

INDIGENOUS LAND RIGHTS: HOW THE DECK IS STACKED AGAINST INDIA'S TRIBAL POPULATION

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ABSTRACT

Famed for its cultural diversity, India's demographic diversity includes 705 recognized tribes. Today, the indigenous identity of many of these tribes is under threat. The indigenous populations are characterized by their attachment towards their land. Many tribes inhabit areas that are of key industrial importance. In an attempt to exploit these regions, industrialists, with the help of the Government, displace the tribal population from their precious land, oftentimes without any relief to the displaced or regard for due process established by land acquisition laws, notably, the 2013 LARR Act. These incidents of usurpation of tribal land expose the weakness of the LARR Act, both on the legislative and executive front. The law may also be immune to such weaknesses, given the manner in which the Fifth Schedule of the Constitution in itself, which guarantees relative autonomy to the Indigenous, has rendered the Tribes Advisory Councils powerless by vesting final discretion in Union and State Executive authorities. Such weak enforcement of tribal land rights is detrimental to India's superficial commitment to the UN Declaration on the Rights of Indigenous Peoples, which is exacerbated by the blatant disregard for democratically elected institutions—as seen in the recent slew of Executive actions taken by the Lakshwadeep authorities to give it power to forcibly execute development plans and displace inhabitants of land by force, all of which were effected without consultation or debate—a move that has met sharp criticism and protests. India's tribal population must be protected for various reasons—to preserve India's famed diversity, to preserve indigenous methods of ecologically sustainable lifestyle, and to respect the principles of self-determination. The Government must take steps to strengthen land acquisition laws and establish inviolable due process.

Keywords: Indigenous, Tribal, LARR, Land Acquisition, Fifth Schedule, Constitution, Lakshwadeep, UN Declaration On Rights Of Indigenous Peoples.

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BACKGROUND

India's diverse cultural identity is incomplete without the over 700 indigenous groups that inhabit most of India. Their unique lifestyle and practices, their characteristic attachment to the land they occupy, and their respect for nature are pleasantly remarkable, especially in a world grappling with the reality of climate change. However, today, the Indigenous are being displaced and unfairly deprived of their land in India by industrialists for their benefit, and the government is watching the crisis unfold and is taking no action to protect the Indigenous people. With their land, which serves them as a source of identity, being deprived of them, India's complicity has resulted in violations of the tenets of self-determination and international standards that mandate respect for Indigenous individuals—all of which is justified under the garb of eminent domain.

This paper covers two broad topics—firstly, how infirmities in India's land acquisition laws have stacked the deck against the indigenous people, and secondly, why tribal land rights must be protected.

INFIRMITIES IN INDIA'S LAND ACQUISITION LAWS

India's Constitution, the supreme legal text and moral tether for Indian society, recognizes the Indigenous people's rights in many ways. Article 15 of the Constitution provides a generalized provision for affirmative action. The Constitution includes Scheduled Tribe-specific provisions as well—such as Article 332, which provides for reservation of seats in specified State Legislative Assemblies to ensure Indigenous representation in India's legislature and polity. However, the most relevant Constitutional provisions for the discussions in this paper are the Fifth (and Sixth) Schedule(s)—which provide for graduated levels of self-governance by the indigenous in their own lands, including the protection of said tribal lands. Various laws that permit the acquisition of land by the State, or at the behest of the State, must also abide by the provisions of the Constitution that protect indigenous rights. The most notable law among them is the 2013 Land Acquisition Act.

RIGHT TO FAIR COMPENSATION AND TRANSPARENCY IN LAND ACQUISITION, REHABILITATION AND RESETTLEMENT (LARR) ACT, 2013

The 2013 LARR Act was implemented by the Central Government to facilitate the equitable acquisition of land for industrialization and other essential uses of the land by establishing

consultative processes to gauge the impact of a project, ecological and otherwise, and to facilitate a process of rehabilitation and resettlement of the displaced, to ensure that they are “partners in the development”. However, weak drafting, coupled with even worse implementation, has significantly debilitated the mandate of the LARR Act to streamline land acquisition in an equitable manner and also debilitated the intent of the makers of the Constitution to establish the right to self-determination of the indigenous groups.

