



Protecting the Aborigines of Jammu & Kashmir - An Exploratory Study of the Tribal Quest for Settlement Through the Roshni Act And Forest Rights Act

*Romit Nandan Sahai**

ABSTRACT

The Jammu & Kashmir Region has seen an unscrupulous wave of changes in its polity within a span of few years. One of the relegations of the year 2020 was the annulment of the Roshni Act, 2001, which sought to provide land to the landless in a lawless state. The aim of this paper is to explore the premise of the Roshni Act through the lens of the aboriginal and indigenous communities of the region to showcase what the act was promulgated to accomplish and what was happening in its guise. It will do so by first highlighting the precarity of the Tribal population of the region, and then it will explain the high aspirations & low realizations of the Roshni Act. It would then analyse the reasoning of the Jammu & Kashmir High Court and extend a robust defence towards their decision. Lastly, it would try to visualize the seemingly uncertain future of these aborigines by analysing the aftermath and outreach of the court's verdict and what future beholds for them with the recent move of the Government to implement the Forest Rights Act in the region to try and answer whether the Forest Right Acts would be able to fill in the void created by the Roshni Act.

Introduction

On the 9th of October 2020, the Jammu & Kashmir High Court pronounced the annulment of the Roshni Act, which was one of the first forms of land reform scheme in any state. The decision received a mixed response. While some right-winged “devotees” acclaimed that the court did its duty to protect the integrity of the State & its land from falling into the wrong hands. The others viewed this move as the starting point of a long land conundrum on top of the already prevailing predicaments of the Jammu & Kashmir Region,

Demography of the Dependents

Jammu & Kashmir, for centuries, has been the epicentre for diverse and vivacious communities; given its unsettling history and its strategic geography as the focal of politics, this region, in fact, holds the 2nd Rank in terms of Percentage of Schedule Tribe population; outpaced only by Madhya Pradesh¹.

* Third Year, B.B.A. LL.B. (H.) Student - Vivekananda Institute of Professional Studies, Guru Gobind Singh Indraprastha University, New Delhi - India.

¹ Office of Registrar General & Census Commissioner, “Jammu & Kashmir – Data Highlights Scheduled Tribe Census” (Ministry of Home Affairs, 2011)



The population of Different Scheduled Tribes in Jammu & Kashmir as per 2011

S. No.	Tribes among STs	Male	Female	Total Population of Tribe	Percentage of Total ST Population
01	Bakarwal	69,621	63,577	13,31,198	09.0
02	Balti	26,473	25,445	51,918	05.6
03	Beda	216	204	420	0.03
04	Bot, Boto	45,295	46,200	91,495	06.2
05	Brokpa, Drokpa, Dard, Shin	25,240	23,199	48,439	03.3
06	Changpa	1,355	1,306	2,661	00.2
07	Gaddi	23,808	22,681	46,489	03.2
08	Garra	275	229	504	0.04
09	Gujjar	5,10,710	4,69,944	9,80,654	65.7
10	Mon	418	411	829	0.06
11	Purigpa	20,119	18,982	39,101	02.7
12	Sippi	3,064	2,902	5,966	00.5
	Total	7,76,257	7,17,042	14,93,299	100.0

Census²

As per the census office of Jammu, STs constitute almost 11.9% of the total population, wherein the Muslim Gujjar community is predominant. Gujjars are named after their profession; Cattle Breeders initially resided in Gurjistan (now Afghanistan), from where they started migrating in the 5th century in search of green pastures, and within the next two centuries, they had migrated into Gujarat. Due to the droughts, they again started migrating, this time towards Kashmir³. They finally settled here because the topography was ideal for cattle grazing. The second dominant tribe in Jammu & Kashmir are the Bakarwals, who share a common ancestry with the Gujjars and differ in titular because of their rearing of goats.

Both of these Scheduled Tribes, among others, were nomadic, moving from pasture to pasture within the vast lands of Jammu & Kashmir. As the political turmoil turned up in the region, these tribes underwent a substantive change in their subsistence. In 1947 when the British left India, and the undecided princely State of Kashmir was still picking whom to side with,

² Kumar Rajesh, "State Policies and Marginalized Communities Politics of Reservation in Jammu and Kashmir" (2016) (25 University of Jammu – India)

³ Mohd. Abdullah & Yassar Mehmod et al, "Historical Background and Socio-Cultural Aspects of Gujjar Community in Jammu and Kashmir: A Case Study" 68(48) *Research Gate* (2020).



