

# Forest Tenure Rights in Global South: Experiences from India and Indonesia

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## 1. Introduction

Over the last three decades, there has been an increase in the recognition of forest tenure rights across the countries in the global south. Forest tenure rights are often justified on the basis of advancing equity, improving the livelihood of forest-dwelling communities, securing the sustainable use and management of forest resources, correcting historical injustices, and averting social conflicts. In addition, there is a view in forest governance literature arguing in favour of local forest communities' involvement in forest management on the grounds of efficiency. This view is grounded in the long-standing empirical evidence and research documenting the socio-economic and environmental benefits of recognition of forest tenure rights<sup>3 4</sup>. While there is no dearth of studies on forest tenure rights in Latin American and African countries, recent forest tenure rights reforms in Asian countries have not been given adequate attention. This article focuses on these rights in India and Indonesia.

Both India and Indonesia are home to a large indigenous population-104 million in India or 8.6% of the total population<sup>5</sup> and 50-70 million in Indonesia or 27% of the total population<sup>6</sup>. Another commonality between the two nations is that both have suffered imperial rule for centuries. While India battled the repression of the British rule, Indonesia was plundered by the Dutch. The imperialists ruling the two colonies were two different countries from the European continent, but their mandate was the same- occupation of territories lying beyond Europe with an abundance of natural resources, available for exploitation. What began as an

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<sup>3</sup> Geetanjoy Sahu, "The Genesis, Process, and Implications of the Forest Rights Act, 2006," *Review of Agrarian Studies* vol. 10, no. 2 (2020)

<sup>4</sup> Sharachandra Lele and Ajit Menon, *Democratizing Forest Governance in India*, (Oxford University Press, New Delhi, 2014)

<sup>5</sup> Office of Registrar General & Census Commissioner India. Census Info. Ministry of Home Affairs, Government of India. 2011, accessed September 13, 2022, <http://www.censusindia.gov.in/2011census/HLO/HH14.html>

<sup>6</sup> "Indigenous peoples in Indonesia", International Work Group for Indigenous Affairs (IWGIA), accessed September 13, 2022, <https://www.iwgia.org/en/indonesia/4224-iw-2021-indonesia.html#:~:text=Indonesia%20is%20home%20to%20an.50%2D70%20million%20indigenous%20peoples>

economic pursuit soon transformed into political ambition. Even after gaining Independence from their respective colonizers, governments in India and Indonesia continued to govern their commons<sup>7</sup> with the same policies established by the colonizers till the end of the 20<sup>th</sup> Century. It was only after several years of petitions, struggles, and campaigns in both countries, that a series of forest tenure legislations were introduced to undo historical injustice. This paper explores the evolution of forest tenure rights in these countries over the last three decades.

The paper is divided into six sections. Section 2 & 3 discuss the forest policies and institutions that were involved by the British and Dutch colonists in India and Indonesia respectively and how these continue to operate in the now independent colonies. Section 4 gives an overview of the process and institutional framework to recognize forest tenure rights through a comparative perspective. The key issues and challenges these two developing countries are facing today in the enforcement of forest tenure rights are discussed in Section 5. Summary of the discussion and the lessons that the two countries can learn from each other are discussed in Section 6. The analysis and discussion in this paper is based on secondary research materials drawn from academic articles, popular journals, government documents and case laws.

## **2. The Indian Story**

Gadgil and Guha (1992)<sup>8</sup> while discussing the “ecological history of British India”, comment that “western imperialism and environment degradation” always go hand in hand. Initially, expansion focused on asserting British dominance and political superiority over Indian kings. However- the destruction of forests was carried out by the British to mainly serve two purposes- first, to establish the railway network across India and second, to build ships, bridges and other wartime equipment for the First World War. The British extracted wood from Indian forests to build an extensive railway network, that was used to explore other far-flung forests and destroy them. It is worth noting that “...the regular high forest areas with

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<sup>7</sup> N.S. Jodha, “Depletion of Common Property Resources in India: Micro-Level Evidence,” *Population and Development Review*, vol. 15 (1989): 261. (The anthropologist scholar defined Commons or common property resources (CPRs) “as resources to which all members of an identifiable community have inalienable use rights... CPRs include community pastures, community forests, waste lands, common dumping and threshing grounds, watershed drainages, village ponds, and rivers and rivulets as well as their banks and beds...”) See also, Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action*, (Cambridge University Press, 1990)

<sup>8</sup> Madhav Gadgil and Ramachandra Guha, *This Fissured Land: An Ecological History of India*, (Oxford University Press, New Delhi, 1992), 102-103

scientific management increased from under one percent in 1919 to 13 percent in 1924 for Bihar and Orissa...”<sup>9</sup>

The British intention of exploitation was ably backed by stringent rules and legislations that they developed to ensure full ownership over the lands of the Indians. Eschewing a “populist” and even a “pragmatic” stance on rights over forest lands, the British colonizers developed an “annexationist” forest management system in India, one that ensured an “absolute proprietary right of the state” over all forest lands on the Indian sub-continent.<sup>10</sup> The long-standing sovereignty of the indigenous population over their customary lands was replaced by a policy of complete subordination, where the real owners, now had to exist and function at the mercy of the colonial state.

The British passed the Indian Forest Act, 1875 to legitimize the British acquisition of forests for building rail networks across India. This was the first step towards establishing a state monopoly- in this case, British monopoly- over Indian forests. The Indian Forest Act, 1878 was the last nail in the coffin. While assuring full ownership of the Indian forests to the British, the Act of 1878, slighted centuries old customary ownership rights and management practices of the Indian indigenous population. In the run-up to the passing of this Act, the British always argued that unless explicitly written<sup>11</sup>, rights cannot be presumed to exist. This argument was used to expunge the customary rights and practices of the original inhabitants of the Indian sub-continent. The Act also classified Indian forests into three categories- reserved forests, protected forests and village forests- and laid down an extensive list of penalties in case of any transgression of the law.<sup>12</sup>

It is important to note that although there was a strict classification of the forests into three on paper, in practice the British blurred the lines between the categories and exacted protected territories within the reserved category. Village forests were given the least territory and priority.<sup>13</sup> The categorizations and treatment mandated in this Act were given a new lease of life in the Indian Forest Act, 1927 which was also adopted by Independent India in 1947. The 1927 Act was passed by the British to restore its coffers that had been emptied due to the First World War. The Act “allowed the Forest Department to declare any forest land or

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<sup>9</sup> Niraj Kumar Singh, “British Forest Policy in India: The Imperial Dilemma”, *International Journal of Science and Research*, vol. 11 no. 1 (2022): 1520

<sup>10</sup> Gadgil and Guha, *This Fissured Land*, 109

<sup>11</sup> Gadgil and Guha, *This Fissured Land*, 110

<sup>12</sup> The Indian Forest Act, 1878 [Act VII of 1878], Chaps II-IV

<sup>13</sup> Gadgil and Guha, *This Fissured Land*, 117-118

wasteland as reserved forest land and prohibit people's access to these reserved forests without prior approval."<sup>14</sup> These forest areas were also permitted to be used for agricultural purposes. Commercially valuable species of trees were grown thereby replacing indigenous plants and species.<sup>15</sup> Such activities led to massive deforestation, rapid extinction of indigenous flora and fauna and a loss of livelihood and subsistence of the local indigenous population.

Surprisingly, the independent Government of India adopted the British-enacted Indian Forest Act, 1927 which was instrumental in organizing the forest governance model of free India.

Positioning economic insecurity as an imminent evil, post-independence government in India focused all its attention towards gaining economic security. This meant that forests would be considered an important source of revenue, a stance not different from the British colonizers. The 1952 National Forest Policy stressed on self-sustenance and "it provided for control over all remaining forests in private ownership, containment of shifting cultivation, and creation of village forests."<sup>16</sup> The principle of "progressively increased sustained yield"<sup>17</sup> was applied to meet the demands of other development sectors like defence, communication and industry. There was no mention of the rights of forest dwellers or indigenous population.

Apart from these policies, the government enacted legislations like the Mines Act, 1952; Wildlife (Protection) Act, 1972; Forest (Conservation) Act, 1980; Environment (Protection) Act, 1986; however, none of these legislations mentioned recognition of tenure rights or security of indigenous population residing in the forests.

The National Forest Policy that the Government of India developed in 1988, for the first time explicitly recognized the needs and traditional rights of local population- "...emphasis on conservation of forests and meeting the local needs of the people and their participation in protection and management..."<sup>18</sup> The policy highlighted the government's goal of increasing the forest cover to 33% across India. This was also the first time that the idea of joint management of forests was introduced. There was a shift of focus from timber production to expansion and conservation of forests.