Weakness In The Legislation

The LARR Act is infested with various infirmities that, instead of establishing procedure and integrity to a process of eminent domain, damage the interests of the indigenous people protected fervently by the Constitution in the Fifth Schedule. For example, Section 41 of the LARR Act states that Section 41 stipulates that land cannot be taken from Scheduled Areas unless as a ‘demonstrable last resort’.¹ This phrase is vague and too broad, as anything can be construed as such- especially given most of India’s coal reserves are located in Scheduled Areas. Further, Section 41, which was laid down to protect tribal lands, only protects tribal lands in Scheduled Areas. It makes no provision for the protection of the Adivasis not living in Scheduled Areas—which amounts to 50% of the Adivasi population.²

Further, the provisions of a Social Impact Assessment can also potentially be abused. Section 4 of the Act mandates a Social Impact Assessment Study for projects.³ It is entirely possible for an independent social impact assessment to maliciously misrepresent data to the benefit of large corporations.⁴ Another prevalent issue about the social impact assessment process is that they are time-consuming and bureaucratic, which is due, in part, to the number of public hearings required, especially when land parcels scattered over many towns must be purchased. The capacity deficiency of SIA state units, agencies, and district administration, as well as the time gap between the submission of the final report and the formation of the SIA Expert Group and its evaluation report, have been noted as factors contributing to land acquisition delays. Concerns have also been raised about land price escalation caused by unscrupulous property

¹ Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013, s. 41.

² Chitragada Choudhury, ‘Adivasis and the New Land Acquisition Act’ (2013) 41(12) Eco. Pol. W. <<https://www.epw.in/node/128484/pdf>> accessed 20 April 2023.

³ Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013, s 4.

⁴ Chitragada Choudhury, ‘Adivasis and the New Land Acquisition Act’ (2013) 41(12) Eco. Pol. W. <<https://www.epw.in/node/128484/pdf>> accessed 20 April 2023.

dealers between the start of the SIA study and the issuance of preliminary notification under Section 11 of the RFCTLARR Act, 2013, which initiates the land acquisition process.⁵

Weakness In Implementation

After unsuccessful attempts to amend the law to weaken the Central law, the Government let the States amend it with the assent of the President. These State amendments weaken provisions that establish strong limitations on eminent domain powers. With the shackles off, the State governments have actively undermined the LARR Act. The Odisha government, which is a battleground for the Adivasis against the Dalmia group, recently tabled a bill to remove the Social Impact Assessment provision from the State law.⁶ A similar provision was tabled in Haryana.⁷ The Supreme Court upheld the Tamil government's use of colonial State land acquisition laws to acquire land- allowing other States to follow suit- which may result in Adivasi lands being jeopardized.⁸ In 2016, a company attempted to illegally acquire land from a tribe in Chhattisgarh using a 1957 law that does not mandate consent- violating the LARR Act and the PESA Act, which accords protection to tribal lands.⁹ However, poor implementation extends beyond the lack of safeguards to check State actions to undermine LARR. Flagrant violations of the LARR Act have met with little to no administrative or judicial resistance.

The LARR Act stipulates that any acquisition of land must be through a process of FPIC (Free, Prior and Informed Consent) from those being deprived of their land. However, extractive industries have routinely violated the statutory mandate. The most notable such instance includes the violations by Coal India, which has been rapidly usurping indigenous land in

⁵ Preeti Jain Das, 'Social Impact Assessment: Can We Do Away with It?' (*The Energy and Resource Institute* 2 January 2013) <<https://www.teriin.org/article/social-impact-assessment-can-we-do-away-it>> accessed 19 June 2024.

⁶ Debabrata Mohanty and Bhubaneswar, 'Odisha Bill Seeks to Exempt Land Acquisition from Social Impact Assessment' (*Hindustan Times* 24 March 2023) <<https://www.hindustantimes.com/india-news/odisha-bill-seeks-to-exempt-land-acquisition-from-social-impact-assessment-101679599285912.html>> accessed 24 April 2023.