Pakistan Armed forces, under the apprehension that Kashmir's Hindu Monarch would join India, launched an armed rebellion, better known now as the Indo-Pak war⁴. Subsequent clashes between India & Pakistan for the political integration of Kashmir resulted in the loss of cattle and a significant hindrance on the nomadic patterns of these Scheduled Tribes. Because of this, these nomadic tribes became more dependent on the forests, wherein they relied upon the various Orchids and Forest Produce for their living.

In essence, these nomadic tribes transfused into Forest Dwellers, who started cultivating patches of crops like maize within the Kashmir Lands. Another consequence of the political volatility within the region was the invasion of these lands by several Separatists and Naxalites like the J&K Liberation Front, who proliferated the dwellings of these indigent people to carry out their plans. These people, under the coercion of these armed militants, were forced to harbour them in their homes which consequently turned their lands into a 'warzone' inviting security combatants. Amidst these crossfires, it was these people who lost out on their dwellings and were left with no place. Not to mention the increase in infrastructural projects like dams has also led to more and more land being annexed and cleared, which again leaves these people displaced from their inhabitancy. Even the High-Level Committee on Socio-Economic Reforms noted the aftermath of the devastations & alienations of Forest Lands on the livelihood of these tribals in its report.⁵ Because of the conflict & volatility, these tribals were forced to occupy the lands of J&K in their anguish for survival. J&K, more than any other state, felt a very strong need for an immediate recognition & enforcement of the principle behind the Right to Land, but because of the special polity of the region, that right was a very distant dream for these at-risk communities and their access to the forests or lands for cultivation never came to be consecrated within the region. As a result of which the Roshni Act was brought in force to regularise the right of these people within the region.

Praxis Of The Roshni Act: High Aspirations & Low Realisations

In 2000, in observance of the increase in land occupation in Kashmir, the then Financial Minister said that under the legal requirement of show-cause notice, eviction of these

⁴ Raju G.C. Thomas, *Perspectives on Kashmir: The Roots of conflict in South Asia* (Avalon Publishing, 1992)

⁵ Government-of-India, "197 Report of the High-Level Committee on Socio-Economic, Health and Educational Status of Tribal Communities of India" (Ministry of Tribal Affairs, 2014).



encroachers would be next to impossible and so proposed a scheme to instead regularise the holdings of these unauthorised people by allotting them rights over these occupied lands at the prevailing circle rate. This scheme in 2001 was manifested into the Jammu & Kashmir State Land (Vesting of Ownership to the Occupants) Act⁶, wherein the funds generated were to finance various hydro-power projects in the region; hence the nomenclature Roshni Act.

It proposed to transfer about 20 Lakh Kanals or 2.5 Lakh acres of land, which included Agricultural & Forest Lands⁷, to its unauthorised occupants, which also meant the displaced indigenous tribes as its direct beneficiaries. Initially, under the act, only 10 Kanals of land could be allotted to a single application which was in long term occupation till 1990, but subsequent amendments were carried out that modified the claim limit to 100 Kanals⁸ and extended the benefit to all those who were in actual and physical occupation till 2004⁹ and then once again till 2007¹⁰. These very amendments reeked of favouritism to the elites who were actively grabbing more and more land at the perils of the poor by unlawful and ungratifying means in anticipation that the pliancy of the act would vest them the rights over it. Thus, in broad daylight under the act, the rich and the powerful were colluding with the executive to usurp more and more land by forcefully removing the poor and indigenous tribal populous from it. In fact, the CAG accosted the entire scheme as a massive scam in which, under the lawful guise of the act, unauthorised means were being used to forcefully snatch and encroach the public land to acquire its ownership at throwaway prices¹¹. More than 75,000 acres of land had been transferred at a meagre amount of Rs.76 /- Crore as against the proposed realisation of Rs. 25,000/- Crores¹². This was attributed to the amendments made, which had though extended the cut-off date for the land occupied to 2007 but had not revised the rate payable, which was still fixed as it stood in 1990. Moreover, the Revenue Department in pursuant to the powers

⁶ The Jammu & Kashmir State Land (Vesting of Ownership to the Occupants) Act, 2001 (Act 12 of 2001) [State Legislature].