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<sup>14</sup> Geetanjoy Sahu, "The Genesis, Process, and Implications of the Forest Rights Act, 2006," *Review of Agrarian Studies* vol. 10, no. 2 (2020): 77

<sup>15</sup> Gadgil and Guha, *This Fissured Land*, 118

<sup>16</sup> "Forest Policy and Legislative Framework," Indian Forests, accessed September 13, 2022, <http://ifs.nic.in/Dynamic/book/page3.pdf>

<sup>17</sup> *Ibid.*,

<sup>18</sup> *Ibid.*,

This policy was quickly succeeded by an action plan, released in 1990 by the Indian government, in the form of the Joint Forest Management (JFM) circular that sought to, “develop and manage degraded forestland under the custody of SFDs (*state forest departments*) with the help of the local community and voluntary organizations.”<sup>19</sup> The passage of the Panchayats (Extension to the Scheduled Areas) Act, 1996 (PESA) was also a victory for the indigenous population of India. PESA sought to create a three-tier decentralized form of self-governance and autonomy for the Scheduled Tribe population living in Scheduled Areas<sup>20</sup>, designated under the Fifth and Sixth Schedules of the Constitution of India. The Act created *Gram Sabhas* or village councils that had the requisite “powers and authority as may be necessary to enable them to function as institutions of self-government...” at the village-level in Scheduled Areas. According to the Act no States could implement laws concerning Panchayats without recognizing “the customary law, social and religious practices and traditional management practices of community resources...”<sup>21</sup>

Despite these enactments the situation of the Indian forest dwelling population remained unchanged. Government apathy towards the interests of the indigenous population percolated across all levels of the administration. This was evident in 2002, when the Supreme Court was hearing the T. N. Godavarman Thirumulpad<sup>22</sup> writ petition filed in 1995 against extensive illegal felling of trees for wood in Gudalur, Nilgiris, Tamil Nadu. The Supreme Court, applying its verdict to the entire country, ordered that any activity meant for non-forest purposes should be stopped within all the forests in India. It also directed the Central government to institute an Expert Committee that would take stock of the transgressions happening like illegal felling of trees, encroachments etc., despite the enactment of the FCA, 1986. As a result, massive eviction drives were launched by the Centre and State governments, evicting indigenous forest dwellers from their habitat.<sup>23</sup>

This proved to be a watershed moment for the advocates and supporters of customary tenure rights who now, rose to the occasion and launched a campaign against the government for its

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<sup>19</sup> “A Handbook: Joint Forest Management,” Ministry of Environment and Forests, accessed September 13, 2022, <http://ifs.nic.in/Dynamic/pdf/JFM%20handbook.pdf>

<sup>20</sup> “Scheduled Areas,” Ministry of Tribal Affairs, accessed September 13, 2022, [https://tribal.nic.in/downloads/CLM/CLM\\_Reports/6.pdf](https://tribal.nic.in/downloads/CLM/CLM_Reports/6.pdf)

<sup>21</sup> Panchayats (Extension to the Scheduled Areas) Act, 1996 (No. 40 of 1996 dated 24<sup>th</sup> December 1996) <https://www.panchayat.gov.in/documents/448457/0/PESA+Act+1996.pdf/df20430d-b595-998c-f3d6-6f7a0d615694?t=1632556716981>

<sup>22</sup> T.N. Godavarman Thirumulpad v. Union of India & Ors., (1997) 2 SCC 267

<sup>23</sup> “How to cheat forest dwellers of their rights (and enable mining),” Ishan Kukreti, Scroll.in, accessed September 13, 2022, <https://scroll.in/article/1023166/how-to-cheat-forest-dwellers-of-their-rights-and-enable-mining>

unlawful eviction drives across the country. Members of the Campaign for Survival and Dignity, “a national platform of tribal and forest dwellers’ organisations”<sup>24</sup> led the protests from the front. “The CSD employed multipronged strategies, ranging from campaigns to dialogue with political parties to litigation, to address the eviction of forest dwellers.”<sup>25</sup> Their struggle finally culminated in the passage of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act in 2006<sup>26</sup>.

The FRA is a momentous legislation for multiple reasons. The struggle towards the enactment of the Act was remarkable as it led to the creation of a separate ministry- the Ministry of Tribal Affairs, (earlier this portfolio was handled by the Ministry of Social Justice and Empowerment until 1999)- that would single-pointedly address the concerns of the Scheduled Tribes and indigenous population in India. Recognising the historical injustice meted out to the forest dwelling Scheduled Tribes and other traditional forest dwellers, FRA not just recognised the pre-existing rights of forest dwellers but also their right to “own, access, use, and manage their forest land within the traditional and customary boundaries of the village, irrespective of the classification of the forest.”<sup>27</sup>

FRA recognises four kinds of forest rights, (widely discussed in Chapter II of FRA, 2006)<sup>28</sup>- individual forest rights<sup>29</sup>, community forest rights<sup>30</sup>, Community Forest resource management rights<sup>31</sup> and local development rights<sup>32</sup>. Where IFR discusses individual ownership of forest land either for habitation or for self-cultivation; CFR and CFRM rights recognise the community ownership and management claims over forest land and its resources including minor forest produce, fish and other products in water bodies, cattle grazing etc. *Nistar* or concessional rights over forest land and resources granted by rulers of princely states also fall under the fold of CFR-CFRM rights. LDR under FRA authorises State governments to initiate development activities like building schools, *anganwadi* centres, canals, roads, drinking water pipelines etc within forest dwelling habitations to improve the standard of life of the forest dwellers. Identifying the limitations of the Central government, State

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<sup>24</sup> “The Forest Rights Act: A Weapon of Democracy in the Forests,” Campaign for Survival and Dignity, accessed September 13, 2021, <https://forestrightsact.com/about/>

<sup>25</sup> Sahu, “The Genesis, Process, and Implications of the FRA, 2006,” 79

<sup>26</sup> Hereinafter “FRA, 2006”

<sup>27</sup> Sahu, “The Genesis, Process, and Implications of the FRA, 2006,” 81

<sup>28</sup> The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (No. 2 of 2007 dated 29<sup>th</sup> December 2006) <https://tribal.nic.in/FRA/data/FRARulesBook.pdf>

<sup>29</sup> Hereinafter “IFR”

<sup>30</sup> Hereinafter “CFR”

<sup>31</sup> Hereinafter “CFRM”

<sup>32</sup> Hereinafter “LDR”

governments with the approval of the *Gram Sabha* can divert forest land for habitation development activities.

Despite its noble intentions, there are ample studies<sup>33</sup> that discuss the limited implementation of FRA even after sixteen years since its enactment in 2006. The Supreme Court of India too in 2019, ordered the eviction of over a million claimants of forest land or forest dwellers whose claims had been rejected. Terming forest dwellers whose claims had been rejected, as “encroachers” and the main cause of destruction of forest land in India, the Supreme Court ordered for their eviction. The Supreme Court failed to recognise how lakhs of claims are wrongfully rejected everyday across the country without following due process of law and by minimising the free exercise of the authority of the *Gram Sabha* in the rights recognition process.<sup>34</sup> Such actions of the executive and the judiciary in India hamper the exercise of FRA, 2006.

### 3. The Indonesian Account

Like India Indonesia also struggled under the rule of the Dutch colonizers who were equally exploitative and extracted not just natural resources but the dignity, sovereignty and even peace of the indigenous population of Indonesia. It all began with the ‘*domein verklarings*’ law or the Dominion Declaration that was adopted by the Dutch in 1870, which stated that ‘all land not held under proven ownership, shall be deemed the domain of the state’.<sup>35</sup> Initially this law was applicable only in modern-day Java however, as the ambitions of the colonizers grew so did the extension of the law- to areas beyond Java. The Dutch used this law to issue permits to foreign entrepreneurs interested in carrying out mining in Indonesia and fattening the colonizers’ coffers.

