020).

27 Stan Stevens (eds), ‘Recognizing and Respecting ICCAs Overlapped By Protected Areas: A Report For The ICCA Consortium’ (Report for the ICCA Consortium 2016) 45-66.

28 Nitin D Rai, ‘Views from the Podu: Approaches for a Democratic Ecology for India’s Forests’ in S Lele and A Menon (eds) *Democratizing Forest Governance in India* (Oxford Scholarship India 2014).

governments on the laws applicable to evictions and encroachments.²⁹

Evictions rupture the relationship of members of forest-dwelling communities with their forests and others in the community, impacting not only livelihoods but their collective ethnic identities and culture. The United Nations Special Rapporteur on the Right to Adequate Housing in fact views forced evictions of indigenous peoples from their lands and territories as a grave human rights violation impacting a range of fundamental rights and freedoms.³⁰

The ILO Convention No. 169 (the Successor to Convention No. 107) includes safeguards to prevent the forced eviction of indigenous peoples from their land. Where this is unavoidable, it should be only as an exceptional measure. Such exceptional relocation should only take place with their free and informed consent. Further, they have the right to return to their traditional lands as soon as possible.³¹ The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is the defining international instrument on the human rights of indigenous persons, and in whose favour India voted at the time of its adoption. UNDRIP was the result of years of negotiations between indigenous peoples and States, and provides the global community with a common framework for realization of cultural, historical, social and economic rights. Article 10 affirms that indigenous peoples ‘shall not be forcibly removed from their lands or territories.’ As an exception, if such forcible removal is unavoidable, it cannot be done without their free, prior and informed consent.³²

These international instruments supplement the constitutional obligations of the State under Parts III, IX and X of the Constitution, as identified in the previous section. This categorization of forest-dwellers as encroachers on their own lands stands transformed under the Indian Constitution through the recognition of their fundamental right to land and forests. This constitutional and legislative architecture recognizes the rights of forest-dwellers previously extinguished under colonial laws, reinstates their lawful authority of self-rule over customary land and forests, and removes them from the category of ‘encroachers’ into the category of rightsholders.

This content of state obligation enables a resolution to the challenge of encroachments and evictions under an exclusionary formal legal framework.

2. *Resolving the Challenge through State Obligation*

29 Wildlife (n 1). Referring to subsequent order dated 28 February 2019.

30 United Nations Special Rapporteur on the Right to Adequate Housing, *Report Of The Special Rapporteur On Adequate Housing As A Component Of The Right To An Adequate Standard Of Living* (2018 A/HRC/4/18) [57],[70].

31 International Labour Office, *Handbook for ILO Tripartite Constituents, Understanding the Indigenous And Tribal Peoples Convention* (1989) No 169 22; Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (CUP 2007) 67-90.

32 Alexandra Xanthaki (n 31) 262.

In furtherance of the positive obligation under Parts III, IX and X, the Parliament of India has enacted the Panchayats (Extension to Scheduled Areas) Act in 1996 (PESA), the Forest Rights Act in 2006, laws prohibiting the alienation of *adivasi* land, among a host of other policies. Prior to these, the colonial government itself had enacted the Chhota Nagpur Tenancy Act, 1908 and the Santhal Parganas Tenancy Act, 1949 applicable to parts of Jharkhand, all of which recognize the right of forest-dwellers on the common land, and to control, protect and administer their own forest resources. These legislations provide the statutory framework by which the pre-existing rights to land and autonomy are to be formally recognized. This part focuses on the PESA and FRA as these are laws of general applicability.

These laws are not ordinary statutes, but emerge specifically from the constitutional mandate of securing the right to land, forests and autonomy for forest-dwellers, and are instruments by which the state fulfills its positive obligation for the full exercise of fundamental rights. The recognition of land and forest rights through these statutes reverses the presumption of encroachment identified earlier, in favour of the existence of rights, and creates a positive obligation on the State to formally recognize them by way of law.

PESA has been enacted following the constitutional mandate under Article 243(M) which states that the provisions of the constitution and state legislations relating to panchayats will not extend to the Scheduled Areas. If the panchayat system is to be extended to the Scheduled Areas, it has to be done through a law which specifically provides modification under which the panchayat system is extended. Therefore, PESA though not enforceable on its own, is a model legislation that has been adopted into law, with some modifications, by ten states with a high population of forest-dwellers.

