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A DEMAND FOR JAL, JUNGLE AUR JAMEEN*

An Argument for Climate Justice of Indigenous Women in India Through Recognition of Land Rights

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* *Water, Forest and Land*

Abstract

The environmental movement of modern-day India could be traced back to protests led by the indigenous Adivasi women. These protests were to secure the health, food security and livelihoods of their families, on lands that they had traditionally occupied. Ironically, the strongest hurdle they face in saving their lands from deforestation and other development projects is the Forest Department in India. This paper seeks to make an argument for the Adivasi woman's climate justice as the realisation of rights over their traditional lands. This paper examines the unique situation of the indigenous peoples in central Indian society. It then considers the effects of climate crisis in this region on the Adivasi women, and how dispossession of land caused by extractivism has affected their lives and livelihoods. It proceeds to deliberate whether gaining rights over their traditional lands would be the solution, and how have legislations and cultural practices affected their land rights. Following this, India's obligations under international law is analysed. Finally, this research studies the implementation of the Forest Rights Act of 2006 that recognised indigenous peoples' rights over forest lands. Based on the findings of this paper, it can be concluded that despite the impediments faced in the implementation of the 2006 Act, the proper enforcement of the legislation is the best available solution towards ensuring climate justice of the indigenous women in India.

Acknowledgments

I would like to start out by thanking the indigenous men and women in India, whose struggles have often been a response to forest policies that threatened their survival. This thesis has been a quest to better understand the issues that indigenous Adivasi women in the Central Indian regions face and how far the efforts of the government has been successful in safeguarding them from the threats they continue to face.

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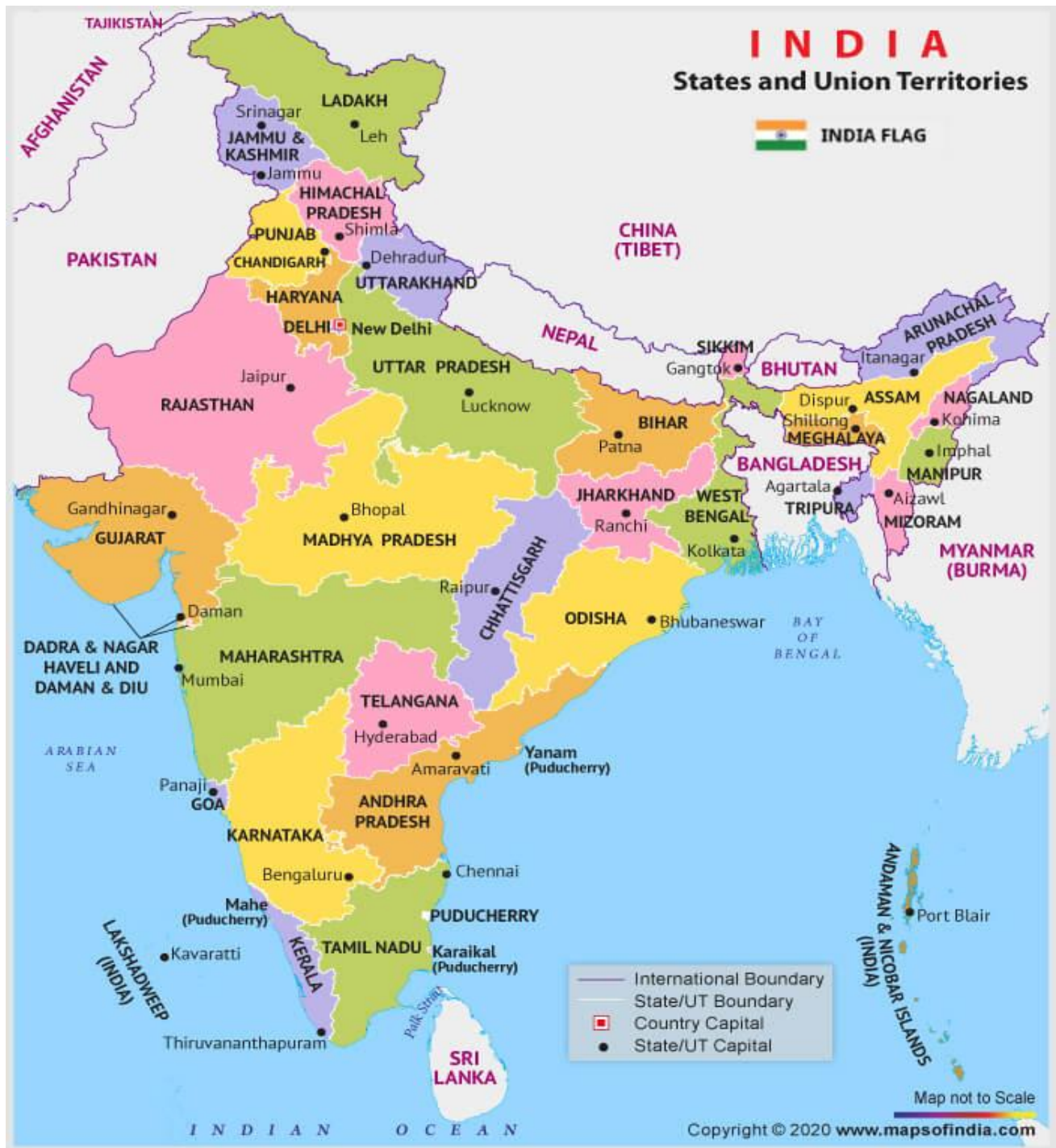
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List of Abbreviations

- CAS – Conference Committee on the Application Standards
- CBDR - common but differentiated responsibilities
- CEACR - Committee of Experts on the Application of Conventions and Recommendations
- CEDAW - Convention on Elimination of All Forms of Discrimination Against Women
- GHG – Green House Gas
- ILO – International Labour Organisation
- IPCC - Intergovernmental Panel on Climate Change
- MEA – Ministry of External Affairs
- MHA - Ministry of Home Affairs
- MoEFF - Ministry of Environment, Forest and Climate Change
- NCST - National Commission for the Scheduled Tribes
- NGO – Non-governmental Organisation
- NGT – National Green Tribunal
- NTFP - non-timber forest produce
- PESA - Panchayat (Extension of the Scheduled Areas) Act
- RCP - Representative Concentration Pathway
- RRVUNL - Rajasthan Rajya Vidyut Utpadan Nigam Limited
- UAPA - Unlawful Activities (Prevention) Act, 1967
- UN – United Nations
- UNDRIP - United Nations Declaration on the Rights of Indigenous Peoples
- UNFCCC - United Nations Framework Convention on Climate Change
- UNHRC - United Nations Human Rights Council

Map of India



This map is included as an easy reference to guide the reader regarding the geographical positioning of the States mentioned in the thesis. Frequent references would be made to the central Indian States of Madhya Pradesh, Chhattisgarh and Jharkhand, which are broadly the areas that the thesis considers with regard to the implementation of legislations regarding land rights of indigenous people in India.

Introduction

While modern environmentalism in India could be said to have begun during the Chipko movement, a similar incident had first taken place back in 1730, when the Maharaja of Jodhpur, Abhay Singh, ordered the felling of trees around the village of Khejarli (where the Bishnoi tribe inhabited) for the renovation of the Mehrangar Fort.¹ The men and women of the Bishnoi tribe, wrapped themselves around the tree in the hope that doing so would prevent the trees from being felled. However, the Maharaja's army cut down the trees along with the 363 people hugging those trees. Following this, 363 trees were planted in their memory around the local temple.²

The Chipko movement was a grassroots movement led by the indigenous communities that lived in the foothills of the Himalayas. They were protesting against the government's move to cut down trees for building highways. Gaura Devi, an indigenous woman, led 26 other women into the forest at night and hugged the trees in a desperate attempt to save the trees.³ In the days that followed, they were joined by many other villagers. This movement in post-independent India gained international attention for its 'Gandhian-style' non-violent protests.

However, Indian scholars like Ramachandra Guha observe a stark difference between this and the environmental movement in the West, by noting, "In the West, the environmental movement stemmed from a desire to protect endangered animal species and natural habitats. In India, however, it arose out of the imperative of human survival. This was an environmentalism of the poor, which sought to promote social justice with sustainability."⁴

The Chipko movement was an early warning on why India could not afford to go down a path of resource and capital-intensive mode of development, without ensuring ecological balance and protecting the forests and communities that called it home. However, nearly half a decade later, the indigenous communities in the present times have still had to resort to similar techniques in a bid to protect their homes from mining companies in Hasdeo Arand.

¹ 'Rajasthan's Bishnoi Villages - Outlook Traveller' (*Outlook India*, 17 February 2017) <https://www.outlookindia.com/outlooktraveller/explore/story/51372/rajasthan_bishnoi_villages> accessed 13 July 2022.

² *ibid.*

³ Poulomi Chandra, 'Gaura Devi: The Environmental Activist Who Played A Prominent Role In The Chipko Movement' (*Feminism In India*, 24 March 2022) <<https://feminisminindia.com/2022/03/25/gaura-devi-environmental-activist-chipko-movement/>> accessed 13 July 2022.

⁴ Preface, Ramachandra Guha, *Environmentalism: A Global History* (Allen Lane 2014).

The Indigenous Peoples in Hasdeo Arand

The forest of Hasdeo Arand in central India is one of the country's largest contiguous forests, and home to the local indigenous peoples called the Gond tribe. They are one of the many indigenous peoples (referred to as 'Adivasi'⁵ in India) recognised by various Indian states (mostly spanning across central and eastern parts of the Indian subcontinent), under the Constitution Scheduled Tribes Order of 1950.⁶ More lately, however, Hasdeo Arand has come to prominence for the issues surrounding the proposed mining projects. These projects, if continued would have led to a loss in biodiversity in the region, and also resulted in the loss of livelihood and the displacement of the Gond people from their traditional homeland.

Despite the Forest Advisory Committee's initial recommendation that the Ministry of Environment, Forest and Climate Change (MoEFCC) reject the two mining proposals for coal mines in this region – citing conservation of biodiversity and wildlife in this region – the then Minister for Environment for the Government of India, Mr. Jairam Ramesh approved these proposals in June, 2011.⁷ In the following years, the country's National Green Tribunal (NGT) set aside the government's approval for these mining projects. However, it was soon followed by an order of the Supreme Court that was meant to stay the decision of the NGT, effectively allowing for the mining project in Hasdeo Arand. Later, in its judgment relating to the coal scam, the approval given for this mining project was cancelled by the Supreme Court.

However, when the new government led by Narendra Modi came into power, they reallocated the project to mine the coal in this region to Rajasthan Rajya Vidyut Utpadan Nigam Limited (RRVUNL). The allocation of these lands to extract coal would essentially result in a vast number of trees and the destruction of biodiversity in the region. These are also located in regions that the indigenous community considers home or have traditionally relied on for resources like firewood.

⁵ Literally translated, the word means original inhabitants.

⁶ 'Adivasi | People | Britannica' <<https://www.britannica.com/topic/Adivasi>> accessed 9 May 2022.

⁷ THE CONSTITUTION (SCHEDULED TRIBES) ORDER 1950.

⁷ 'Jairam Ramesh Okays Mining Proposals on Fringes of Hasdeo-Arand Forest' *The Economic Times* (28 June 2011) <<https://economictimes.indiatimes.com/industry/indl-goods/svs/metals-mining/jairam-ramesh-okays-mining-proposals-on-fringes-of-hasdeo-arand-forest/articleshow/8969714.cms?from=mdr>> accessed 9 May 2022.

While RRVUNL was a power company owned by the state of Rajasthan, the operation of this coal mine was contracted to Adani Enterprises.⁸ Incidentally, Adani Enterprises is owned by Gautam Adani and is one of the richest individuals in the country as well as the world today.⁹

Amidst all this, however, the indigenous women from this region have been rallying over the years to save the forest. Their form of protest often translates to camping out in the forest and hugging the trees in an attempt to save them from being felled.¹⁰ Similar efforts by indigenous women in Koriya, Sarguja and Kawardha had previously succeeded in the conservation of the forests in these regions.¹¹ At the face of it, they are fighting for their health, livelihoods and food security. However, there is also a non-economic factor at play here. It involves a core aspect of their way of being that associates a spiritual value to the living and non-living things that inhabit their ancestral forests.¹² Further, their efforts would inadvertently also have a positive impact on the environment,¹³ as the mining project would have affected the migratory corridor of wild animals like the elephants in the region preventing them from accessing their ancient migratory routes.¹⁴

Their protests, however, did not garner as much media attention as the farmers protesting in the nation's capital against legislations that would drastically affect the farming populations, as a harsh reminder that the major media houses in the country largely continues to focus on the events that take place close to Delhi. However, in this particular case, Chhattisgarh's Chief Minister was forced to indefinitely put on hold three of the mining projects that were part of the second phase. However, the two other mining projects that had already been underway since 2013 were allowed to continue.¹⁵

⁸ 'India's Ancient Tribes Battle to Save Their Forest Home from Mining' *The Guardian* (10 February 2020) <<https://www.theguardian.com/environment/2020/feb/10/indias-ancient-tribes-battle-to-save-their-forest-home-from-mining>> accessed 9 May 2022; 'Another Win for Adani's Parsa East Kente Basan Mine' (*The Morning Context*) <<https://themorningcontext.com/chaos/another-win-for-adanis-parsa-east-kente-basan-mine>> accessed 9 May 2022; Nileena MS, 'The Long Battle of Hasdeo Arand Residents against the Parsa Coal Project in Chhattisgarh' (*The Caravan*) <<https://caravanmagazine.in/communities/long-battle-of-hasdeo-arand-residents-against-parsa-coal-project-chhattisgarh>> accessed 9 May 2022.

⁹ 'Gautam Adani & Family' (*Forbes*) <<https://www.forbes.com/nft-profile/gautam-adani-1/>> accessed 12 July 2022.

¹⁰ 'Government Gives Assent to Coal Mining in Hasdeo Forests in Central India' <<https://thediplomat.com/2022/05/government-gives-assent-to-coal-mining-in-hasdeo-forests-in-central-india/>> accessed 9 May 2022.

¹¹ Sulakshana Nandi and Samir Garg, 'Indigenous Women's Struggles to Oppose State-Sponsored Deforestation in Chhattisgarh, India' (2017) 25 *Gender & Development* 387.

¹² *ibid.*

¹³ *ibid.*; 'Government Gives Assent to Coal Mining in Hasdeo Forests in Central India' (n 10).

¹⁴ 'Government Gives Assent to Coal Mining in Hasdeo Forests in Central India' (n 10).

¹⁵ Ritesh Mishra, 'Hasdeo Arand Protest: Chhattisgarh Puts Three Mining Projects on Hold' (*Hindustan Times*, 9 June 2022) <<https://www.hindustantimes.com/india-news/hasdeo-arand-chhattisgarh-govt-puts-mining-on-hold-following-stiff-push-back-101654772371848.html>> accessed 13 July 2022.

While this was a minor victory, the struggles of these indigenous peoples also shine light on the difficulty in ensuring their rights over their traditional lands. Their story might find resonance with indigenous peoples in various countries across Asia, Africa and Latin America, where the lands of indigenous communities are increasingly threatened by development and mining projects. Similarly, in many of these instances these populations from indigenous communities have to protest and campaign against their governments, often putting their lives at risk in the process.

This paper will examine **how dispossession of land affects indigenous women in India, whether the domestic legislation passed by the Government of India in 2006 - the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act – complies with India’s international obligations, and whether its implementation has helped to ensure the Adivasi woman’s demand for ‘*jal, jungle aur jameen*’ (water, forest, and land).**

This paper will try to answer this question by addressing the different aspects of this question in the next five Chapters.

The first Chapter provides an overview of the unique position India’s Adivasi population by tracing their position in society and the struggles they faced from pre-colonial times to modern times. It also briefly considers the aspects that led to the development of indigenous peoples rights in International law, and contrasts the current situation of Adivasis to that of indigenous peoples from other countries which experienced settler colonialism. In doing so, it would mainly rely on literature review focussing on writings by anthropologists, historians, legal scholars and sociologists. Reliance would also be placed on analysing colonial era legislations, the debates of the Constituent Assembly while framing independent India’s Constitution, and reports considering the status of indigenous peoples (often referred to as ‘tribals’ in the Indian context).

Chapter 2 will discuss the concept of climate justice in the Adivasi context, while considering the environmental and man-made factors that are resulting in increased vulnerability of Adivasi women. It would elaborate on the ways in which dispossession of their ancestral lands has affected Adivasi women. This is followed by deliberating on the argument that ensuring land rights of Adivasi women would be a step towards ensuring their climate justice. The Chapter will fall back on scientific reports by bodies of the United Nations (UN), and those published by the relevant ministries of the Government of India to advance this argument.

The domestic legislations within India that pertain to the realisation of Adivasi women's land rights are considered in Chapter 3. The Chapter looks at the evolution of legislations and policies relating to both forest governance and Adivasi rights. A separate segment within this Chapter also gives a brief overview of women's legal and traditional rights over land. This is followed by an analysis of the provisions of the Forest Rights Act of 2006 that sought to empower Adivasi women. The relevant statutes and judicial decisions are the main sources referred to in this Chapter.

India's positioning with respect to 'indigenous peoples' rights in international law and the obligations it has undertaken under international treaties and other documents would be discussed under Chapter 4. While India's obligations under the International Labour Organisation's (ILO) Convention on indigenous and tribal populations (No. 107) would be the key focus, the Chapter also considers the reservations that India has expressed regarding the revised Convention No. 169 of 1989 and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Following this, India's commitments under other international treaties such as the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) and the United Nations Framework Convention on Climate Change (UNFCCC) would also be briefly considered. As far as possible, reliance has been placed on the official texts and documents of the ILO, the UN, and the Government of India. Writings of legal scholars are used to justify certain implication in international law.

In the final Chapter, this paper examines the implementation of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. By analysing the latest available data regarding the rights that have been granted under this legislation, it tries to make preliminary observations regarding the implementation of the Act in the states of Chhattisgarh, Jharkhand and Madhya Pradesh. Further, data from reports by the National Commission for Scheduled Tribes (NCST) – a constitutional body that is mandated to present annual reports on the status of Scheduled Tribes in India – will be considered. In order to obtain a better understanding regarding the operation of this legislation on the ground, this paper would also refer to secondary sources such as reports by non-governmental organisations (NGO) working on the implementation of land rights of Adivasi people in these regions. Further, semi-structured telephonic interviews were conducted with 4 individuals working with such NGOs spread across the three states, a lawyer who has represented Adivasi groups in Jharkhand, and an ethnographer, whose has previously researched on Adivasi women's rights and the implementation of the Forest Rights Act in Gujarat. These interviews were used to support or nuance the observations that came forth from the government data and the reports on the implementation by NGOs.