Post-independence, with the passage of the Basic Agrarian Law<sup>36</sup>, in 1960, indigenous Indonesians believed that their position would improve. However, advocates fighting for the justice for Indonesia’s indigenous population argue that although on paper by passing the

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<sup>33</sup> “Promise & Performance: Ten Years Of The Forest Rights Act In India,” Citizens’ Report as part of Community Forest Rights-Learning and Advocacy (CFR-LA) process, 2016, accessed October 16, 2022, <https://rightsandresources.org/publication/promise-performance-10-years-forest-rights-act-india/>

<sup>34</sup> “SC eviction order likely to impact 1.89 mn tribal, forest-dwelling families,” Nitin Sethi, Business Standard, accessed October 16, 2022, [https://www.business-standard.com/article/current-affairs/sc-eviction-order-likely-to-impact-1-89-mn-tribal-forest-dwelling-families-119022101132\\_1.html](https://www.business-standard.com/article/current-affairs/sc-eviction-order-likely-to-impact-1-89-mn-tribal-forest-dwelling-families-119022101132_1.html)

<sup>35</sup> “A 150-year old obstacle to land rights,” Ahmad Dhialulhaq & Ward Berenschot, Inside Indonesia, accessed September 13, 2022, <https://www.insideindonesia.org/a-150-year-old-obstacle-to-land-rights>

<sup>36</sup> Hereinafter “BAL”

BAL, the Sukarno regime, or the Old Order Era<sup>37</sup> tried to undo the wrongs committed by the Dutch, however, in practice the law is no different from the ‘*domein verkalring*’ law. By passing this law, advocates argue that the government reinforced the State’s control over forests in Indonesia. Article 5 of the Law while recognizing customary laws or *adat law* as law of land and agrarian affairs also states that the government has the power to declare all customary lands and resources as state property.<sup>38</sup> The government through this law snatched away from one hand what it had offered from the other, nothing different from the practice of the Dutch colonizers.

The New Order regime under General Suharto did little to alter the existing situation; on the contrary General Suharto passed the Basic Forestry Law No. 5/1967<sup>39</sup>, that asserted that “all forests in the territory of the Republic of Indonesia, including the natural resources contained therein, [are] controlled by the State.” Further, it stated that the state has the authority to even “a) establish and manage the planning, designation, provision and use of forests in accordance with its function in providing benefits to the people and the State; b) regulate forest management in the broadest sense; c) determine and regulate legal relations between person or legal entity with forest and regulate legal acts related to the forest.”<sup>40</sup> Article 2 of the law categorized forests into two- one, State forest and two, privately owned forest; the former and latter both did not include any customary land or rights.<sup>41</sup> The New Order was reminiscent of the Dutch colonial rule in Indonesia that sought to invisibilize the existence of indigenous population, their customary lands and even their customary rights over those lands.

The Suharto regime viewed land as an economic commodity, one that could ensure economic prosperity for the people of Indonesia. To that extent, the New Order law also introduced the concept of permanent forest which highlighted four types of land-use patterns- “(1) production forest, aimed at extraction to support timber exports and later timber-based industries (64.3 million ha); (2) protection forests mainly for environmental protection,

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<sup>37</sup> “Managing Popular Culture: Comparing Old Order, New Order, and Reform Periods,” International Integration for Regional Public Management (ICPM)2014, accessed September 13, 2022, <https://www.atlantispress.com/article/13402.pdf>

<sup>38</sup> Siscawati M, Banjade MR, Liswanti N, Herawati T, Mwangi E, Wulandari C, Tjoa M and Silaya T., “*Overview of forest tenure reforms in Indonesia*,” (Working Paper 223, 2017, Center for International Forestry Research, Bogor, Indonesia), p. 7, DOI: 10.17528/cifor/006402

<sup>39</sup> Basic Agrarian Law, 1967 (No. 5 of 1967), <http://extwprlegs1.fao.org/docs/pdf/ins3173.pdf>

<sup>40</sup> *Ibid.*,

<sup>41</sup> Siscawati M, Banjade MR, Liswanti N, Herawati T, Mwangi E, Wulandari C, Tjoa M and Silaya T., “*Overview of forest tenure reforms in Indonesia*,” (Working Paper 223, 2017, Center for International Forestry Research, Bogor, Indonesia), p. 5, DOI: 10.17528/cifor/006402

particularly for soil and water conservation (30.7 million ha); (3) natural conservation areas and nature preserve forests for conservation of endangered species and biodiversity conservation (18.8 million ha); and (4) convertible production forests for logging and agricultural estates (26.6 million ha).”<sup>42</sup> This categorization attracted a lot of foreign investment in the country however, it also led to massive deforestation in Indonesia. As a result, the economic position of the indigenous population suffered greatly, as their land was sold to private companies without their consent or sometimes even coerced consent.<sup>43</sup>

The New Order era is synonymous with widespread human rights abuses, conflicts, forced displacements and loss of substantial natural habitat and thereby the loss of wildlife and indigenous population.<sup>44</sup>

In 1999 with the passage of Forestry Law No. 41/1999<sup>45</sup>, the Indonesian indigenous community received some respite. Although this law continued to categorize forests as “State” and “Private”, for the first time, it recognized the existence of customary rights; albeit under the category of State forests. Article 1 of the law states that “customary forest is a State forest that is located in the territory of *masyarakat hukum adat* (customary law communities).”<sup>46</sup> Again, in Article 5 of the Act, it is stated that, “in case in its development the *masyarakat hukum adat* in question no longer exists, the management right of customary forest shall be returned to the government.”<sup>47</sup> Although the law failed to explicitly recognize customary and traditional rights of indigenous population, it was the first time that an Act mentioned the idea of ‘Social Forestry’.<sup>48</sup>

The combined ill-effects of the New Order regime and the impacts of the Forestry Law, 1999, led to the creation of the National Alliance of Indigenous Peoples of the Archipelago<sup>49</sup>, a coalition of indigenous groups in Indonesia.<sup>50</sup> AMAN argued that the Indonesian government was not committed to the cause of the indigenous population as it is repeatedly trying to superimpose the control of the State over the customary lands and forests. In 2012, AMAN

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<sup>42</sup> *Ibid.*,

<sup>43</sup>“Suharto’s Legacy,” Down to Earth, accessed September 13, 2022, <https://www.downtoearthindonesia.org/story/suhartos-legacy>

<sup>44</sup> *Ibid.*,

<sup>45</sup> Basic Agrarian Law, 1999 (No. 41 of 1999),

<http://www.flevin.com/id/lgso/translations/Laws/Law%20No.%2041%20of%201999%20on%20Forestry.pdf>

<sup>46</sup> *Ibid.*,

<sup>47</sup> *Ibid.*,

<sup>48</sup> Siscawati M, Banjade MR, Liswanti N, Herawati T, Mwangi E, Wulandari C, Tjoa M and Silaya T., “Overview of forest tenure reforms in Indonesia,” (Working Paper 223, 2017, Center for International Forestry Research, Bogor, Indonesia), p. 7, DOI: 10.17528/cifor/006402

<sup>49</sup> Hereinafter “AMAN”

<sup>50</sup> Aliansi Masyarakat Adat Nusantara (AMAN), <https://www.aman.or.id/>

submitted a petition in the Constitutional Court of Indonesia, challenging the constitutional validity of the 1999 Forestry Law. Advocates representing AMAN argued that the Forestry Laws in Indonesia neglected the interests of the indigenous population, and the government used these laws to systematically dismantle the management and self-governance practice of the customary communities. The laws they argued, were anti-indigenous tenure rights and were gender blind i.e., did not appreciate the contributions of indigenous women.<sup>51</sup> Further, they presented as evidence personal testimonies of community members, who had been subjected to human rights abuses that had hurt their survival and livelihood opportunities.<sup>52</sup>

The Constitutional Court of Indonesia ruled in 2013 that customary forests are no longer state forests but private forests. This was a big win for the indigenous population in Indonesia. It meant that the indigenous population of Indonesia could now lay claims to forests that they had lived on and managed since centuries. The Court also ruled that the state should offer collective ownership and management rights to communities thereby heralding the cause of community forest rights in conserving the forests and checking climate change.<sup>53</sup>

The Court's ruling was a landmark judgement, which created a positive impact upon the local communities. However, advocates argue that the success of the ruling has been limited. Changes were incorporated in the Forestry Laws but on-ground the situation remain unchanged. This was because the government incorporated a lot of conditionalities in granting titles to the communities. "For example, the customary communities are required to prove that their customary institutions for forest use and management existed and that they have sufficient evidence to claim their traditional territory."<sup>54</sup> The government has encouraged bureaucratic high-handedness and red-tapism is the norm. New layers to the existing administrative structures have been added making the entire title distribution process cumbersome and time-consuming. Hence, the government has not fulfilled the targets it had set out initially to grant titles to the maximum forest dwelling indigenous population in Indonesia.

