

The Legal Realism of the Access and Utilization of Forest Land by the Tribals in India Vis-A-Vis Australia.

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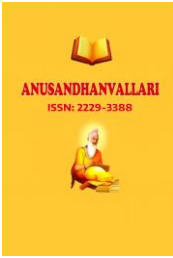
Abstract: This paper examines two landmark legal frameworks India's Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) and Australia's Native Title Act 1993 (NTA) which aim to restore land rights to indigenous forest-dwelling communities. The FRA was enacted to "undo the historical injustice" done to tribal communities by formally recognizing and vesting their customary forest rights. Likewise, the NTA followed the *Mabo* decision (1992) to acknowledge Aboriginal and Torres Strait Islander peoples' native title under common law. Both statutes enshrine the principle of self-determination and seek to secure livelihoods, culture and dignity for indigenous peoples, but their implementation has diverged. In India, FRA empowers Gram Sabhas (village councils) to adjudicate claims and grants a bundle of individual and community rights. In Australia, native title is recognized through federal court determinations and Indigenous Land Use Agreements; claimants must prove continuous traditional connection since sovereignty, and rights remain non-exclusive and subject to prior interests. This comparative study uses doctrinal analysis of statutes and case law, review of implementation data and field studies, and illustrative case examples to assess how effectively these regimes realize the right to life and dignity of forest-dwelling peoples. The analysis finds that although both frameworks have achieved important legal in practice India's FRA is still largely unimplemented in most areas, and Australia's native title system remains burdened by stringent proof requirements. Administrative bottlenecks, contested conservations laws, and entrenched interests have hampered both regimes.

Keywords: Forest Rights Act; Native Title Act; Indigenous land rights; Scheduled Tribes; Aboriginal rights; self-determination; Gram Sabha; prescribed body corporate.

Introduction

Forests and other ancestral lands are central to the culture, livelihood and dignity of indigenous peoples. Both India and Australia have acknowledged past dispossession and adopted rights-based laws for forest-dwelling communities, but with different foundations. India's FRA explicitly recognizes the colonial-era marginalization of Scheduled Tribes (STs) and traditional forest dwellers, vesting in them legal rights to occupy, use and manage forest lands and resources. The FRA's Preamble declares it a "watershed legislation to undo the historical injustice" to tribal communities. By contrast, Australia's Native Title Act 1993 arose from the common law rejection of *terra nullius* in *Mabo v Queensland* (1992), and provides for recognition of native title where Aboriginal and Torres Strait Islander peoples can prove continuous traditional connection to land and waters. Both regimes aim to restore community control, self-determination and livelihood security, but do so within each nation's legal traditions: India's framework is statutory and participatory, whereas Australia's is a hybrid of statute and common law adjudication.

The **Statement of Problem** frames the challenge: despite similar objectives, the two regimes differ greatly in realization. Australia has made over 660 native title determinations, recognizing title (fully or partially) in 534 areas about 32% of the continent. Yet the rights conferred are often non-exclusive and limited in scope, and many indigenous people remain socioeconomically disadvantaged. In India, although FRA theoretically covers millions of forest dwellers, actual implementation lags: NGO surveys suggest over 90% of eligible villages still lack community forest



rights. Recent events (e.g. a 2019 Supreme Court eviction order that threatened 1.6 million tribal families) underline the volatile policy landscape. This research thus asks: How do the legal and administrative mechanisms of India's FRA and Australia's NTA compare in delivering land rights, livelihood security and dignity to indigenous forest communities?

To answer this, we conduct a comparative legal analysis. We review primary statutes (FRA 2006 and NTA 1993) and key case law, examine implementation reports and statistics, and incorporate secondary scholarship from law journals and NGOs. We also draw on illustrative community examples (e.g. Gond villagers in India, Aboriginal claimants in Australia) to highlight social impacts. By tracing both laws' intent and outcomes, we aim to evaluate their efficacy in fulfilling Article 21 (right to life and dignity) and related rights of tribal peoples.