⁷ Ayaskant Das, 'Haryana Set to Dilute Land Acquisition Rules Allegedly to Benefit Corporates' (*NewsClick* 9 September 2022) <<https://www.newsclick.in/haryana-set-dilute-land-acquisition-rules-allegedly-benefit-corporates>> accessed 24 April 2023.

⁸ Nihar Gokhale, 'In Crucial Verdict, Supreme Court Allows TN to Acquire Land Using State Laws, Not LARR' (*The Wire* 24 July 2021) <<https://thewire.in/law/supreme-court-tamil-nadu-land-acquisition>> accessed 24 April 2023.

⁹ Saumya Ranjan Nath, 'Illegal and Unfair Acquisition of Mining Land in Korba' (*Down to Earth* 29 June 2016) <<https://www.downtoearth.org.in/news/mining/illegal-and-unfair-acquisition-of-mining-land-in-korba-54627>> accessed 24 April 2023.

Odisha, Jharkhand and Chattisgarh without seeking consent.¹⁰ Their failure to recognize Indigenous rights and the Government's complacency in implementing the LARR Act have only compounded an international human rights violation, given that India was a signatory to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007 and the ILO Convention 107 (although India conveniently advances the position that all Indians are "Indigenous" to shield themselves from liability).¹¹ Further, State governments themselves have forced evictions without seeking informed consent, conducting social impact assessments, or following due process while acquiring land. The Tripura government, in order to build a firing range for the Assam Rifles, razed indigenous lands.¹² Worse yet, Indigenous people have been the subject of physical abuse and torture, oftentimes at the hands of State security services.

The Fifth Schedule of the Constitution of India affords relative autonomy to the Adivasi communities living in Scheduled Areas of Peninsular India. Indigenous lands have not been restored and have been alienated by the Government, with no recourse through alternate settlements for the displaced people of Indigenous origin.¹³ The Constitution holds that, as much as possible, indigenous lands must not be acquired by the State. The LARR Act only fleetingly attempts to incorporate this aspect by incorporating Section 41 in the Act. Further, it lays down, on paper, safeguards in an attempt to honour Constitutional stipulations. However, weak drafting, coupled with even worse implementation, has significantly debilitated the mandate of the LARR Act to streamline land acquisition in an equitable manner and also debilitated the intent of the makers of the Constitution to establish the right to self-determination of the indigenous groups.

THE FIFTH SCHEDULE

Another interesting aspect to note is the infirmity of the Fifth Schedule itself. While the Constitution is rooted in the principle of the right to self-determination, it fails to comprehensively establish protections for Fifth Schedule areas to fully exercise this right to self-determination. When finalising the Fifth Schedule's provisions, the Constituent Assembly introduced a Tribes Advisory Council for all tribal areas that facilitated independent decision-

¹⁰ 'Indian Government and Coal India Sacrifice Indigenous Rights in the Name of Development' (*Amnesty International USA* 11 July 2016) <<https://www.amnestyusa.org/press-releases/indian-government-and-coal-india-sacrifice-Indigenous-rights-in-the-name-of-development/>> accessed 19 June 2024.

¹¹ Cultural Survival, 'Observations on the State of Indigenous Human Rights in India'.

¹² *Ibid.*

¹³ *Ibid.*

making. However, through a series of amendments, the provision annulled all of its powers by affording the President the final discretion on whether or not to allow the decision to be thoroughly affected. Further amendments also gave the State Governors the same power.¹⁴ Ultimately, if even the Constitution of India failed to thoroughly and effectively guarantee the right to self-determination and protection of tribal lands, it cannot be said that the Constitution guarantees, with absolute certainty, such protections—the absence of which can be used to justify any challenge to the acquisition of tribal lands—on the grounds of constitutionality or otherwise.