Unlike the provisions of Part IX, PESA gives very central role to the Gram Sabhas, Section 4(b) states that ‘a village shall ordinarily consist of a habitation or a group of habitations or a hamlet or a group of hamlets comprising a community and managing its affairs in accordance with traditions and customs.’

Under Section 4(d), PESA recognizes the authority of the *Gram Sabhas* to ‘safeguard and preserve the traditions and customs of the people, their cultural identity, community resources...’

Section 4(m) obligates state legislatures to enable *Gram Sabhas* to function as units of local self-governance through the formal recognition of their powers and authorities. Specifically, *Gram Sabhas* are empowered to address illegal encroachments over their customary lands, and have the power to ‘prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of a Scheduled Tribe’. PESA, among other powers also empower the *Gram Sabha* to approve plans and projects³³, and provides mandates consultation with *Gram Sabha* before acquisition of land

33 Panchayats (Extension to Scheduled Areas) Act, 1996, s 4(e)(i).

for developmental projects, and before resettlement of project affected people³⁴, ownership of minor forest produce³⁵.

The Forest Rights Act, 2006 represents a milestone in Indian legislative history with Parliament acknowledging the historical injustice done to India's tribal and other traditional forest-dwelling communities during the consolidation of the state forests.³⁶

‘AND WHEREAS the forest rights on ancestral lands and their habitat were not adequately recognized in the consolidation of State forests during the colonial period as well as in independent India resulting in historical injustice to the forest dwelling Scheduled Tribes and other traditional forest dwellers who are integral to the very survival and sustainability of the forest ecosystems...’

Preamble to the FRA

The Forest Rights Act also follows the scheme which has the *Gram Sabha* as the central authority. The Act has three major provisions: (a) the rights that may be claimed in all categories, including Protected Areas; (b) the authorities and the procedures for receiving and verifying the claims; and (c) the empowerment of right-holders and /or *Gram Sabhas* for conservation of forests, wildlife, and biodiversity and their natural and cultural heritage.³⁷

The Act specifies 13 claimable rights providing individual and /or community tenure. Claimable rights over forest land include land under occupation, land disputed between forest-dwellers and the Forest Department due to faulty forest settlements. Claimable community forest rights include right to nistar (usufructs); water bodies; community tenure over community habitat in case of pre-agricultural communities; seasonal resource access for nomadic and pastoral communities; other traditional rights and most importantly Section 3(1)(i) recognizes the collective right of forest-dwellers to ‘protect, regenerate or conserve or manage any community forest resource...’.³⁸ Section 5 of the Forest Rights Act elucidates the powers and duties of the *Gram Sabha* to protect wildlife, biodiversity, water sources, and the rights of forest-dwellers within their customary forests. It also vests in the *Gram Sabha* the power to ensure compliance of their decisions under this Section, and to stop activities adverse to biodiversity and their rights. Section 6 treats the *Gram Sabha* as the primary authority for fact-finding on the existence and extent of right holding in forests.

34 Panchayats (Extension to Scheduled Areas) Act, 1996, s 4(i).

35 Panchayats (Extension to Scheduled Areas) Act, 1996, s 4(m)(ii).

36 Madhu Sarin, ‘Undoing Historical Injustice: Reclaiming Citizenship Rights and Democratic Forest Governance through the Forest Rights Act’ in S Lele and A Menon (eds), *Democratizing Forest Governance in India* (OUP 2014).

37 *ibid* 126.

38 Madhu (n 36) 126.

This has laid down foundation for democratization of forest governance and reverses the presumption of ‘encroachers’ on the millions of the forest dwelling communities. Section 4 declares forest rights to be ‘vested’ in forest-dwellers upon the immediate enactment of the law, which is then to be formalized through processes for recognition of rights under section 6. It is for the same reason that the Forest Rights Act does not provide for evictions, but in fact, guarantees against arbitrary and unlawful evictions.

Cumulatively, these constitutional laws uphold the application of customary laws relating to ownership, use and access over forests, and the autonomous decision-making authority of *gram sabhas* over matters relating to their land and forests, including but not limited to the right of free, prior and informed consent. These also recognize pre-existing rights which may have been extinguished under formal law or are disputed.

