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Destroying a Way of Life: the Forest Rights Act of India and Land Dispossession of Indigenous Peoples

Indrani Sigamany

This chapter contains a narrative that is not new. The story concerns land displacement of indigenous peoples, some of whom are nomadic, and whose occupations such as hunting and gathering and herding animals are a continuation of ancient lifestyles. Land dispossession of indigenous peoples is a story that is occurring globally, and has been happening for centuries, resulting in impoverishment: “While indigenous peoples make up around 370 million of the world’s population (some five percent) they constitute around one third of the world’s 900 million extremely poor rural people” (UN, no page number 2010). When examining the issues of land rights of indigenous peoples, it rapidly becomes apparent that this area is riddled with contradictions and anomalies. The laws of land ownership for example presume private individual ownership, and indigenous peoples, especially mobile indigenous peoples, traditionally use land collectively not individually, and do not necessarily possess titles to the land they use, making land rights law relatively inaccessible for them. In this chapter I argue that true access to justice requires more than merely enacting new legislation.

Access to justice is defined by the United Nations Development Program (UNDP) as, “much more than improving an individual’s access to courts, or guaranteeing legal representation. It must be defined in terms of ensuring that legal and judicial outcomes are just and equitable.” (UNDP, p.6 2004) For indigenous peoples struggling against dispossession of their lands and livelihoods, access to justice not only ensures their tenurial rights, but also contributes positively to poverty alleviation (Anderson, p.23 2003). This study critically examines the internal displacement debate in the context of human rights legislation and explores whether access to justice is improved by social justice legislation such as the Forest Rights Act 2006, (FRA) of India. This chapter is

divided into three sections. In the first section I begin with a description of indigenous peoples, and explore the particular problem of displacement that they are faced with by the emergence of the land conservation movement and the development of extractive industries. In the second section I trace the evolution of human rights norms, which since the 1970s, has been the foundation for “the elimination of extreme poverty as a moral imperative” (Gauri and Gloppen, p.486 2012). I posit that these norms have created positive change for indigenous rights and have led to development of legal architecture based on principles of social justice and human rights. In the third section, using two contemporary case studies of land displacement of two groups of forest people in Odisha and in Madhya Pradesh, I examine empirically how the Forest Rights Act of 2006, which is social justice legislation in India, affects indigenous forest peoples. Applying a UNDP typology for Access to Justice (UNDP, 2004) as a theoretical framework, I analyse socio legal indicators for positive change resulting from the Forest Rights Act. I compare these indicators to evidence that the FRA’s requirements are being ignored by both the Indian government and the corporate sector, who are prioritising economic development over indigenous livelihoods and land rights. This in turn could be propelling forest peoples into vulnerability and further impoverishment. I conclude the chapter with a discussion of whether this legislation offers indigenous peoples a tool with which to advocate for their rights against displacement, or whether in reality it makes this community more vulnerable.

Indigenous Peoples and Displacement

Indigenous peoples were ancient inhabitants of the land before the land was either colonised or had been established as separate Nation States (Gilbert and Doyle, p.5 2011). There are around 370 million indigenous peoples, comprising 5000 groups, living in about 70 countries (Impe, p.12 2011). Amongst indigenous peoples, mobile indigenous peoples comprise a sub category, who earn their livelihoods from activities that require a nomadic way of life (Dana Standing Committee, 2002). Examples of mobile indigenous peoples are pastoralists who herd animals; hunters and gatherers; and coastal nomads who sail and fish, though an increasing number of them are resorting to either semi nomadic or completely settled lives. In India, indigenous peoples are ancient

communities who reside in the hills and forests. The government uses the word Adivasi or tribal to refer to them. Kurup (2008, p.91) reports that according to the 2001 Government of India Census, 8.2 per cent of India's population is considered as tribal.