Scope and limitation

Throughout the course of this paper, an effort has been made to understand the issue from an intersectional feminist perspective. Towards this, wherever possible, the relevant legislations have been assessed with a focus on its implication for Adivasi women. Further, at the international level, India's obligations under CEDAW and the observations of the Committee have been considered. However, gender-disaggregated quantitative data regarding the implementation of the 2006 Act is not maintained by the government. Therefore, this paper relies on NGO reports and observations by interviewees in this regard.

Based on data from the latest census data available for India, the population of Scheduled Tribes groups across the country constituted around 8.63% of the national population in 2011.¹⁶ However, the Adivasi communities in India are spread over different geographical regions of the country and are just as varied. Therefore, the observations coming from this region might not be applicable to all indigenous women across the Indian subcontinent. but focussed on the states of Chhattisgarh, Jharkhand and Madhya Pradesh.

The primary limitation has been the sources relied on. This paper has mainly been an exercise in analysing secondary data in the form of legislations and literature review, with very little quantitative or qualitative data. However, efforts have been made to capture the details that underlie the secondary data. This has been done by conducting interviews with individuals who have worked at the grassroots in these three states and also in the state of Gujarat, in order to ascertain the similarity or differences in their experience with the implementation of the law.

¹⁶ The official figures, based on the last census in 2011 places the national population at 1,210,854,977. While the country awaits for its latest census to complete in 2022 due to delays caused by the COVID-19 pandemic, the estimates according to a report by the country's Union Ministry of Health and Family Welfare come up to about 1,363,006,000. MOHFW Report <https://main.mohfw.gov.in/sites/default/files/Population%20Projection%20Report%202011-2036%20-%20upload_compressed_0.pdf> accessed 4 May 2022.; 'Scheduled Tribe (ST) Data - Census 2011 India' <<https://www.census2011.co.in/scheduled-tribes.php>> accessed 6 May 2022.

1. Adivasis as Indigenous Peoples of India

Most literature regarding indigenous communities across the world generally portrays the indigenous community as a group that has a very close relationship with nature. Scholars have argued that although indigenous groups across the world differ, there are various commonalities of experience between them, including their increased susceptibility to climate change and their unique connection to their lands for legal, spiritual and cultural reasons.¹⁷ Additionally, Kemp and Martens also argue that an aspect connecting indigenous people is ‘their understanding of and living with nature.’¹⁸

At the onset, it becomes relevant to understand the distinct historical context of India and how this has affected the Adivasi communities in India. This chapter will rely on writings by anthropologists, historians, legal scholars and sociologists to demonstrate the position of Adivasi communities in Indian society in various time periods, beginning with pre-colonial times. It would then consider the effects of various colonial legislations on Adivasi populations, before looking at the efforts made by the government in independent India to improve their situation. Later, it proceeds to briefly consider the evolution of indigenous peoples’ rights in International law. Following this, it would evaluate whether the experiences of the early developments in international law relating to indigenous peoples apply to India.

1.1 The Adivasi’s position in society

Among the scholars studying the indigenous populations in India, the terms ‘adivasi’, ‘tribal’ and ‘indigenous communities’ are often used interchangeably.¹⁹ What might distinguish these groups in India from the general global understanding of who constitutes an ‘indigenous community’ is perhaps the fact that the ‘adivasi’ (first settlers) or ‘vanvasi’ (inhabitants of forests) have existed on the fringes of the sedentary Indian society long before colonialism.²⁰ Therefore, an argument of whether or not they are the ‘first settlers’ or the true owners of the land against the rest of the Indian population becomes a difficult question to ascertain. Scholars studying the Adivasi movements in India have gone to the extent

¹⁷ Randall S Abate and Elizabeth Ann Kronk Warner, *Climate Change and Indigenous Peoples* (Edward Elgar 2013) 4.

¹⁸ Pim Martens, ‘Indigenous Spirituality and Worldview as an Alternative Approach in Thinking about the COVID 19 Pandemic’ (*PIM MARTENS*, 10 May 2021) <<https://pimmartens.com/2021/05/10/indigenous-spirituality-and-worldview-as-an-alternative-approach-in-thinking-about-the-covid-19-pandemic/>> accessed 2 June 2022.

¹⁹ Indra Munshi, ‘Introduction’, *The Adivasi Question: Issues of Land, Forest and Livelihood* (1st edn, Orient BlackSwan Private Limited 2012).

²⁰ *ibid*; Biswamoy Pati, ‘Introduction: Situating the Adivasi in Colonial India’, *Adivasis in Colonial India: Survival, Resistance and Negotiation* (1st edn, Orient BlackSwan Private Limited 2011) 3.

of stating that the Adivasi identity was of relatively recent origin and was forged by the commonality of experience.²¹

And while the Adivasi communities historically enjoyed considerable autonomy, self-sufficiency, and their distinct way of life, they have generally co-existed with mainstream society, with considerable interactions between the two societies unlike the history of indigenous peoples in other countries, which was typically characterised by their differentiation from mainstream societies.²²

1.1.1 The pre-colonial Adivasi identity

In her book, ‘Against Ecological Romanticism’,²³ historian Archana Prasad analyses the possibility of the tribal people in the Central Provinces of pre-colonial India being sedentary cultivators, who could have been driven to shifting agriculture and hunting and gathering lifestyle as a result of being marginalised into the forests by the caste Hindu society during the Maratha period (during the 17th and 18th century).

Scholars also postulate the interactions between the Adivasi people and the caste Hindu society leading to tribal deities and rituals being modified and incorporated into Brahminical Hinduism.²⁴ Moreover, authors like Biswamoy Pati also talk about the Hinduisation of these tribes, with sections of these populations being incorporated into the Brahminical order, especially those among tribal groups that were landlords and moneylenders.²⁵ Thus, resulting in improving their status in the caste-Hindu society.

These experiences of the Adivasi communities in the region point to a complex relationship between the Adivasi people and the mainstream society that had interacted influenced and evolved over centuries, long before the British took over the administration of India.

1.1.2 Adivasis under colonialism

Under the British Raj, the term ‘tribe’ was largely used to define a large number of groups who did not fit into the caste Hindu society.²⁶ However, one cannot simply term it as a colonial construct, as these perceptions of the Adivasi population by the British, and the resulting policies in this regard would have

²¹ Crispin Bates, “‘Lost Innocents and the Loss of Innocence’: Interpreting Adivasi Movements in South Asia”, *Indigenous Peoples of Asia* (Association for Asian Studies, Inc 1995) 119.

²² Munshi (n 19).

²³ Archana Prasad, *Against Ecological Romanticism: Verrier Elwin and the Making of an Anti-Modern Tribal Identity* (1st edn, Three Essays Collectives 2003) 3.

²⁴ Munshi (n 19).

²⁵ Pati (n 20) 10.

²⁶ Munshi (n 19).

been aided by the prejudices of the caste Hindus of the time. Consequently, the colonial administrators and anthropologists often ignored the real-life situation of these groups and their distinct identities. The British tried to locate the Adivasis in relation to the caste Hindu society based on the similarities or differences in their lifestyle.²⁷ On the part of the British administration, this pointed towards both; a desire to encourage settled agriculture that could be taxed easily; and ignorance about the role that Adivasi societies played and their important contribution to the Indian economy.²⁸

The Criminalisation of certain Adivasi communities

In 1871, the British passed ‘the Criminal Tribes Act’, which was borne out of the colonial administration’s belief that the Indian system of caste – where someone born into a family practising a certain trade would go on to practise that trade – could be transposed to tribes in India, some of whom might have been criminals.

In his speech introducing the bill, Mr. T. V. Stephens, the then Member of Law and Order is recorded to have stated, “The special feature of India is the caste system. ...It means a tribe whose ancestors were criminals from times immemorial, who are themselves destined by the usages of caste to commit crime and whose descendants will be offenders against law, until the whole tribe is exterminated or accounted for in the manner of the Thugs. When a man tells you that he is an offender against the law, he has been so from the beginning, and will be so to the end, reform is impossible, for it is his trade, his caste, I may almost say his religion to commit crime.”²⁹

Thus, the administration, by passing this legislation criminalised the entire population of certain tribes by classifying them as ‘addicted to the systematic commission of non-bailable offences’ with the local government.³⁰ Under this legislation, the place where the members of such tribes were to be registered with the police in whose jurisdiction it fell. The members of such tribes had to report to the police at fixed intervals, intimate the police in case they moved to another town or village, and also inform about any absence from residence. They required passes to leave their permitted limits.³¹ The law also had a provision exempting itself from being challenged before a court of justice on the question of the notifications issued under the legislation,³² and placed the burden of proof on the member of the tribe to

²⁷ Pati (n 20) 6.

²⁸ The Adivasis of central India produced and sold a wide range of products like dyes, mahua (an alcoholic drink), spices, silk and tendu leaves (for making bidis, the Indian version of cigarettes) Bates (n 21) 112.

²⁹ KM Kapadia, ‘The Criminal Tribes of India’ (1952) 1 Sociological Bulletin 99.

³⁰ Section 2, Criminal Tribes Act 1871.

³¹ Section 18, *ibid.*

³² Section 6, *ibid.*

prove his lawful excuse.³³ The same legislation was also extended to allow for maintaining registers of Eunuchs ‘reasonably suspected of kidnapping or castrating children’.³⁴

These provisions reveal the British colonial administration’s outlook of these tribes as ‘dangerous elements’, whose freedoms had to be restricted in order to protect the rest of the society. Such criminalisation based on the family one was born into, coupled with a response based on retributive justice, without exploring any avenue for the reformation of these groups resulted in the ostracization of these groups in Indian society. Some tribes continue to be marginalised even today despite the fact that the Act was repealed in 1952, following a report by the Criminal Tribes Enquiry Committee. This could also be attributed to the repealed Act being replaced in many States by the Habitual Offenders Act.³⁵ To this day, members of these communities are randomly rounded up by the police (who, in most states, continue to be governed by colonial legislation, perhaps with minor changes)³⁶ in cases of petty crimes.³⁷

Special measures for areas occupied by Adivasi populations

In 1874, the British enacted the Scheduled Districts Act, which would be applicable to certain areas that were inhabited by ‘primitive people’.³⁸ There was a concern by the colonial administration that the agricultural lands of these people needed to be guarded against their neighbouring more ‘civilised’ neighbours.³⁹ Also, a need was felt to take measures to protect these people from being entrapped into bonded labour by moneylenders.⁴⁰ The resulting legislation allowed the British administration to exclude these ‘scheduled areas’ from the application of legislations passed by the provinces. The subsequent Simon Commission, reporting to the British monarch with recommendations on constitutional reforms, was of the opinion that the responsibility of these ‘backward areas’ should rest with the Central government, but under the Government of India Act of 1935, these areas were classified as ‘excluded areas’ and ‘partially excluded areas’, where the Governor of the Province had been vested the authority

³³ Section 9, *ibid.*

³⁴ Section 24, *ibid.*

³⁵ Virginius Xaxa and others, ‘Report of the High Level Committee on Socio-Economic, Health and Educational Status of Tribal Communities of India’ (Ministry of Tribal Affairs, Government of India 2014) 361 <<https://cjp.org.in/wp-content/uploads/2019/10/2014-Xaxa-Tribal-Committee-Report.pdf#page=355>> accessed 7 July 2022.

³⁶ For more on this, read ‘The Sordid Story of Colonial Policing in Independent India’ (*The Wire*, 20 November 2017) <<https://thewire.in/government/sordid-story-colonial-policing-independent-india>> accessed 20 June 2022.

³⁷ Dilip D’Souza, ‘Declared Criminal at Birth: India’s “Denotified Tribes”’ (*Manushi: A journal about women and society*, Issue 123) <<https://indiatgether.org/manushi/issue123/tribe.htm>> accessed 20 June 2022.

³⁸ B. Shiva Rao, *The Framing Of India’s Constitution A Study* (Indian Institute of Public Administration 1968) 569 <<http://archive.org/details/in.ernet.dli.2015.275967>> accessed 24 June 2022.

³⁹ B. Shiva Rao (n 38).

⁴⁰ *ibid.*

to apply laws with such modifications as were considered necessary to these areas.⁴¹ However, the framers of the Constitution for independent India alluded to this provision having remained a ‘dead letter’ during their discussions at the Constituent Assembly debates.⁴²

The decision by the British to have certain areas where the Governor could choose to apply legislations passed by the state with appropriate amendments continue to be the law regarding the governance of scheduled areas in independent India. However, its application on the ground is far from efficient. The relevant domestic legislations in this regard are discussed under Chapter 3 (in Section 3.1.2).

Restricted access to forest land

During colonialism, the Adivasis saw increased encroachment into forest lands and loss of their ancestral land. When the colonial administration tried to record land ownership, the Adivasis who were used to collective ownership by clans, could not prove an individual ownership over land. The forest laws during this period banned shifting agriculture. In the event that the rights of tribal peasants were recognised, the high taxes and plough cultivation in land not suited to such agricultural pattern only led to further destitution and marginalisation of these groups.⁴³

The colonial administration went on to implement a legislation to regulate and control the use of forest resources, and established a system of reserved forests where people were prevented from being able to move freely in forests that were protected under the Indian Forest Act of 1927 (a legislation that is still in force today, and elaborated further under section 3.1.2 below). However, the administration soon realised that they needed the knowledge about the forests that the tribal communities possessed, in order to access timber and other forest produce. Ultimately, the British administration granted Adivasi people small patches to cultivate in exchange for providing labour to the forest department.⁴⁴

The present day situation of Adivasi communities in India has many similarities with colonial times, with many patterns of their treatment continuing even today.

1.1.3 The Adivasi identity today

The Constituent Assembly was set up to draft the Constitution of India, following the negotiations between the leaders of the Indian independence movement and members of the British Cabinet Mission.

⁴¹ *ibid* 572.

⁴² ‘Constituent Assembly Debates (Proceedings) - Volume IX (9 August 1949)’ (*Constitution of India*, 8 September 1949) <https://www.constitutionofindia.net/constitution_assembly_debates/volume/9/1949-08-09> accessed 24 June 2022.

⁴³ *Adivasis in Colonial India: Survival, Resistance and Negotiation* (1st edn, Orient BlackSwan Private Limited 2011) 8–9.

⁴⁴ *ibid* 14.

It held its first meeting in New Delhi on 9 December 1946.⁴⁵ In one of his initial speeches in the Constituent Assembly debates, Mr. Jaipal Singh, one of the six tribal members represented at the Constituent Assembly, recalled the shabby treatment meted out to the Adivasi people for the last 6000 years, and asked the leaders to ensure that all Indians would have ‘equality of opportunity, where no one would be neglected’.⁴⁶ He also called for better representation of the Adivasi men and women, and the need to move forward by working together and building trust between the Adivasi communities and the general population.⁴⁷

The Assembly set up a Sub-Committee on the Excluded and Partially Excluded Areas in Provinces other than Assam. This Sub-Committee submitted its interim report on 18 August 1947.⁴⁸ Based on the Committee’s recommendations some regions predominantly populated by Adivasi people came to be known as “Scheduled Areas” (based on areas that were to be notified to which the provisions of Schedule V of the Constitution would apply, further explained under section 3.1.2 below). Article 342 of the Indian Constitution states that, those tribal communities deemed to be Scheduled Tribes in each state or Union Territory in India would be specified by the President and would be included in the Constitution (Scheduled Tribes) Order, 1950.⁴⁹ While recommending that the development of the people in these excluded and partially excluded areas should be the priority, the Sub-Committee also recognised that there were tribal populations that lived among the rest of the country’s population who should also be treated as minorities and given special representation in the legislatures.⁵⁰ Similarly, the sub-committee on Assam Tribal and Excluded Areas also made a reference to tribals living in the plains and recommended that they be treated as minorities.⁵¹

The Government’s policy from the beginning involved safeguarding the culture and the traditional way of life of the tribal communities. They also recognised the need to improve the level of education among this group and their standard of living.⁵² In 1965, the Government set up an Advisory Committee on the Revision of the Lists of Scheduled Castes and Scheduled Tribes, popularly known as the Lokur Committee Report. This report recommended an expansion of the list of Scheduled Tribes by defining

⁴⁵ B. Shiva Rao (n 38) 2.

⁴⁶ ‘Constituent Assembly Debates (Proceedings) - Volume I (19 December 1946)’ (*Constitution of India*, 19 December 1946) <https://www.constitutionofindia.net/constitution_assembly_debates/volume/1/1946-12-19> accessed 24 June 2022.

⁴⁷ *ibid.*

⁴⁸ B. Shiva Rao (n 38) 573.

⁴⁹ Article 342, Constitution of India 1949.

⁵⁰ B. Shiva Rao (n 38) 575.

⁵¹ B. Shiva Rao (n 38).

⁵² *ibid.*

them as groups characterised by their ‘primitive traits, distinctive culture, geographic isolation, shyness of contact with the community at large and backwardness.’⁵³ The committee also noted that Scheduled tribes may belong to any religion.⁵⁴

Following independence, matters regarding the Scheduled Tribes were initially considered by the Ministry of Social Justice and Empowerment. In 1999, with the aim to take a more focussed approach, a dedicated Ministry of Tribal Affairs was set up by the Government of India.⁵⁵

Today, most of the indigenous peoples of India are found either in the seven states of northeast India, or in the Central Tribal Belt stretching from Rajasthan to West Bengal. Based on the last census collection exercise of India which took place in 2011 (the process for 2021 was delayed due to the pandemic), the total population of Scheduled Tribes in India is around 104.3 million today.⁵⁶ The state of Madhya Pradesh has the highest with 15.3 million Scheduled Tribes in the state. Other major states include Maharashtra (10.5 million), Odisha (9.6 million), Rajasthan (9.2 million), Gujarat (8.9 million), Jharkhand (8.6 million), Chhattisgarh (7.8 million), and Andhra Pradesh (5.9 million).⁵⁷ This research will mainly focus on the implementation in the Central Indian states of Chhattisgarh, Jharkhand and Madhya Pradesh.

However, what is very important to note with regard to any study regarding the tribal population of the country is the enormous heterogeneity between these groups.⁵⁸ Further, many tribal groups that have been classified as ‘Particularly Vulnerable Tribal Groups’ by the government on the basis of their traditional livelihoods, habitats and customary resource rights. They mainly inhabit the States of Maharashtra, Madhya Pradesh, Chhattisgarh, Jharkhand, Odisha, Andhra Pradesh and Tamil Nadu.⁵⁹ Although not all of them have been granted Scheduled Tribe status.⁶⁰ Thus, rendering them even more vulnerable and depriving them of the protections and positive discrimination that comes with such status.