As the legal category of ‘encroacher’ stands transformed to that of a ‘right holder’ under these laws, there is insufficient basis for evictions based on encroachments. A reversal of the presumption of encroachments in favour of right holding implies a State obligation for the formal recognition of these pre-existing rights. The implementation of these laws is part and parcel of state obligation emerging from Parts III, IX and X.

Accordingly, the invisibility of right holding under formal law, or, in other words, the absence of formal legal title is indicative not of encroachment, but of a failure of State obligation. The failure of the State to formally recognize these rights does not justify penalties on right holders who may or may not be recognized specifically under formal law.

Although FRA emerged as a legislative response to a national grassroots movement to record the rights of forest dwelling communities, but the access to the rights, and implementation by the State depicts the failure on the part of the State to recognize the rights. According to the Promise and Performance Report, 2016 only 3 percent of the minimum potential of Community Forest Resource (CFR) rights has been achieved in 10 years.³⁹ The report highlights the poor performance of FRA with deep structural and institutional issues. Additionally, the lack of capacity building in the nodal agency Ministry of Tribal Affairs, low budgetary support and lack of political will reflects no vision to implement land and forest reform. The Ministry of Environment Forest & Climate Change continue to bring in policies through acts such as Compensatory Afforestation Fund (CAF) Act, 2016 which are in contradiction to the Forest Rights Act.

The following section turns its attention to particular laws providing for evictions, and assesses their constitutionality in light of the foregoing analysis and overall compliance with due process.

39 Citizens’ Report as part of Community Forest Rights-Learning and Advocacy process, ‘Promise & Performance Report, Ten Years of The Forest Rights Act in India’ (Rights and Resources Initiative, 2017) 17 <https://rightsandresources.org/wp-content/uploads/2017/11/India-Promise-and-Performance-National-Report_CFRLA_2016.pdf> accessed 19 July 2020.

IV. EXISTING PROCEDURES FOR EVICTION FROM FOREST LANDS: A SAMPLE STUDY

As forests are a part of the concurrent list where the centre and state both have legislative powers, this section evaluates laws which vest powers of eviction both at the central and state level, with specific focus on Madhya Pradesh, Maharashtra, Odisha, Tamil Nadu and Telangana. These are states with a high population of forest-dwellers and reported instances of evictions, and other than Tamil Nadu, have significant geographical areas notified as Scheduled Areas under the Fifth Schedule. This is a sample study, focusing on forest and revenue laws applicable in these states, and does not extend to specific legislations relating to protection of tribal lands, prevention of alienation, and restoration. In addition, the analysis of central laws brings attention to amendments made by eight states which have introduced evictions. Such a study enables an examination of laws and procedures for evictions against the benchmark of fundamental rights of forest-dwellers including the right to life, land and autonomy.

1. Central Forest Laws Along With State Amendments

The Indian Forest Act 1927 (IFA), under which the colonial state established its eminent domain over all forests in the country, and which continues in post-Independence India, does not provide for evictions of forest-dwellers. This reflects the colonial mandate of establishing dominion over forests to enable resource exploitation, where the pre-existing 'rights and privileges' of communities are to be settled as per procedures laid down in the statute itself. Even so, the IFA does not prescribe any penalty or procedure for evictions, but identifies a range of acts as forest offences, where the maximum punishment (imprisonment extending to two years, or fine, or both) is awarded for counterfeiting or defacing marks on timber or standing trees, or alteration of boundary marks of forest land. Forest offences include creating fire, trespass of cattle, causing damage to trees by negligence, collecting forest produce, among others.

At the level of central laws, only the Wild life (Protection) Act, 1972 has provisions with respect to eviction from forest lands, but which are limited to evictions from protected areas. Section 34A of the Wild life (Protection), 1972 authorises officers of the rank of Assistant Conservator of Forests or above to evict a person from a wildlife sanctuary or a national park who is in unauthorized occupation, and also to remove structures, tools, effects belonging to such person from such land. The provision requires that prior to any such order, the affected person must be given an opportunity to be heard.

However, certain states, have made amendments to the IFA and added provisions with respect to eviction. These states include Gujarat, Maharashtra, West Bengal, Uttar Pradesh, Uttarakhand, Bihar, Punjab and Madhya Pradesh.

These amendments are analysed below, based on the procedures for evictions stipulated by law.

