

**ENCROACHMENT OF FOREST LAND: A CRITIQUE ON HIMACHAL PRADESH  
FOREST LAND USE POLICY**

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ABSTRACT

The land is one of the essential assets for social and monetary advancement. Modern-day developmental activities are putting massive pressure on existing land availability, and beneficial land assets are getting scant in the vast part of the country. Forests are national assets having environmental, ecological, and biological significance. However, anthropogenic causes are creating tremendous pressure on forest land. The Doctrine of Public Trust, whereby states hold these assets for the public good, is being manipulated for ulterior motives. This results in forest land encroachment, endangering forest resources throughout the country.

Forest land encroachment is rampant in the state of Himachal Pradesh. It is mainly done to grow apples in the upper parts of Himachal Pradesh, known as the apple belt. These encroachments are not an overnight effort; instead, they result from a series of unlawful human activities, sometimes with the connivance of state authorities. Inaction on the part of the authorities encourages illegality to perpetrate in one form or the other. The present work examines the impact of forest land encroachment from the perspective of environmental issues. The work examines laws and policies for regularising land encroachment in Himachal Pradesh. The evaluation of regularisation policy is based on values and objectives enshrined in international conventions and domestic legislation.

Key Words: Environment; Pollution; Land Encroachment; Forest Land etc.

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## **ENCROACHMENT OF FOREST LAND: A CRITIQUE ON HIMACHAL PRADESH FOREST LAND USE POLICY**

### **INTRODUCTION**

In most developing nations, the land is one of the essential assets accessible for their citizens' social and monetary advancement. Due to expanding economic interest in the land, the desire to hold the land and expand the land is growing very fast. It is because of this reason; the beneficial land assets are progressively getting scant. Because of this, people are tempted to encroach on the land unauthorisedly. The encroachment is no more limited to mere interference with others' possessory rights but rather turning into lawlessness. The forests are national assets having environmental, ecological and biological significance. The doctrine of Public Trust states that the state holds natural resources such as forests, rivers, and other natural resources in trust for the public good.<sup>1</sup>

Encroachment of forest land for cultivation and other purposes continues to be the most pernicious practice endangering forest resources throughout the country. In the state of Himachal Pradesh, the encroachment of forest land is on rampant for the purposes of growing apples. The encroachment is so widespread that the Himachal Pradesh High Court has to initiate criminal proceedings against all the encroachers after First Information Reports (FIR) registration.<sup>2</sup> The status report filed in the High Court reveals the following:

*"It is evident from the status report that there have been rampant encroachments over the forest land. 9612 cases of encroachment over less than 10 bighas of encroached forest land had been registered up to 30.9.2014 and proceedings in 7009 cases had been completed by the Divisional Forest Officers-cum-Collectors under H.P. Public Premises (Eviction and Rent Recovery) Act, 1971 whereas 2603 cases were stated to have been processed in completion. Out of 7009 cases, encroachment had been removed in 3392 cases by vacating the illegal possession...."*

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<sup>1</sup> *M.C. Mehta v. Kamal Nath*, (1997) 1 SCC 388

<sup>2</sup> *Court on its Own Motion v. State of H.P.*, C.W.P.I.L. No. 17 of 2014 dated 06-04-2015.

As many as 2513 FIRs were lodged against the encroachers on Forest/Government land where an area encroached was found to be more than 10 bighas. This on done in accordance with the direction issued by Hon'ble High Court.<sup>3</sup>

These encroachments, as such, cannot be conceived as a sudden outcome. It is always a result of series of unlawful human actions to which the authorities are *particeps criminis*. Inaction on the part of the authorities encourages the illegality to perpetrate in one form or the other. the matters get aggravated due to attempts on the part of the State Government to regularise these encroachments. This act as a strong inducement for further encroachments in forest areas, and the problem remains as elusive as ever for want of an effective and concerted drive against this evil practice.

### **Scope of Study and Methodology**

The scope of the study primarily revolves around the theoretical analysis of the power of the Himachal Pradesh Government in conferring proprietary/ownership rights in respect of persons holding illegal possession of forest land. This study is conducted to ascertain whether conferring proprietary/ownership rights are exclusively within the domain of the State Government and, if so, up to what extent. It would encompass an examination of instances wherein the State Government has regularised the illegal encroachments in the past. Also, whether or not it is permissible for the State Government to regularise any illegal land encroachment upon payment of a penalty and if so, what will be the environmental impact of such a course?