⁵³ BN Lokur, ‘The Report of the Advisory Committee on the Revision of the Lists of Scheduled Castes and Scheduled Tribes’ (1965) 7 <<https://tribal.nic.in/downloads/Statistics/OtherReport/LokurCommitteeReport.pdf>> accessed 25 June 2022.

⁵⁴ Lokur (n 53).

⁵⁵ ‘About the Ministry’ (*Ministry of Tribal Affairs - Government of India*) <<https://tribal.nic.in/>> accessed 24 June 2022.

⁵⁶ ‘ST Population - Dashboard’ (*Ministry of Tribal Affairs - Government of India*) <<https://dashboard.tribal.gov.in/>> accessed 24 June 2022.

⁵⁷ *ibid.*

⁵⁸ Xaxa and others (n 35) 34.

⁵⁹ *ibid* 59.

⁶⁰ *ibid* 60.

1.2 Early history of indigenous peoples in International Law

Having looked at the developments related to Adivasi communities in India over the ages, it becomes pertinent to examine the evolution of the concept of ‘indigenous peoples’ in international law. The term itself, as anthropologist Ronald Niezen notes, was barely used in journals or newspapers before the 1980s.⁶¹ However, their beginnings in International law can be traced back to when the European colonists entered into treaties with indigenous peoples to recognise the relationship of the colonial powers with respect to the original settlers.⁶² This demonstrates their position as distinct autonomous groups at the advent of European colonist, which has since been forgotten as the Western philosophical thought and positivist notions of international law evolved to take a central stage. The positivist approach of international law helped establish a Euro-centric world order, where international law accepted the doctrine of *terra nullius* to legitimise the actions of European states as they ‘invade(d) foreign lands and peoples and asserted their sovereignty over them.’⁶³

1.2.1 Developments in recognition of indigenous peoples’ rights

However, one could perhaps point to the sixteenth century Spanish theologians Francisco de Vitoria, Bartolomé de las Casas and others (together referred to as the Spanish School), who were worried about the rights of the indigenous communities under the Spanish conquistadores and maintained that these self-determining communities owned their lands.⁶⁴ The sermon in 1511 by a Dominican friar, Antonio de Montesinos, condemning the unjust ill-treatment suffered by the Indians moved the Spanish King to call for an official discussion on the topic that led to the adoption of the Laws of Burgos in 1512.⁶⁵ Nevertheless, the statements by the Spanish School were looked upon by legal theorists ‘as statements of morality as opposed to the law.’⁶⁶ Thus, diminishing the threat these admonishments posed, so as not to challenge the suzerainty that the colonial states exercised over these people under international law.

In most instances, over time the indigenous populations dwindled in comparison to the settler population and they came to be regarded as a minority that had to be integrated into the mainstream society or

⁶¹ Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (1st edn, University of California Press 2003) 3.

⁶² *ibid* 29.

⁶³ S James Anaya, ‘Indigenous Rights Norms in Contemporary International Law’ (1991) 8 *Arizona Journal of International and Comparative Law* 42, 3.

⁶⁴ Odette Mazel, ‘THE EVOLUTION OF RIGHTS: INDIGENOUS PEOPLES AND INTERNATIONAL LAW’ (2009) 13 *Australian Indigenous Law Review* 140.

⁶⁵ Felipe Gomez Isa, ‘Spain: The First Cry for Justice in the Americas - From Antonio de Montesinos to the Laws of Burgos (1512)’, *First Fundamental Rights Documents in Europe : Commemorating 800 Years of Magna Carta* (Intersentia 2015) 93.

⁶⁶ Anaya (n 63).

relegated to the fringes by displacement or other strategies.⁶⁷ In such situations, these communities saw little use of approaching the national courts and legislations to address their concerns. A few indigenous communities under the British Empire did try to appeal to the monarch during the mid-nineteenth century, but these did not result in anything more than ‘a polite hearing’.⁶⁸

1.2.2 Lack of legal recognition of indigenous peoples before international forums

The application of positivist international law also meant further invisibilization of indigenous communities in international forums during the early twentieth century by refusing to acknowledge them as legal entities,⁶⁹ and non-recognition of the treaties entered between indigenous peoples and colonising states as legally binding.⁷⁰ In the island of Palmas case, the Permanent Court of Arbitration stated that, “As regards contracts between a State or a Company such as the Dutch East India Company and native princes or chiefs of peoples not recognised as members of the community of nations, they are not, in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties.”⁷¹ However, the arbitrator follows it up by stating that these contracts created a relationship of “suzerain and vassal” or “so-called colonial protectorate”.

A few decades later, changes began to take shape with the ILO’s recognition of rights of tribal and indigenous populations. This would be further explored with its implications on the Indian government in Chapter 3, under section 3.1.

1.3 The unique positioning of the Adivasi population in India

India was part of the British Empire until 14 August 1947. As discussed earlier in this Chapter, the Adivasis or indigenous peoples of India were a subsection of the colonised population that had been living in the fringes of society even prior to colonial occupation. The flawed British understanding of the caste-based mainstream society in India, the resulting legislations that they brought forth, and their eagerness to find new forms of revenue resulted in further stigmatising the Adivasi communities during the colonial administration. Therefore, unlike the experiences of indigenous peoples in other parts of the

⁶⁷ Niezen (n 61).

⁶⁸ *ibid* 30.

⁶⁹ *Cayuga Indians (Great Britain) v United States* (1926) VI Reports of International Arbitral Awards 173; *Legal Status of Eastern Greenland (Norway v Denmark)* [1933] Permanent Court of International Justice Ser. A/B, No.53 71.

⁷⁰ *Island of Palmas (United States v Netherlands)* (1928) II Reports of International Arbitral Awards 829 (Permanent Court of Arbitration).

⁷¹ *ibid* 858.

globe, their marginalisation from society did not happen solely as a result of colonisation by a foreign power.

Moreover, another concern comes from the fact that international law has by and large shied away from clearly defining tribal. In this context, Professor André Béteille, one of India's leading sociologists has commented on the confusion that the term 'tribe' causes in India as opposed to the easily located and differentiated groups in Australia, Melanesia, and North America. He has noted that,

*"In India, and also to a certain extent in Africa, the situation is conspicuously different.... Except in a few areas, it is very difficult to come across communities which retain all their pristine tribal characters. In fact, most such tribal groups show in varying degrees elements of continuity with the larger society of India."*⁷²

Zia Rizvi, in the report "Indigenous Peoples: A Global Quest for Justice", prepared for the Independent Commission on International Humanitarian Issues in 1987, simply translated indigenous in Asia as tribal and explained this in the context of various occupations that preceded European colonialism. Therefore, the tribal populations were considered 'indigenous' in the context of what the author terms as 'internal colonisation'.⁷³

It then becomes necessary contrast this to the definition given by Mr. José Martínez Cobo in his report, which was referenced by the UN Working Group of the draft Declaration and has come to be used as the 'scope of application' of the Declaration. His report observed that,

*"Indigenous communities, peoples, and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on the territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present, non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their own cultural patterns, social institutions and legal systems."*⁷⁴

⁷² Benedict Kingsbury, "'Indigenous Peoples' as an International Legal Concept", *Indigenous Peoples of Asia* (Association for Asian Studies, Inc 1995) 22.

⁷³ Andrew Gray, 'The Indigenous Movement in Asia', *Indigenous Peoples of Asia* (Association for Asian Studies, Inc 1995) 38.

⁷⁴ José R Martínez Cobo, 'Study of the Problem of Discrimination Against Indigenous Populations' (United Nations 1987) E/CN.4/Sub.2/1986/7/Add.4 para 379.

The factors he considered for historical continuity included the occupation of ancestral lands, common ancestry with the original occupants of these lands, culture, language, residence in certain parts of the country or regions of the world, and other relevant factors.⁷⁵

Thus, while the term ‘indigenous peoples’ general denotes groups with historical continuity, whose struggles commenced with the European colonisation of their ancestral lands, this is only partially true in the Indian context. India’s own positioning in this regard will be analysed in Chapter 3, in light of India’s obligations under international law. Nevertheless, it cannot be denied that they experienced historical injustices as a result of the stigmatisation, and in that sense, they have much in common with the indigenous peoples of the world. In this sense, perhaps the lack of a clear restrictive definition might be a good thing in the context of the Adivasi communities.

⁷⁵ *ibid* 380.

2. Climate Justice of Adivasi Women through Land Rights

Mary Robinson defines climate justice as a moral argument that looks at both, the challenges faced by those people and communities who are most susceptible to the effects of climate change, and their differentiated responsibility in responding to the situation, so as to enable everyone's right to development.⁷⁶

While considering climate justice for indigenous women in India, this Chapter considers the challenges posed by human activities that lead to habitat loss in the lands that Adivasi communities in India have traditionally occupied, and also of climate change. This is in line with observations by Intergovernmental Panel on Climate Change (IPCC), in its August 2021 report that climate change was 'unequivocally' caused by human activities.⁷⁷ The next report that came in 2022 predicted increase in the frequency and intensity of extremes leading to acute food insecurity and reduced water security resulting in decrease in dietary option and increased malnutrition, especially among indigenous peoples, in many locations including Asia.⁷⁸ This paper would then consider how dispossession of land has affected the lives and livelihood of Adivasi women, before advancing an argument for the realisation of Adivasi women's land rights as climate justice in this context.

2.1 Exploitation of natural resources on Adivasi Land

While India has been advocating for common but differentiated responsibilities (CBDR) as a principle of equity, allowing the country to pursue development goals, this has often come at the cost of the human rights of the Adivasi communities in the country. This points to the hypocrisy in India's position when it comes to applying principles of equity to the most vulnerable among its citizens.

A report published by the United Nations Environment Programme in 2009 demonstrates the link between the exploitation of natural resources and conflicts.⁷⁹ The report elaborates on how the exploitation of natural resources plays a role, not just in starting conflicts but also in its perpetuation and

⁷⁶ Germana Canzi, 'What Is Climate Justice?' (World Economic Forum, 8 April 2015) <<https://www.weforum.org/agenda/2015/08/what-is-climate-justice/>> accessed 24 May 2022.

⁷⁷ Valérie Masson-Delmotte and others (eds), 'Summary for Policymakers', *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2021) 4.

⁷⁸ Hans-Otto Pörtner and others (eds), 'Summary for Policymakers', *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2022) 11.

⁷⁹ United Nations Environment Programme (ed), *From Conflict to Peacebuilding: The Role of Natural Resources and the Environment* (United Nations Environment Programme 2009).

weakening the peace process in these regions.⁸⁰ As a result, the people living in that region would be faced with environmental damage, and environmental risks that threaten their health, livelihoods and security.⁸¹ In this light, it was concerning to note that India abstained from voting of the United Nations Human Rights Council (UNHRC) resolution⁸² recognising the right to clean, healthy and sustainable environment.

These findings are in concurrence with the situation of the Adivasis living in the regions which this research would focus on. Chhattisgarh and Jharkhand were states that were carved out of the larger Indian states of Madhya Pradesh and Bihar respectively, in 2001. The creation of these states was then lauded as a victory for the indigenous communities that had been demanding for rights over ‘jal, jungle, aur jamin’ (water, forest and land).⁸³ The original states lost considerable forest cover in the process.⁸⁴ The new states of Chhattisgarh and Jharkhand had considerable natural resources, with the industrial region of Jharkhand being often compared to the mineral-rich region of Ruhr in Germany.⁸⁵

The hope had been that the governments that would be formed in these new states would be more judicious in the utilisation of the natural resources of forests, minerals and rivers, and move away from the old ‘development model’ which had led to considerable exploitation of resources in these regions, with the Adivasi communities in these regions suffering the consequences without gaining any share in the ‘development’ that these projects brought the country. It is the resultant discontentment among the local population due to alienation from their traditional land and forest that has been often cited as a reason for the continued presence of the Communist Party of India (Maoist) – a Leftist extremist group that has been banned as a ‘terrorist organisation’ under Section 35 of the Unlawful Activities (Prevention) Act, 1967⁸⁶ – in these regions. The history of the Maoist uprisings could be traced to 1967, in a small village in the Darjeeling district of West Bengal, when the peasants in the region banded together and

⁸⁰ *ibid.*

⁸¹ *ibid.*

⁸² UN Human Rights Council, Resolution 48/13, ‘The Human Right to Clean, Healthy and Sustainable Environment’ (United Nations 2021) A/HRC/RES/48/13.

⁸³ ‘Poor Little Rich States’ *Down To Earth* (15 January 2001) <<https://www.downtoearth.org.in/coverage/poor-little-rich-states-15616>> accessed 3 June 2022.

⁸⁴ At the time, Chhattisgarh had a forest cover of 42 per cent of its total geographical area, and Jharkhand had 28 per cent. ‘State of Forest Report 2001’ (Forest Survey of India, Ministry of Environment, Forest and Climate Change 2001) 6.

⁸⁵ ‘Poor Little Rich States’ (n 83).

⁸⁶ ‘Banned Organisations’ (Ministry of Home Affairs, Government of India, 30 March 2015) <<https://www.mha.gov.in/banned-organisations>> accessed 4 June 2022.

revolted against their exploitation by local landlords.⁸⁷ This event fuelled a movement that has continued to this day in the tribal regions of Chhattisgarh, Jharkhand, Odisha and Andhra Pradesh.⁸⁸

Therefore, efforts by the governments to increase the exploitation of the natural resources in these regions would only worsen the conflict in these regions. Ultimately, these activities would lead to depletion of natural resources in the region and the further marginalisation of the indigenous communities.

2.2 Climate Change in Adivasi land

As has been previously stressed, scientists now believe that those who are most vulnerable to the effects of climate change are often disproportionately affected by the ravages of weather and climate extremes that have been attributed to human-induced climate change.⁸⁹ The IPCC, in its 2022 Report titled, “Climate Change 2022: Impacts, Adaptation and Vulnerability” has recognised the interdependence of climate, ecosystems and biodiversity, and human societies.⁹⁰ Therefore, it acknowledges the need to look at the effect of climate change in the context of a world where humanity is also contending with issues like ‘biodiversity loss, overall unsustainable consumption of natural resources, land and ecosystem degradation, rapid urbanisation, human demographic shifts, social and economic inequalities and a pandemic’.⁹¹

In 2020, the Ministry of Earth Sciences of the Government of India released its first comprehensive assessment report on climate change, which predicts an average increase in temperatures across India by approximately 4.4°C by the end of the twenty-first century.⁹² Among other observations, the report also cites a 6% decline in the summer monsoon precipitation during the past 6-7 decades. This has contributed to increased propensity for droughts across the subcontinent with regions across central India, southwest coast, southern peninsula, and north-eastern India. Consequently, these regions have been facing at least

⁸⁷ ‘Naxalbari: How a Peasant Uprising Triggered a Pan-India Political Movement’ (*The Indian Express*, 2 November 2020) <<https://indianexpress.com/article/research/51-years-of-naxalbari-how-a-peasant-uprising-triggered-a-pan-india-political-movement-5191046/>> accessed 4 June 2022.

⁸⁸ *ibid.* To read further on the Maoist uprising and its links with the tribal resistance, one could refer to Kishalay Bhattacharjee, *An Unfinished Revolution: A Hostage Crisis, Adivasi Resistance and the Naxal Movement* (1st edn, Pan Macmillan India 2017); ‘Walking With The Comrades’ (*Outlook India*, 4 February 2022) <<https://www.outlookindia.com/magazine/story/walking-with-the-comrades/264738>> accessed 4 June 2022.

⁸⁹ Pörtner and others (n 78) 11.

⁹⁰ *ibid.* 8.

⁹¹ Pörtner and others (n 78).

⁹² R Krishnan and others, *Assessment of Climate Change over the Indian Region* (Ministry of Earth Sciences (MoES), Government of India 2020) xiv <<https://link.springer.com/book/10.1007/978-981-15-4327-2>> accessed 3 June 2022.

2 droughts each decade. The report also predicts that, in the coming years, the area affected by drought increased by 1.3% each decade.⁹³

The year 2022 also saw the hottest March that India had recorded, which was soon followed by 280 heat waves across the country, specially across the Northern, Central and Eastern states of India.⁹⁴ This is the highest that have been recorded in over 12 years, and almost double of 2012, which was the second-highest heat waves recorded in a year over the past decade.⁹⁵ Even more concerning perhaps, is the fact that the data for the ‘Total number of disastrous heat wave days’ recorded by the India Meteorological Department since 1969 only has data starting from April to July,⁹⁶ pointing ominously to the link between climate change and the unusual weather pattern.⁹⁷

In July 2021, the UNHRC recognised that the rights of people in vulnerable situations were disproportionately affected by the negative impact of climate change.⁹⁸ Therefore, even as the country as a whole faces the effects of climate change, it is acknowledged that the vulnerable communities will bear the brunt of it in terms of food insecurity and water shortage. In these circumstances, dispossession of their ancestral lands would deprive them of their traditional sources of food and subsistence and aggravate this situation. This issue would be discussed in further detail under section 2.3 below.

Predictions for the future

On 13 January 2022, the Forest Survey of India under the MoEFCC, published its latest biennial assessment of India’s forests for the year 2021.⁹⁹ Based on the findings of this report, the total forest cover of the country in 2021 stood at 713,789 square kilometres (sq km), which formed 21.71% of the

⁹³ *ibid* xv.

⁹⁴ Kiran Pandey, ‘State of India’s Environment in Figures: India Recorded 280 Heat Wave Days across 16 States in 2022 — Most in Decade’ *Down To Earth* (6 February 2022) <<https://www.downtoearth.org.in/news/climate-change/state-of-india-s-environment-in-figures-india-recorded-280-heat-wave-days-across-16-states-in-2022-most-in-decade-83131>> accessed 3 June 2022.

⁹⁵ *ibid*.

⁹⁶ ‘HAZARD ATLAS OF INDIA’ (India Meteorological Department, Pune) <<https://imd pune.gov.in/hazardatlas/heatnew.html>> accessed 3 June 2022.