Research Methodology

The study uses a mixed-methods approach:

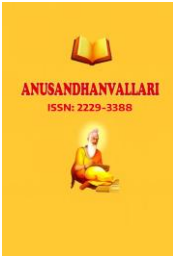
- **Doctrinal Analysis:** We examine statutory texts of the FRA and NTA, their legislative intent (e.g. Preamble language), and relevant constitutional provisions such as India's Fifth Schedule and Article 46, and Australia's Racial Discrimination Act 1975 as it intersects with native title. Key judicial decisions are analyzed for interpretation of these laws e.g. *Samata v. Andhra Pradesh* (1997) on tribal land transfer and *Yorta Yorta v. Victoria* (2002) on proof of native title.
- **Comparative Framework:** We compare legal features scope of rights, evidentiary requirements, institutional mechanisms side by side. We note differences in law type FRA as special legislation vs. native title as recognition of common-law rights, and in rights conferred individual vs. communal, land use vs. land ownership.
- **Secondary Sources:** We survey empirical and analytical literature on outcomes. For India, reports by NGOs and government. For Australia, government tribunals NNTT and academic reviews e.g. ALRC reports give statistics and critique. We ensure information is drawn from reputable sources, including peer-reviewed works and official releases, citing judicial precedents where available.
- **Case Illustrations:** Although we did not conduct fieldwork, we reference documented examples to flesh out analysis. For instance, Gond communities in central India e.g. Odisha/Chhattisgarh and Aboriginal communities e.g. Miriwoong or other native title groups illustrate how legal rights translate or fail to translate into community control and livelihood benefits.

By systematically comparing law, administration and social outcomes, this method identifies strengths and gaps in each regime's contribution to indigenous justice.

Legal and Constitutional Foundations

India: The Forest Rights Act, 2006

India's FRA 2006 is a statutory regime enacted under Article 21 (right to life) and Entry 18, List II of the Seventh Schedule, read with Article 46 (promotion of STs). Its Preamble explicitly acknowledges that forest dwellers' rights "were not adequately recognized" historically, resulting in "longstanding injustice to forest-dwelling Scheduled Tribes and other traditional forest dwellers". The Act's long title states it is "to recognise and vest the forest rights and occupation in forest land in forest-dwelling Scheduled Tribes and other traditional forest dwellers who have been



residing in such forests for generations but whose rights could not be recorded”. In effect, FRA retroactively validates customary claims. It grants both individual rights (e.g. private cultivation and habitation up to 4 hectares, rights to settled lands and disputed territories) and community rights (e.g. grazing, fishing, use of water, collection of minor forest produce). Critically, it empowers Gram Sabhas to make claims and manage community forest resources under a conservation-focused plan. Rights vest automatically upon recognition subject to due process, are heritable but not alienable, and include protection against eviction on development projects under the Land Acquisition Act. Overall, FRA embodies an affirmative vision: forest dwellers become “protectors and stakeholders” in their forests, with duties to conserve biodiversity in return for tenure.

Constitutional Context: FRA works within India’s Fifth Schedule (administration of Scheduled Areas) and Articles 244/275 Scheduled Areas funds, but creates specific rights beyond those in the Constitution. It was challenged on federalism grounds, but the Supreme Court has upheld its validity while recognizing land’s centrality to tribal dignity. Notably, *Samata v. AP* (1997) affirmed that tribal land assures “equality of status and dignity of person”, underpinning FRA’s rationale.

Australia: The Native Title Act, 1993

Australia’s NTA 1993 codifies the common-law doctrine of native title, recognizing that Aboriginal and Torres Strait Islander peoples hold traditional rights to land and waters. Following *Mabo* (1992) which struck down terra nullius, the NTA establishes a system for lodging claims with the National Native Title Tribunal (NNTT) and adjudication by the Federal Court. Unlike FRA’s legislative grant, native title arises automatically where a community can prove it has continuously observed traditional laws and customs since before British sovereignty. The statutory definition requires an “ongoing acknowledgment and observance” of traditional laws. If recognized, native title may coexist with other interests subject to prior pastoral leases, mining rights, etc. hence rights are often non-exclusive: “If rights of pastoralists, mining companies, or the Crown come into conflict, they supersede native title”.

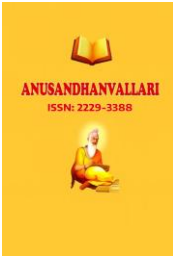
Key features of the NTA regime include the establishment of prescribed bodies corporate (PBCs) native title holders must form corporations to manage their rights and negotiate agreements. Since 1993, there have been 661 determinations (520 by consent) recognizing native title in 534 areas, covering roughly one-third of Australia’s landmass. Compensation provisions (post-1975 acts) exist, and a 1998 amendment added “right to negotiate” procedures for future land acts. Overall, the NTA builds on common law with statutory procedures; it does not per se create new rights but acknowledges surviving traditional rights within the settler legal framework.