⁷ *Id.*, s. 2(h) & s. 3-A.

⁸ *Id.*, s. 8.

⁹ Murli Krishnan, "Roshni Land Scam and Jammu & Kashmir High Court judgment explained", *available at*: <https://www.barandbench.com/columns/litigation-columns/roshni-land-scam-jammu-kashmir-high-court-judgment> (last visited on Mar. 31, 2021)

¹⁰ *Id.*, at 9.

¹¹ S.C Pandey, "Report No. 1 of 2014 - Performance Audit on Revenue and Public Sector Undertakings of Government of Jammu Kashmir" (Comptroller and Auditor General of India, Mar. 4 2014)

¹² *Ibid.*



conferred under the act,¹³ formulated certain rules which enabled free of cost transfer of agricultural lands and provided other incentives, all done to further exasperate the encroachments¹⁴.

As a riposte to the above wrongdoings and abuse of the act, a PIL¹⁵ was filed in J&K High Court to draw its attention towards the coercive & arbitrary land misappropriation under the guise of the act. In 2018 when the Writ PIL still laid pendente-lite in the Augustus of the J&K High Court, the then Governor of the un-bifurcated Jammu & Kashmir, while taking note of the unlawful land Grabbing and low-realisation of sale proceeds, said that the act had failed to achieve its purposes and repealed the act and repudiated all pending applications leaving only the sanctioned ones as valid allotments¹⁶. He also ordered the CBI to launch a probe for the illegal land transactions that were effectuated under the act.

In 2019 after much outcry of foul play under the act, J&K took up the hearing of the PIL. The first impetus of the court was to look into the validity of the Roshni Act and its object¹⁷. In it, the court relying on the observation made by the apex court, said that the State is a trustee of its land on behalf of the people and is not free to do as they please with it¹⁸ thus, the entire modality of allotting state land is impermissible by the law¹⁹. It further cited that the State is not entirely prevented from distribution of Public land but that its disposal must only be done in compelling circumstances in the interest of the public²⁰.

While the court, in light of the above premise, held that the purpose of the act was not permissible in law, it did, however, venture into the possibility of saving the act. It held that while the object of the act was for the benefit of the public, the same, however, is still not maintainable on two counts; first, that the process of distributing the land was not in

¹³ *Supra* note 7, s. 18.

¹⁴ Jammu & Kashmir State Land (Vesting of Ownership to the Occupants) Rules, 2007.

¹⁵ *Prof. S.K Bhalla v. State of Jammu & Kashmir*, (2020) CM: 4036 JKHC.

¹⁶ Safwat Zargar, "What exactly is the 'land scam' in which Kashmiri parties are implicated", *available at* : <https://scroll.in/article/980114/what-exactly-is-the-land-scam-in-which-kashmiri-parties-are-implicated> (last visited on Mar. 31, 2021).

¹⁷ *Supra* note 16 at 26.

¹⁸ *Centre for Public Interest Litigation v. Union of India*, (2012) 3 SCC 1.

¹⁹ *Supra* note 16 at 27.

²⁰ *Sachidanand Pandey v. State of West Bengal*, (1987) 2 SCC 295.



consonance with public policy, and second, that the act legitimised unlawful acts. The court iterated that when the Government intends to divest its State Land, it must do so in a manner that realises maximum return for the public; one way to do so is by way of public action or tenders²¹. While the above rule is not absolute and any other means may be used as well but the fact that the rate at which sale was to be affected was not changed for 28 years, the transactions which occurred under it cannot be said to be fetching the best price and be of any public return. So, it was held that the prescribed mode of dispossession under the Roshni Act is arbitrary & violating Article 14²².