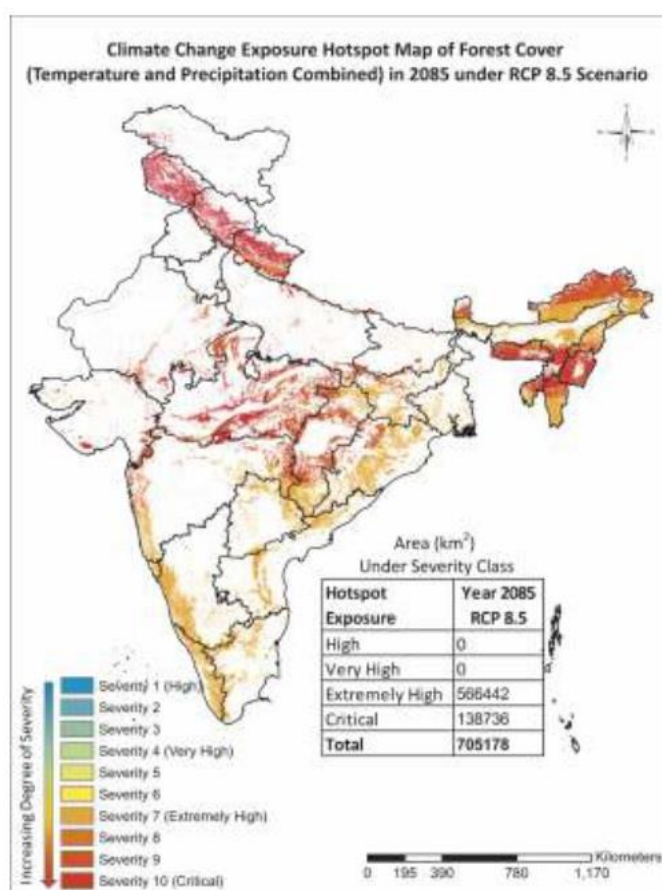
⁹⁷ ‘Climate Change Made Devastating Early Heat in India and Pakistan 30 Times More Likely – World Weather Attribution’ (*World Weather Attribution*, 23 May 2022) <<https://www.worldweatherattribution.org/climate-change-made-devastating-early-heat-in-india-and-pakistan-30-times-more-likely/>> accessed 3 June 2022.

⁹⁸ UN Human Rights Council, Resolution 47/24, ‘Human Rights and Climate Change’ (United Nations 2021) A/HRC/RES/47/24.

⁹⁹ ‘Forest Survey Report 2021 Released; Increase of 2,261 Sq Km in the Total Forest and Tree Cover of the Country in Last Two Years.’ <<https://pib.gov.in/pib.gov.in/Pressreleaseshare.aspx?PRID=1789635>> accessed 9 May 2022.

country's geographical area.¹⁰⁰ Of these, 422,296 sq km of the forest cover is in tribal districts.¹⁰¹ This would mean that, close to 60% of the forest cover recorded by the government report happens to be in regions mainly inhabited by tribal populations.

However, the information in this report needs to be assessed in the face of the criticism it has received from experts on the basis of its definitions and unverifiable data.¹⁰² It has been speculated that this was more an effort to showcase India's efforts towards meeting its goals for climate action.¹⁰³ Still, the fact that 60% of these lands fall in tribal populations – whose sustainable use of the forest the government has co-opted to meet its climate action goals would only strengthen the Adivasi claim to their lands.



The 2021 Report also devotes a chapter to consider the possible impact of climate change to the country's forests – Representative Concentration Pathway (RCP) – based on moderate greenhouse gas (GHG) emissions scenario and highest GHG emissions scenario for the years 2030, 2050 and 2080.¹⁰⁴ Predictably, in both scenarios, the area under hotspots within India's forest cover increases as the years go. The image on the left is the visual depiction from the report of the climate change predictions.¹⁰⁵ Based on this image, under RCP 8.5 scenario, most of the regions in the states of Chhattisgarh, Madhya Pradesh and Jharkhand would fall within 'extremely high' and 'critical' hotspot exposure by 2085.¹⁰⁶

¹⁰⁰ 'India State of Forest Report' (Ministry of Environment, Forest and Climate Change, Government of India 2019) Biennial 17 xiii <<https://fsi.nic.in/forest-report-2021-details>> accessed 9 May 2022.

¹⁰¹ 'India State of Forest Report' (n 100).

¹⁰² Aathira Perinchery, 'India's New "State of Forest" Report Is Not Really About Forests – The Wire Science' (16 January 2022) <<https://science.thewire.in/politics/government/india-2021-state-of-forest-report-flawed-methods-unverifiable-data-climate-commitments/>> accessed 14 July 2022.

¹⁰³ *ibid.*

¹⁰⁴ 'India State of Forest Report' (n 100) 228.

¹⁰⁵ *ibid.* 235.

¹⁰⁶ *ibid.*

Therefore, it is a truism that climate change would adversely affect the regions that many Adivasi communities considered for this paper call home. Meanwhile, the country's development activities focussed on further deforestation of these regions would only go on to exacerbate the problem of climate change.

To add to this, a resolution passed by the UNHRC in July 2018 acknowledged the gendered impact of climate change and called for a gender-responsive approach into climate policies in order to better address issues relating to climate change mitigation and adaptation.¹⁰⁷ Looking at the gendered impact of dispossession of Adivasi land becomes an important precursor to implementing a gender-responsive policies in this context. The following section would explore this further.

2.3 Impact of dispossession of land on Adivasi Women

Following the process of the decolonisation, the indigenous peoples across the world have been faced with a new form injustice in the form of development projects. In many instances, these have led to the dispossession of their ancestral lands and resulted in perpetuating the marginalisation they have faced in society.¹⁰⁸ While this affects both men and women in the community, it might lead to increased vulnerability in the case of Adivasi women. This section will try to enumerate some examples of the same.

2.3.1 Violence by State

The Adivasi communities in India – and to some extent, this has been the case for many indigenous communities across the world – have responded to this assault on their ancestral lands through movements for self-determination and self-governance over their lands. However, as in many other parts of the world, the government's response in such situations has often been to quash such movements by militarisation of these regions and incarceration of people from the scheduled tribes community. The Adivasi women are often at the forefront of these struggles, and as a result are subjected to harassment

¹⁰⁷ UN Human Rights Council, Resolution 38/4, 'Human Rights and Climate Change' (United Nations 2018) A/HRC/RES/38/4 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/214/16/PDF/G1821416.pdf?OpenElement>> accessed 6 April 2022.

¹⁰⁸ 'The Impacts of Land Dispossession on Indigenous Women' (Asia Indigenous Peoples Pact 2015) Briefing Paper 4 <https://asiapacific.unwomen.org/sites/default/files/Field%20Office%20ESEAAsia/Docs/Publications/2015/02/Final%20Briefing%20Paper_Impact%20of%20Land%20Dispossession%20and%20IW_Feb%202015.pdf> accessed 6 July 2022.

and other forms of violence by the State. They are accused of having links with the left-wing extremist Maoist movement, and charged under the Unlawful Activities (Prevention) Act, 1967 (UAPA).

The legislation has been designed by the Department of Internal Security of the Ministry of Home Affairs (MHA) as a tool to prevent ‘unlawful’ activities and deal with ‘terrorist activities’.¹⁰⁹ It has been notorious for the broad definitions of these key terms. Being charged under the UAPA often makes it very difficult to be released on bail. Authorities have often used the UAPA to keep people incarcerated for long durations without any credible case against them.¹¹⁰ Based on the latest statistics by the National Crime Records Bureau, a total of 796 cases were reported in 2020.¹¹¹ Of these, a chargesheet was filed after an investigation evidenced the commission of a crime in a total of 398 cases.¹¹² The report records the pendency under this legislation to be 85%.¹¹³

In the case of Soni Sori, an adivasi school teacher and the warden of government-run school for tribal children in the Dantewada region of Chhattisgarh, her arrest in 2011 under the UAPA was apparently linked to several cases of left-wing extremism in the region. She claimed that the police had been harassing her ever since she refused to be an informer against the Maoists.¹¹⁴ In a series of letters to the Supreme Court of India, Soni Sori alleged instances of severe torture and sexual assault in police custody. She accused the Superintendent of Police in Dantewada of verbally abusing her, directing police personnel to strip her naked and administer electric shocks.¹¹⁵

Hers was a case that garnered enough sustained media attention, although such instances in the name of tackling ‘left-wing extremism’ is rampant in the region. The police officials in these cases rarely face any consequences. And in this particular instance, the police officer in question was later recognised with the Presidents Gallantry Award.¹¹⁶

¹⁰⁹ Unlawful Activities (Prevention) Act 1967.

¹¹⁰ Mayank Chawla, “‘Have We Lost All Humanity?’: Former SC Judges Raise Concerns on Misuse of UAPA” (*The Quint*, 28 November 2021) <<https://www.thequint.com/news/law/former-supreme-court-judges-raise-concerns-over-misuse-uapa-sedition>> accessed 7 July 2022.

¹¹¹ Table 10A.3, National Crime Records Bureau, ‘Crime in India 2020 Report - Volume II’ (Ministry of Home Affairs, Government of India 2021) Annual Report 68 854–857 <<https://ncrb.gov.in/en/Crime-in-India-2020>> accessed 7 July 2022.

¹¹² Table 10A.3, *ibid*.

¹¹³ *ibid* 858.

¹¹⁴ Team FI, ‘The Soni Sori Case: A Travesty of Justice’ (*Feminists India*, 8 March 2022) <<http://feministsindia.com/the-soni-sori-case-a-travesty-of-justice/>> accessed 8 July 2022.

¹¹⁵ Xaxa and others (n 35) 359.

¹¹⁶ *ibid* 360.

Similarly, Father Stan Swamy's¹¹⁷ organisation Bagaicha based in Jharkhand had conducted a study for the state of Jharkhand. The report of this study disclosed that a significantly large number of undertrials arrested under the UAPA and alleged to be 'Maoists' were men and women of Adivasis communities, Dalit and other backward castes.¹¹⁸ Such attacks have continued to plague Adivasi society.¹¹⁹

2.3.2 Displacement without adequate measures on compensation

In many of these Adivasi communities, the women are the main bearers of traditional knowledge in relation to use, conservation and sustainable management of the natural resources in their traditional lands.¹²⁰ This is crucial towards ensuring their sustenance and livelihood. However, when alienation of land results in their displacement from these ancestral lands, these productive areas like the forests and farms become off-limit.¹²¹

A High Level Committee on Tribal Affairs noted that women in tribal societies have traditionally enjoyed relatively equal status with the men in their societies, when compared to the mainstream caste-based societies.¹²² Displacement has forced them to go and search for jobs outside their traditional sources of livelihood in a labour force that marginalises women. This has led to a weakening of their economic status. Although the government has enacted laws such as the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 to ensure fair compensation, these rehabilitation and resettlement programmes are steeped with gender disparity, as they do not recognise adult unmarried daughters, widows, or deserted divorcees as a separate family.¹²³

¹¹⁷ An 84-year old Jesuit priest and Adivasi rights activist, who was one of the accused in the Bhima Koregaon case (despite having never visited the place) and charged under the UAPA. His arrest was during the pandemic and despite various attempts, his bail applications on the basis of pre-existing medical ailments were continuously denied and he finally succumbed to COVID seven months after his arrest. Ironically, four years before, he had filed a public interest litigation at the Jharkhand High Court for the release of thousands of Adivasi undertrial prisoners arrested under the provisions of the same legislation. To read more on this, refer to - Prachi Lohia, 'Remembering Stan Swamy, Whose Struggle Was Driven by Empathy and Love' (*The Wire*, 5 July 2022) <<https://thewire.in/rights/remembering-stan-swamy-whose-struggle-was-driven-by-empathy-and-love>> accessed 8 July 2022.

¹¹⁸ Bagaicha Research Team, 'Deprived of Rights over Natural Resources, Impoverished Adivasis Get Prison: A Study of Undertrials in Jharkhand' (Bagaicha 2015) <http://sanhati.com/wp-content/uploads/2016/02/Undertrials.in_.Jharkhand.pdf> accessed 8 July 2022.

¹¹⁹ Riddhi Dastidar, 'An "Encounter" in Jharkhand Shows Nothing Has Changed for Adivasis since a 2015 Study by Stan Swamy' (*Scroll.in*, 30 October 2021) <<https://scroll.in/article/1008704/an-encounter-shows-nothing-has-changed-for-adivasis-in-jharkhand-since-a-2015-study-by-stan-swamy>> accessed 8 July 2022.

¹²⁰ 'The Impacts of Land Dispossession on Indigenous Women' (n 108) 6.

¹²¹ *ibid* 7.

¹²² Xaxa and others (n 35) 294.

¹²³ *ibid*.

2.3.3 Enforced Migration

In response to a question in the Parliament answered by the Minister for Tribal Affairs in 2018, it was estimated that, about 3.5 million tribal people have left agriculture and agriculture-related activities to enter the informal labour market.¹²⁴ The response also noted that displacement and enforced migration was leading to an increased number of Scheduled Tribes working as contract labourers in the construction industry and domestic workers in major cities.¹²⁵ This steady decline in the number of tribal agricultural labourers also indicates increased landlessness amongst these communities. The research in this regard mainly identifies the reason to be poverty-induced migration, as they are mostly reliant on rain-fed agriculture and forest produces for their livelihood, and lack other sources of income to support themselves.¹²⁶

Often, in these scenarios, it is the men in these societies that migrate to urban areas in search of jobs, while women are left with the additional burden of taking care of the household and their agricultural land. However, in its 11th Annual Report, the NCST observed that a large number of domestic workers in metropolitan cities like Delhi, Mumbai, Bangalore and Kolkata are tribal women who have migrated from the States of Chhattisgarh, Jharkhand, Odisha and Madhya Pradesh.¹²⁷ The Commission also noted that a lot of complaints had been reported by these women regarding ill-treatment and sexual assault, and recommended the implementation of standards under the ILO Convention No. 189 on Decent Work for Domestic Workers, that India has not ratified.¹²⁸

2.3.4 Vulnerability to violence

In traditional indigenous communities, the kinship amongst the members of the community ensured relative safety of women amongst these communities. However, with increased displacement from their traditional lands, these communities and their traditional structures are weakened and result in the rupture

¹²⁴ 'Unstarred Question No. 968, Answered on 17.12.2018' (*Lok Sabha, Parliament of India*, 17 December 2018) <<http://loksabhaph.nic.in/Questions/QResult15.aspx?qref=74445&lsno=16>> accessed 8 July 2022.

¹²⁵ *ibid.*

¹²⁶ Xaxa and others (n 35) 257.

¹²⁷ Rameshwar Oraon, '11th Annual Report of the National Commission for Scheduled Tribes' (National Commission for Scheduled Tribes 2016) Annual Report 11 26 <https://164.100.94.154/sites/default/files/2019/Annual_Report/11.pdf> accessed 10 July 2022.

¹²⁸ *ibid* 27.

of the ‘reciprocity ties’ in their community.¹²⁹ This results in their increased vulnerability and reduced resilience to both climate and social crises.¹³⁰

An indication of this could be the national statistics regarding crimes against Scheduled Tribes, where reported incidents of assaults on women for the year 2020 was 885, the second most reported offence that affected the Scheduled Tribes population.¹³¹ Incidents recorded of rape against women and children stood at 1137 (681 cases of rape of women, and 456 cases of rape of children below 18¹³²).¹³³

To add on to this, in the rural areas of States like Jharkhand, women are often victims of witch-hunt, where they are labelled as witches and killed. This is often intended as a ploy to grab land, settle scores, or as a reaction to the woman turning down sexual advances.¹³⁴ In 2020, the National Crime Records Bureau recorded 88 instances where the motive for murder was shown as witchcraft.¹³⁵ Of these, 16 were in Chhattisgarh, 15 in Jharkhand, and 17 in Madhya Pradesh. These were also the top three States on the list. While these do not directly mean that these deaths were all of Adivasi women, these are States with some of the largest populations of Adivasi people in the State. And given the prevalence of such practices in Adivasi communities in these regions,¹³⁶ it could be safely assumed that, in majority of the cases, the victims would be Adivasi women.

Hence, we see the vulnerability of Adivasi women to violence motivated by various factors, and the weakening of community ties often lead to increased vulnerability in this regard. It then becomes vital that we find a solution to this issue.

2.4 Land Rights of Adivasi Women as Climate Justice

When contemplating issues of climate justice, it also becomes important to consider the possible ways in which this could be achieved in this scenario. In its 2014 Report, the International Bar Association’s Taskforce on Climate Change Justice and Human Rights noted how current international and national

¹²⁹ Food and Agriculture Organisation, Indigenous Peoples Unit, ‘Indigenous Women, Daughters of Mother Earth’ (Food and Agriculture Organisation 2020) 6 <<https://www.fao.org/3/cb0719en/CB0719EN.pdf>> accessed 13 April 2022.

¹³⁰ *ibid.*

¹³¹ Table 7C.2 and Table 7C.3 - National Crime Records Bureau (n 111) 623–624, 631.

¹³² The legislation regarding sexual violence against children is gender neutral and applies to both boys and girls.

¹³³ Table 7C.2 and Table 7C.3 - National Crime Records Bureau (n 111) 623–624, 631.

¹³⁴ ‘The Impacts of Land Dispossession on Indigenous Women’ (n 108) 12.

¹³⁵ Table 2A.2, National Crime Records Bureau, ‘Crime in India 2020 Report - Volume I’ (Ministry of Home Affairs, Government of India 2021) Annual Report 68 164 <<https://ncrb.gov.in/sites/default/files/CII%202020%20Volume%201.pdf>> accessed 8 July 2022.

¹³⁶ Shipra Deo, ‘THIS IS NOT YOUR HOME : An Assessment of Land Rights of Tribal Women in Jharkhand’ (Landesa and SHARC 2021) 34 <<https://cdn.landesia.org/wp-content/uploads/This-is-not-your-home-10-August-2021-Jharkhand.pdf>> accessed 11 July 2022.

legal regimes make climate action more difficult.¹³⁷ It then provides recommendations on ways to make climate action more practical. It recognises the need to reinforce human rights goals of nations and strengthening existing frameworks by greening existing human rights, highlighting the core rights and duties, and recognising the right to a safe, clean, healthy and sustainable environment.¹³⁸ In 2020 it published a Model Statute that could help in holding governments accountable and address climate change.¹³⁹

While these efforts have the potential to green the existing legal framework and improving climate action, it might be relevant to note that the vulnerability of indigenous peoples to the effects of climate change has been recognised by various bodies including the ILO, CEDAW and the World Bank. They have generally also proceeded further and recognised the important role that indigenous people, their culture and their special relationship with their traditional lands could prove to be the solution to the issue of climate change.