The methodology of the study is doctrinal. The research is based on an analysis of the information collected from secondary sources. In this regard, the researcher has compiled the information from relevant legislation, books, journals, and data/information published in print and electronic media. The directions issued by the Hon'ble High Court of Himachal Pradesh have been used extensively to frame the arguments.

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<sup>3</sup> Cr.M.P. (M) No. 1299 of 2008 (HP High Court)

## THE CONSTITUTIONAL FRAMEWORK & LEGISLATIVE POLICY

### Constitutional Framework-

The Constitution (Forty-second Amendment) Act, 1976, inserted Article 48A in Part IV of the Constitution. This part of the Constitution deals with the Directive Principles of State Policy, which though non-justiciable, yet "*the principles therein laid down are nevertheless fundamental in the country's governance, and it shall be the State's duty to apply these principles in making laws.*"<sup>4</sup> Article 48A makes it imperative for the State "*to protect, improve and safeguard flora and fauna of the nation.*"<sup>5</sup> When this provision is read along with the "doctrine of public trust", as enunciated by the Supreme Court of India *M.C. Mehta v. Kamal Nath*,<sup>6</sup> where the court has said that "the state is the trustee of all-natural resources which are by nature meant for public use and enjoyment.....[and] the state as a trustee is under a legal duty to protect the natural resources." The Court has made it very clear that "*these resources meant for public use cannot be converted into private ownership.*" (emphasis supplied).

The Constitution (Forty-second Amendment) Act, 1976 further strengthen the idea of public trust and incorporates citizens' duty "to safeguard and improve the natural environment as also to be compassionate towards the living entities' by inserting Article 51-A(g)<sup>7</sup> Every citizen of India is under a bounden duty to take care of natural resources and improve the natural environment. These two constitutional provisions speak volumes about the concern coming directly from *suprema lex* as to the preservation and protection of natural resources, including the forests.

Further, to bring harmony between law and regulation passed by various states, apart from having a centralised guideline for the protection and conservation of forest and forest resources, by virtue of the Constitution (Forty-Second Amendment) Act, 1976, the subject "Forest" was placed in entry 17A of List III i.e. *concurrent list*. This was to enable the Parliament and states to legislate concerning Forests.

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<sup>4</sup> Article 37, Constitution of India, 1949.

<sup>5</sup> *Id.*, Article 48A.

<sup>6</sup> (1997) 1 SCC 388; See also *Illinois Central Railroad Co. v. People of the State of Illinois*, 146 US 387; *Gould v. Greylock Reservation Commission*, 350 Mass 410 (1966).

<sup>7</sup> Article 51-A (g), Constitution of India, 1949.

**Legislative Framework-****(a) The Indian Forest Act, 1927**

The Indian Forest Act, 1927 is the first direct enactment with respect to protection of forests. The Act neither defines the word 'forest' nor does it define the expression 'forest land', however it categorises the forests into four distinct categories i.e. 'Reserved Forest', 'Protected Forest', 'Village Community Forest' and 'Private Forest'. These categories of forest have some inherent limitations as to use of forest and forest resources. By virtue of Section 76 of the Act, the state government has Rule making power which *inter alia* provides power of framing Rules necessary to carry out the provisions of the Act.<sup>8</sup>

In the line of the Indian Forest Act, 1927, the Government of Himachal Pradesh has framed the Himachal Pradesh Nautor Land Rules, 1968 which apply to those areas of Himachal Pradesh where the Nautor Rules made under the Indian Forest Act, 1927 do not apply.<sup>9</sup> Under these rules, a *Nautor Land*, a waste land not falling within the a town, reserved forest, demarcated forest or such other area as may be notified by the State Government, may be granted for the purposes mentioned under Rule 5 to those who are eligible as per Rule 7 of the said rules. However, the Nautor land can also be granted even if such land is comprised within Demarcated or Reserved forest as per proviso to Rule 3 (a) of the Rules.<sup>10</sup>

**(b) Himachal Pradesh Land Revenue Act, 1954**

The Himachal Pradesh Land Revenue Act, 1954 is another enactment that directly and indirectly deals with forest land. With respect to forest land encroachment, the Act imposes a duty upon the Revenue Officer to prevent illegal forest encroachment by initiating the ejection proceedings. The power conferred on the revenue officer *via* Section 163 of the Act (as amended by the Himachal Pradesh Land Revenue (Amendment) Act, 2000) can be executed after giving the land encroacher an opportunity of being heard. Any further re-entry after the ejection, is penalised by Sub-section (2). The section further provides that any contention about title over the land under the 'claim of adverse possession' having been perfected due to unrestricted and undisturbed

<sup>8</sup> Section 76, the Indian Forest Act, 1927.