Legal Status: The NTA sits on Parliament’s power over Indigenous affairs and external treaties Racial Discrimination Act. It has been amended several times notably 1998, and its provisions are interpreted by courts such as in *Yorta Yorta* (2002), which set a precedent on proof of continuity.

Administrative Mechanisms and Judicial Outcomes

India: Claims Process and Enforcement

Under FRA, village-level Gram Sabhas are empowered to verify and recommend claims for individual and community forest rights, subject to approval by Sub-Divisional and District Committees. In theory, once a claim is approved by the Gram Sabha, it should be granted in a simple ministerial act. The Ministry of Tribal Affairs has issued guidelines and authored a national implementation framework, but actual execution is state-driven. As a result, performance varies widely across India. Some states e.g. Chhattisgarh pioneered innovative approaches: the state issued ~6,200 titles to Other Traditional Forest Dwellers (OTFDs) by using separate, color-coded claim forms and jointly processing



claims of STs and OTFDs. Conversely, many states neglected FRA implementation, focusing only on tribal claims and leaving OTFDs in limbo. Central agencies and NGOs such as the Vasundhara trust etc. often assist local communities to navigate bureaucracy. Odisha's recent "Mission Prahar" sets aside special funds and mobilizers one per 10 villages to push FRA coverage to all forest villages.

Judicially, FRA has seen major cases. In *Wildlife First v. Union of India* (ongoing), conservation groups challenged FRA's constitutionality. In Feb 2019 the Supreme Court controversially ordered eviction of all individuals whose FRA claims were rejected in 21 states. This eviction directive affecting over 1 million forest dwellers was later stayed, as the government argued FRA contains no eviction clause and that due process had to be examined. The episode highlighted administrative confusion: dozens of state status reports were called up by the court, and a pause was ordered to review claim-verification procedures. The ongoing litigation has underscored that many valid claims have been arbitrarily denied, and it forced the government to clarify that FRA grants, once made, cannot be easily overturned.

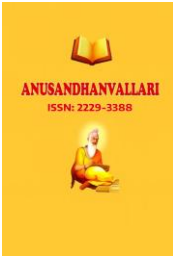
Case Example Samata (1997): Even before FRA, the Supreme Court in *Samata v. State of AP* invalidated mining leases on tribal land, holding that no "government land" in a scheduled area may be leased to a non-tribal. The Court emphasized that "Agriculture is ...a base for dignity of person", and assured tribal land tenure as essential for their social status and economic empowerment. This reasoning underlies FRA's ethos: legalizing land rights is linked to fundamental human dignity. However, post-FRA jurisprudence has yet to significantly expand the Act, aside from confirming Gram Sabha powers (e.g. Orissa Mining, 2013). Challenges remain mainly in enforcement rather than on-the-books legal questions.

Australia: Tribunal Process and Case Law

In Australia, native title claims are lodged with the National Native Title Tribunal (NNTT) and ultimately determined in the Federal Court. Claimants provide evidence (often anthropological) of continuous observance of traditional law and customs on the land. The evidence standards are widely regarded as stringent: the High Court in *Yorta Yorta* (2002) noted "difficult problems of proof" when requiring unbroken tradition. The Australian Law Reform Commission observes that proving "survival of rights over approximately 200 years" without written records is a formidable challenge. These requirements have drawn criticism even from UN human rights bodies as "a high standard of proof" that may effectively extinguish many claims.

Once native title is recognized, a prescribed body corporate (PBC) must be formed to hold and manage the title. Australia also developed negotiation mechanisms: in practice, about 78% of determinations have been by consent, often via Indigenous Land Use Agreements (ILUAs) or negotiated settlements. These agreements frequently involve compensation or sharing arrangements. However, a 2016 Federal Court decision (*Griffiths v Northern Territory*) showed native title holders can receive monetary compensation for past extinguishments, akin to land value and cultural loss.

Institutional Support: The Native Title regime is backed by federal institutions – the NNTT, Registered Native Title Bodies Corporate (RNTBCs), and legal aid services. A significant achievement has been the integration of native title with conservation: many recognized areas have become Indigenous Protected Areas (IPAs). As of 2013, IPAs covered about 48 million hectares 36% of Australia's national reserve system, reflecting how native title has enabled indigenous stewardship.



Notable Cases: Apart from Mabo and Yorta Yorta, cases like Wik Peoples v. Queensland (1996) established that native title can coexist with pastoral leases. More recently, the Noongar people in Western Australia secured a landmark consent determination in 2020 covering the Perth region, illustrating the capacity for negotiated outcomes. Still, many indigenous communities have seen their claims fail or be only partially recognized, and Australia's overall Indigenous disadvantage indices remain high, indicating that legal recognition has not fully translated into material welfare.