2.4.1 ILO on Indigenous Peoples and Climate Change

In 2015, the ILO recognised a need to frame guidelines towards sustainable development that was focussed on a just transition with decent work and green jobs.¹⁴⁰ In this light, it developed two reports between 2017 and 2019 that looked at indigenous peoples and climate change. During this period, the ILO shifted its focus from the vulnerability of indigenous peoples to climate change, and identified indigenous peoples as agents of change.¹⁴¹ The motivation essentially stemmed from an understanding that human activity over the past decades have significantly contributed to the effects of climate change and climate justice in the global context would require a shift in the way development is achieved.¹⁴²

¹³⁷ Climate Change Justice and Human Rights Task Force, 'Achieving Justice and Human Rights in an Era of Climate Disruption' (International Bar Association 2014) 61–96 <<https://www.ibanet.org/MediaHandler?id=0F8CEE12-EE56-4452-BF43-CFCAB196CC04&.pdf&context=bWFzdGVyYGFzc2V0c3wxNjE4NjA3fGFwcGxpY2F0aW9uL3BkZnXoOGMvaDFILzg3OTcwNTUxNTYyNTQvMEY4Q0VFMTItRUU1Ni00NDUyLUJGNDMtQ0ZDQUlXOTZDQzA0LnBkZnwyYjgzZWm3OTJhY2U5MjVmMjNkMWFjOTVmZjI0ZTZlNmIwNWUyOGQ5ZmVjNGY4ZmZmNDgzMWU4Mjk3NDZjYWVm>> accessed 14 July 2022.

¹³⁸ *ibid* 117.

¹³⁹ Climate Change Justice and Human Rights Task Force, 'Model Statute for Proceedings Challenging Government Failure to Act on Climate Change' (International Bar Association 2020) 3 <<https://www.ibanet.org/Climate-Change-Model-Statute>> accessed 14 July 2022.

¹⁴⁰ 'Guidelines for a Just Transition towards Environmentally Sustainable Societies for All' (International Labour Organisation 2015) <https://www.ilo.org/wcmsp5/groups/public/@ed_emp/@emp_ent/documents/publication/wcms_432859.pdf>.

¹⁴¹ International Labour Organization Gender, Equality and Diversity Branch, *Indigenous Peoples and Climate Change: From Victims to Change Agents through Decent Work* (ILO 2017).

¹⁴² *ibid* 1.

In acknowledging the specific vulnerability of indigenous peoples to climate change and their contribution towards a solution rooted in their traditional knowledge of their ancestral lands, these reports embody aspects of climate justice of indigenous peoples.

2.4.2 CEDAW on Climate Change

The 37th General Recommendation by the Committee on the Elimination of Discrimination against Women considered the gender-related dimensions of disaster risk reduction in the context of climate change.¹⁴³ The committee while elaborating on the different effects of climate change on women and girls from that of men and boys, also considered how climate change and other disasters directly affect indigenous women as food producers and agricultural workers¹⁴⁴ and compound their intersecting forms of discrimination.¹⁴⁵ The committee also recommended that stakeholders responding to climate change and disaster risk reduction should ensure that the measures were gender responsive and sensitive to indigenous knowledge systems while respecting human rights.¹⁴⁶

In this context, it also becomes relevant to consider the IPCC's Special Report on Climate Change and Land that reinforces the point that limited recognition of the customary access to land and ownership of land can lead to increased vulnerability and reduce the adaptive capacities of communities.¹⁴⁷ Similarly, a 2006 report by the World Bank had included a recommendation to secure tribal communities' rights over forest resources and management of the forests.¹⁴⁸

Based on the recommendations of these bodies, it is clear that not only are indigenous peoples especially vulnerable to climate change, but empowering them with increased rights over their traditional lands might be the solution to make them more adaptive to the effects of climate change.

¹⁴³ 'General Recommendation No. 37 (2018) on the Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change.' (Committee on the Elimination of Discrimination against Women 2018) CEDAW/C/GC/37 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/068/98/PDF/N1806898.pdf?OpenElement>> accessed 4 July 2022.

¹⁴⁴ *ibid* 70.

¹⁴⁵ *ibid* 2.

¹⁴⁶ *ibid* 8.

¹⁴⁷ Intergovernmental Panel on Climate Change, 'Summary for Policymakers — Special Report on Climate Change and Land' (Intergovernmental Panel on Climate Change 2020) para C.1.2 <<https://www.ipcc.ch/srccl/chapter/summary-for-policymakers/>> accessed 14 July 2022.

¹⁴⁸ Grant Milne, 'Unlocking Opportunities for Forest-Dependent People in India (Volume 1)' (The World Bank 2006) 46 <http://web.worldbank.org/archive/website01291/WEB/0__CO-62.HTM> accessed 15 July 2022.

3. The Domestic Legislations Relating to Adivasi Land Rights

This Chapter considers the conflicting legislations and policies that shape forest governance and Adivasi peoples' rights. It seeks to point to the underlying challenges and how the court has dealt with this challenge. It would also land rights from an intersectional feminist approach and consider how the traditional and cultural practices have affected Adivasi women's access to land rights. The question it would then attempt to answer is whether the implementation of the Forest Rights Act could indeed be the progressive step towards ensuring Adivasi women's rights over land.

3.1 The parallel regimes of forest laws and Adivasi people's rights

The national legislations in India first developed with no explicit recognition of land rights of Adivasi communities. As previously discussed under Chapter 1, the history of Adivasi community is tied to forest regions, but these were often as a result of events that transpired in empires that pre-dated colonialism.¹⁴⁹ The forest policies developed during the British era encroached upon the lifestyle of Adivasi communities that depended on the forest for their own needs like firewood or grazing their cattle, and also for their livelihood where they sold forest produce like tendu leaves and other minor forest produce.¹⁵⁰ The laws to improve the situation of Adivasi people were brought in following India's independence through by granting them special protections under various legislations. Therefore, what we see today are two parallel legislative frameworks, looking at forests and tribal rights respectively.

During the colonial times, the British developed forest policies with objectives of preserving the forests and meeting the requirements of the people for firewood and other forest produce. The Indian Forest Act of 1927 that was enacted by the British in the pre-independence era – and continues to be in force throughout the territory of India today – was enforced mainly with the aim of regulating the movement of timber and other non-timber forest produce (NTFP) for the benefit of the colonial administration, without considering the implications this would have on the Adivasi communities that traditionally depended on forest resources for their livelihood.

3.1.1 Conservation of Forests in India

The forest policy in India until the mid-nineteenth century was mostly with regard to planting of trees and harvesting timber from the forests. A publication on Indian forests by the MoEFCC states that it was

¹⁴⁹ For more on this, refer to the Chapter titled 'Adivasis as Swadeshis' in Prasad (n 23).

¹⁵⁰ These leaves are used to roll bidi - the local variation of a cigarette. For more on this, read - 'Minor Forest Produce FEDERATION - Tendu Patta' <<http://www.mfpfederation.org/content/tendupatta.html>> accessed 24 June 2022.

in 1864, under the first Inspector General of Forests (IGF) of India, Dr D. Brandis, that a uniform forest policy for the country was first formulated.¹⁵¹ The first policy statement was issued in 1894, with its main object being the general well-being of the country. The primary reasons for forests were identified as the preservation of climatic and physical conditions of the country, and to fulfil the needs of the people in terms of firewood and other basic needs.¹⁵² The first time that the conservation of forest was considered as policy object was in 1952, which aimed to have at least 33 percent of the country's land area under forest cover.¹⁵³ However, the main focus remained on production of timber and not much attention was paid to non-commercial species, which led to sizeable area of uneven forests being used for timber production.¹⁵⁴

Indian Forests Act, 1927

This legislation was enacted under the colonial rule and remains the main legislation with regard to forest governance. It was passed with the goal of consolidating the laws relating to forests.¹⁵⁵ The Act focusses mainly on the transport of forest produce and levy of taxes on timber and other forest produce.¹⁵⁶ It defines three types of forests; reserved forests, village forests, and protected forests. Chapter V of the legislation gives the state Government powers to take action regarding the management and protection of forests and lands that were not considered to be under the Central Government.

The wide powers under this legislation sought to bring the rights over all forest produce under the colonial administration and helped it to regulate activities inside forests. The legislation primarily viewed forests as a resource that could be exploited for its revenue. Therefore, focus was often placed on growing trees that was more profitable, which was then controlled and regulated. Very little regard was given for the need to conserve and protect the forest for its biodiversity.

The Forest Conservation Act, 1980

As an effort to curb the deforestation and improve conservation of forests, the central government passed this legislation in 1980. It placed restrictions on the state government's powers to convert forest land for developmental purposes.¹⁵⁷ The power to grant an approval in such cases was brought into the hands of

¹⁵¹ 'India's Forests : Forest Policy and Legislative Framework' (Ministry of Environment, Forest and Climate Change) 2 <<http://ifs.nic.in/Dynamic/book/page3.pdf>> accessed 4 June 2022.

¹⁵² *ibid.*

¹⁵³ *ibid.*

¹⁵⁴ *ibid.*

¹⁵⁵ Objects - The Indian Forest Act 1927 (16 of 1927).

¹⁵⁶ *ibid.*

¹⁵⁷ The Forest (Conservation) Act 1980 s 2.

the Central Government, and such approvals were to be given on the basis of the recommendations of an Advisory Committee.¹⁵⁸ This was a welcome step, as indiscriminate logging to meet the developmental needed to be checked. And the provision requiring the Advisory Committee to provide their considered opinion regarding the conversion would have met this object.

However, on 2nd October 2021, the Indian MoEFCC published a consultation document, proposing changes to the Forest Conservation Act, to ease forest clearance and grant exemptions to projects such as those for railways, highways and oil explorations.¹⁵⁹ The proposed changes have been criticised for the impact it would have on Adivasi populations in these forests, as it seeks to treat the use of forest resources by Adivasi populations on par with industrialists owning mining companies.¹⁶⁰ The impact of this legislation would effectively negate the rights that have been granted under the Forest Rights Act of 2006.

Forest Policy of 1988

The Forest Policy of 1988 placed the focus on the conservation of forests, meeting the local needs of the people, and their participation in the protection and management of the forests.¹⁶¹ The policy shifted focus from the use of forests as a source of timber. Afforestation of wastelands was contemplated as a way to expand the forest cover of the country to 33%.¹⁶² Further, the policy also recognised for the first time, the symbiotic relationship between forests and forest-dwelling communities.¹⁶³

Another notable recommendation of the 1988 policy was its acknowledgment of women and spoke of the involvement of women in the maintenance of ecological balance and environmental stability.¹⁶⁴ However, as a women farmers rights forum observes, this policy has rarely translated to anything more than employment of women as labour the work of Forest Department.¹⁶⁵

¹⁵⁸ *ibid* 3.

¹⁵⁹ 'Consultation Paper on Proposed Amendments in the Forest (Conservation) Act, 1980' <http://environmentclearance.nic.in/writereaddata/OMs-2004-2021/263_OM_02_10_2021.pdf> accessed 15 July 2022.

¹⁶⁰ Satyam Shrivastava, 'Proposed Changes to Forest Conservation Act a Larceny of Village Resources' (*DownToEarth*, 12 October 2021) <<https://www.downtoearth.org.in/blog/forests/proposed-changes-to-forest-conservation-act-a-larceny-of-village-resources-79654>> accessed 15 July 2022.

¹⁶¹ 'India's Forests : Forest Policy and Legislative Framework' (n 151) 3.

¹⁶² *ibid*.

¹⁶³ Krishnadas Rajagopal, 'What Is Forest Rights Act?' *The Hindu* (2 March 2019) <<https://www.thehindu.com/sci-tech/energy-and-environment/what-is-forest-rights-act/article26419298.ece>> accessed 4 June 2022.

¹⁶⁴ 'Patriarchies in the Forests in India: Communities in Peril' (*World Rainforest Movement*, 14 May 2022) <<https://www.wrm.org.uy/bulletin-articles/patriarchies-in-the-forests-in-india-communities-in-peril>> accessed 11 July 2022.

¹⁶⁵ *ibid*.

3.1.2 Development of legal safeguards of Adivasi rights

The Constituent Assembly members had debated at length the possibility of vesting powers into the Adivasi villages, but many members were strongly opposed to the principle of self-determination within the country.¹⁶⁶ Therefore, it was only in 1992, by an amendment to the Indian Constitution that the Panchayat system (the local self-government bodies in India) was introduced in the constitution with jurisdiction over certain matters of governance.¹⁶⁷ The application of this provision was later extended to the Scheduled Areas and Tribal Areas by the passing of the Panchayat (Extension of the Scheduled Areas) Act (PESA) by the Indian Parliament.¹⁶⁸

The Panchayat (Extension of the Scheduled Areas) Act, 1996

Article 244 of the Constitution of India, along with the fifth and sixth schedule of the Constitution of India lay out a design for the administration of Scheduled Areas and Tribal Areas. This was done because the constituent assembly felt the need to provide special powers in these regions for the advancement of the Scheduled Tribes, as it conferred additional autonomy in these regions.¹⁶⁹ The scheme identifies Adivasi tribes, recognises their unique social and political systems. It also considers their vulnerability and designs special protections for them through the governor of the state. The fifth schedule of the Indian Constitution provides for a Tribal Advisory Council (3/4th of whom have to be representatives of STs in the state's Legislative Assembly). In consultation of the Tribal Advisory Council, the governor is empowered to decide on the applicability of certain legislations to these Scheduled Areas and Tribal Areas and make regulations regarding transfer and allotment of property. However, in practice, this schedule has rarely been used towards empowering the Scheduled Tribes.¹⁷⁰

In 1996, PESA extended the powers of local self-governance¹⁷¹ to Scheduled Areas. Therefore, it empowered these areas by granting them the autonomy to administer these areas in consonance with their customary law and traditional practices. The law required that the panchayats (local self-government bodies) were to be consulted before any land was acquired for development projects,¹⁷² and their

¹⁶⁶ Brajeshwar Prasad in 'Constituent Assembly Debates (Proceedings) - Volume IX (6 September 1949)' (*Constitution of India*, 9 June 1949) <https://www.constitutionofindia.net/constitution_assembly_debates/volume/9/1949-09-06> accessed 24 June 2022.

¹⁶⁷ The Constitution (Seventy-third Amendment) Act, 1992.

¹⁶⁸ The Provisions of the Panchayats (Extension to the Scheduled Areas) Act 1996.

¹⁶⁹ Bhupinder Singh, 'The Fifth Schedule of the Constitution' (2015) 54 Economic and Political Weekly 7.

¹⁷⁰ *ibid.*

¹⁷¹ Enumerated in Part IX of the Constitution of India.

¹⁷² The Provisions of the Panchayats (Extension to the Scheduled Areas) Act s 4(i).

recommendations were to be taken for mining lease.¹⁷³ Other powers of the Panchayat included ownership of forest produce, prevent alienation of land in the Scheduled Areas and take appropriate action to restore any unlawfully alienated land of a Scheduled Tribe, manage village markets, and control over institutions and functionaries in all social sectors.¹⁷⁴

However, the implementation of this Act remains very low, with only six States (Andhra Pradesh, Gujarat, Himachal Pradesh, Maharashtra, Rajasthan and Telangana) having taken steps towards framing State-specific Rules towards implementation of this legislation.¹⁷⁵ When tribal populations in the regions of Jharkhand and Chhattisgarh sought to exercise these rights, they were faced with criminal charges being levelled against many in their communities, with many of them being accused of being Maoists and faced charges of sedition and provisions under the UAPA.¹⁷⁶

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

Commonly referred to as the Forest Rights Act, 2006, the legislation finally recognised the rights of forest dwelling tribal communities and other traditional forest dwellers to forest resources that they have traditionally depended on for their livelihood, habitation and other socio-cultural needs.¹⁷⁷ It strived to strike a balance between the right to environment and the forest-dwelling communities' right to life and livelihood, by granting individual and community rights over forest land, even as it placed the responsibility of conservation and protection of biodiversity on the community.

The legislation recognised the traditional and statutory rights over forest land, ranging from individual ownership to community tenure and includes rights to access to biodiversity.¹⁷⁸ The Act encompasses individual rights of self-cultivation and habitation; and community rights as grazing, fishing and access to water bodies in forests, and access to biodiversity. Additionally, it provides rights to allocate forest land for developmental purposes to fulfil basic infrastructural needs of the community. Additionally, the

¹⁷³ *ibid* 4(k).

¹⁷⁴ *ibid* 4(m).

¹⁷⁵ 'Implementation of PESA Act' (Press Information Bureau) <<https://pib.gov.in/pib.gov.in/Pressreleaseshare.aspx?PRID=1781707>> accessed 9 July 2022.

¹⁷⁶ 'Pathalgadi Movement: Chattisgarh Govt's Undermining of Tribal Rights, PESA Act Provisions Led to Resistance-India News , Firstpost' (*Firstpost*, 24 July 2018) <<https://www.firstpost.com/india/pathalgadi-movement-chattisgarh-govts-undermining-of-tribal-rights-pesa-act-provisions-led-to-resistance-4809841.html>> accessed 4 June 2022; Supriya Sharma, '10,000 People Charged with Sedition in One Jharkhand District. What Does Democracy Mean Here?' (*Scroll.in*, 19 November 2019) <<https://scroll.in/article/944116/10000-people-charged-with-sedition-in-one-jharkhand-district-what-does-democracy-mean-here>> accessed 4 June 2022; 'Interpreting the Pathalgadi Movement - Communist Party of India (Marxist-Leninist) New Democracy' <<https://www.cpimind.org/interpreting-the-pathalgadi-movement/>> accessed 4 June 2022.

¹⁷⁷ Dhanush Samvaad, 'Ministry of Tribal Affairs, Government of India' <<https://tribal.nic.in/>> accessed 24 May 2022.

¹⁷⁸ The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 52, s 3.

Forest Rights Act along with the central legislation of 2013 on land acquisition sought to protect the tribal population from eviction without rehabilitation and settlement.

3.1.3 The Conflict between these parallel regimes

However, the issue regarding the implementation of this legislation has been fraught with issues. A major barrier to the recognition of their rights has been the fact that the Adivasi communities that have traditionally occupied these lands rarely have the relevant paperwork to prove their occupation over the land and are unable to claim their rights over these lands.

Litigation concerning these incongruencies

Further, various organisations working in the area of forest conservation have viewed this legislation as posing a threat to India's forest cover. Such was the case of Wildlife First and a few other organisations, which in 2008 filed a writ petition before the Supreme Court of India on the grounds that the Forest Rights Act was in violation of the citizens' right to life and threatened the country's ecology. They argued that the categories identified were too vague and would result in protected areas being destroyed. In 13 February 2019, the Supreme Court of India – following reports by various state governments on rejection of claims under the 2006 legislation – ordered the eviction of the Adivasi communities living in these forest lands, whose claims had been rejected.¹⁷⁹ If implemented, it was estimated that this would have resulted in the eviction of close to 2 million indigenous people. Two weeks later, however, the Court stayed its own order following submissions before it pointed the various lacunae in the procedure followed. And no substantial hearing in this case has taken place since February 2019.