1.1. Where eviction can be undertaken pursuant to a conviction for a forest offence

In Gujarat⁴⁰ and Maharashtra,⁴¹ sections 26 and 33 of the IFA have been amended through which provisions relating to eviction have been added. Under unamended IFA, Section 26 provides a list of acts prohibited in Reserved Forests, the penalty for which is imprisonment, or fine, or compensation for damage done to the forest, but only pursuant to a conviction by Court. In Gujarat and Maharashtra this provision has been amended and the penalty of evictions has been added for trespass, pasturing cattle or clearing land. Such evictions can be carried out by a forest officer, police officer or revenue officer only after the Court orders eviction upon conviction for the offences. Similarly under section 33 of unamended IFA, a list of acts are prohibited in Protected Forests upon issuance of notification and rules by the State Government. The penalty for having done any of the prohibited acts is imprisonment, or fine, or both. In Gujarat and Maharashtra this provision has been amended and penalty of eviction has been added for cases where conviction for all the listed prohibited acts but only when the State Government has issued notification and made rules with respect to this. These prohibited acts includes felling of trees, defacing trees, quarrying stones, clearing land, setting forest on fire etc. The evictions can be carried out by a forest officer, police officer or revenue officer once the person has been convicted for any of these offences.

In Uttar Pradesh,⁴² sections 61A has been added to the IFA. Under section 61A, the court has been given the power to direct evictions pursuant to convictions for fresh clearing, trespassing, pasturing cattle or clearing land. The amendments do not clarify who is the rightful authority and the procedure to be followed for evictions after such conviction.

1.2. Where Forest Officer is vested with magisterial powers to initiate for eviction

In Bihar⁴³, section 66A has been added to IFA, 1927 dealing with eviction of encroachment from government forest land. This section makes encroachment in Government Forest Land a cognizable and non-bailable offence whereby a forest officer not below the rank of Divisional Forest Officer has been given the power to evict the encroachment. The Officer is conferred the powers of Magistrate under the Bihar Public Encroachment Act, 1956.

In Punjab⁴⁴, section 66A has been added to IFA, 1927 dealing with eviction of encroachment from government forest land whereby a forest officer not below the rank of Divisional Forest Officer has been given the power to evict the encroachment. The Officer is conferred the powers of Executive Magistrate under the Punjab Public Land Premises

40 The Indian Forest (Gujarat Unification and Amendment) Act, 1960.

41 The Indian Forest (Maharashtra Unification and Amendment) Act, 1960

42 The Indian Forest (Uttar Pradesh Amendment) Act, 1965.

43 The Indian Forest (Bihar Amendment) Act, 1989.

44 The Indian Forest (Punjab Amendment) Act, 2004.

and Land (Eviction and Rent Recovery) Act, 1973.

The Forest Officer under these laws is conferred with the power to issue a show cause notice to a person whom they believe to have been in unauthorized occupation of land. Such person will be provided with an opportunity to be heard and the final authority to make the decision lies with the Forest Officer.

1.3. Where Forest Officers can summarily evict persons from forest land

In Uttar Pradesh⁴⁵, section 61B has been added to IFA and in Uttaranchal section 61A has been added to IFA. These provisions provide for evictions in cases of unauthorized occupation of land in Reserved or Protected Forests. Here, the Divisional Forest Officer or those above him in rank, may be authorized to evict pursuant to a summary proceeding. The procedure stipulates that a show cause notice must be sent to a person suspected of unauthorized occupation and after considering the cause, the officer is satisfied that the land is under unauthorized occupation, a reasoned order for eviction can be passed. There exists a provision to file an appeal against the order of the Forest Officer to the Conservator of Forests.

In Madhya Pradesh,⁴⁶ section 80A has been added to the IFA. This provision provides for eviction in case of unauthorized possession of any land in Reserved or Protected Forests. Here, a Forest Officer not below the rank of Divisional Forest Officer has been given the power to evict. However, the section makes it clear that no eviction order can be passed unless a reasonable opportunity of showing cause has provided. Further, a person aggrieved by an order of the Forest Officer can appeal against the order to the State Government or to any officer authorized.

1.4. Where a Forest Officer can evict without serving notice

In West Bengal also,⁴⁷ sections 26 and 33 of the IFA, have been amended, simply stating that any forest officer has the power to evict persons for trespass, cattle-grazing or clearing land. No procedure has been stipulated at all.