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<sup>51</sup> Siscawati M., "Gender and forest tenure reform in Indonesia," (Working Paper 258, 2020, Center for International Forestry Research, Bogor, Indonesia), p. 1, DOI: 10.17528/cifor/007572

<sup>52</sup> "Ministry of Forestry obstructs law on indigenous peoples' rights in Indonesia," REDD Monitor, accessed September 13, 2022, <https://redd-monitor.org/2014/10/07/ministry-of-forestry-obstructs-law-on-indigenous-peoples-rights-in-indonesia/>

<sup>53</sup> "A turning point for Indonesia's indigenous peoples," Down to Earth, accessed September 13, 2022, <https://www.downtoearth-indonesia.org/story/turning-point-indonesia-s-indigenous-peoples>

<sup>54</sup> Siscawati M, Banjade MR, Liswanti N, Herawati T, Mwangi E, Wulandari C, Tjoa M and Silaya T., "Overview of forest tenure reforms in Indonesia," (Working Paper 223, 2017, Center for International Forestry Research, Bogor, Indonesia), p. 16, DOI: 10.17528/cifor/006402

As a result of the ruling of the Constitutional Court, a coalition of NGOs prepared a draft Recognition and Protection of the Rights of Indigenous Peoples Bill<sup>55</sup>, that was submitted to the House of Representatives to fully realize the vision of the Court's verdict. However, the legislation has been languishing in the hands of the lawmakers in Indonesia, who are reluctant to pass the Bill, albeit may negatively impact business interests in Indonesia.<sup>56</sup> The draft Bill seeks to provide legal recognition to the indigenous community, their rights to the land and resources, and legitimize the existence of traditional knowledge to combat climate change. It also lays down a system whereby community members can use free, prior and informed consent to either accept or reject development proposals of the government or private companies on their land. The Bill also provides for wider participation of indigenous women in decision-making processes as well as their representation in governance. Forest management too is an important theme in the Bill.<sup>57</sup>

Such provisions have shaken the decision-makers in Indonesia who have not responded favourably to the draft Bill.<sup>58</sup> In contrast, they have responded to the draft Bill by passing the Omnibus Laws on job creation, that make it easy for private companies like multinational corporations to acquire indigenous lands and do business in Indonesia.<sup>59</sup>

#### **4. Process of Enforcement of Forest Tenure Rights in India and Indonesia**

##### ***(a) The Case of India***

Chapter IV of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 lays down the process of enforcement of tenure right claims submitted by both individual forest dwellers as well as Gram Sabhas (village assemblies). There is no separate procedure for filing individual or community claims and the structure of enforcement is also the same.

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<sup>55</sup> Hereinafter "PPHMHA"

<sup>56</sup> "New life for Indonesia's long-delayed indigenous rights bill?" Cory Rogers, Mongabay, accessed September 13, 2022, <https://news.mongabay.com/2016/03/new-life-for-indonesias-long-delayed-indigenous-rights-bill/>

<sup>57</sup> Siscawati M, Banjade MR, Liswanti N, Herawati T, Mwangi E, Wulandari C, Tjoa M and Silaya T., "Overview of forest tenure reforms in Indonesia," (Working Paper 223, 2017, Center for International Forestry Research, Bogor, Indonesia), p. 17, DOI: 10.17528/cifor/006402

<sup>58</sup> "For Indonesian MPs, Indigenous rights may be bad for business, report says," Hans Nicholas Jong, Mongabay, accessed September 13, 2022, <https://news.mongabay.com/2021/09/for-indonesian-member-parliament-indigenous-rights-may-be-bad-for-business-report-says/>

<sup>59</sup> "Indigenous peoples and civil society organisations file a UN CERD submission on Indonesia's highly controversial Omnibus Law," Forest Peoples Programme, accessed September 13, 2022, <https://www.forestpeoples.org/en/press-release-indonesia-CERD-submission-omnibus-law>

The Act proposes a three-tier governance and enforcement model whereby a claim is first submitted to the *Gram Sabha* (village council), that after receiving claims, consolidates, and verifies them and then prepares a map “delineating the area of each recommended claim in such manner as may be prescribed for exercise of such rights”.<sup>60</sup> The *Gram Sabha* then, passes a resolution and forwards it to the Sub-Divisional Level Committee<sup>61</sup>. The SDLC, second tier in the governance model, is instituted by the state governments and is responsible for one, verifying the resolution of the *Gram Sabha*, and two, preparing a record of forest rights to be further aggregated to the District Level Committee<sup>62</sup>. The SDLC aggregates the record of forest rights through the office of the Sub-Divisional Officer. DLC is the final decision-maker in the three-tier enforcement model, and its approval of the record of forest rights prepared by the SDLC is final and binding.

Section 7 of Chapter IV in the Act provides for a State Level Monitoring Committee<sup>63</sup>, that shall be created by the state government to supervise and monitor the “the process of recognition and vesting of forest rights.” It shall also work as a medium of exchange of communication between the three-tier governance structure and the higher nodal agencies.

According to Section 8, members of the SDLC, DLC and SLMC are usually state government officers from the departments of Revenue, Forest, and Tribal Affairs and three members from the Panchayati Raj Institutions at the appropriate level, appointed by the respective Panchayati Raj Institutions “of whom two shall be Scheduled Tribe members and at least one shall be a woman.”<sup>64</sup>

The enforcement of tenure rights model in India follows an ‘appeals process’ in case of any conflict or dispute. The Act lays down that in cases wherein an individual or community is dissatisfied with the decision of the *Gram Sabha*, especially if its claims have been rejected by the *Gram Sabha*, it can appeal to the SDLC within sixty days of the passage of the resolution of the *Gram Sabha*. The SDLC is bound by law to hear the aggrieved party before taking a decision. If the party is unhappy with the decision of the SDLC it can further appeal, again within sixty days of the passing of the DLC resolution, to the DLC, that is also bound to hear the aggrieved party impartially. If the aggrieved parties are still dissatisfied with the

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<sup>60</sup> The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (No. 2 of 2007 dated 29<sup>th</sup> December 2006) <https://tribal.nic.in/FRA/data/FRARulesBook.pdf>

<sup>61</sup> Hereinafter “SDLC”

<sup>62</sup> Hereinafter “DLC”

<sup>63</sup> Hereinafter “SLMC”

<sup>64</sup> *Ibid.*,

decision of the DLC, they can file petitions in the respective State High Courts under Article 226 and in the Supreme Court under Article 32 of the Constitution of India.<sup>65</sup>

The entire enforcement procedure can reasonably wrap-up within six months to a year, provided all the documents are ready and verified and the government is in favour of granting the titles. However, there are times when the wait to receive the titles is endless<sup>66</sup> for the Indian Scheduled Tribes and other forest dwellers.<sup>67</sup>

### ***(b) The Case of Indonesia***

Unlike India, Indonesia does not have a comprehensive central law that governs the activities of its indigenous population occupying customary or *adat* forest lands. Provisions of the Basic Agrarian Law of 1999<sup>68</sup> are still used to deal with issues concerning indigenous population in Indonesia, especially their land and ownership rights.

The BAL, 1999, classifies forests into three functional categories-Production, Protection, and Conservation forests. Production forests are meant for production of timber and leased out to timber companies. Protection and conservation forests include national parks and biodiversity reserves. Any individual or group desirous of using forest products from these forests requires a license. Use of these lands is for purposes, defined in the law, like "planting, cultivating, harvesting, processing and marketing forest products," to gather non-tropical forest products, timber, or non-timber products as well as exercise usufruct rights. Users of these forests must pay a fee to access the resources, "All licensed Forest Users under Clauses 27 & 29 will have to pay various fees, including operational fees and Reforestation Funds levies plus an investment fund for forest conservation."<sup>69</sup>

In Indonesia, formalisation of customary land rights through statute can happen in two ways. "The first is through a statutory grant of authority to an *adat* law community or *adat* chief to

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<sup>65</sup> *Ibid.*,

<sup>66</sup> "Down memory lane: Forest Rights Act yet to achieve major milestones," G Seetharaman, Economic Times, accessed September 13, 2022, <https://economictimes.indiatimes.com/news/politics-and-nation/down-memory-lane-forest-rights-act-yet-to-achieve-major-milestones/articleshow/53469538.cms>

<sup>67</sup> "TN: Irular Tribe Long for Community Certificates, Face Hampered Education and Constitutional Rights," Neelambaran A, accessed September 13, 2022, <https://www.newsclick.in/TN-Irular-Tribe-Long-Community-Certificates-Face-Hampered-Education-Constitutional-Rights>

<sup>68</sup> Basic Agrarian Law, 1999 (No. 41 of 1999),

<http://www.flevin.com/id/lgso/translations/Laws/Law%20No.%2041%20of%201999%20on%20Forestry.pdf>

<sup>69</sup> Szczepanski, Kallie, "Land Policy and Adat Law in Indonesia's Forests," *Washington International Law Journal*, Vol 11 No 1 (2002), 231-255, <https://core.ac.uk/download/pdf/267981533.pdf>

control and manage customary land rights.”<sup>70</sup> The second is by granting rights to an *adat* law community through an administrative decision, like a ministerial decree from the Ministry of Environment and Forest. By granting recognition the customary communities can manage and utilise the resources from that land. Using the first way the “state creates avenues through which customary authorities are recognised by government, whereas in the second, the state grants a particular formal land title.”<sup>71</sup> Whereas the first is mere recognition, the latter is enforceable. Most provinces adopt the recognition model and do not go ahead with the decree due to resource constraints.