3.2 The legal protections of women in India and its application to Adivasi Women

Since the legislations recognise land rights of the Adivasi population as a whole, as well as those of individuals within the community, it becomes important to analyse the aspects relating to women's rights in India, specifically in the context of land rights and recognition women's right to land within the Adivasi communities.

¹⁷⁹ *Wildlife First & Ors v Ministry of Forest and Environment Ors* (Supreme Court of India).

3.2.1 Constitutional protections of equality

Under Article 14 of the Constitution of India, the State has an obligation to ensure ‘equality before the law’ and ‘equal protection of the laws within the territory of India’.¹⁸⁰ The subsequent provision, Article 15, prohibits discrimination against any citizen on the grounds of ‘religion, race, caste, sex, place of birth’, but includes a *non-obstante* clause allowing for the State to make special provision for women and children.¹⁸¹ These protections under the Constitution allow for positive discrimination, in the form of legislations that improve their situation in the country.

3.2.2 Land Rights and Women’s right to Land

The jurisprudence regarding land rights in India following independence went through myriad changes. What started as a fundamental right under the Indian Constitution¹⁸² was soon modified by the very first amendment to the Constitution providing restrictions to the right. Later, as the Government was faced with numerous litigations contesting the validity of legislations on the basis of the fundamental right to property, a further amendment was made and therefore, the right to property today is a legal right that is protected under Article 300-A of the Constitution of India.¹⁸³

However, even as these legal developments took place, women’s independent rights over land were rarely recognised or implemented. The laws regarding inheritance of property in the country are largely governed by customary laws of the different religious communities, with the Hindus, Sikhs, Buddhists, and Jains being governed by the Hindu Succession Act, 1956; the Muslims by the Muslim Personal Law (Shariat) Application Act, 1937 (based on the Holy Quran and other holy books); and Christians, Jews, and Parsis under the Indian Succession Act, 1925.

While the Indian Succession Act and the Muslim Personal Law recognised non-testamentary succession rights of widows and daughters, the customary laws of Hindu women have been more complex. A Hindu daughter’s equal rights to Hindu Undivided Property was only recognised after an Amendment to the Hindu Succession Act in 2005.¹⁸⁴ The right of widows to their husbands property was only recognised in the twentieth century and expanded upon in the Hindu Succession Act. However, in case of remarriage,

¹⁸⁰ Article 14, Constitution of India.

¹⁸¹ Article 15(3), *ibid.*

¹⁸² Part III of the Constitution of India (Articles 12 to 35), considered core individual rights essential for preserving human dignity, upon violation of which, individuals have a right under Article 32 to move the Supreme Court of India for the enforcement of their fundamental rights (or Article 226 to move the High Court of the State).

¹⁸³ For a detailed discussion on the evolution of right to property in India, refer to - AK Ganguli, ‘Right to Property: Its Evolution and Constitutional Development in India’ (2006) 48 *Journal of the Indian Law Institute* 489.

¹⁸⁴ The Hindu Succession Act, 1956.

they lost their rights to inheritance upon remarriage under the Hindu Widows Remarriage Act, 1856 (which is a colonial legislation still in force today, that actually contributed to social changes allowing for Hindu widows to remarry). Nevertheless, some High Court judgments have tried to interpret the facts to help the remarried woman access her deceased husband's property.¹⁸⁵

A 2011 study by the Centre for Policy Studies in India estimated that nearly 75 million of the 84 million Scheduled Tribe population practiced Hinduism, Buddhism, or one of the many sects. There were also a small population of 1.2 million Muslims and about 8 million Christians.¹⁸⁶ Further, in the state of Jharkhand the land rights of indigenous peoples have been codified under the Chotanagpur Tenancy Act of 1908 and the Santhal Pargana Tenancy Act of 1949. These legislations do not recognise women as independent individuals.¹⁸⁷

Therefore, in the case of the majority of Adivasi women, the law that applies regarding inheritance is the Hindu Succession Act, 1956.

3.2.3 Rights of Adivasi Women under the Forest Rights

The provisions of the law on Forest Rights Act recognises women's participation as right holders and their role in the process of the operation of these rights. These are enumerated below.

Recognition of Rights of Women under Forest Rights Act

The legislation recognises and vests the rights of forest dwelling Scheduled Tribes and traditional forest dwellers. However, it does not specifically recognise individual rights of Adivasi women. Nevertheless, Section 4(4) of the Forest Rights Act states that this right is to be 'registered jointly in the name of both spouses in case of married persons'.¹⁸⁸

While the law provides for the titles to be registered with the names of both spouses, if the property were to be registered only in the name of the man, the provisions regarding succession from the relevant

¹⁸⁵ *Sanjay Purshottam Ptankar v Smt Prajakta Pramod Patil* [2015] Indian Kanoon (Bombay High Court); Sharmeen Hakim, 'Hindu Remarried Widow Has Right To Deceased Husband's Property If She Wasn't Remarried On The Day Succession Opens: Bombay High Court' (11 September 2021) <<https://www.livelaw.in/news-updates/bombay-hc-hindu-succession-act-remarried-widows-right-to-husbands-property-181365>> accessed 25 June 2022.

¹⁸⁶ Jatinder K Bajaj, 'Scheduled Tribes of India: Religious Demography and Representation' (*Centre for Policy Studies*, 24 November 2011) <<https://www.cpsindia.org/dl/Vanvasi/English.pdf>> accessed 25 June 2022.

¹⁸⁷ 'The Indigenous World 2022' (International Work Group for Indigenous Affairs 2022) 36.

¹⁸⁸ The complete provision of Section 4(4) of the Forest Rights Act reads thus - "A right conferred by sub-section (1) shall be heritable but not alienable or transferable and shall be registered jointly in the name of both the spouses in case of married persons and in the name of the single head in the case of a household headed by a single person and in the absence of a direct heir, the heritable right shall pass on to the next-of-kin."

personal law based on the Adivasi community will come into play, and in the case of Adivasi groups that follow Hinduism or other related sects, the wife upon remarriage would lose her right over this property.

The Representation of Women as envisioned under the legislation

The Act specifically recognises the role of women in the Gram Sabha (a village assembly which is to consist of all adult members of the village)¹⁸⁹, which is the authority that is vested with the right to initiate the process of determining the nature and extent of individual or community forest rights under the Act.¹⁹⁰ In the Rules for the implementation of the Act, the Central Government has stated that at least one-third of the members of the Gram Sabha has to be women.

The Forest Rights Act requires the state Government constitutes a Sub-Divisional Level Committee, which is the first body examining the resolution passed by the Gram Sabha, preparing the record of forest rights, and forwarding it through the Sub-Divisional Officer to the District Level Committee. The District Level Committee makes a final decision on the individual and community claims. The state Government also constitutes a State Level Monitoring Committee to monitor the process and submit reports to the nodal agency as required. These three committees consist of officers of the department of Revenue, Forest and Tribal Affairs of the State Government and three members of the Panchayati Raj Institutions (local self-government bodies mentioned earlier under 3.1.2). The provisions of the Forest Rights Act stipulate that two of these have to be Scheduled Tribe members and at least one has to be a woman.¹⁹¹

While these provisions show an effort by the government in ensuring the participation of women in these decision making processes, the actual implementation of these provisions shows that reality remains far removed from the goals of the statute. This will be further elaborated under Chapter 5.

¹⁸⁹ The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules 2007 s 2(g).

¹⁹⁰ *ibid* 6(1).

¹⁹¹ *ibid* 6(8).

4. India's Obligations under International Law

This Chapter considers the evolution of the rights of indigenous peoples in international law and India's engagement with these treaties and soft-law instruments. It would begin by analysing relevant provisions in the ILO Conventions regarding land rights and considering India's obligations. It then considers the observations of the Committees under the ILO regarding India's compliance with the treaty. Following this, India's obligations under various international law instruments that the country has ratified or voted on will be discussed. The goal of this exercise would be to look at instances where land rights of indigenous peoples are recognised in an international law instrument that India is obligated to comply with. Discussions on indigenous peoples' rights by the treaty body under CEDAW and India's commitments at the UNFCCC are also relevant to this, as India is a signatory to these treaties.

4.1 The International Labour Organisation and Indigenous Peoples

Since the 1920s, the International Labour Organisation (ILO), the UN's tripartite agency that brings together governments, employers and workers of member states to set labour standards, develop policies, and programmes to promote decent work for all people,¹⁹² has engaged with issues concerning indigenous peoples.¹⁹³ To this day, the Conventions under the ILO remain the only binding treaties relating to indigenous peoples.

4.1.1 ILO C.107 on Indigenous and Tribal Populations Convention, 1957

The first treaty concerning the issues of indigenous and tribal populations was the ILO Convention on Recruiting of Indigenous Workers 1936 (No.50),¹⁹⁴ which was regarding the working conditions of individuals from both 'indigenous by origin' and 'indigenous by assimilation'.¹⁹⁵ This Convention has since been abrogated at the 107th Session of the International Labour Conference in 2018.¹⁹⁶ The ILO Convention No. 50 was followed in the 1940s by a push from the countries of the Americas for a Convention by the ILO that provided more protection and assistance to the indigenous workers, as well as general measures concerning indigenous peoples.¹⁹⁷ This resulted in Convention No. 107 on

¹⁹² 'About the ILO' (*International Labour Organisation*) <<https://www.ilo.org/global/about-the-ilo/lang--en/index.htm>> accessed 21 June 2022.

¹⁹³ 'Indigenous and Tribal Peoples (Indigenous and Tribal Peoples)' (*International Labour Organisation*) <<https://www.ilo.org/global/topics/indigenous-tribal/lang--en/index.htm>> accessed 21 June 2022.

¹⁹⁴ Convention C050 - Recruiting of Indigenous Workers Convention, 1936 (No. 50) 1936.

¹⁹⁵ Article 2(b), *ibid*.

¹⁹⁶ 'Abrogation of Six International Labour Conventions and Withdrawal of Three International Labour Recommendations [Electronic Resource] / International Labour Conference, 107th Session, 2018, International Labour Office.' <<https://ilo.primo.exlibrisgroup.com>> accessed 23 June 2022.

¹⁹⁷ Kingsbury (n 72).

Indigenous and Tribal Populations Convention, 1957,¹⁹⁸ which referred to ‘members of tribal or semi-tribal populations’¹⁹⁹ whereby, the test of ‘tribal’ status applied to the group as a whole, and the test with respect to the individual was regarding their membership to the group.²⁰⁰

The convention has been criticised for its assumption that indigenous peoples who fall within the ambit of the convention are ‘tribal or semi-tribal’,²⁰¹ and takes on an assimilationist approach that sought to integrate the members of tribal and semi-tribal groups with the mainstream society.²⁰² The Convention also makes it its primary objective to be ‘the fostering of individual dignity, and the advancement of individual usefulness and initiative’.²⁰³ Evidencing very little consideration is being given to ensure the preservation of the group’s culture and collective identity. While this Convention has been criticised for its philosophy of assimilation and paternalism,²⁰⁴ in India’s case such a perspective would have made it easier to ratify the Convention as the distinction between the Adivasi people and the rest of the society has always been more muddled. Therefore, a Convention that sought to assimilate the tribal and indigenous groups would be in line with India’s objectives of integrating them into the overall Indian population.

Going beyond the working conditions of indigenous peoples, ILO Convention No. 107 also considers topics concerning the general well-being of indigenous peoples, including land rights, vocational training, health, and education. For the purposes of this research, the focus would be limited to the rights related to land within this Convention and India’s reporting regarding the same.

¹⁹⁸ Convention C107 - Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries 1957 (No107) 107.

¹⁹⁹ Article 1 para 1, *ibid*.

²⁰⁰ Kingsbury (n 72) 20.

²⁰¹ Kingsbury (n 72).

²⁰² *ibid* 22.

²⁰³ Article 2 paragraph 3, Convention C107 - Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries.

²⁰⁴ Chris Swartz, ‘After 30 Years, Only 23 Countries Have Ratified Indigenous and Tribal Peoples Convention ILO 169’ (*Cultural Survival*, 6 May 2019) <<https://www.culturalsurvival.org/news/after-30-years-only-23-countries-have-ratified-indigenous-and-tribal-peoples-convention-ilo>> accessed 25 June 2022.

Provisions concerning Land Rights

Part II of the Convention addresses issues of recognition of land ownership (collective or individual),²⁰⁵ the need for free consent before displacing a community,²⁰⁶ provision of alternative land that would meet present needs and future development,²⁰⁷ and provision of fair compensation.²⁰⁸

Article 13 requires States to take measures to ensure that the transfer of ownership rights and use of land as established in the customs of the indigenous and tribal populations are respected, as long as they satisfy the needs of these populations and ‘do not hinder their economic and social development’.²⁰⁹ Further, the agrarian programmes of States are to afford equal treatment to these populations in terms of provision of more land where it is required, and also provide means for the development of their lands.²¹⁰

India’s obligations under ILO C.107

India ratified the ILO Convention No. 107 on 29 September 1958.²¹¹ The Convention entered into force in June 1959. As with every ILO Convention, as a signatory of the ILO Convention, India is obligated to provide reports on the application of the Convention to the Committee of Experts on the Application of Conventions and Recommendations (CEACR). The CEACR examines the country’s reports as well as comments of employers’ and workers’ organisations on the report, or on the implementation of the Convention.²¹² A further supervisory mechanism is the tripartite Conference Committee on the Application Standards (CAS), whose work is based on the CEACR’s reports, and it draws up individual cases from the country for examination by ILO constituents.²¹³

India has received five comments by the CAS based on individual cases that came up for examination before it. All five of these cases considered the issue of tribal populations having to be resettled due to the Sardar Sarover Dam and Power Project.²¹⁴ Despite the frequent discussion of this issue by the

²⁰⁵ Article 11, Convention C107 - Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries.

²⁰⁶ Article 12 para 1, *ibid.*

²⁰⁷ Article 12 para 2, *ibid.*

²⁰⁸ Article 12 para 3, *ibid.*

²⁰⁹ Article 13, para 1, *ibid.*

²¹⁰ Article 14, *ibid.*

²¹¹ ‘India & ILO’ (*Ministry of Labour & Employment*, 8 November 2019) <<https://labour.gov.in/lcandilasdivision/india-ilo>> accessed 15 July 2022.

²¹² ‘ILO Supervisory Mechanism’ (*ional Organisation of Employers*) <<https://www.ioe-emp.org/international-organisations/international-labour-organization/ilo-supervisory-mechanism>> accessed 25 June 2022.

²¹³ *ibid.*

²¹⁴ ‘Individual Case (CAS) - Discussion: 1988, Publication: 75th ILC Session (1988)’ (*International Labour Organisation*, 1988)

<https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2554333,102691,India,1988> accessed 25 June 2022; ‘Individual

Committee, the Indian government had not provided further information regarding the rehabilitation of indigenous populations. Hence, the Committee expressed concern about the lack of information shared in other cases of displacement of indigenous populations due to development projects.²¹⁵ This came in light of the evidence put forth by the Centre of Indian Trade Unions on the tribal peoples being evicted from which development projects like mining, and construction of dams were to be undertaken.²¹⁶ The Committee in this instance noted how the rehabilitation efforts in Madhya Pradesh (and in 1997, this would have included the present state of Chhattisgarh) were only at 9 per cent.²¹⁷

In its Observations in 2020, the CEACR asked the government for detailed information on the implementation of a Conservation-cum-Development Plan in an area in the state of Odisha. This was the subject of litigation at the Supreme Court of India between the indigenous people and a bauxite mining company. The Committee also called for details regarding the implementation of the Supreme Court judgment with regard to the Forest Rights Act.²¹⁸ The Committee considered the data regarding the Monthly Progress Report (previously discussed in Chapter 5 below), and the Supreme Court's initial order in *Wildlife First* (discussed under section 3.1.3 above), noting that an estimated 9 million forest dwellers would be affected if they were to be evicted.²¹⁹ The Committee suggested that the reason for this would be the lack of proper implementation of the Forest Rights Act, expressing concerns regarding the transparency of the process, the process of consent before displacement, provision of adequate compensation, and allegations of violence and arbitrary arrests of the communities seeking to exercise their rights protected under Article 12 of the Convention. The Committee requested the government to involve the scheduled tribes and other forest dwellers in the formulation of the new forest policy of the

Case (CAS) - Discussion: 1990, Publication: 77th ILC Session (1990)' (*International Labour Organisation*, 1990) <https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2554012,102691,India,1990> accessed 25 June 2022; 'Individual Case (CAS) - Discussion: 1991, Publication: 78th ILC Session (1991)' (*International Labour Organisation*, 1991) <https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2554777,102691,India,1991> accessed 25 June 2022; 'Individual Case (CAS) - Discussion: 1993, Publication: 80th ILC Session (1993)' (*International Labour Organisation*, 1993) <https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2555104,102691,India,1993> accessed 25 June 2022; 'Individual Case (CAS) - Discussion: 1997, Publication: 85th ILC Session (1997)' (*International Labour Organisation*, 1997) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2555518,102691,India,1997> accessed 25 June 2022.

²¹⁵ 'Individual Case (CAS) - Discussion: 1997, Publication: 85th ILC Session (1997)' (n 214).

²¹⁶ *ibid.*

²¹⁷ *ibid.*

²¹⁸ 'Observation (CEACR) - Adopted 2020, Published 109th ILC Session (2021)' (*International Labour Organisation*, 2021) <https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:4049340,102691> accessed 26 June 2022.

²¹⁹ *ibid.*

country. Several years on, the Committee was still waiting on the government for information regarding the resettlement of those scheduled tribes who had been displaced by the Sardar Sarovar dam project. In a direct request to the government, the Committee asked for more information concerning the adoption of a National Tribal Policy, which the Indian Government had indicated was still at the stage of receiving comments from all States based on the report by a High-Level Committee.²²⁰

These observations from the reporting process at the ILO point to numerous instances of failure on the part of the Indian government, to comply with its obligations under ILO Convention No. 107. And considering that the Committee has continued to wait for the Indian government to provide data on implementation years after first requested for the same, is a clear indication of the limitations of this procedure to ensure compliance with a treaty that India has officially ratified.