It is notable that the original IFA does not recognize any powers of the State to evict in partial deference to the prior customary claims of forest-dwellers. However, states have made amendments to these laws providing such powers in contravention of the constitutional mandate as well as prior customary rights of forest-dwellers.

While we submit that evictions of forest-dwellers from their customary lands is unconstitutional *per se*, a perusal of these state amendments shows that they fail to meet even minimum due process guarantees under the Constitution. None of these procedures

45 The Indian Forest (Uttar Pradesh Amendment) Act, 1965.

46 Indian Forest (Madhya Pradesh Amendment) Act, 1965.

47 The Indian Forest (West Bengal Amendment) Act 1988.

recognize the power and authority of *Gram Sabhas* to protect, preserve and conserve their customary lands and forests, and by virtue of this alone, are violative of the constitutional scheme of rights protection of *adivasis*. The right of *Gram Sabhas* to collectively manage and protect their forests and resources is a constitutionally guaranteed right, which also includes the right to free, prior and informed consent. Any evictions of forest-dwellers by authorities other than the *Gram Sabha* are violative of Fifth Schedule, PESA and FRA. Instead, under these laws, the Forest department has been entrusted with powers of eviction, when the forest department itself is an interested party in the proceedings. This fails to provide adequate checks and balances against the arbitrary exercise of power by the forest department, and therefore violates the principles of natural justice. Shockingly, in some states, evictions may be carried out without any procedure at all. This is *ex facie* unconstitutional and *ultra vires* Article 21. For other states, proceedings do not guarantee a reasonable opportunity of being heard. The Forest Department is empowered to evict summarily, which is inadequate for state action carrying such grave implications on the right to life. As *adivasis* are generally unfamiliar and unable to navigate formal legal systems, they may not have complete knowledge of their rights, due process, as well as evidence that may be provided in response to show cause notices. Also, there is no guarantee of legal aid, or any requirement for official documents to be translated and explained so that forest-dwellers are able to appropriately have their case heard.

2. State Forest and Revenue Laws

Different states have different statutory frameworks governing land and forests, sometimes multiple legislations in a single state. Based on the formal categorization of land, these include:

- state forest laws,
- revenue laws relating to encroachments on government lands and public premises,
- other laws.

This section focuses on state forest laws and revenue laws in the states of Madhya Pradesh, Maharashtra, Odisha, Tamil Nadu and Telengana. Out of these, Madhya Pradesh and Maharashtra have amended the central IFA as analysed above, while the other three states have enacted their own forest laws. All five states also recognize the power of eviction under revenue laws relating to encroachments on government property and public premises.

STATE	STATE FOREST LAWS	REVENUE LAWS re GOVT. PROPERTY/ PUBLIC PREMISES
MADHYA PRADESH	NA	Madhya Pradesh Land Revenue Code, 1959
MAHARASHTRA	NA	Maharashtra Land Revenue Code, 1966

ODISHA	The Orissa Forest Act, 1927	The Prevention of Land Encroachment Act, 1972; The Public Premises (Eviction of unauthorised Occupants) Act, 1972
TAMIL NADU	The Tamil Nadu Forest Act, 1882	The Tamil Nadu Land Encroachment Act, 1905
TELANGANA	The Andhra Pradesh Forest Act, 1967	Telangana Land Encroachment Act, 1905; The Telangana Public Premises (Eviction of unauthorised occupants) Act, 1968

2.1. State forest laws

Several state legislatures have exercised their legislative power to enact their own forest legislations, supplanting the central Forest Act. Interestingly, although these legislations are almost identical to the central law, all the state forest legislations examined (Odisha, Tamil Nadu and Telangana) have made additional provisions for eviction from forest lands.

In Odisha⁴⁸, The Orissa Forest Act, 1972 has provisions for eviction against certain acts committed in both reserved and protected forests. Section 27 provides grounds for eviction from a reserved forests. It states that the court may order eviction of a person from the forest land who has been convicted of an offence of making fresh clearing or setting fire to a reserved forests or breaks land for any purpose. Section 37 provides grounds for eviction from protected forests.