The next reason why the act is not good in law is because of the roots of its object. The act aimed to regularise the land ownership of those who were in its illegal occupancy. The court lamented that this was the first time that an act had legitimised and reinforced criminal activity at the cost of both private and public interest²³. And so, by applying the basic principle of Interpretation of Statues as propounded by the Supreme Court,²⁴ it held that the object of the act in itself aimed to condone or remit the illegalities of trespass, and hence the same cannot be valid. Because of this, the court held that the entire act is ultra vires and void ab initio²⁵.

Lastly, the court delved into the Petitioner's pray for investigation & criminal action against those who were party to the illicit transactions and acts done under the statute. The court observed that several complaints were filed to the Vigilance Organization of Kashmir (hereinafter VOK), levelling the allegation of collusion and complicity of bureaucrats and police officers in 'Land Grabbing' under the act, but the VOK had instead turned a 'blind eye' & a 'deaf ear' to all of them. The court also saw that the Revenue Department, which had formulated and published Roshni Act rules that provided free of cost transfer of agricultural land and concessions on an already undercast value rate, were done illegally without seeking the approval of the State Legislature. The Bench held that the inaction of the executive and the subsequent amendments and rules made tantamount amounts to the disfigurement of the act's objective of raising resources for investment in infrastructure projects and are a clear indication

²¹ *Aggarwal & Modi Enterprises v. NDMC*, (2007) 8 SCC 75.

²² *Supra* note 16 at 39.

²³ *Supra* note 16 at 3.

²⁴ *Jagpal Singh & Ors. v. State of Punjab & Ors.*, (2011) 11 SCC 396

²⁵ *Supra* note 16 at 40.



of politically influenced illegal acts. The court thus ordered the CBI and other administrative authorities to investigate and disclose the details of all applicants, encroachers, land allotted, and sanctions under the act²⁶.

Forest Rights Act: A Viable Solution?

While the court had rightly held the act as void, it failed to appraise the most important backdrop for legislating of the act, which was to apprise the Scheduled Tribes of the region who had been severely affected as annotated above, and any further alienation would have only aggravated the Separatist activities and further pushed these indigenous persons into partaking in the Naxal-Tribal Conflict. The Government of Jammu and Kashmir made this conscious decision to regularise instead of evicting these encroachers to avoid civil unrest through the Roshni Act. However, while some attribute this failure as the reason for the missed opportunity to do greater good by certifying genuine cases of the tribal people and sanctioning a criminal action against the wrongdoers, but this argument does not hold as, despite the attempts of the court to save the act, the fundamental character of the legislation was so invariably illegal that it couldn't have been sustained without breaking the oath of justice at all cost.

However, the woes of the Indigenous persons have not been completely derailed; the Parliament, after the abrogation of its Special Status, quickly responded to the repealing of the act by extending most of the Central Laws of India²⁷, including the Forest Rights Act²⁸. As a response to the verdict of the J&K High Court, the J&K Administration swiftly avowed to implement the Forest Rights Act and it's under Rules in the region and complete the survey & record of the claimants by 30th of January 2021²⁹. Even the Supreme Court remarked while hearing petitions in the aftermath of the scrapping of the act that no immediate coercive action will be taken against those persons who are valid occupants³⁰.

²⁶ *Supra* note 16 at 219.

²⁷ The Jammu & Kashmir Reorganization Act, 2019, (Act 34 of 2019).

²⁸ Forest Rights Act, 2006, (Act 2 of 2006).

²⁹ Scroll Staff, "Forest Rights Act to be implemented in Jammu and Kashmir", *Scroll-In* Nov. 18, 2020, available at: <https://scroll.in/latest/978856/forest-rights-act-to-be-implemented-in-jammu-and-kashmir> (last visited on Mar. 31, 2021).

³⁰ Krishna Das Rajgopal, "Roshni Act: no immediate 'coercive action' against petitioners, says SC", available at: <https://www.thehindu.com/news/national/supreme-court-asks-jk-hc-to-decide-on-dec-21-pleas-seeking-review-of-its-verdict-scrapping-roshni-act/article33296595.ece> (last visited on Mar. 31, 2021).