4.1.2 ILO C.169 on Indigenous and Tribal Peoples Convention, 1989

Over the years, the discourse regarding the indigenous peoples across the world changed, and at the ILO Meeting of Experts in 1986, a discussion on the revision of the original Convention took place.²²¹ Following a process that spanned around two years, all three parties (government, employers and employees) participated in questionnaires to revise the Convention. Indigenous communities were usually represented as employee representatives through trade unions.²²² The participation of indigenous peoples in these discussions is reflected in the language of the Convention, which places emphasis on the participation of indigenous peoples in the policies and decisions that affect them. This process of being able to negotiate their rights has been described by scholars as having helped them move from being ‘objects of protection’ to ‘subjects of rights’ in International Law.²²³

The ILO Convention No. 169 applied to both ‘tribal peoples’ and ‘peoples regarded as indigenous’.²²⁴ It, however, clarifies that the use of the term ‘peoples’ would not have the implications under international law,²²⁵ which endow rights of self-determination on all peoples, including their political status. This

²²⁰ ‘Direct Request (CEACR) - Adopted 2020, Published 109th ILC Session (2021)’ (*International Labour Organisation*, 2021)

<https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:4049337,102691> accessed 26 June 2022.

²²¹ ‘25 Years of ILO Convention 169’ <<https://www.culturalsurvival.org/publications/cultural-survival-quarterly/25-years-ilo-convention-169>> accessed 26 June 2022.

²²² *ibid.*

²²³ Felipe Gómez Isa, ‘The UNDRIP: An Increasingly Robust Legal Parameter’ (2019) 23 *The International Journal of Human Rights* 7, 9.

²²⁴ Article 1, C169 - Indigenous and Tribal Peoples Convention 1989.

²²⁵ Article 1 para 3, *ibid.*

resulted from the strong opposition from the delegates of various countries to the use of the term ‘peoples’ in the Convention, including India which stated that the terminology was not relevant to the tribal people in the country and would create more concerns in a country that was already facing issues with integration.²²⁶

Article 3 of the Convention specifically mentions that the provisions under the Convention would apply without discrimination ‘to male and female members of these peoples’.²²⁷ Other provisions relevant to this study are the requirement for State Parties to take special measures for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned,²²⁸ and the State Party’s obligation to take measures to protect and preserve the environment of the territories they inhabit.²²⁹

Provisions concerning Land Rights

In a departure from ILO Convention No. 107, the new Convention required governments to respect the cultural and spiritual aspect of the indigenous peoples’ relationship with lands and territories,²³⁰ and this constituted ‘the total environment’ that the indigenous peoples occupied.²³¹

In addition to the rights of ownership and possession over the lands that they traditionally occupied, the ILO Convention No. 169 went further and recognised land use rights, taking into consideration the rights of nomadic peoples and shifting cultivators.²³² It also called for States to provide sufficient procedures within their domestic systems to process the land claims of indigenous peoples.²³³

With regard to the dispossession of their traditional lands or relocation, the ILO Convention No. 169 goes beyond the previous Convention by recognising the right of the indigenous peoples to participate in the use, management and conservation of the resources. It also contemplated the aspect of mineral or sub-surface resources, requiring the government to consult with indigenous peoples before it undertakes any programme for exploration or exploitation of these resources.²³⁴ Additionally, the Convention recognises the peoples’ right to return to their traditional lands once the grounds for their relocation cease

²²⁶ International Labour Conference (ed), *Record of Proceedings : International Labour Conference, 76th Session, Geneva, 1989* - *International Labour Organization*, vol 76 (1990) 25/3
<https://labordoc.ilo.org/discovery/fulldisplay/alma994689623402676/41ILO_INST:41ILO_V2> accessed 3 July 2022.

²²⁷ Article 3 para 1, C169 - Indigenous and Tribal Peoples Convention.

²²⁸ Article 4 para 1, *ibid*.

²²⁹ Article 7 para 4, *ibid*.

²³⁰ Article 13 para 1, *ibid*.

²³¹ Article 13 para 2, *ibid*.

²³² Article 14 para 1, *ibid*.

²³³ Article 14 para 3, *ibid*.

²³⁴ Article 15, *ibid*.

to exist,²³⁵ and places a responsibility on the governments to penalise unauthorised intrusion on their lands.²³⁶

India's reasons for not ratifying the convention

While discussing the revision of the ILO Convention No. 107 in the seventy-sixth session of the International Labour Conference, the government representative from India stated that the tribal people of India, 'were not comparable in terms of their problems, interest, rights' to the indigenous populations of other countries. Citing this, the government maintained that setting international standards on the issues of tribal people in India might be 'counter-productive'.²³⁷

With respect to land rights under the new Convention, the Indian delegate expressed reservations regarding the use of the term 'territories' (which would have had political connotations, and India saw that as a threat to its sovereignty) and advocated for retaining the wording of the earlier Convention. Moreover, while India stated that its government gave 'utmost importance to preventing the alienation of tribal lands' and that legislations in this regard had been enacted, it referred to scarcity of land and expressed the inability of the government in all cases to dispossess the non-tribals from lands that had been traditionally occupied by tribal populations.²³⁸

Therefore, although the Government of India engaged actively in the revision of the text, ultimately it chose not to ratify the Convention.

The NCST' Inquiry Regarding ratification of the treaty

The NCST was set up as a constitutional body in 2004, following an amendment to the Constitution of India in this regard in 2003.²³⁹ Its mandate includes presenting annual reports to the President of India on the working of the safeguards available to members of the Scheduled Tribes and making recommendations for effective implementation of these safeguards.

²³⁵ Article 16 para 3, *ibid.*

²³⁶ Article 18, *ibid.*

²³⁷ International Labour Conference (n 226) 25/3.

²³⁸ *ibid.*

²³⁹ To read the specific provision of the Constitution, refer to - 'Article 338A - National Commission for Scheduled Tribes' (*Constitution of India*) <https://www.constitutionofindia.net/constitution_of_india/special_provisions_relating_to_certain_classes/articles/Article%20338A> accessed 3 July 2022.

As part of the Commission's Special Report on Good Governance in Scheduled and Tribal Areas,²⁴⁰ it enquired regarding the ratification of the ILO Convention No. 169. The Commission reached out to three Ministries of the Central Government, namely the Ministry of External Affairs (MEA), the Ministry of Tribal Affairs, and the Ministry of Labour & Employment.²⁴¹ While it did not receive any response from the Ministry of Tribal Affairs, the MEA responded by stating that the Ministry of Labour & Employment was the nodal Ministry for matters regarding the ILO. The Ministry of Labour & Employment in turn shared the comments from the MEA, the Ministry of Tribal Affairs, and the MHA on the stand of the Government of India regarding ratification of the ILO Convention No. 169.²⁴²

All three ministries were opposed to the use of 'indigenous peoples' and reiterated India's position that all Indians are 'indigenous people'. Further, the MEA expressed reservations about Article 32 of the ILO Convention No. 169, which requires governments to take measures to facilitate contact and co-operation between indigenous and tribal peoples across borders.²⁴³ The MEA considered this problematic, given that India did not recognise any specific group as 'indigenous people'. Finally, the MEA was also concerned about being subjected to the supervisory mechanism of the ILO, where civil society is also an equal participant. The MEA stated that this could bring forth 'motivated complaints' and such reports would put the government 'unnecessarily on the defensive and embarrass us in international fora'.²⁴⁴

The MHA, on its part, was concerned about the administrative problems that the participation of tribal populations in the development of national plans, the provision regarding criminal law administration, and the security issues that facilitating contact and cooperation with other tribal peoples across the borders would imply. This was in line with the reservations expressed by various members of the Constituent Assembly, who had been against the idea of creating 'states within states' and granting further autonomy at village level in an already federal structure that India decided to adopt after its independence (previously discussed under section 1.1.3).

²⁴⁰ Rameshwar Oraon, 'Special Report of Good Governance for Tribal Development and Administration | National Commission for Scheduled Tribes' (National Commission for Scheduled Tribes 2012) Special Report <<https://ncst.nic.in/content/special-report-good-governance-tribal-development-and-administration>> accessed 3 July 2022.

²⁴¹ *ibid* 9.

²⁴² *ibid*.

²⁴³ *ibid* 10.

²⁴⁴ *ibid*.

Moreover, and more relevant to this study, the MHA expressed reservations regarding compensation for the State retaining ownership of mineral or sub-surface resources as the national legislations do not recognise such rights.²⁴⁵

The Ministry of Tribal Affairs was of the opinion that the national safeguards of tribal rights were sufficient and the State only needed to focus on its implementation. Finally, the Ministry of Tribal Affairs questioned the need to take on reporting obligations under another UN body when this information was already being submitted to other bodies.²⁴⁶

The Commission, however, felt the need to recommend the harmonisation of domestic law with certain international best practices that emerge from this Convention. It highlighted the need for considering the aspect of compensation on the basis of mineral or sub-surface resources, given that dispossession of land often renders Adivasi people jobless and the compensation received was mostly inadequate for the tribal population to have a peaceful livelihood, and linked this as a cause for the left-wing extremism that is prevalent in these regions.²⁴⁷

However, in its explanatory note to the Parliament, on the Commission's recommendation, the Ministry of Tribal Affairs argued that in light of the Integrated Action Plan, which focussed on the implementation of the existing mechanisms under the PESA and Forest Rights Act, further changes based on best practices under ILO Convention No.169 was 'not supportable at present'.²⁴⁸

This demonstrates a reluctance on India's part to ratify the ILO Convention No. 169, particularly with respect to the aspect of compensation for mineral or sub-surface resources covered under Article 15, which the MHA cited as a concern. Moreover, the hesitancy by the Indian government to incorporate these international best practices in the domestic laws, even if it does not take on additional international law obligations, is concerning.

4.2 United Nations Declaration on the Rights of Indigenous Peoples

Based on the report submitted by Special Rapporteur, Mr. José Martínez Cobo, on the problem of discrimination against indigenous populations, a Working Group on Indigenous Populations was

²⁴⁵ *ibid* 11.

²⁴⁶ *ibid*.

²⁴⁷ *ibid* 12.

²⁴⁸ Ministry of Tribal Affairs, 'Explanatory Memorandum on the Special Report of the National Commission for the Scheduled Tribes, 2012' (Ministry of Tribal Affairs, Government of India 2013) 1–2 <https://tribal.nic.in/downloads/NCST_Report/7.pdf> accessed 7 March 2022.

established in 1982.²⁴⁹ The Working Group prepared a draft declaration on the rights of indigenous peoples which was approved by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1994. However, various concerns were raised by States with regard to the right to self-determination of indigenous peoples and the control over natural resources on indigenous peoples' traditional lands.²⁵⁰ Finally, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the United Nations Human Rights Council on 29 June 2006 and by the United Nations General Assembly on 13 September 2007.

The UNDRIP, in a departure from traditional human rights principles, recognised the collective rights of indigenous peoples. Article 3 of UNDRIP also went on to recognise their right to self-determination. This was further clarified as relating to their internal and local affairs.²⁵¹

Furthermore, Article 22 of the UNDRIP requires States to pay special attention to the rights and special needs of various groups within the indigenous community including women.²⁵² It obligates States to take measures to ensure that women and children enjoy the full protection and guarantees against all forms of violence and discrimination.²⁵³

4.2.1 Legal impact of a soft law instrument

Although the UNDRIP is a soft law instrument, the fact that several countries with a large indigenous population signed the Declaration is looked at by some as a positive outcome towards realising these rights.²⁵⁴ Moreover, in 2012, the International Law Association recognised that while the UNDRIP as a whole cannot be considered as customary international law, it observed that the fact that the UNDRIP passed with an overwhelming support of the United Nations General Assembly 'leads to an expectation of maximum compliance by States and other relevant actors.'²⁵⁵ The ILA enumerated several rights that had come to be regarded as customary international law, which included the right to participate in national

²⁴⁹ 'United Nations Declaration on the Rights of Indigenous Peoples | United Nations For Indigenous Peoples' <<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>> accessed 3 July 2022.

²⁵⁰ *ibid.*

²⁵¹ Article 4, United Nations Declaration on the Rights of Indigenous Peoples 2007 [(A/RES/61/295)].

²⁵² Article 22(1), *ibid.*

²⁵³ Article 22(2) *ibid.*

²⁵⁴ Randall S Abate and Elizabeth Ann Kronk Warner, *Climate Change And Indigenous Peoples* (Edward Elgar 2013) [13].

²⁵⁵ International Law Association, *Rights of Indigenous Peoples* 26-30.08.2012 [Resolution No. 5/2012] para 2.

decision-making on decisions that affected them; the right to free, prior informed consent;²⁵⁶ the right to their traditional lands, territories and resources, including the restitution of these rights.²⁵⁷

Scholars have cited the use of UNDRIP as a parameter of reference before UN bodies and human rights treaty bodies as an indicator of its strong persuasive authority.²⁵⁸ Further, countries like Bolivia have incorporated the UNDRIP into their domestic legal system, and regional human rights mechanisms such as the Inter-American Court of Human Rights and the African Commission on Human and People's Rights have used UNDRIP as a legal basis in their decisions, showing the legal impact of the UNDRIP.²⁵⁹

4.2.2 India's reservations

Although India voted in favour of the Declaration, the Indian delegate clarified the country's position with regard to the right to self-determination, as only applying 'to peoples under foreign domination', and not applying to 'sovereign independent States or to a section of people or a nation, which was the essence of national integrity'.²⁶⁰ This position was reiterated a decade later during the United Nations General Assembly's adoption of the draft resolution on "Enhancing the participation of indigenous peoples' representatives and institutions in meetings of relevant United Nations bodies on issues affecting them."²⁶¹ The Indian delegate explained that, while India supported the rights of indigenous peoples, there was no internationally agreed definition or criteria of identification of 'indigenous peoples'.²⁶² India considered it as relating to 'specific situations where people suffered from historic injustices as a result of their colonization and dispossession of their lands, territories and resources' and could not be 'expanded arbitrarily to include societies where diverse ethnic groups have lived together for thousand years to create artificial divides'.²⁶³

Thus, even while supporting the UNDRIP and supporting the rights of indigenous peoples, it has persistently objected the applicability of it to the Indian context.

²⁵⁶ *ibid* 5.

²⁵⁷ *ibid* 7.

²⁵⁸ Gómez Isa (n 223) 16.

²⁵⁹ Felipe Gomez Isa, 'The Role Of Soft Law In The Progressive Development Of Indigenous Peoples' Rights', *Tracing the Roles of Soft Law in Human Rights* (1st edn, Oxford University Press 2022).5

²⁶⁰ 'GENERAL ASSEMBLY ADOPTS DECLARATION ON RIGHTS OF INDIGENOUS PEOPLES; "MAJOR STEP FORWARD" TOWARDS HUMAN RIGHTS FOR ALL, SAYS PRESIDENT | Meetings Coverage and Press Releases' <<https://www.un.org/press/en/2007/ga10612.doc.htm>> accessed 13 June 2022.

²⁶¹ Mayank Joshi, 'Statement on Agenda Item 65: Rights of Indigenous Peoples' (*Permanent Mission of India to the UN*, New York, 9 August 2017) <<https://pminewyork.gov.in/IndiaatUNGA?id=MzUwMQ,>> accessed 13 June 2022.

²⁶² *ibid*.

²⁶³ *ibid*.

4.3 Convention on Elimination of All Forms of Discrimination Against Women (CEDAW)

India signed the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) on 30 July 1980 and ratified it on 9 July 1993. However, it has not signed the Optional Protocol under the Convention, thereby the Committee on the Elimination of Discrimination against Women cannot receive communications from individuals in India.

Nevertheless, in its combined periodic report for the fourth and fifth cycle submitted on 6 July 2012 (which is the latest report submitted by India), India's report to the Committee included developments in the domestic legislature with respect to the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 and the provisions under it with respect to individual claims being registered jointly in the name of both spouses, and the membership of women in the Forest Rights Committee (which was previously discussed under 2.3.3).²⁶⁴

In its Concluding Observations, the Committee under CEDAW expressed concern over traditional practices and customs that prevent rural women from inheriting and acquiring land and recommended that India abolish such practices.²⁶⁵ It also recommended that India take steps to monitor the availability and efficiency of legal services authorities, implement legal literacy programmes and raise their awareness of legal remedies available to them.²⁶⁶

General Recommendations of the Committee on the Elimination of Discrimination against Women

The Committee under CEDAW has drafted its 39th General Recommendation focussing on the rights of indigenous women and girls.²⁶⁷ It highlights the fact that their traditional land forms an integral part of the indigenous woman's identity, worldview, livelihood, culture and spirit.²⁶⁸ The limited recognition of ownership of their ancestral lands, territories, and natural resources, as well as the absence of titles to

²⁶⁴ 'Combined Fourth and Fifth Periodic Reports of State Parties - India' (Committee on the Elimination of Discrimination against Women 2012) CEDAW/C/IND/4-5 para 11 <<http://cedawsouthasia.org/wp-content/uploads/2010/12/G1247051.pdf>> accessed 7 April 2022.

²⁶⁵ 'Concluding Observations on the Combined Fourth and Fifth Periodic Reports of India' (Committee on the Elimination of Discrimination against Women 2014) OHCHR | CEDAW/C/IND/CO/4-5: para 33 <<https://www.ohchr.org/en/documents/concluding-observations/cedawcindco4-5-concluding-observations-combined-fourth-and-fifth>> accessed 4 July 2022.

²⁶⁶ *ibid* 35.

²⁶⁷ '(DRAFT) General Recommendation No. 39 on the Rights of Indigenous Women and Girls' (Committee on the Elimination of Discrimination against Women) <<https://www.ohchr.org/en/calls-for-input/2022/draft-general-recommendation-rights-indigenous-women-and-girls>> accessed 4 July 2022.

²⁶⁸ *ibid* 69.

their lands results in their inability to collectively use and enjoy their land.²⁶⁹ The Committee had previously stressed on the importance of land rights and collective ownership to indigenous women in its General Recommendation No. 34.²⁷⁰ The Committee recommended the need for equal access to ownership and possession of and control over land and other resources, and the provision of legal access for this.²⁷¹ Further, it recommended the development of local laws and policies to recognise indigenous women's rights to collective ownership and control over land and customary land tenure.²⁷²

The delay in submission of periodic reports is again an indication of the lackadaisical approach that India has generally adopted towards its international treaty obligations. In light of this, the General Recommendations by the Committee might not in itself persuade India to change its approach.

4.4 United Nations Framework Convention on Climate Change (UNFCCC)

It is also relevant to briefly mention India's commitments as a signatory of the UNFCCC. India has frequently drawn reliance on tribal knowledge for climate adaptation at the UNFCCC,²⁷³ and in its National REDD+ Strategy document from 2018, India has referred to the provisions of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 as a way of ensuring sustainable use of forests, conservation of biodiversity and maintenance of ecological balance.²⁷⁴ Further, India's Biennial update report also considers working with these communities as a way to address the climate crisis.²⁷⁵

Therefore, India's climate adaptation plans²⁷⁶ depend on the proper implementation of this legislation, where forest land is transferred to indigenous communities not just for their use, but also for their management of these lands using traditional knowledge in order to conserve such regions. This has the potential for being a good tool to help assess India's efforts in fulfilling its obligations to the indigenous

²⁶⁹ *ibid.*

²⁷⁰ *ibid* 25.