Social Outcomes and Comparative Analysis

India: Community Empowerment and Obstacles

Where implemented, FRA has had transformative effects on some communities. In an Odisha example, Kodalpalli village's women had long practiced thengapalli day-long forest patrol rotations. Only in 2021 were their communal forest rights formally recognized under FRA. This validation legally empowered an existing community conservation scheme. Experts note that granting FRA rights "strengthens existing community-based institutions...while opening up new livelihood opportunities". For instance, collective rights over nontimber forest products have enabled villages to sustain local self-help enterprises e.g. dried leaf products, honey.

However, the gap between law and reality remains large. Nationwide, 17 years after enactment, more than 90% of eligible villages lack any recorded community forest rights. The key barrier is administrative inertia and resistance. Conservation agencies often view FRA skeptically, fearing loss of control. Few authentic reports highlight that many state forest departments have simply ignored FRA provisions, giving rise to illegal claim rejections and reluctance to demarcate lands. Even where Gram Sabhas have validated rights, slowness in issuing titles has left villagers in limbo. The FRA's promise – securing livelihoods as a component of the "right to life" – is thus unfulfilled for vast swathes of India.

Nevertheless, progress is uneven. States like Chhattisgarh, Maharashtra and Odisha have shown positive examples, set up state missions and involved NGOs to push claims. Civil society advocates point out that FRA's very passage represented a shift toward participatory forest management. Researchers argue that if "more than 50% of forest land can be recognized and protected as community forest resource" under FRA, such rights could combine conservation with local welfare. Yet they caution that new laws e.g. the Forest Conservation Act 2023 amendments risk undermining FRA: analysts note that the amendment bill "sidelines the need for ensuring forest rights prior" and exempts projects from clearance procedures. There is international concern e.g. from UN committees about erosion of tribal land rights.

Australia: Recognition vs. Reality

Australia's native title regime, while pioneering, has also yielded mixed social outcomes. Legally, the acknowledgement of title in 32% of the continent represents a major correction of past dispossession. Communities with native title can negotiate economic development, establish joint management of parks, and plan for cultural heritage. For example, native title corporations may partner in mining royalty schemes or tourism ventures. Some studies emphasize that native title has "enabled the restitution of ownership rights, while putting governance arrangements in place that offer strong enabling conditions for indigenous land management".

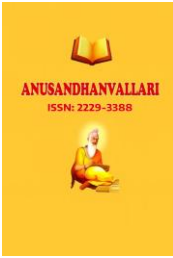
Yet critics argue that many Aboriginal people gain little direct benefit. Unlike land grants in freehold, native title rights are often shared with other users, and the demanding proofs mean that many claims never succeed. The ALRC notes that Yorta Yorta's requirement of unbroken tradition meant "difficult problems of proof" face claimants". Even when native title exists, it must be managed through PBCs often under-resourced and subject to bureaucratic constraints. A

landmark compensation case (Timber Creek) was a rare judicial win; otherwise, most disputes are settled by agreement, which some Indigenous leaders feel dilute rights.

In social indicators, Australia's Indigenous communities still rank poorly on health, education and income. Studies observe that formal recognition of land rights is a necessary but not sufficient condition for socio-economic improvement. The UN Committee on the Elimination of Racial Discrimination (CERD) in 2005 urged Australia to review the onerous proof standards in the NTA, highlighting that the high evidentiary bar may itself perpetuate disadvantage.