<sup>9</sup> Rule 1(2) of H.P. Nautor Land Rules, 1968.

<sup>10</sup> *Id.*, Rule 3 (a).

possession for a continuous period of thirty years, the Revenue Officer shall proceed to decide the question of 'title' as if it is a 'Civil Court'.<sup>11</sup> Further, Section 163-A (inserted by the Himachal Pradesh Land Revenue (Amendment) Act, 2000) is another enabling provision which allows the State Government to accord a status of legality to the encroachments by regularising the same.<sup>12</sup>

**(c) Himachal Pradesh Tenancy and Land Reforms Act, 1972**

Chapter IX of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 deals with the acquisition of proprietary rights by occupancy tenants. The expression "Occupancy Tenant" is defined under section 92(b) of the Act. According to this provision, 'Occupancy Tenant' is "*a tenant who prior to the coming into force of this Act stands recorded as an occupancy tenant in the revenue records, and includes a kismi tenant and a tenant who, after such commencement obtains a right of occupancy in respect of the land held by him whether by agreement with the landowner or through a Court of competent jurisdiction or otherwise and includes also the predecessors and successors in interest of an occupancy tenant.*" Section 94 of the Act, 1972 provides for the conferment of proprietary rights upon occupancy tenant in respect of land held by him 'free from all encumbrances'.<sup>13</sup> Further, Section 103 of the Act enables the State Government to make rules in this regard. Section 104 of the Act, vide Chapter X deals with acquisition of proprietary rights by tenants other than occupancy tenants.

**(d) The Forest (Conservation) Act, 1980**

The purpose of enacting this legislation was to restrict the state government from exercising its unfettered power of changing the use of forest land for non-forest. This was done in view of the ecological and environmental repercussions. The Forest (Conservation) Act, 1980 imposes a restriction upon the State Government to order de-reservation of a reserved forest in the state and to change the use of forest land for non-forest purposes "*without the prior approval/sanction of the Central Government.*"<sup>14</sup> The contravention as also abetment of the same has been made

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<sup>11</sup> *Id.*, Section 163, the Himachal Pradesh Land Revenue Act, 1954.

<sup>12</sup> *Id.*, Section 163A: Notwithstanding anything contained in section 163 of this Act, or any other law for the time being in force, the State Government may make rules regarding the regularisation of the encroachment on Government land.

<sup>13</sup> *Id.*, Section 94.

<sup>14</sup> Section 2, the Forest (Conservation) Act, 1980.

punishable with an imprisonment of fifteen days. What is noteworthy is that the Act does not prohibit the conversion, it rather only strengthens the procedure.

**(e) The National Forest Policy Resolution 1894 & 1952**

The first National Forest Policy Resolution was adopted by erstwhile Department of Revenue and Agriculture, Government of India *vide* Resolution No. 22-F., dated the 19th October, 1894. The Policy 1984 outlines the general policy to be followed in the management of State forests in the country. Soon after the independence, the Government of India notified the National Forest Policy 1952 *vide* Notification No. 13-1/52-F, dated May 12<sup>th</sup>, 1952. This was urgently needed in the wake of political and economic developments of far-reaching importance. The importance of forests was highlighted in the opening lines of the Policy viz. "*The country has passed through two world wars which disclosed unsuspected dependence of defence on forests. The reconstruction schemes, such as river-valley projects, development of industries and communications, lean heavily on the produce of forests.*" The policy of 1952 was intended to re-orient the then-existing forest policy in the light of the socio-economic and political changes.

**(f) The National Forest Policy, 1988**

The Government of India revised the Forest Policy in the year 1988 to manage the forests in the country. The National Forest Policy, 1988 was to achieve the objectives *inter alia* maintenance of environmental stability through preservation and restoration of the ecological balance; conserving the natural heritage; checking soil erosion and denudation in the catchment areas of rivers, lakes, reservoirs; increasing substantially the forest/tree cover in the country through massive afforestation and social forestry programmes; encouraging efficient utilisation of forest produce and maximising substitution of wood etc. The assessment of the outcome of this policy is yet to be empirically tested. However, the policy has contributed immensely in the management and development of forest reserves in the country. It has also contributed in sensitisation of masses towards environment protection, specially the forests.