In Tamil Nadu,⁴⁹ the Tamil Nadu Forest Act, 1882 deals with eviction from reserved forests and land at the disposal of the government. It provides that a person can be summarily evicted if found in unauthorized occupation of a government land. The Forest officer or Tahsildar has the power to evict after serving notice and giving an opportunity for representation.⁵⁰

In Telangana,⁵¹ the Andhra Pradesh Forest Act, 1967 deals with eviction. It states that a Forest Officer or Police Officer or Revenue Officer can evict a person from the forest land who trespasses, pastures cattle or breaks land after providing an opportunity to be heard.

2.2. Revenue laws relating to encroachments on government property and public premises

Most states have enacted state level legislations enabling eviction from the government property or the public premises. A survey of the definitions of Government Property and Public Premises makes it clear that forests are not included in these definitions *per se*. Therefore, it remains questionable on whether or not these laws apply to evictions from

48 Orissa Forest Act 1972, s 27 and 37.

49 Tamil Nadu Forest Act 1882, s 68A.

50 Tamil Nadu Lands (Eviction of Encroachments) Rules 1981, rule 2 and 3.

51 Andhra Pradesh Forest Act 1967, s 20.

forests in the first place. Nevertheless, we analyse the procedures specified under these laws for Odisha, Telangana, Tamil Nadu and Madhya Pradesh to clarify their due process content in case of attempted evictions from revenue land.

In Madhya Pradesh, section 126 of the Madhya Pradesh Land Revenue Code, 1959 is regarding eviction from land in case of unauthorised possession with no prescribed procedure.

In Maharashtra, sections 53 and 242 of the Maharashtra Land Revenue Code, 1966 deals with eviction from the government land in case of unauthorised occupation whereby the Collector can evict such person by serving a notice and providing an opportunity to be heard.

In Odisha, the Prevention of Land Encroachment Act, 1972 and The Public Premises (Eviction of unauthorised Occupants) Act, 1972 has provision with regard to eviction. Sections 4, 6 and 7 of the Orissa Prevention of Land Encroachment Act, 1972 provides authority to the Tahsildar for imposing rent, penalty and evict the person who is found in unauthorised occupation of government land by serving a notice and granting an opportunity to make representation. Sections 4 and 5 of the Public Premises (Eviction of unauthorised Occupants) Act, 1972 has provision for eviction from public premises by providing authority to the Estate Officer, with same powers as civil court, to issue an order for eviction after notice and hearing.

However, the Prevention of Land Encroachment Act, 1972 in Odisha operates under the logic of recognition of the right to land and livelihoods by protecting landless and homesteadless persons. Here, in case any person is found in unauthorized occupation, then instead of evicting or imposing rent/ penalty, the authority is obligated to recognize and settle rights in their favour.⁵²

In Telangana, eviction provisions are contained in the Telangana Land Encroachment Act, 1905 and the Telangana Public Premises (Eviction of unauthorised occupants) Act, 1968. Section 3 of the Telangana Land Encroachment Act gives power to the Collector/ Tahsildar to impose rent, penalty and evict the person found in unauthorised occupation of government property by serving notice and granting an opportunity to make representation. According to section 6 of the Act, if a group of persons are found in occupation of a Government property, they can be evicted immediately by the District Collector by an order without even serving any notice. Section 4 and 5 of the Telangana Public Premises (Eviction of unauthorised occupants) Act, 1968 has provision for eviction from public premises by providing authority to the Estate Officer, with same powers as civil court wherein order for eviction can be issued after serving notice and hearing.

In Tamil Nadu, evictions can be undertaken under sections 3, 5 and 6 of the Tamil Nadu

52 Orissa Prevention of Land Encroachment Act 1972, s 7.

Land Encroachment Act, 1905 wherein the Collector/Tahsildar can impose rent, penalty and evict the person found in unauthorised occupation of government property by serving notice and granting an opportunity to make representation.

The examination of the laws where the states have their own forest legislation clearly breaks down that in some cases absolute power to evict has been vested in forest officer without having prescribed any procedure at all. In other cases, the authority to determine whether or not the person has been in unauthorized occupation of land is also bestowed on the forest department. This grant of ultimate authority in the hands of the Forest Department while depriving the forest dwellers of their customary land and rights is gross violation of their fundamental rights and the special framework established for protection of their rights in the constitution.