In 2016 the Ministry of Land and Spatial Planning created a new indigenous right of land called communal rights or *Ulayat* rights. These rights grant joint ownership land titles to indigenous groups or any groups that have inhabited a land or territory for more than ten years. In addition to guaranteeing their rights to possess a land through certification, communal rights are offered to prevent the land from being transferred to parties other than the indigenous group itself. However, *Ulayat* right is only eligible for indigenous or *adat* law communities.<sup>72</sup> Prior to the passage of Regulation 10/2016, indigenous groups could use but not own territories. By passing this legislation, Indigenous people can now apply to the National Land Agency (BPN) to register their land and get a legal document that shall prove the ownership and entitlement of their land. *Ulayat* right that exists on forest land is administered by the Minister of Environment and Forestry and in other cases by the BPN or Mines and Energy Agency.<sup>73</sup>

It is worth noting that although indigenous community rights are recognised as *Ulayat* rights, the registration of the land takes place on behalf of a group leader (*adat* chief) or an individual and not the entire group. So, although the community rights are recognised, due to the absence of a statute these collective rights are not legally enforceable. Hence, this does not ensure the security of customary lands of indigenous groups, at all. However, if a ministerial decree is passed then the rights are enforceable.<sup>74</sup>

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<sup>70</sup>Simarmata, Rikardo, “The Enforceability of Formalised Customary Land Rights in Indonesia”, *Australian Journal of Asian Law*, 2019, Vol 19 No 2, 299-313, <https://ssrn.com/abstract=3396381>

<sup>71</sup> *Ibid.*,

<sup>72</sup> Anggraini, Nesita and Lathifa, Umery, “Communal Rights of Land: Indonesia Government Effort to Protect the Rights of Indigenous Group,” *International Journal of Social Science and Humanity*, Vol. 7, No. 8, 2017, 513-517, <http://www.ijssh.org/vol7/876-SH0011.pdf>

<sup>73</sup> *Ibid.*,

<sup>74</sup> *Ibid.*,

Registration of land in Indonesia is carried out either systematically or sporadically. In the former, the government organises a registration drive to register several lands within a specified area, at once. “Meanwhile, in sporadic land registration, the land is registered based on the request of private individuals or entities.”<sup>75</sup>

Social forestry has also been an innovative feature of Indonesian forest governance model. There are several ways by which social forestry is carried out. The Village Forest scheme entails transfer of management rights to village institutions for its welfare. The Community Forestry scheme, wherein efforts are taken to rehabilitate the State forestland; “and State-sponsored community empowerment through community groups”<sup>76</sup>. The Community Plantation Forest Scheme is a plantation forest in a production forest, mostly for timber, nurtured by the community groups to increase the potential and quality of production forests. The Customary Forest scheme is a forest within the territories of indigenous population and is therefore, excluded from the State Forest category. In the Forestry Partnership scheme, “there is cooperation between the local community and the forest manager, the holder of the business license for forest utilization, forest services, the permit to use the forest area or the holder of the forest product primary industry business license.”<sup>77</sup>

The procedure for the enforcement of tenure rights in Indonesia is complex. Each provinces have its own way of doing it. According to Regulation 10/2016, groups should file their application to the local land office of the government.<sup>78</sup> All relevant files and documents should be enclosed in the application for communal tenure. Consequently, it is the responsibility of the mayor or the governor, whose jurisdiction the requested land falls in, to appoint an ad-hoc team consisting of government officials handling land affairs, forestry, and natural resources; an expert in *adat* law; representatives of the indigenous community; and a representative of the NGO communicating with the *adat* community. This team carries out administrative and on-ground verification before granting tenure.<sup>79</sup>

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<sup>75</sup> *Ibid.*,

<sup>76</sup> Siscawati M, Banjade MR, Liswanti N, Herawati T, Mwangi E, Wulandari C, Tjoa M and Silaya T., “*Overview of forest tenure reforms in Indonesia*,” (Working Paper 223, 2017, Center for International Forestry Research, Bogor, Indonesia), p. 11, DOI: 10.17528/cifor/006402

<sup>77</sup> Sari, D. A. A., A. Mayastuti, A. Rianto, and Z. Lutfiyah. "Indigenous people's forest management to support REDD program and Indonesia one map policy," *IOP Conference Series: Earth and Environmental Science*, 2018 Vol. 200, No. 1, IOP Publishing.

<sup>78</sup> Simarmata, Rikardo, “The Enforceability of Formalised Customary Land Rights in Indonesia”, *Australian Journal of Asian Law*, 2019, Vol 19 No 2, 299-313, <https://ssrn.com/abstract=3396381>

<sup>79</sup> Anggraini, Nesita and Lathifa, Umery, “Communal Rights of Land: Indonesia Government Effort to Protect the Rights of Indigenous Group,” *International Journal of Social Science and Humanity*, Vol. 7, No. 8, 2017, 513-517, <http://www.ijssh.org/vol7/876-SH0011.pdf>

Upon verification, the team shall submit a report to the mayor or governor who will then issue a decree accepting or rejecting the application of the *adat* community. If accepted, the decree issued will be submitted to the local land office that will register the land under communal tenure.

In instances where the community is occupying forest land the Ministry of Environment and Forestry will verify the report and release the land. The local land office shall then carry out the registry of the said land. In case the land falls within a plantation area, the ad hoc team will submit their investigation report to the individual or entity who owns the “tenure of *hak guna usaha* (a tenure that gives the holder a right to exploit any land for plantation or other types of enterprise) over the land.”<sup>80</sup> The entity or individual shall be asked to release the land voluntarily and then the local land office shall release the certificate. However, if the plantation area tenure holder objects to the claim of the community over its land, it can file a motion in the local land office that shall then involve the Ministry of Land and Spatial Planning to settle the dispute.<sup>81</sup>

The ordeal of the indigenous community does not end here. All certificates have attached with it restrictions, conditionalities and duties which they have to strictly abide by, as prescribed by the State. Tackling the outbreak of forest fires on their land is the responsibility of the community; further, “it is illegal to ‘clear forests’ or to cut down trees less than 500 meters from a lakeside, 200 meters from a water source or river in a swampy area...”; “harvest forest products without authorization . . . graze livestock in forests except where authorized . . . [or] remove any wild plants or animals from the forests without authorization.”<sup>82</sup> In Part XIII, civilian forestry officials are given overarching powers to initiate or stop investigations on illegal activities of indigenous community members, interview suspects, ask for proof of identification of individuals found in the forests at any time, even “confiscate any timber, forest products or equipment that they suspect is being used illegally or could be used in evidence; and arrest and hold suspects in conjunction with

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<sup>80</sup> Sari, D. A. A., A. Mayastuti, A. Rianto, and Z. Lutfiyah. "Indigenous people's forest management to support REDD program and Indonesia one map policy," *IOP Conference Series: Earth and Environmental Science*, 2018, Vol. 200, No. 1, IOP Publishing.

<sup>81</sup> Anggraini, Nesita and Lathifa, Umery, “Communal Rights of Land: Indonesia Government Effort to Protect the Rights of Indigenous Group,” *International Journal of Social Science and Humanity*, Vol. 7, No. 8, 2017, 513-517, <http://www.ijssh.org/vol7/876-SH0011.pdf>

<sup>82</sup> Szczepanski, Kallie, “Land Policy and Adat Law in Indonesia's Forests,” *Washington International Law Journal*, Vol 11 No 1 (2002), 231-255, <https://core.ac.uk/download/pdf/267981533.pdf>

the police.”<sup>83</sup> There are hefty fines against illegal activities too, indicating towards zero relief for the indigenous community.