**(g) The Himachal Pradesh Forest Sector Policy and Strategy, 2005**

There has been a change in outlook of Forest Policy at the national and state level from the primary state woods strategy. The Himachal Pradesh government notified its first forest policy in September 1980 which was in the line of the National Forest Policy Resolution of 1952. The forest

policy framed has seen sea change due the coming into force of the Forest Conservation Act, 1980 and the National Forest Policy of 1988.

### **International Conventions**

Before examining the recent policy whereby illegal encroachers of forest land are being awarded with proprietary rights, it would be worth underlining the national commitment made at international forums. The government of India, being the signatory of various international legal instruments, has made express commitment to it will ensure that no national policy would impair the environment protection efforts. Principle 2 of the Stockholm Declaration 1972 says that "*the natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.*" Principle 4 outlines the special responsibility all to safeguard and wisely manage the heritage of wildlife and its habitat, which are now gravely imperilled by a combination of adverse factors including haste planning for the economic development. The Earth Summit 1992 has similar intent, agreed by all the countries including India. Rio Declaration on Environment and Development, 1992 and the other convention clearly highlight that developing countries must abandon the economic development policies good for erstwhile racial and colonial countries. The Government of India participated in the Convention on International Trade in Endangered Species of Fauna and Flora (CITES), and the convention, signed in 1973, was ratified in 1976. The Convention unequivocally stress on protection and conservation of forests. The United Nations Conference on Environment and Development, 1992 has again underlined the necessity of distinct approaches in forest management, conservation and sustainable development.

In fact, India has been participating in several international summits and conventions on conservation and sustainable development of forest and is active member of various international forums on forestry matters viz. United Nations Forum on Forests (UNFF), Committee on Forestry (COFO) of Food & Agriculture organisation (FAO) and UN-REDD of United Nations Framework Convention on Climate Change etc.



## **LAND ENCROACHMENT AND H.P. DRAFT RULE, 2017**

### **Problem of Forest Land Encroachments**

As stated earlier, government land encroachment is rampant across the country. The State of Himachal Pradesh is no exception to this general tendency. There are many reasons of this. However, lack of proper survey, demarcation and delimitation of forest lands is considered to be the biggest reason for encroachment on forest land. Various governments often ignore the incidences of encroachments due to political reasons. However, the problem turns into an alarming situation when government, rather than initiating the process of ejections, rather regularise their encroachment into some form of settlement.

Concerning settlement of encroachments, the Central Government Guidelines of 1990 and subsequent circulars play an important role. Special fast track courts with powers of eviction must be settled to speed up the eviction process.

### **(a) The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006**

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 recognised and vested the forest rights and occupation in forest land in favour of forest dwelling Scheduled Tribes and other traditional forest dwellers. This is done as part of the recognition that these communities have been residing in such forests since time immemorial, but their dwelling rights have yet to be recorded in the revenue entries. The Forest Rights specified under section 3 of the Act include the right to livelihood and habitation, right to ownership over forest produce, community rights for grazing of animals and pasture, rights for the conversion of lease or pattas, rights of settlement and conversion of all forest villages, rights to protect, regenerate or conserve or manage a community forest resource, rights to access biodiversity, etc.

### **(b) The Himachal Pradesh Conferment of Proprietary Rights (in Certain Cases, for Small and Marginal Farmers) on the Government Land Rules, 2017**

In exercise of the powers conferred by Section 163-A read with section 169 of the Himachal Pradesh Land Revenue Act, 1954, the Government of Himachal Pradesh notified the Himachal Pradesh Conferment of Proprietary Rights (in Certain Cases, for Small and Marginal

Farmers) on the Government Land Rules, 2017 (hereinafter referred to as Draft Rules, 2017). The Draft Rules 2017 is formulated for regularisation of encroachment on land *vide* notification dated 19.04.2017. These rules would repeal the Himachal Pradesh Regularization of Encroachments (in Certain Cases) on Government Land and Disposal of Government Land Rules, 2002.