During and after the colonial period in India, tribal communities had an unfortunate history of land dispossession and impoverishment. Initially, under colonial rule, their lands were converted to state property as a source of revenue in the 1850s (Gadgil p.102 1992, Veron and Fehr, p.285 2011). Excluded from their forest based livelihoods, and from their lands which were being “eroded by the penetration of market forces, Adivasis were increasingly engulfed in debt and lost their land to outsiders, often being reduced to the position of agricultural labourers, sharecroppers and rack rented tenants” (Chandra et al., p.135 2008). The most detrimental legislation, passed by the British in 1871, was the Criminal Tribes Act that “notified about 150 tribes around India as criminal, giving police wide powers to arrest them and monitor their movements.” (D’Souza, p.3576 1999). Though the criminal Tribes Act was annulled in 1952 several years after independence (Radhakrishna, 2009), the attitudes of police and the general mainstream population have retained an anti tribal prejudice, often perceiving indigenous peoples as inferior and criminal. D’Souza (p.3576 1999) points out that Adivasis, who were traditional hunters and gatherers, when excluded from the forests were forced to forage elsewhere, and if found by the police were charged for ‘stealing’. Furthermore, their culture was being undermined by missionaries and colonists. Legislation such as the Indian Forest Act 1927 (Lim and Anand, 2004), displaced traditional forest dependents and dwellers from forest lands reserved for economic timber harvesting for the colonial government, and legalised the expropriation of forest lands from tribal and other forest peoples. The 1927 law is not to be confused with the Forest Rights Act of 2006, which legislates the restoration of land rights of forest peoples and forest workers.

Pressure from growing populations, their need for food and therefore more demand for agricultural land, often encroaches on forest lands. Growing extractive industries such as mining for economic development in mineral rich forest lands have been a threat to forest peoples in India both before and after independence. In addition to extractive industries, biodiversity conservation as a movement has unintentionally displaced forest peoples. In

many parts of the world including India, efforts at community conservation are often impeded by processes of development, and competition between human being and wildlife (Pathak, 2009). This process of destruction of habitats has happened universally and not only in India. For the world of conservation, this connotes the disappearance of flora, fauna, and competition for shrinking space between human beings and wildlife (Chatty and Colchester, p.3 2002;(Chatty, 2002).

The Wildlife Protection Act of 1972 in India, which created ‘inviolable protected areas’, excluded forest dwellers, and aimed at protecting wildlife. It was amended in 2002, to permit tribal peoples who were dependent on the forests to have usufruct rights. The amendments also introduced the concept of participative community management of buffer zones outside the forests, and of ‘Community Reserves’. This decentralised governance created new powers for local village decision making in the form of governance committees called gram sabhas. The amendments extended the gram sabha remit to "safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution" (Government of India, 2011). This was the start of more rights based norms to land rights in India, inclusive of greater participative and democratic policies, paving the way for a more just social legislation in the form of the Forest Rights Act of 2006.

This normative progression reflected the universal evolution of rights based jurisprudence, which offered indigenous peoples a legal tool to counter displacement, to rectify historical injustices and lost territories. This new awareness of the need to develop protective human rights norms, grew dramatically after the Second World War, strengthening the rights of indigenous peoples. It included both international and national human rights instruments, aspects of which can be used to advocate legally for land rights of indigenous peoples. These human rights instruments “establish principles and minimum rules for administration of justice and offer fairly detailed guidance to states on human rights and justice” (Galligan and Sandler, 2004). In this section below, I do not comprehensively list all legislation that comprise a normative framework for land rights, but highlight a few of the most important enactments pertaining to land rights, which are used by indigenous peoples.

A Human Rights Normative Framework

The Universal Declaration of Human Rights (UDHR 1948) recognizes equality, dignity and respect for all individuals, and these rights are 'inalienable' and absolute (United Nations, 1948). Revolutionary for marginalized communities such as indigenous communities, its basic principles have informed subsequent international and national legislation. The Convention on the Elimination of Racial Discrimination (CERD) of 1965 applies to all indigenous individuals and groups and resolves "to adopt measures to eliminate racial discrimination in all its forms" (ILO, 2003, OHCHR, 1965). The General Recommendation 23 of CERD on indigenous peoples urges States to ensure "that no decisions directly relating to ensure that indigenous rights and interests are taken without their informed consent." (Gilbert p.222 2007) Signatory states must submit a report to the UN Office of the High Commission for Human Rights (OHCHR) on the status of discrimination in their country.