Key Comparisons-

- **Scope of Rights:** India's FRA explicitly grants both individual and collective rights over forests, including ownership-like land claims (up to 4 ha for cultivation) and community conservation rights. Australia's NTA recognizes traditional rights of access, use and occupancy which can translate into exclusive title only where no prior grants exist. Thus, FRA's rights can be seen as broader, potentially giving near-feudal tenure, whereas native title often yields usufructuary interests.
- **Evidence and Claim Process:** FRA requires simpler proof: the claimant must show 75 years of residence or tribal status. Gram Sabhas review claims, making the process community-driven. In contrast, NTA requires continuity of law and custom since sovereignty, which courts have interpreted strictly. The ALRC notes that proving native title involves "suffering from the disadvantage that there are no indigenous documentary records". Indian claimants are spared such burdens, though they must still navigate formal committees.
- **Institutions:** FRA relies on decentralized bodies Gram Sabha, forest rights committees at sub-divisional levels under the control of state governments, whereas Australia uses national tribunals and courts, and indigenous corporations (PBCs) subject to federal oversight. Australia's system tends to centralize adjudication, while India's emphasizes local decision-making though final approval often lies with state or central officials.
- **Relationship with Conservation Law:** In India, FRA coexists and often conflicts with forest conservation laws like Indian Forest Act, Forest Conservation Act 1980. The 2023 FCA amendments have reignited debates on whether development projects will bypass tribal consent. In Australia, native title is expressly subject to "valid past and future acts" – e.g. large parts of land are already granted, and native title rights were extinguished on pastoral leases unless Wik rights survived. Both countries struggle to balance forest preservation and indigenous use: India's forest bureaucracy has often prioritized conservation at the expense of tribal rights, whereas Australia's system typically requires coexistence e.g. title holders may co-manage national parks.
- **Impact on Dignity and Livelihood:** Both laws frame land rights as linked to human dignity. The Indian Supreme Court in Samata explained that secure land tenure gives tribals "equality of status and dignity". Similarly, Australia's NTA was meant to rectify dispossession and promote reconciliation. However, on-the-ground dignity and quality of life depend on enforcement and complementary measures education, infrastructure. In India, FRA intends to unlock livelihood through agriculture and forest produce rights, but decades of neglect have left many without even this modest security. In Australia, while legal recognition is a step forward, Indigenous communities still demand broader social justice.



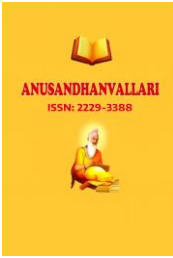
Conclusion and Recommendations

In summary, India's Forest Rights Act and Australia's Native Title Act represent landmark commitments to indigenous justice, yet each fall short in practice. Legally, FRA is more expansive recognizing collective management of forests and vesting land rights whereas native title acknowledges surviving traditional rights but circumscribes them by other interests. Administratively, Australia's centralized system has delivered many formal recognitions (albeit through protracted litigation), while India's decentralized regime has seen patchy implementation: only proactive states like Odisha and Chhattisgarh have systematically issued titles. Socially, both countries still grapple with the legacy of dispossession. Even with native title, many Aboriginal Australians continue to face disadvantage. In India, millions of tribals await the basic legal sanction of land they and their ancestors have long occupied.

Recommendations: To better realise the aims of these laws – especially the tribals' *right to life and dignity* hereby suggest the following steps for policymakers and practitioners:

- **Strengthen Grassroots Authority:** Ensure that Gram Sabha decisions under FRA are legally binding and timely. This could involve capacity-building training facilitators, legal help and dedicated funding (as Odisha now does). Similarly, Australia should support RNTBCs and native title bodies to enable true self-governance over returned lands.
- **Streamline Evidence and Claims:** In India, continue simplifying procedures e.g. two-tier claim forms for STs and OTFDs as in Chhattisgarh. In Australia, revisiting evidentiary rules may be wise: CERD and ALRC have advised lowering the proof threshold. Presumptions of continuity could be introduced for well-documented regions.
- **Guard Against Contradictory Reforms:** Amendments to forest laws must not undermine rights. For example, new amendments to India's Forest Conservation Act have alarmingly "sidelined the need for ensuring forest rights prior to project approval," potentially allowing projects to proceed without Gram Sabha consent. To prevent this, legislators should explicitly retain FRA protections: as experts note, there is "no provision in the new Bill to comply with FRA," and even existing rules lack mechanisms to secure consent before clearances. Both India and Australia should harmonize forest conservation policy with indigenous rights (e.g. integrate Gram Sabha input in clearance rules).
- **Enhance Co-Management and Protection:** Build on successful models. Australia's Indigenous Protected Areas show how title can enable indigenous stewardship. India could adopt similar community-managed conservation zones under FRA's "community forest resource" rights. Encouraging joint forest management with clear local leadership would align rights with environmental goals.
- **Fulfill International Commitments:** Both governments should actively implement UNDRIP principles which call for FPIC (free, Prior and Informed Consent). Engaging indigenous institutions in policy design – whether Panchayats in India or state agencies in Australia will improve trust.

In conclusion, the FRA and NTA have reoriented their nations' legal landscapes toward indigenous justice, but work remains. A comparative perspective shows that strong statutory provisions (India) must be matched by political will and resources, while recognized titles (Australia) must translate into genuine autonomy and benefits. By reinforcing community control, easing bureaucratic hurdles, and aligning allied laws with forest rights, India and Australia can make this promise of dignity a reality for their forest peoples.



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