The meaning of expression "Land" used in these draft rules is the same as defined in Section 5 of the Himachal Pradesh Land Revenue Act, 1954 which includes forest land, ghasni land, waste land which is cultivable as well uncultivable and *khadeter* land and includes the superstructure thereon.<sup>15</sup> Rule 6 prescribes the outer limit of the area under encroachment (in rural areas) in which proposed regularisation of illegal forest encroachments can be done by way of conferring the proprietary rights upon the encroachers on the payment of certain amount of fees.<sup>16</sup>

It is worth mentioning that the Himachal Pradesh Regularization of Encroachments (in Certain Cases) on Government Land and Disposal of Government Land Rules, 2002 are subject matter of consideration before Hon'ble High Court of Himachal Pradesh in *Smt. Poonam Gupta v. State of Himachal Pradesh*<sup>17</sup>. The observation of Hon'ble High Court of Himachal Pradesh in *Smt. Vimla Devi v. State of Himachal Pradesh*,<sup>18</sup> is worth mentioning here:

*"There can, however, be no exception, but to hold that the State Government is obliged to take a final decision pursuant to the Notification dated 19th April, 2017 containing Draft Rules for the conferment of proprietary rights on the unauthorised occupants of the Government land....as the land under encroachment belongs to more than one Government Departments. [We] therefore, deem it appropriate to direct the Chief Secretary, Government of Himachal Pradesh, to convene a meeting of all the Principal Secretaries of such Departments whose lands are involved in the matter of Policy decision under consideration. Let the Authorities take a holistic view as to in what cases proprietary rights are to be conferred and, if so, on what terms and conditions?"*

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<sup>15</sup> Section 5, the Himachal Pradesh Land Revenue Act, 1954.

<sup>16</sup> Rule 6 of the Draft Rules, 2017.

<sup>17</sup> CWP No. 1028 of 2002, Himachal Pradesh High Court.

<sup>18</sup> CWP No. 2559 of 2018 Himachal Pradesh High Court.

The Court further made it categorical that "*while taking the final decision, the Authorities also must keep in view that an individual hardship cannot be given preference or precedence over the public interest.*"

### **A CRITIQUE OF THE REGULARISATION POLICY**

A bare reading of the above provisions relating to the protection and conservation environment and natural resources, there is a clear conflict between the Constitutional ideals, the commitment made with the world community and the policy of conferring proprietary rights to illegal encroachers of land. The policy of conferring proprietary rights to illegal encroachers could be critiqued on the basis of three fundamental objections. *Firstly*, the policy is against the constitutional spirit. Article 48A of the Constitution makes it imperative for the State "*to protect, improve and safeguard flora and fauna of the nation.*"<sup>19</sup> It is beyond doubt that conferring settlement in favour of encroachers would in no way result in forest protection. It would necessarily cause damage to the forest, wildlife and biodiversity.

Secondly, land settlement/regularisation in favour of land encroachers by the government is against the doctrine of public trust. The Supreme Court of India has categorically stated in *M.C. Mehta v. Kamal Nath*,<sup>20</sup> that:

"Our legal system — based on English common law — includes the public trust doctrine as part of its jurisprudence. The state is the trustee of all-natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The state as a trustee is under a legal duty to protect the natural resources. *These resources meant for public use cannot be converted into private ownership.*" (emphasis supplied)

Thus, the state, being a trustee of the forest land on behalf of the public, cannot settle the public land in favour of land encroachers for political benefits. Even if such settlement results in

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<sup>19</sup> Article 48A, Constitution of India, 1949.

<sup>20</sup> (1997) 1 SCC 388; See also *Illinois Central Railroad Co. v. People of the State of Illinois*, 146 US 387; *Gould v. Greylock Reservation Commission*, 350 Mass 410 (1966).

economic benefit, the same must be rejected as it causes irreparable environmental and forest loss.

Thirdly, and as commitment expressed at various international forums, the government of India and the state governments must refrain from formulating national/municipal policies that go against international commitment. An economic development policy that is inherently contradictory to environmental protection must be abandoned.

## **CONCLUSION**

The unfettered usufructuary trait of natural resources makes them vulnerable and prone to exploitation. A claim of natural resource ownership usually begins with long-term unobjectionable usage. The natural resources, which hitherto had a 'community possession' and were administered by the government as 'Public Trust', suddenly became private property. To stop this lawlessness, asserting the doctrine of public trust with much more vigour would be obvious. The use of natural resources has to be regulated, and intervention would be required to secure equitable access to all and, at the same time to ensure inter-generational equity.

The policy of conferring land title to those who have illegal possession of the forest land would be as good as rewarding the pickpockets. This would inevitably result in government-sponsored abetting and perpetuating forest land encroachment. It will also result in irreparable loss of natural resources, biodiversity, and wildlife and thus would affect the overall eco-system and the environment.