The International Labour Organisation (ILO) Convention on Indigenous and Tribal Peoples of 1989, No. 169 (ILO, 2003) contains a substantial component on land rights. The ILO Convention used the term 'self management' which was incorporated into newer legal standards such as the 2007 UN Declaration of the Rights of Indigenous Peoples, and the national Forest Rights Act 2006 of India, and has been used by indigenous and tribal peoples to fight against displacement and for self management of forest lands. The Dana Declaration of 2002 emerged as a response to increasing problems of displacement of mobile indigenous peoples (Dana Standing Committee, 2002). It was the first declaration unique to mobile indigenous peoples, and therefore constituted a milestone. Though not legally binding, it established the context for mobile indigenous peoples' rights, and it also raised international awareness of a group that has been marginalised through history. Once a government ratifies a treaty recognizing rights of indigenous and tribal peoples, it has a responsibility to protect these rights, and to implement the legal principles fully (ILO, 2003). Since nomadic peoples use land and property collectively the question of property rights is complicated. Their particular rights were expanded in the 2007 UN Declaration of Rights for Indigenous Peoples (The Declaration) which has been a landmark for indigenous peoples and especially for

pastoralists, since it refers to communal land rights, collective usufruct rights, and also customary land laws (Gilbert and Doyle, 2011). One of the most significant international legal norms has been Free and Prior Informed Consent (FPIC) found in The Declaration. This specifies a very definite obligation of the state, requiring governments to inform and obtain the consent of indigenous and tribal peoples before taking any action involving their lands and giving indigenous peoples veto rights to decisions concerning their lands.

Consistent with this international human rights normative development, a series of other social justice laws were passed in India including National Rural Employment Guarantee Act, 2005; Right to Information Act, 2005; Protection Of Women From Domestic Violence Act, 2005; Right of Children to Free and Compulsory Education Act, 2009. (Sircar, p.545 2012), and the Forest Rights Act: Scheduled Tribes and Other Forest Dwellers (Recognition of Forest Rights) Act 2006 also known as the FRA (Indian Tribal Heritage, 2013, Government of India, 2012). The FRA, enacted by the Parliament of India, recognised usufruct and habitat rights of tribal and indigenous peoples. It was framed in progressive, rights based language, and was the result of long and vigorous advocacy by forest dwellers and activists.

Case Studies and Socio Legal Analysis

The Forest Rights Act grants community and individual forest rights to forest tribes and other forest dwellers. It is a revolutionary land rights law in India, because it includes local democratic forest governance, and gives the community the right to conservation of their lands, and rights to minor forest produce which has been the basis of their traditional livelihoods. A crucial aspect of this law is that forest dwellers cannot be evicted from the forests over which they have claimed rights, especially “till the recognition and verification procedure is completed” (Government of India 2012). In India there have been many recent examples of clear violations of the FRA however. The national newspaper The Hindu reported on February 18, 2013, that government officials destroyed 30 huts of the very isolated Baiga tribe leaving about 200 people homeless. They lived near the Bhoramdeo Reserve Forest, in the state of Orissa, sometimes known as Odisha. The Nehru government in 1947 records the Baiga community’s presence for centuries in

Orissa and the surrounding hills for centuries. The tribe had not been told that they would be evicted. The eviction, any potential plans of resettlement without prior land allocation, and a lack of gram sabha consent, were all violations of the FRA. No reason was given by the Administration for the destruction of the community's homes, other than ensuring the "safety of wildlife" (Sambhav, 2012).

On February 15, 2013, the Central government of India filed an affidavit in the Vedanta case, in which it took the position that it can acquire forest lands for the 'public interest' by 'extinguishing' tribal rights. Vedanta is a global mining company, planning to mine for Bauxite in the Niyamgiri hills, which is sacred to the Dongria Kondh tribes in Odisha (Saikia p.18 2014). This violated the provision in the Forest Rights Act which maintains forest dwellers and tribal communities final say in allowing forest land diversion for mining and other projects. Furthermore the affidavit sought to dilute the powers of the gram Sabha who also had veto rights under the Forest Rights Act (Natural Justice p.161 2013). According to the Forest Rights Act, forest dwellers cannot be resettled without the consent of the gram sabha. Furthermore, the affidavit claimed that consent is only necessary in cases in which "displacement of large numbers of people" was involved, and which affected their quality of life" (Sambhav, 2012), though the text of the law itself contained no such exception.