## 5. Enforcement Challenges for Forest Tenure Rights in India and Indonesia

According to the latest Monthly Progress Report (March 2022) released by the Ministry of Tribal Affairs, claim titles distributed are only fifty percent of the number of titles received. Out of 4429065 claims received only 2234292 claims have been distributed by the States in India.<sup>84</sup> In Indonesia the situation is much worse.<sup>85</sup> The government has only recognized 176 Indigenous territories spanning over 2.69 million hectares, a meagre 15% of what the BRWA or the Ancestral Domain Registration Agency- created by a group of NGOs to guide Indigenous groups in mapping their own territories- has mapped. Within that, the MOEF has recognized only 89,783 hectares of customary forests, which is less than 1% of the 13.76 million hectares of customary forests, *hutan adat*, recognised by the BRWA.<sup>86</sup> Several reasons can be attributed to such abysmal performance in both countries.

### 5.1 Ground Realities from India

#### (a) *Ideological clashes among political parties in India*

It has been observed in recent times that due to different political parties forming governments at the Centre and State, implementation of laws and policies has been inconsistent.<sup>87</sup> FRA, 2006 has not been evenly executed across India especially in the north-east India, despite having a thick forest cover and a substantial forest dwelling population.<sup>88</sup> So is the case in Himachal Pradesh where the Central Act is yet to be adopted by the State government.<sup>89</sup> These are examples of cases wherein the Act is not in place. However, the situation is no different in states where the Act is implemented. Madhya Pradesh has the

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<sup>83</sup> *Ibid.*,

<sup>84</sup> Monthly Progress Report March 2022, Ministry of Tribal Affairs, Government of India, accessed September 13, 2022, [https://tribal.nic.in/downloads/FRA/MPR/2022/\(A\)%20MPR%20Mar%202022.pdf](https://tribal.nic.in/downloads/FRA/MPR/2022/(A)%20MPR%20Mar%202022.pdf)

<sup>85</sup> “Indonesian government lagging independent effort to recognize Indigenous lands,” Hans Nicholas Jong, Mongabay, accessed September 13, 2022, <https://news.mongabay.com/2022/05/indonesian-government-lagging-independent-effort-to-recognize-indigenous-lands/>

<sup>86</sup> “NGO maps out indigenous community territories,” The Jakarta Post, accessed September 12, 2022, <https://www.thejakartapost.com/news/2013/06/24/ngo-maps-out-indigenous-community-territories.html>

<sup>87</sup> “The shifting dynamics of Centre-state relationship,” Roshan Kishore, Hindustan Times, accessed September 13, 2022, <https://www.hindustantimes.com/india-news/the-shifting-dynamics-of-centre-state-relationship/story-f3BoA7Y6yq0xjQgLmrmBVJ.html>

<sup>88</sup> “Why India’s Northeast Could See FRA as a Way to Protect Its Community Forests,” C. R. Bijoy, The Wire, accessed September 13, 2022, <https://thewire.in/environment/why-indias-northeast-could-see-fra-as-a-way-to-protect-its-community-forests>

<sup>89</sup> “FRA implementation moving at a sluggish pace in Himachal Pradesh,” Vikas Vasudeva, The Hindu, accessed September 13, 2022, <https://www.thehindu.com/news/national/other-states/fra-implementation-moving-at-a-sluggish-pace-in-himachal-pradesh/article36678971.ece>

highest Scheduled Tribes population in the country, but the state is infamous for mounting atrocities on tribals and forest dwellers and failing to provide any relief to them in cases of conflict.<sup>90</sup> It is alleged by the forest dwelling population that their sufferings increase especially when a right-wing government sits in power.<sup>91</sup>

The FRA was passed by the United Progressive Alliance (UPA) coalition government headed by the Congress in 2006. Ever since the shift in power in the hands of the National Democratic Alliance (NDA) led by the Bharatiya Janata Party (BJP) in 2014, efforts at diluting laws protecting forests have increased. The recent attack on FRA was the release of ‘2022 Forest Conservation Rules’ under which consent of the Gram Sabha, as mandated under FRA, 2006, shall not be required in diverting forest land for development purposes.<sup>92</sup> In 2014 the Centre came up with a notification that sought to make the District Collector the deciding authority on forest land diversions and not the Gram Sabha.<sup>93</sup> However, this was rolled-back after much protest but through the recent rules, the BJP is again trying to dilute the provisions of the FRA.<sup>94</sup>

According to the Ministry of Tribal Affairs data from March 2022, Chattisgarh and Odisha have performed exceedingly well in distributing titles to its forest dwelling population. The Congress-led government in Chattisgarh, on the occasion of World Indigenous Day celebrated on 9<sup>th</sup> August 2022 distributed community forest resource rights to ten villages.<sup>95</sup> The Biju Janata Dal (BJD) government in Odisha has also been very active in distributing titles to the forest dwelling communities. In November 2021 twenty-four villages in

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<sup>90</sup> “Tribals at the receiving end in Madhya Pradesh,” Anando Bhakto, Frontline. Accessed on September 13, 2022, <https://frontline.thehindu.com/the-nation/human-rights/tribals-at-the-receiving-end-in-madhya-pradesh/article65666370.ece>

<sup>91</sup> “India’s indigenous peoples under attack by Modi government and conservationists,” Survival International, accessed October 15, 2022, <https://www.survivalinternational.org/articles/India-indigenous-under-attack>

<sup>92</sup> “Proposed changes to Forest Conservation Act a larceny of village resources,” Satyam Shrivastava, Down To Earth, accessed September 13, 2022, <https://www.downtoearth.org.in/blog/forests/proposed-changes-to-forest-conservation-act-a-larceny-of-village-resources-79654>

<sup>93</sup> “New FCA rules not in compliance with FRA, endanger rights of tribals and forest dwellers,” Shuchita Jha, Down To Earth, accessed September 14, 2022, <https://www.downtoearth.org.in/news/forests/new-fca-rules-not-in-compliance-with-fra-endanger-rights-of-tribals-and-forest-dwellers-84052>

<sup>94</sup> “Mass protests in Mumbai, Dehradun against Centre’s attempts to undermine forest rights,” Vijay Ravikumar, Down To Earth, accessed September 14, 2022, <https://www.downtoearth.org.in/news/mass-protests-in-mumbai-dehradun-against-centres-attempts-to-undermine-forest-rights-47543>

<sup>95</sup> “10 villages get community forest resource rights in Chhattisgarh,” R Krishna Das, Business Standard, accessed September 14, 2022, [https://www.business-standard.com/article/current-affairs/10-villages-get-community-forest-resource-rights-in-chhattisgarh-122081101339\\_1.html](https://www.business-standard.com/article/current-affairs/10-villages-get-community-forest-resource-rights-in-chhattisgarh-122081101339_1.html)

Nayagarh, Odisha received fourteen CFR titles.<sup>96</sup> Both the states have a non-BJP-led government and both the states have tried to expedite the implementation of FRA, 2006.

This asymmetry among states along with an asymmetry between the Centre and the states has greatly contributed to an uneven implementation of FRA, 2006 in India.

***(b) Problem of coordination among departments leads to delays***

FRA lays down that members of the SDLC and DLC include officers from the Revenue, Tribal and Forest Departments in every state.<sup>97</sup> Coordination among them is difficult due to conflicting demands among them. While the Tribal department was instituted to protect the Scheduled Tribe community from atrocities like discrimination, displacement etc., the revenue and forest departments have solely looked at the forests as revenue maximizing hubs and hence consider the forest dwellers obstacles in their mission. These conflicting viewpoints make it difficult for SDLCs and DLCs to function smoothly and address the concerns of the forest dwellers especially regarding claims distribution.

***(c) Flouting the provisions of FRA, 2006***

Under the Compensatory Afforestation Fund Management and Planning Authority (CAMPA) Act, 2016<sup>98</sup> the government tried to compensate for the impact of diversion of forest land for non-forest purposes by planting trees elsewhere, mostly on the lands of forest dwellers as was reported in Odisha.<sup>99</sup> Such actions go against the FRA, 2006 as the consent of the Gram Sabha is essential prior to the planting of trees on lands owned by forest dwelling communities.