With respect to the revenue laws, states must first establish that the land from which they are seeking to evict any forest-dweller is government property or public premises. As the FRA vests pre-existing rights in forest and revenue lands both, no such presumption of state ownership of land can be raised in these cases unless established through necessary notifications. However, the analysis of the provisions in the revenue laws also establishes that in some cases eviction can be carried out without any established procedure. The authority is under no obligation to provide notice or an opportunity to make representation. In others, along with imposition of rent and penalty, the provision to evict has been given. A bare perusal of eviction procedures under most of these laws reveal gross violations of principles of natural justice and minimum due process guarantees.

V. CONCLUSION

This paper set out to ascertain the legality of forced evictions of forest-dwellers for encroachment in the context of a constitutional right to land. At the central level, the IFA, which applies to a majority of states, does not empower the State to forcibly evict forest-dwellers for offences relating to encroachment. Even so, the legal category of ‘encroacher’ is premised on the exclusive dominion of the State over land and forests to the exclusion of pre-existing rights and regimes of use. The creation of forest offences and the category of encroacher came into existence precisely to establish such dominion through the extinguishment of customary rights and authorities, and the criminalization of forest-based livelihoods of forest-dwellers. Under this logic, all livelihood-based uses of forests are presumed to be encroachments, unless they are specifically recognized for individuals under formal law.

This study also analysed forest and revenue laws at the state level in specific states in the search for the legality of the presumed power of the State to evict. In addition to amendments made by some states to the IFA, some state forest laws and revenue laws applicable to government property and public premises do contain the power of forced eviction. These laws extend the appropriatory logic of the IFA to provide for forced evictions as penalty for encroachment. However, a bare perusal of these laws reveals that they fail

to comply with principles of natural justice and minimum standards of due process. In many instances, forced evictions may be carried out without following any procedure at all, while in others, low-ranking officials of the forest department are empowered to evict after issuing a show-cause notice. In such proceedings, the procedure does not provide checks against the arbitrary exercise of power by the forest department, as not only are they interested parties in the dispute, but there are no safeguards (such as free legal aid, mandatory translation of notices, reasonable period to respond) to enable forest-dwellers to adequately present their case. Final adjudication of the existence of fundamental rights cannot be entrusted to executive functionaries who are also parties vested with an interest in the outcome of the hearing.

None of these laws (except one provision in the Madhya Pradesh Land Revenue Code) respect the authority of customary institutions such as *gram sabhas* over matters relating to their forests, either through the power of restitution or the right to free, prior and informed consent. On these grounds alone, these statutory provisions are invalid and *ultra vires* the Constitution on account of their manifest arbitrariness and violation of natural justice. Only the state forest law in Odisha provides some safeguards, by requiring evictions only pursuant to conviction by a court for a forest offence, and in case specifically ordered by the court from among other alternatives of rent or fines.

Laws and judicial orders relating to evictions raise challenges beyond violations of due process standards alone. The concept of encroachment is tied to the colonial presumption in favour of State ownership of all lands and forests within its territories, which stands reversed under a combined reading of Parts III, IX and X of the Constitution. These recognize a right to land with a content of autonomy of customary institutions as nestled within the guarantees of life, substantive equality, culture and dignity of *adivasis* and forest-dwellers under Part III, in nexus with the guarantee of self-rule under Parts IX and X. This right to land reverses the presumption of encroachment, into a presumption of rightsholding, and accordingly births positive State obligations to formally recognize pre-existing customary land and forest rights of forest-dwellers and uphold the autonomy of customary institutions.

The State has enacted a host of laws and policies in furtherance of this State obligation, most notably, PESA and the Forest Rights Act. Both of these recognize land and forest rights of various kinds and formally recognize the decision-making authority of *gram sabhas* over matters relating to land and forests. The Forest Rights Act expressly vests pre-existing rights immediately upon enactment of the law, to be then followed by procedures for the formal recording of these rights. Some parts of the Odisha Land Revenue Code also operate on this reversal of presumption by prohibiting evictions of landless or homesteadless persons and mandating the grant of title in their favour. In such a scenario, the absence of formal title is not evidence of encroachment, as under the colonial logic, but of the failure of State obligation under the constitutional logic. Accordingly, this paper finds that forced evictions are a violation of State obligation, and are supported neither by valid law nor by the Constitution.