In each of these cases the Forest Rights Act was violated. I will concentrate only on the Vedanta case, in which the government diverted forest lands for non forest purposes. In doing so, the government circumvented the authority of the gram sabha and its eviction of the community under these circumstances was illegal. It also overrode the law's requirement for free, prior and informed consent. Activists and the tribal populations were extremely concerned that this was the beginning of the erosion of the Forest Rights Act, and everything that it was meant to protect (Natural Justice p.160, 2014; Dash & Khotari p.156, 2013)

When discussing a typology of fundamental elements of 'access to justice' below, I list the capacities that advance access to justice for marginalized communities such as indigenous peoples. This typology was developed by the United Nations Development Program (UNDP, 2004), and includes legal protection, legal awareness, legal aid and

counsel, adjudication, enforcement, civil society and parliamentary oversight, which I define below. I support this list with a discussion of the Indian government's response to, the Forest Rights Act.

The first element identified in this typology is legal protection, referring to enactment of the law and provision of mechanisms to implement it, including entitlement to remedies for violations of the law. The FRA fulfills the first element of the typology by providing a comprehensive framework for identifying those who are protected, and establishing procedures under which rights may be asserted.

The second element of the typology is legal awareness on the part of disadvantaged people. This includes their understanding of their right to seek redress, to know which individuals and institutions are entrusted with the protection of their rights, and the procedures for claiming their rights. In the Vedanta case, the community began a protest that drew the support of civil society activists. The activists helped raise their awareness of rights and the procedures under the FRA. The FRA requires the government to educate the community about the law. The government has failed to educate both the applicable communities and its own government officials about the FRA (Sarin and Springate-Baginski, 2010), as in shown in the Vedanta case, in which the government also ignored the substance of the law by forwarding a proposal to divert forest lands in Odisha for the mining of bauxite (Dash and Khotari p.159 2013). One of the particular challenges of providing access to justice through the FRA is that eighty five per cent of the Adivasi population live below the poverty line (Bhengra et al., p.7 1999), with lower literacy levels, making the formal legal system even more unfamiliar to them in comparison to their indigenous dispute resolution traditions. In addition, Adivasis, impoverished through land displacement have fewer resources to pursue claims.

Legal Aid and counsel is the third component and includes legal representation in formal legal proceedings. The constitution of India requires that free legal aid be provided to all those needing such services (Indian Constitution Part 4, article 39A). However, as with many of the promises embodied in the constitution, this is a right that is available more in theory than in practice. Galanter and Krishnan (2004, p.34) point out that public interest litigation programs in India have contributed to social change by raising “public

awareness of many issues, energized citizen action, ratcheted up governmental accountability, and enhanced the legitimacy of the judiciary.” However, the vast majority of poor people in India have no legal representation and lack resources, rendering them unable to claim their legal rights under either the FRA or any other law (Galanter p.8 1983).

The fourth component is adjudication, which refers to the fora in which disputes are resolved and compensation determined. India has courts and other less formal bodies such as lok adalats which are people’s courts. These are however expensive, overcrowded and slow. “the courts and tribunals where ordinary Indians might go for remedy and protection [of their rights] are beset with massive problems of delay, cost and ineffectiveness. Potential users avoid the courts; in spite of a long standing reputation for litigiousness, existing evidence suggests that Indians avail themselves of the courts at a low rate and the rate seems to be falling” (Galanter and Krishnan p.789 2004).

India does have procedures in place for appeals, and for implementation of final court orders, which constitute enforcement, the fifth element for the access to justice typology. If it is possible to overcome the barriers discussed in relation to the above four components of access to justice, and obtain a court order, the element of enforcement should not be a significant barrier to realising rights. In India however, research shows a “failure of the government to enforce court orders” even when a courtroom victory has been secured. “The High Court of Bangalore, for example, had 11,500 contempt of court proceedings before it in 1996 – most relating to the failure of government officers to enforce court orders” (Anderson, p.17 2003). For indigenous peoples seeking court action to force government officials to comply with the FRA, this creates further barriers to accessing justice.