Furthermore, the amendments proposed to the Indian Forest Act, 1927 in 2017<sup>100</sup> were violating FRA to the extent that it would strengthen the powers of the Forest Department and legitimize its harassment of forest dwellers. The amendments would also create Reserved

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<sup>96</sup> “In Nayagarh, India, community women get long-due recognition for protecting their forests,” Vandana Dhoop, the Land Writes Blog, Rights and Resources Initiative, accessed September 14, 2022, <https://rightsandresources.org/blog/in-nayagarh-india-community-women-get-long-due-recognition-for-protecting-their-forests/>

<sup>97</sup> Geetanjoy Sahu, “The Genesis, Process, and Implications of the Forest Rights Act, 2006,” *Review of Agrarian Studies* vol. 10, no. 2 (2020): 86

<sup>98</sup> The Compensatory Afforestation Fund Act, 2016 (No. 38 of 2016 dated 3<sup>rd</sup> August 2016), <https://www.ukcampa.org.in/Docs/CAMPA%20Act%202016.pdf>

<sup>99</sup> “Forest departments violating Forest Rights Act, say tribals,” Mayank Aggarwal, Mint, accessed September 13, 2022, <https://www.livemint.com/Politics/vIRcN0PdeQN5YqApdbNdll/Forest-departments-violating-Forest-Rights-Act-say-tribals.html>

<sup>100</sup> “Notice for Public Consultation,” Ministry of Environment, Forest, and Climate Change, accessed September 12, 2022, <https://prsindia.org/files/parliamentary-announcement/2022-07-31/Draft%20Indian%20Forest%20Act%201927%20.pdf>

Forests and Protected Areas in forests that would be used for commercial purposes by the government.<sup>101</sup> Such initiatives hurt the forest dwelling community and weaken the provisions of FRA.

More recently, the rules passed by the government on FCA, 1980 hits at the democratic spirit of FRA, 2006. According to the new rules *Gram Sabha's* consent is not mandatory (as enshrined in FRA, 2006) to use forest land for non-forest purposes.

***(d) Pandemic created trouble for the forest dwelling communities***

Due to the COVID 19 lockdown many tribal community members especially women across the country faced survival issues to the extent that their health, education, livelihood and means of sustenance were threatened. Trade of timber, non-timber forest produce, minor forest produces completely stopped. Primary health care centers became dysfunctional, and schools and colleges shut down. Migrants from the forest dwelling communities returned home without adequate funds at their disposal thereby making it difficult for their families to survive with enough food and basic amenities.<sup>102</sup> The Nomadic tribal communities too faced great hardship when they could not migrate because of the consecutive lockdowns.<sup>103</sup>

The forest dwelling community also dealt with massive evictions that took place in the Aravalli range in Haryana under the order of the Supreme Court during the peak of the pandemic.<sup>104</sup> There were evictions in Tamil Nadu as well where members of the Kadar tribe were evicted from Theppakulammedu settlement inside the Anamalai Tiger Reserve.<sup>105</sup>

Furthermore, multiple forest groups across the country alleged that the government gave clearance to over 120 development projects in fifth schedule districts amid the pandemic without taking the consent of the Gram Sabhas. Moreover, most meetings, to seek consent,

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<sup>101</sup> "The Indian Forest Act's proposed amendment is dangerous and fanciful," N. Broome, S. Ajit, M. Tatpati, Down To Earth, <https://www.downtoearth.org.in/blog/forests/the-indian-forest-act-s-proposed-amendment-is-dangerous-and-fanciful-64319>

<sup>102</sup> "COVID-19 and Tribal Communities: How State Neglect Increased Marginalisation during the Pandemic," EPW Engage, accessed September 13, 2022, <https://www.epw.in/engage/article/covid-19-and-tribal-communities-how-state-neglect>

<sup>103</sup> "Locked Down by the Pandemic, Culturally Important Nomadic Communities Struggle to Survive," Mohan et.al., The Wire, accessed September 14, 2022, <https://thewire.in/the-arts/locked-down-by-the-pandemic-culturally-important-nomadic-communities-struggle-to-survive>

<sup>104</sup> "SC refuses to stay demolition of over 10,000 settlements in Aravalli Forest area in Haryana," Scroll.in, accessed September 13, 2022, <https://scroll.in/latest/997836/sc-refuses-to-stay-demolition-of-over-10000-settlements-in-aravalli-forest-area-in-haryana>

<sup>105</sup> "ATR Kadar tribe eviction: NHRC issues summons to Tamil Nadu Chief Secretary, State submits report," SV Krishna Chaitanya, The New Indian Express, accessed September 14, 2022, <https://www.newindianexpress.com/states/tamil-nadu/2022/jun/04/atr-kadar-tribe-eviction-nhrc-issues-summons-to-tamil-nadu-chief-secretary-statesubmits-report-2461638.html>

were held virtually and it was difficult for the forest community members to participate as they did not have network in their villages.<sup>106</sup>

## **5.2 Indonesia**

### ***(a) Absence of a central law specifically catering to the needs of the indigenous population***

Provinces in Indonesia have adopted local laws for recognizing and granting rights to its customary forest dwellers<sup>107</sup> however, without an overarching law in place, indigenous population has no respite when faced with human rights abuses, eviction, displacement etc. Although a draft bill has been prepared by AMAN, lawmakers have not acted on it in the fear that it might discourage large businesses to do business in Indonesia.

To make matters worse, the Indonesian government passed the Omnibus law on job creation that, among many things, made it easy for oil palm plantations to continue extraction on forestland, home to indigenous communities, for three years provided they apply for legitimate paperwork and documents and pay the requisite penalties.<sup>108</sup> These companies would also have to denotify the designation of ‘forest’ attributed to the forest area where the extraction is taking place because by law palm oil extraction cannot be carried out in an area designated as forest.

### ***(b) Uneven distribution of customary rights in Indonesia***

As per records the government in Indonesia has recognized land rights of indigenous population over only 5000 hectares across Indonesia. Merangin reGENCY in the Jambi province has been a pioneer<sup>109</sup> in acquiring formal recognition of customary communities however, the same cannot be said about other provinces in Indonesia. However West

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<sup>106</sup> “Forest Rights Have Been Crushed During Lockdown, Say Activists,” Newsclick, accessed September 13, 2022, <https://www.newsclick.in/forest-fights-crushed-during-lockdown-activists>

<sup>107</sup> “Mapping of Indigenous lands ramps up in Indonesia — without official recognition,” Hans Nicholas Jong, Mongabay, accessed September 12, 2022, <https://news.mongabay.com/2022/09/mapping-of-indigenous-lands-ramps-up-in-indonesia-without-official-recognition/>

<sup>108</sup> “Indonesian omnibus law’s ‘whitewash’ of illegal palm oil shocks its architects,” Hans Nicholas Jong, Mongabay, accessed September 12, 2022, <https://news.mongabay.com/2021/05/indonesian-omnibus-laws-whitewash-of-illegal-palm-oil-shocks-its-architects/>

<sup>109</sup> “How Jambi province could become the role model of sustainable landscapes in Indonesia,” André Rodrigues De Aquino and Efrían Muharrom, World Bank, accessed September 12, 2022, <https://blogs.worldbank.org/eastasiapacific/how-jambi-province-could-become-role-model-sustainable-landscapes-indonesia>

Kalimantan has been consistently performing poorly on the same parameter.<sup>110</sup> The central government should take up the recognition process urgently as the local laws are not adequate to address the challenges faced by the indigenous communities in Indonesia.

***(c) Individual ownership of customary lands***

The drawback of individual ownership of customary lands is that it makes it easier for the State and other private companies to acquire large amounts of land by bribing or even manipulating leaders of these groups. Further, the idea of individual ownership of *adat* forests contradicts the very principle of community living practiced by the indigenous population everywhere. The regulation, though mentions ownership over *adat* lands, fails to explicitly discuss the management and utilisation of resources from the forests, which is central to the role played by indigenous communities across the world. Lack of legal recognition of community rights hits at the heart of the struggle for survival of the indigenous population in Indonesia.<sup>111</sup>

***(d) Widespread corruption and bottlenecks in the bureaucratic set-up***

By instituting processes that focus on licensing, the government in Indonesia has created multi-level corruption conducive avenues. This is especially true in the case of granting licenses to oil palm plantation companies who have the requisite capital to acquire licenses on forest land after paying penalties and paying-off officials for the important documents. Bribes to the tune of \$1.6 million have been paid by these companies to land agencies, as per media reports.<sup>112</sup>

The Indonesian Sustainable Palm Oil certification, released by the government in 2011, is another way by which government officials engage in corruption. This certification was adopted by Indonesia after condemnation from the Roundtable on Sustainable Palm Oil, a certification standard for palm oil production in the world, over Indonesia's breach of the Roundtable on Sustainable Palm Oil certification in 2010.<sup>113</sup> Forests were being given to the