WHY TRIBAL LANDS MUST BE PROTECTED

Tribal Rights Are Globally Recognized

In 2006, the United Nations General Assembly took note of the recommendations of the Human Rights Council and decided to adopt the United Nations Declaration on the Rights of Indigenous Peoples. This adoption shows the extent of the United Nation's faith in the rationale that giving control to the "Indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development by their aspirations and needs."¹⁵ Article 8 (2) (b) of the Declaration states that states should provide effective mechanisms for preventing and redressing any action that tries to dispossess or alienate the Indigenous people of their lands, territories or resources.¹⁶ Further, Article 10 also stipulates that Indigenous peoples shall not be removed from their lands without prior informed consent, along with an agreement on just and fair compensation and, where possible, the option of return to their lands.¹⁷ Alongside these Articles, Articles 25 to 32 further grant various provisions that safeguard the tribal land rights against non-tribal groups.

In 2007, India voted in favour of the declaration; it is, therefore, worth pondering why these laws are not saving the tribal lands in India. The reason for the inefficiency of the international instrument is the condition established by India before its vote—that the entire population of India shall be regarded as indigenous. This rationale is fundamentally flawed. Indigenous

¹⁴ Saagar Tewari, 'Framing the Fifth Schedule: Tribal Agency and the Making of the Indian Constitution (1937–1950)' (2022) 56 *Modern Asian Studies* 1556.

¹⁵ United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007), UNGA Res 61/295 ("UNDRIP").

¹⁶ UNDRIP, art 8 (2) (b).

¹⁷ UNDRIP, art 10.

people are people coming from a particular place and having lived there for a long time before other people came there, relating to, belonging to or developed by these people. In light of the definition, Indians cannot be considered entirely indigenous as many of our lands have been invaded by the English colonists. However, the United Nations, considering the diversity of Indigenous groups, decided against using a formal definition and arrived at a set of guidelines in order to determine who could qualify as Indigenous people. These guidelines include the existence of distinct social, economic, and political systems, languages, cultures, beliefs and forms of non-dominant groups of society, along with the resolve to maintain and reproduce their ancestral existence as distinctive peoples and communities.¹⁸ According to these guidelines, all of the 705 ethnic groups in India that are officially recognized as scheduled tribes can be counted as real indigenous people. If India were to agree to adopt the laws established under the declaration, it would pave the way for establishing more stringent laws along with the necessary backing to enforce the implementation of the laws.

The Indian government continues to promote policies and practices that support Land grabbing, eviction of Indigenous Peoples from their lands and territories, and targeting of Indigenous rights and land defenders. Militarization of Indigenous territories, policies such as the Armed Forces Special Powers Act, and the labelling of Indigenous people as terrorists have been used to justify extrajudicial killings of Indigenous people. Defenders of Indigenous rights suffer state-inflicted violence. Despite the Forest Rights Act of 2006, which aimed to address historical and ongoing land theft, over half of claims had been rejected as of August 2021. This has led to millions of evictions of Indigenous Peoples from their lands, egregiously violating their rights. An aggressive hydropower development agenda also violates Indigenous Peoples' rights to Free, Prior and Informed Consent (FPIC) and affects their livelihoods, sacred sites, and economies on lands that are flooded and damaged by projects. The 2020 Foreign Contribution Regulation Act limits access to funding for civil society organizations, including Indigenous organizations. The Citizenship Amendment Act threatens the citizenship rights of Indigenous Peoples. Indigenous women continue to face violence due to their multiple marginalized identities as women and Indigenous people. India must ratify ILO 169, end extrajudicial killings and the policies that justify them, process land claims in compliance with

¹⁸ UN Permanent Forum on Indigenous Peoples, 'Factsheet: Who are indigenous peoples?' (*United Nations*) < https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf > accessed 19 June 2024.