The last element for access to justice comprises the monitoring and watchdog capacities of civil society and parliament in order to strengthen accountability of the justice system. Civil society organisations and the media are effective watchdogs. India has a robust and activist civil society, and a “largely uncensored” media (Dreze and Sen p.12 2013), both of which carefully highlight transgressions and lack of compliance on the part of the

government. The Baiga and Vedanta cases discussed in this chapter are contemporary and have been reported extensively by the media, which contributes to public awareness of issues related to the law. India's vibrant civil society has generated NGOs, such as AWARE, CERC and Anand Niketan Ashram, which run legal support programs for the poor (Galanter p.13 1983). Given the large numbers of potential claimants under the FRA, these resources are likely inadequate. National social justice activist NGOs such as Kalpavriksh, Vasundhara and Campaign for Survival Dignity to name just a few, have been instrumental in passing and monitoring the legislation, and creating nationwide networks such as Community Forest Rights Learning and Advocacy "CFR-LA" to share information, problems and updates about efforts to fully implement the FRA across India. Governmental accountability mechanisms include the Parliamentary Standing Committee on Social Justice and Empowerment, Forest Advisory Committee, the MoEF-MoTA (Ministry of Environment and Forests and Ministry of Tribal Affairs) Joint Committee set up in 2010 to examine the implementation of the FRA.

Conclusion

Since Independence in 1947, a number of promises have been made to the people of India through constitutional and legislative enactments. The implementation of some of these laws has been inadequate, leading to laws making very little practical difference in the lives of the people. The caste system, child labour, and bonded labour, have all been abolished in theory. However, in spite of human rights norms dominating social legislation for about three decades, a lack of access to justice for marginalised peoples ensure the existence of each of these outlawed practices. For the sake of a balanced view, we need to draw attention to the fact that under the FRA, many claims have been made, some of which have been successful in restoring land rights to indigenous peoples. The fact that social justice legislation such as the FRA exists also means that legal protection is established in principle. The issue is that these successes are neither uniform nor are they guaranteed, as illustrated above by the socio legal analysis using the UNDP typology on access to justice. Indigenous peoples are still faced with threats to their forest lands and livelihoods, in spite of the FRA having been in existence since 2006.

To some extent, it may be expected that a law will rarely solve all the problems its proponents hoped it would address. “Socio legal studies now assumes that an inevitable gap exists between black letter law and law in action.” (Schmidt and Halliday, p.7 2004). One of the reasons for this gap is those who work to pass a law and those who are responsible for its implementation are always members of different branches of the government: in India the Parliamentary and Executive branches. The different groups may have radically different levels of commitment to the purposes of the law, which impacts on whether the law is successful in contributing to social justice. In the case of the FRA, those who fought for its passage were members of the indigenous communities and civil society organizations who shared a fervent commitment to improving the lives of tribal peoples. However, those responsible for implementing the law and honoring its intent when dealing with forest lands, are largely members of the Forest Department of the MoEF. The Forest Department has for many years had territorial responsibility over forest lands. The FRA radically changed their responsibilities and removed a good deal of power from them. Perhaps not surprisingly, they have been reluctant to relinquish the power they previously enjoyed. Studies on the implementation of the Act paint a sobering picture of government violations, heavy handed and unjust administration, and of community forest rights being withheld (Agarwal, 2011, Dash and Khotari, 2012). This has led to “the alienation of tens of millions of forest dwellers from their surroundings, constant harassment and suffering, and the erosion of their own customs, institutions, and knowledge related to forests” (Dash and Khotari, 2013). The Council for Social Development, in its 2010 report on the Implementation of the Forest Rights Act warns that “unless immediate remedial measures are taken, undoing the historical injustice to tribal and other traditional forest dwellers, the Act will have the opposite outcome of making them even more vulnerable to eviction and denial of their customary access to forests”.

The implementation of the FRA, albeit imperfect, provides a tool for progress and legitimate hope for forest peoples that this legislation will correct historical injustices and begin to give forest peoples a greater voice in decisions. Changes however will be needed for the purposes of the law to be fully realised. These changes would include a sincere

commitment to abide by the letter of the law, accountability including consequences for those who fail to abide by the law, increased awareness and education about the law for both community and government administrators, and provision of greater resources for legal services. The capacity to be able to use legal processes would have many positive repercussions. Besides legal empowerment it would increase the political power of indigenous communities, which is “a prerequisite to the elimination of extreme poverty” (Gauri and Gloppen, p.486 2012)

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