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<sup>110</sup> Herman Hidayat et al., "Forests, law and customary rights in Indonesia: Implications of a decision of the Indonesian Constitutional Court in 2012," *Asia Pacific Viewpoint*, Vol. 59, No. 3 (2018), ISSN 1360-7456, p.293-308

<sup>111</sup> Nesita Anggraini, and Umery Lathifa, "Communal Rights of Land: Indonesia Government Effort to Protect the Rights of Indigenous Group," *International Journal of Social Science and Humanity*, Vol. 7, No. 8, 2017, 513-517, <http://www.ijssh.org/vol7/876-SH0011.pdf>

<sup>112</sup> "Indonesian officials charged in \$1.6m bribes-for-permits scheme," Hans Nicholas Jong, Mongabay, accessed September 13, 2022, <https://news.mongabay.com/2019/12/indonesia-palm-oil-permits-bribes-corruption-kpk/>

<sup>113</sup> "Fraud allegations against Indonesian palm oil giant widen, tarnishing auditors and sustainable palm oil initiative," Rhett A. Butler, Mongabay, accessed September 12, 2022,

companies for palm oil extraction before any environmental impact assessment could be carried out. However, despite having the Indonesian Sustainable Palm Oil certification there is no assurance that palm oil extraction is happening in a sustainable and corruption-free manner.<sup>114</sup>

Moreover, "...corruption also flourishes when rules and laws are complex, confusing or contradictory, and difficult and expensive to implement..."<sup>115</sup> as is the case in Indonesia wherein the local provinces have passed a variety of laws on recognizing customary forests but there is no Central law to monitor and bind these scattered laws.

In an attempt to arrest deforestation and corruption, the REDD+ (or the reducing emissions from deforestation and forest degradation and enhancing carbon stocks) proposition, under the United Nations Framework Convention on Climate Change (UNFCCC) sought to legalize corruption. This was done to harness better opportunities for mitigating climate change. The proposal laid down that by allowing corruption in the preliminary stages of rolling-out the REDD+ policy, probability of its occurrence later reduces. However, the Indonesian government must identify the corruption hotspots and increase transparency at all stages.

## 6. Conclusion

On a close reading of the above sections, India and Indonesia have undergone a similar trajectory when it comes to its forest governance struggle and there are many areas of convergence between the two Asian nations. Largely, India and Indonesia converge on three major points- first, both countries depict a co-governance model whereby the formal governing institutions share decision-making responsibilities with non-governmental or civil society organizations. Campaign for Survival and Dignity and others in India and, AMAN in Indonesia have created a space at the decision-making table, as worthy representatives of the indigenous population.

Second, despite a greater emphasis on 'decentralization of power' in both the nations, institutional and financial support of the State is extremely essential for the indigenous community to not only achieve *de facto* but a *de jure* identity. The passage of the PPHMHA

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<https://news.mongabay.com/2010/08/fraud-allegations-against-indonesian-palm-oil-giant-widen-tarnishing-auditors-and-sustainable-palm-oil-initiative/>

<sup>114</sup> SAB Choiruzzad, A Tyson, H. Varkkey, "The ambiguities of Indonesian Sustainable Palm Oil certification: internal incoherence, governance rescaling and state transformation," *Asia Europe Journal*, (2021) 19:189–208 doi: 10.1007/s10308-020-00593-0

<sup>115</sup>A. Dermawan, E. Petkova, A. Sinaga, M. Mumu Muhajir, and Y. Indriatmoko, "Preventing the risk of corruption in REDD+ in Indonesia," United Nations Office on Drugs and Crime and Center for International Forestry Research, 2011, Jakarta and Bogor, Indonesia

drafted by AMAN will help secure a *de jure* existence for the indigenous population in Indonesia. In India, the forest dwelling population will benefit from a more robust and cooperative institutional mechanism that upholds their rights and dignity guaranteed under FRA, 2006.

Third, India and Indonesia have found reason in using and harvesting forest resources more efficiently and sustainably. There is a growing consensus within the two Asian nations over developing mechanisms to protect natural resources like certifications for sustainable use of palm oil in Indonesia and creation of management committees to protect common forest resources in India. Some states in India have even granted titles to villages where women lead forest protection committees that guard and ensure sustainable use of forest resources.<sup>116</sup>

There are multiple points of convergence between the two nations, nevertheless, it is important to focus on what these two countries can learn from each other's experiences.

It would be beneficial for Indonesia to understand the implications of pre-FRA India and the post-FRA India. The reluctance of Indonesian policymakers in passing the Recognition and Protection of the Rights of Indigenous Peoples Bill in its People's Consultative Assembly will only aggravate the long-standing issues of its indigenous population. Certifications and licenses can only go so far in ameliorating the historical injustice meted out to the customary population; however, by constituting a comprehensive law in favour of its customary population, not only does the indigenous community benefit but also climate change or deforestation concerns get addressed.

It is worth noting that the process of formulating a legislation in Indonesia, catering to the needs of the indigenous population, should first begin with the constitution of a Truth and Reconciliation Commission<sup>117</sup>, which, the civil society in Indonesia believes, is essential to build trust between the ailing indigenous population and the government. Institution of such Commissions will help in undoing the historical wrongs committed by the State against the

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<sup>116</sup> "As COP26 Vows to End Deforestation, a Lesson Closer Home from Odisha's Nayagarh," Vandana Dhoop, the Quint, accessed October 16, 2022, <https://www.thequint.com/voices/opinion/as-cop26-vows-to-end-deforestation-a-lesson-closer-home-from-odishas-nayagarh#read-more>

<sup>117</sup> "RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES Truth commissions," Office of The United Nations High Commissioner for Human RIGHTS, 2006, accessed September 13, 2022, <https://www.ohchr.org/sites/default/files/Documents/Publications/RuleoflawTruthCommissionsen.pdf>

customary communities and in understanding the needs of the indigenous community.<sup>118</sup> This could be the first step towards bringing justice to the customary communities in Indonesia.

India has a lot to learn from Indonesia too. Indonesia's experience in creating certification models for sustainability is a positive step provided it is followed-up by anti-graft rules and policies. Further, the mapping techniques adopted by the BRWA<sup>119</sup>, is a great way, available to the civil society, of asking for accountability from the government thereby forcing them to produce genuine data on mapping of forest areas claimed by the forest dwelling population in India. More so because the government of India has rolled-out the SVAMITVA Scheme<sup>120</sup> in 2021, whereby the government proposes to establish clear ownership of property in rural areas using drone technology. By mapping these land parcels, the government will be able to issue legal ownership property cards or title deeds and present a 'Record of Rights' to the households.

The scheme focuses on individual ownership and does little to change the status of non-ownership rightsholders living on public lands like slum-dwellers. As there is no provision for co-ownership within the scheme, women too have been excluded from it. It also does not encourage community participation in boundary mapping thereby creating scope for more conflicts among various communities.<sup>121</sup> In order to check the authenticity and veracity of the mapping it is essential for civil society groups in India to develop mapping techniques, as has been done by BRWA in Indonesia.

There is also an urgent need for both the countries to implement the United Nations Declaration on the Rights of Indigenous People (UNDRIP)<sup>122</sup>, 2007 in its letter and spirit for better governance of its forest dwelling indigenous population.

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<sup>118</sup> "Indonesian ministry discusses draft law on formation of truth and reconciliation commissions," International Coalition for Papua, accessed September 12, 2022, <https://humanrightspapua.org/news/2021/indonesian-ministry-discusses-draft-law-on-formation-of-truth-and-reconciliation-commissions/>

<sup>119</sup> "Mapping of Indigenous lands ramps up in Indonesia — without official recognition," Hans Nicholas Jong, Mongabay, accessed September 12, 2022, <https://news.mongabay.com/2022/09/mapping-of-indigenous-lands-ramps-up-in-indonesia-without-official-recognition/>

<sup>120</sup> "SVAMITVA SCHEME: Survey of Villages Abadi and Mapping with Improvised Technology in Village Areas," Ministry of Panchayat Raj, accessed September 11, 2022, <https://svamitva.nic.in/svamitva/index.html>

<sup>121</sup> "SVAMITVA may reinforce inequalities in rural India," Kaveri Haritas, Deccan Herald, accessed September 13, 2022, <https://www.deccanherald.com/opinion/panorama/svamitva-may-reinforce-inequalities-in-rural-india-1111852.html>

<sup>122</sup> "United Nations Declaration on the Rights of Indigenous Peoples," Department of Economic and Social Affairs Indigenous Peoples, United Nations, accessed September 13, 2022, <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>