Indigenous land rights in accordance with India's international obligations, and ensure compliance with Indigenous Peoples' rights to FPIC.¹⁹

According to the monthly progress report published by the Ministry of Tribal Affairs, as of August 31, 2021, a total of 4.2 million individual and community claims seeking title have been filed under the FRA, of which 53% from 20 states were rejected. Supporters of Scheduled Tribes' rights claim that "the Ministry and Department of Tribal Affairs are ignoring the legitimate claims of Scheduled Tribes."²⁰

Strong laws guarantee the land rights of Adivasi in India, but these legal provisions have never been implemented. For example, Section 4(5) of the Forest Rights Act states, "...no member of a forest-dwelling Scheduled Tribe or other traditional forest dwellers shall be evicted or removed from the forest land under their occupation until the recognition and verification procedure is complete."²¹ Similarly, the Panchayats (Extension to Scheduled Areas) Act, 1996, Section 4(i) states, "...Gram Sabha or the Panchayats at the appropriate level shall be consulted before acquiring land in the Scheduled Areas or implementing development projects and before resettling or rehabilitating persons affected by such projects in the Scheduled Areas..."²²

On February 13, 2019, the Supreme Court of India ordered the eviction of more than a million forest dwellers after their land claims were rejected and directed 21 state governments to file affidavits detailing how they had processed those claims under the FRA. The court then directed states to specify whether due process was followed in rejecting the claims. The forest department could not initiate any eviction process because the move could trigger social tensions in the area. Just two weeks later, the Supreme Court stayed its eviction order, considering that the state governments had not provided sufficient information on how the decisions on the claims were made. It directed all states to submit an affidavit by July 12, 2019.

¹⁹ Office of the United Nations High Commissioner for Human Rights, 'Observations on the State of Indigenous Human Rights in India' (*OHCHR* 2022) <<https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=10048&file=EnglishTranslation>> accessed 19 June 2024.

²⁰ Government of India, Ministry of Tribal Affairs, "Monthly update on status of implementation of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006," 2021.

²¹ Ministry of Tribal Affairs, Government of India and United Nations Development Programme, India. 2014. "Forest Rights Act, 2006."Section 4(5), <https://Tribal.nic.in/FRA/data/FRARulesBook.pdf>

²² The Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996, s 4 (i).

The stay on evictions was subsequently further extended as states did not provide information to the court.²³

These aforementioned instances greatly describe the ways in which India violates various articles of UNDRIP, including Articles 3, 5, 8, 10, 11, 19, 20, 21, 25, 26, 27, 29, 31, and 32; additionally violating Articles 22, 23, and 25 of the UDHR and Article 12 of the ICCPR.

THE CASE OF LAKSHWADEEP ISLANDS

Lakshadweep has undergone significant transformations over the years, shaped by its unique cultural and historical context. Established as a union territory in 1956, the islands transitioned from isolation to modernity with new governance, judicial systems, education, and land reforms. Historically, the islanders' livelihoods centred on fishing and coconut farming, with related industries forming the backbone of their economy. Despite the advantages of modern facilities, the island's distance from the mainland has been a double-edged sword, safeguarding their ecological balance but limiting access to essential services and infrastructure.

Recent legislative changes proposed by administrator Praful K Patel have sparked significant controversy. Appointed in December 2020, Patel introduced several regulations, including the Prevention of Anti-social Activities Regulation, Panchayat Regulation, Lakshadweep Development Authority Regulation, and Animal Preservation Regulation. These proposals, which lack local consultation, mark a departure from the inclusive approach of past reforms. The Lakshadweep Development Authority Regulation is particularly contentious, as it grants the administrator broad powers to execute development plans, forcibly evict residents, and penalize obstruction. Islanders fear this will lead to displacement and loss of traditional land ownership. The Panchayat Regulation, which bars individuals with more than two children from contesting local elections, is seen as an infringement on fundamental rights and self-autonomy. Additionally, the Prevention of Anti-social Activities Regulation is viewed as a tool to suppress dissent despite the low crime rates on the islands.²⁴

²³ Office of the United Nations High Commissioner for Human Rights, 'Observations on the State of Indigenous Human Rights in India' <<https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=10048&file=EnglishTranslation>> accessed 19 June 2024.

²⁴ Mariyam Mumthas, 'Lakshadweep and the Land Question: Historicising the Present Crisis | Economic and Political Weekly' (*Economic and Political Weekly* 24 June 2021) <<https://www.epw.in/engage/article/lakshadweep-and-land-question-historicising>> accessed 19 June 2024.