However, this void cannot merely be filled by implementing the Forest Rights Act, and as time has been of evidence, the problems of ‘Land License’ is far from ending. One of the most incumbent issues of the judgement is that because of the court’s findings of all acts done under it as illegal and the order to rec-account the land has wrongly labelled these landless Schedule Tribes not as Disputed Occupants but as Encroachers. The outreach of this is that there now is a misconception because of which the authorities now view their possession as prohibited instead of permitted or contested under the law. The consequence of this erroneous verdict can be traced all the way back to the Godavarman Case,³¹ where the apex court’s order to remove the commercial timber intruders and prevent any encroachment of the forests was understood as the mandate to remove all occupants of the forest and led to large-scale eviction drives³². And as it has been, history is repeating itself; within a month after the verdict, the Jammu & Kashmir Administration started conducting large-scale encroachment eviction drives³³.

Despite the clarifications of the courts & government officials, the J&K Forest Dept. has identified more than 63,000 Individuals in encroachment of more than 15,000 hectares of land and is undertaking their eviction³⁴. But this isn’t anything new either; despite several efforts to ensure the Tribal people do not fall prey to unlawful dispossession of Forests, it has been to no avail. Under the FRA, approval of the Gram Sabha is needed before the eviction of any STs or Forest Dwellers³⁵, but over the past, it has been merely reduced to an *ad-lib*. Even the apex court in the infamous Vedanta Case³⁶ provided an escape clause where this approval will not be mandatory when they agree to ensure compliance with the environmental regulations.

Another major drawback of the FRA is that it has a very restrictive definition of Forest Dwellers. If any person is to claim Rights to occupation and use of Forest and its produce, one must be primarily residing inside of the forest³⁷. This provision again excludes the major

³¹ *T. N. Godavarman Thirumulkpad v. Union of India*, (1997) AIR SC 1228.

³² Jean Dreze, “Tribal Evictions from Forests” *Econ SSCI* WP 7 (2005-2009).

³³ Wire Staff, “After Demolition Drive to Evict Nomadic Groups, J&K Govt to Implement FRA”, *available at* : <https://thewire.in/government/jammu-and-kashmir-forest-rights-act> (last visited on Mar. 31, 2021).

³⁴ Azaan Javaid, “J&K names over 63,000 ‘encroachers’ of forest land, say they’re occupying 15,000 hectares”, *available at*: <https://theprint.in/india/jk-names-over-63000-encroachers-of-forest-land-say-theyre-occupying-15000-hectares/555716/> (last visited on March 31, 2021).

³⁵ *Supra* Note 29, s. 6.

³⁶ *Orissa Mining Corporation Limited v. Ministry of Environment & Forest Affairs*, (2013) SC CA: 180.

³⁷ *Supra* Note 29, s. 2(c)(o).



indigenous populous of J&K who, though are dependent upon the Forests for their subsistence, still reside near or outside of them because they are predominantly cattle herders. This restrictive application again provides little to no scope for these people to secure their rights and livelihood. And the very few stratum of communities that do reside in the forests cannot prove their claim as the demolition of their hut structures leaves them with no evidence to prove their residence³⁸. Till now, only 3% of Community Forest Rights has been recognised under the FRA because of the deep structural & institutional issues pertaining to the execution of the Act³⁹.

Conclusion

It is quite evident that the Roshni Act, like the incumbent Forest Rights Act and many other legislations, was purported for public welfare and, like all legislations, fell prey to the corrupt bureaucracy and politics which shackled and reduced the act to a precursor of criminal and illegal activities. The Jammu & Kashmir High Court also inadvertently recognised the well-intentioned notion of the act but, in reluctance, had to strike it down because of a huge magnitude of perversion of the scheme. This seemingly left the lives of the aboriginals dangling from a thread that might as well be their gallows. Even despite the good intentions of the Forest Rights Act, it is laden with shortcomings that, as history has shown, seem to offer no recourse to the poor tribes and forest dwellers. The entire future of these indigenous people is indeed brazened with uncertainty.

³⁸ Forest Rights Rules 2008, r. 11(a) & r. 13.

³⁹ Citizens Report as part of Community Forest Rights-Learning and Advocacy process, "Promise & Performance Report, Ten Years of The Forest Rights Act in India" 17 (2017).