Public reaction has been swift and vocal. Under the banner of the Save Lakshadweep Forum (SLF), Islanders have organized peaceful protests, accusing the administration of prioritizing tourism development over local interests. They argue that dismantling structures used by fisherfolk and ignoring traditional practices will harm their livelihoods and cultural heritage. Critics, including former administrators, argue that any changes should respect local customs and involve the community in decision-making. They caution against blindly adopting tourism models from other regions, such as the Maldives, pointing out significant differences in size and population. Instead, they advocate for tailored, inclusive development plans that improve infrastructure, communication, and health facilities and support traditional industries like coconut farming and fishing.²⁵

Why Must We Care?

In the approved judgement of *Samatha v State of Andhra Pradesh and Others*, Justice K Ramaswamy stated that "Land is their most important natural and valuable asset and imperishable endowment from which the tribal derive their sustenance, social status, economic and social equality, permanent place of abode, work and living. Consequently, tribes have great emotional attachments to their lands."²⁶ The Honourable Justice was right in establishing the correlation between the identity of tribes and their dependence on their lands. Tribes have developed indigenous knowledge systems from the symbiotic relationship shared between themselves and their lands. It is important to preserve indigenous knowledge as it promotes sustainable resource management, which will lead to improved food security and biodiversity conservation. The indigenous knowledge includes the knowledge of agricultural matters such as seed selection, crop rotation and specialized water management techniques developed according to the local topography.

Further, as India is a country of diversified topographical regions, preserving indigenous knowledge is also important in preserving India's biodiversity. Another reason for protecting the indigenous knowledge derived from the lands of the tribes includes the development of traditional medicinal practices. It is important to preserve traditional practices such as Ayurveda, Siddha and Unani as they are quintessential towards the promotion of culturally appropriate, accessible and sustainable medical help in a country like India. Safeguarding

²⁵ Mariyam Mumthas, 'Lakshadweep and the Land Question: Historicising the Present Crisis | Economic and Political Weekly' (*Economic and Political Weekly* 24 June 2021)

<<https://www.epw.in/engage/article/lakshadweep-and-land-question-historicising>> accessed 19 June 2024.

²⁶ *Samatha v State of Andhra Pradesh* AIR 1997 SC 3297, [10].

cultural heritage and indigenous knowledge through safeguarding the homelands of scheduled tribes will lead to greater development of the cultural diversity and resource management of our nation. Further, it could pave the way for the establishment of intellectual property rights in various practices and customs. These property rights will promote the development and sharing of such practices, ultimately resulting in increased respect and recognition of their practices. This recognition could protect them from the infringement and unfair sharing of their knowledge, therefore allowing them to share their knowledge with the rest of the nation in order to promote sustainable development.

CONCLUSION

Tribal land rights are globally recognized, and India is a party to the convention that recognizes it. Adivasis are equal citizens of this nation. As aggressively India is preserving religious cultures, it must also preserve the Adivasi culture, which is dependent on land. Hence, the Central Government must take active steps to strengthen the LARR Act to prevent the acquisition of tribal land. The Act must be given powers to override legislation that jeopardizes tribal land rights. To enhance tribal land rights under the LARR Act, the Indian government should adopt several important measures. Firstly, ratifying ILO Convention 169 would strengthen protections for Indigenous and tribal peoples.

Additionally, carrying out independent investigations into extrajudicial killings in northeast India would help ensure justice for victims and their families. Repealing the Armed Forces Special Powers Act is vital to eliminating the culture of impunity linked to such acts. The government should also uphold the Forest Rights Act by safeguarding the rights of Scheduled Tribes and traditional forest-dwelling communities and by ensuring fair and transparent land claim processes. Furthermore, development plans should adhere to international human rights standards, including Free, Prior, and Informed Consent, and provide effective remedies for affected communities. Protecting human rights defenders and civil society organizations from harassment and intimidation is also essential. Implementing a national action plan on Indigenous Peoples' rights and collecting data disaggregated by gender and ethnicity will help develop appropriate policies and protection measures. Finally, the government should work with Indigenous communities to mitigate the adverse effects of the Citizenship Amendment Act and uphold their rights to citizenship and their territories.