²⁷¹ *ibid* 28.

²⁷² *ibid* 71.

²⁷³ Akhilesh Gupta and H Pathak, 'Climate Change and Agriculture in India' (Ministry of Science & Technology, Government of India 2016) 11 <https://dst.gov.in/sites/default/files/Report_DST_CC_Agriculture.pdf> accessed 7 April 2022.

²⁷⁴ Ministry of Environment, Forest and Climate Change, 'National REDD+ Strategy India' (Ministry of Environment, Forest and Climate Change, Government of India 2018) s 1.11 <https://redd.unfccc.int/files/india_national_redd_strategy.pdf> accessed 7 April 2022.

²⁷⁵

²⁷⁶ 'India. Biennial Update Report (BUR). BUR3. | UNFCCC' (UNFCCC, 20 February 2021) <<https://unfccc.int/documents/268470>> accessed 15 July 2022.

communities in India. However, although its National REDD+ Strategy was submitted in 2018, it is yet to report on the results of these measures.²⁷⁷

²⁷⁷ 'Info Hub - REDD+' (*REDD+*, *UNFCCC*) <<https://redd.unfccc.int/info-hub.html>> accessed 5 July 2022.

5. Implementation of the Forest Rights Act

This Chapter is an attempt to understand the implementation of the Forest Rights Act and how the legal safeguards at the international and national level have translated on the ground. In doing so, this paper will examine secondary data that is available from government sources, as well as reports by NGOs working with indigenous peoples in the States of Chhattisgarh, Jharkhand, and Madhya Pradesh.

Additionally, six interviews were conducted in a semi-structured manner, as a way to gather more information based on the experiences of people working on the implementation of the Forest Rights Act in the regions of Chhattisgarh, Jharkhand and Madhya Pradesh. These included four representatives of NGOs working on the rights of Adivasi women and their land rights²⁷⁸, one lawyer who has previously represented Adivasi members in their claims over land rights in Jharkhand, and an ethnographer whose research has focussed on legal pluralism in the context of Adivasi communities and women's rights and the enforcement of the Forest Rights Act.

To begin with, this Chapter would focus on the data that has been provided by the government. Additionally, reports of the NCST and NGOs are relied on. The interviews are used mainly as a way to nuance the data collected from these secondary sources. Thereafter, an effort would be made to understand whether and how this has helped Adivasi women, and the main issues they encounter in the implementation of the application of this legislation in different regions. The Chapter will conclude with recommendations towards a better realisation of land rights of Adivasi women.

5.1 Implementation of Individual and Community Claims under the Act

When considering the implementation of the Forest Rights Act, it would be pertinent to remind ourselves that the legislation sought to recognise a broad range of rights that the Scheduled Tribes and other forest dwelling communities had over forest land, which included individual rights, community rights, right to use of resources, and community tenures. This was listed in Section 3 of the Forest Rights Act and has been reproduced here, as it would be relevant to the discussion in the subsequent sections of this Chapter.

3. (1) For the purposes of this Act, the following rights, which secure individual or community tenure or both, shall be the forest rights of forest dwelling Scheduled Tribes and other traditional forest dwellers on all forest lands, namely:-

²⁷⁸ Individuals from Badlao Foundation at Godda district of Jharkhand; Ekta Parishad in Chhattisgarh; Vikalp Samaj Sevi Sanstha in Madla district of Madhya Pradesh; and National Institute of Women, Child and Youth Development (NIWCYD) in Dindori district in Madhya Pradesh.

- a) *right to hold and live in the forest land under the individual or common occupation for habitation or for self-cultivation for livelihood by a member or members of a forest dwelling Scheduled Tribe or other traditional forest dwellers;*
- b) *community rights such as nistar²⁷⁹, by whatever name called, including those used in erstwhile Princely States, Zamindari or such intermediary regimes;*
- c) *right of ownership, access to collect, use, and dispose of minor forest produce which has been traditionally collected within or outside village boundaries;*
- d) *other community rights of uses or entitlements such as fish and other products of water bodies, grazing (both settled or transhumant) and traditional seasonal resource access of nomadic or pastoralist communities;*
- e) *rights including community tenures of habitat and habitation for primitive tribal groups and pre-agricultural communities;*
- f) *rights in or over disputes lands under any nomenclature in any State where claims are disputed;*
- g) *rights for conversion of Pattas²⁸⁰ or leases or grants issued by any local authority or any State Government on forest lands to titles;*
- h) *rights of settlement and conversion of all forest villages, old habitation, unsurveyed villages and other villages in forests, whether recorded, notified or not into revenue villages;*
- i) *rights to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving for sustainable use;*
- j) *rights which are recognised under any State law or laws of any Autonomous District Council or Autonomous Regional Council or which are accepted as rights of tribal under any traditional or customary law of the concerned tribes of any State;*
- k) *right of access to biodiversity and community right to intellectual property and traditional knowledge related to biodiversity and cultural diversity;*
- l) *any other traditional right customarily enjoyed by the forest dwelling Scheduled Tribes or other traditional forest dwellers, as the case may be, which are not mentioned in*

²⁷⁹ Nistar refers to concessional supply of forest produce that rural and tribal households living in the vicinity of forests in India have traditionally received as their livelihoods were dependent on access to these produce.

²⁸⁰ A patta refers to the legal deed issued by the government in the name of the actual owner of a property. 'Patta Noun - Definition, Pictures, Pronunciation and Usage Notes' (Oxford Advanced Learner's Dictionary) <<https://www.oxfordlearnersdictionaries.com/definition/english/patta>> accessed 6 July 2022.

clauses (a) to (k) but excluding the traditional right of hunting or trapping or extracting a part of the body of any species of wild animal;

m) right to in situ rehabilitation including alternative land in cases where the Scheduled Tribes or other traditional forest dwellers have been illegally evicted or displaced from forest land of any description without receiving their legal entitlement to rehabilitation prior to the 13th day of December, 2005.

(2) Notwithstanding anything contained in the Forest (Conservation) Act, 1980, the Central Government shall provide for diversion of forest land for the following facilities managed by the Government which involve felling of trees not exceeding seventy-five trees per hectare, namely:-

- (a) schools;*
- (b) dispensary or hospital;*
- (c) anganwadis²⁸¹;*
- (d) fair price shops;*
- (e) electric and telecommunication lines;*
- (f) tanks and other minor water bodies;*
- (g) drinking water supply and water pipelines;*
- (h) water or rain water harvesting structures;*
- (i) minor irrigation canals;*
- (j) non-conventional source of energy;*
- (k) skill up-gradation or vocational training centers;*
- (l) roads; and*
- (m) community centers;*

Provided that such diversion of forest land shall be allowed only if, -

- i. the forest land to be diverted for the purposes mentioned in this subsection is less than one hectare in each case; and*

²⁸¹ Angandwadi Centres were set up under the Integrated Child Development Services Scheme launched by the Government of India on 2 October 1975 that has universal coverage and is available for children below 6 years of age, pregnant women and lactating mothers. For more on this, refer to - 'Integrated Child Development Services (ICDS) Scheme' (Ministry of Women and Child Development, Government of India) <<http://icds-wcd.nic.in/icds.aspx>> accessed 6 July 2022.

- ii. *the clearance of such developmental projects shall be subject to the condition that the same is recommended by the Gram Sabha.*

Based on the rights enumerated in the legislation, and with the aid of the claim forms that were included as Annexures to the Rules promulgated in 2008, the Scheduled Tribes and forest dwellers would have claims to individual rights to forest land,²⁸² community rights (including nistar, rights over minor forest produce, community uses, grazing, traditional resource access, community tenures of habitat and habitation for primitive tribal groups, right to access biodiversity, intellectual property and traditional knowledge),²⁸³ and rights to community forest resource.²⁸⁴

5.1.1 Government's Monthly Progress Reports

The Central Government has been publishing monthly progress reports regarding the claims that were distributed along with the details regarding the claims filed by individuals and communities. This information has been made available periodically in a State-wise format, allowing us to analyse the implementation of individual and community claims.

However, the first concern that arises is the fact that this information does not give a bifurcation of the nature of community claims that have been granted, or at least a distinction between Community Forest Rights and Community Forest Resources. Therefore, while we see the overall claims distributed to communities based on their claims, there is close to no information on the type of community claims raised by these communities and those that are granted. This becomes relevant when comparing these figures with the reports of organisations and the experiences of those working with Adivasi groups on the implementation of the Forest Rights Act, which is discussed in the forthcoming sections of this Chapter.

Another issue was with regard to the lack of gender-disaggregated data, in these monthly reports. This makes it difficult to analyse whether joint-title were being granted, or whether single women's individual claims were approved.

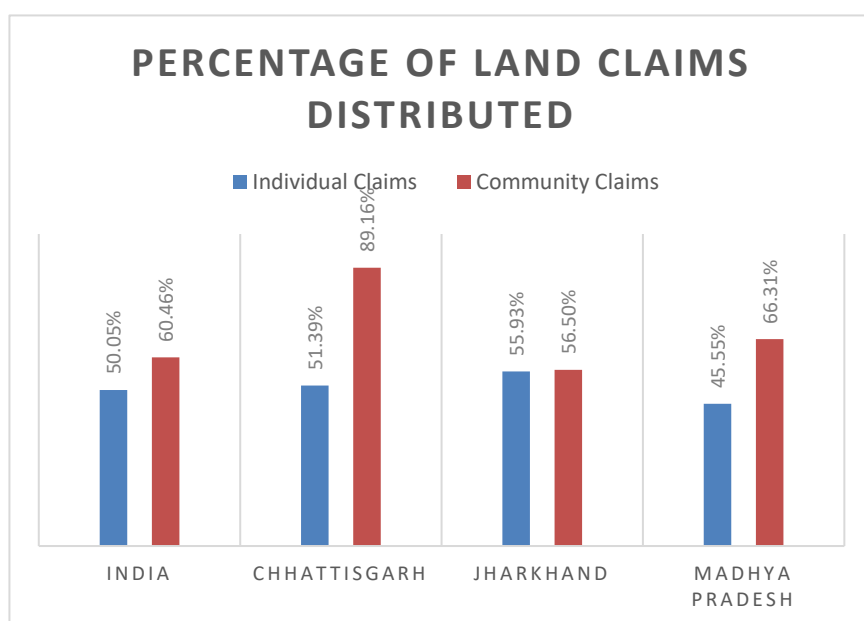
As per the latest report published by the Ministry for the period ending on 31 March 2022, out of a total of 4,260,247 individual claims and 168,818 community claims filed, a total of 2,132,217 (50.05%)

²⁸² Annexure I of Rules under FRA 27.

²⁸³ Annexure II, Form B of *ibid* 29.

²⁸⁴ Annexure II, Form C of *ibid* 30.

individual claims and 102,075 (60.46%) community claims have been granted.²⁸⁵ About 87.88% of the claims have been disposed of, implying that only about 12% of the applications remain to be processed. According to the information shared, only about half of the claims received have been successful (50.45%). The total extent of India's forest land for which individual titles that have been vested stands at 4,547,165 acres, while community titles form 11,365,528 acres. Thus, based on the official monthly progress report, there is ambiguity over the nature of rights regarding 71.42% of the land that has been distributed.



A closer look at the percentage of titles distributed shows that Jharkhand stands at 5th place in the country with respect to claims distribute, Chhattisgarh is at 6th place and Madhya Pradesh at 10th.²⁸⁶ The figure on the left was prepared based on quantitative data accessed from the government report. In terms of the percentage of land claims granted, in all three states the percentage of community

claims successfully processed stands above that of individual claims. This is also true at a pan-India level. The distribution of land rights under community claims was highest in Chhattisgarh, with almost 90%. In the case of Madhya Pradesh, the figure was 66.31%, and it was around 56.50% in Jharkhand. While the numbers were generally lower for individual claims, it was lowest in Madhya Pradesh at 45.55% (even lower than the national figure of 50.05%), followed by Chhattisgarh at 51.39% and Jharkhand coming up on top with 55.93%.

The following segments will briefly consider the implementation of the Forest Rights Act through reports by the NCST, and some NGO reports looking at the status of implementation in the States of Chhattisgarh, Jharkhand and Madhya Pradesh. Reliance would be placed primarily on secondary data

²⁸⁵ 'Monthly Progress Report - March 2022' (Ministry of Tribal Affairs - Government of India, 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)> accessed 26 June 2022.

²⁸⁶ *ibid* 11.

from reports by organisations working in these states. Additionally, inputs from the people interviewed in these states would also be included to clarify certain issues and nuance the findings from these reports.

5.1.2 Reports of the NCST

Since its inception, the NCST has presented 14 Annual Reports before the President of India.²⁸⁷ The 14th report was presented to the president on 24 March 2021. However, to date, only eleven annual reports have been laid in the Parliament (which has the effect of making the document public), with the eleventh report being made public on 25 November, 2019.

The annual reports of the NCST over the years point to the vast differences, even between different districts of the same State with respect to the implementation of the Forest Rights Act. In its 10th report, the Commission in its visit to Lohardaga (a district in Jharkhand) noted that claims of forest rights by tribals who had lived and cultivated on forest lands for many years are yet to be processed.²⁸⁸ In its 11th report, the Commission looked into issues in the State of Karnataka where despite being granted pattas, Adivasi communities were not extended crop insurance cover that farmers in the country are entitled to.²⁸⁹ In Tripura, the Commission found that, where claims had been granted, the average size of these lands was around 2.5 acres and insufficient to meet the needs of the families that had been farming on much larger plots for decades.²⁹⁰ This observation about claims in Tripura was echoed in the interviews conducted with NGO personnel working in Chhattisgarh, Jharkhand and Madhya Pradesh.

5.1.3 NGO Reports on Community Forest Rights

A general observation across States with regard to implementation of the Forest Rights Act has been the focus over the years on individual rights over Community Forest Rights. A report analysing the claims recognised until October 2018 observed that 96% of the recognised claims across the country had been on individual forest rights.²⁹¹ This is in sharp contrast to the data provided by the government, which shows higher approval rates for claims regarding Community Forest Rights.

²⁸⁷ 'NCST Reports | National Commission for Scheduled Tribes' (*National Commission for Scheduled Tribes, Government of India*, 22 July 2021) <<https://ncst.nic.in/content/ncst-reports>> accessed 3 July 2022.

²⁸⁸ Rameshwar Oraon, '10th Annual Report of the National Commission for Scheduled Tribes' (National Commission for Scheduled Tribes 2015) Annual Report 10 97 <https://ncst.nic.in/sites/default/files/2019/Annual_Report/10.pdf> accessed 10 July 2022.

²⁸⁹ Oraon, '11th Annual Report of the National Commission for Scheduled Tribes' (n 127) 186.

²⁹⁰ *ibid* 302.

²⁹¹ Geetanjoy Sahu, Abhilash Toppo and Aindrila Ganguly, 'Forest Rights Act Implementation in Jharkhand: Promise and Performance' (Tata Institute of Social Sciences and Oxfam India 2018) 20 <<https://www.oxfamindia.org/sites/default/files/2020-07/Promise%20and%20Performance%20report%20on%20FRA%20in%20Jharkhand%202018.pdf>> accessed 11 July 2022.

NGO reports also point towards individual rights being recognised only over 3-5 acres in Chhattisgarh.²⁹² And in many instances, the Community Forest Rights recognised have been reported to be regarding the development of facilities by the government as listed under Section 3(2) of the legislation.²⁹³ Oxfam India reported that it was only in 2019 that a village in Chhattisgarh was first awarded rights over Community Forest Resource.²⁹⁴ And in August 2020, the State also recognised such rights in a Tiger Reserve, which was the first instance in the country.²⁹⁵

Individuals working in the State observe that the majority of these rights granted under Section 3(2) of the Act are in fact projects that the government introduces, without any demand from the Adivasi communities. Further, instances of approval of Community Forests Rights remain few and far between.²⁹⁶

Additionally, Chhattisgarh has also had to contend with issues of tribal populations migrating to neighbouring states due to violence between the State and Maoists. The NCST had recommended the state to make arrangements for their rehabilitation.²⁹⁷ Further, there have been instances such as in Hasdeo Arand where the forest in control of local community has been given to mining companies without consent from the local Gram Sabhas in clear violation of provisions under the Forest Rights Act and PESA.²⁹⁸

In Jharkhand, there were concerns with regard to the Community Forest Rights titles that were distributed, as the titles did not specify the boundaries or the areas covered.²⁹⁹ Another key observation that came to the fore in NGO reports was with regard to the timeline of implementation, since the implementation spiked around elections and trickled down during the post-election phase.³⁰⁰ The process of recognition has largely been an effort led by NGOs and grassroots organisations.³⁰¹ Furthermore, the average recognised area of individual claims in Jharkhand only came up to 1.77 acres; far lower than the national average of around 2.56 acres and much lower than the other Chhattisgarh and Madhya

²⁹² Kalpavriksh and Vasundhara, 'Citizen's Report : Community Forest Rights Under The Forest Rights Act' (The Community Forest Rights - Learning and Advocacy (CFR-LA) Process and Oxfam India 2015) 39 <<https://www.fra.org.in/document/Citizen%20Report%202015.pdf>> accessed 10 July 2022.

²⁹³ *ibid.*

²⁹⁴ Sandip Chowdhury, 'Chhattisgarh Recognises CFR Rights – A First Since FRA's Inception' (*Oxfam India*, 25 August 2020) <<https://www.oxfamindia.org/blog/chhattisgarh-recognises-cfr-rights-first-fras-inception>> accessed 10 July 2022.

²⁹⁵ *ibid.*

²⁹⁶ Interview with National Coordinator, 'Regarding Implementation of FRA in Chhattisgarh (Ekta Parishad)' (23 June 2012).

²⁹⁷ Arnab Bose and Jeet Singh, 'Status of Forest Rights Act in Chhattisgarh' (2020) IX Policy Watch, Rajiv Gandhi Institute for Contemporary Studies 29, 32.

²⁹⁸ *ibid.*

²⁹⁹ Kalpavriksh and Vasundhara (n 292) 48.

³⁰⁰ Sahu, Toppo and Ganguly (n 291) 17.

³⁰¹ *ibid.* 26.

Pradesh.³⁰² What is more concerning is that traditional and customary laws in the State that had been codified during the British administration (and are still in place) recognise up to 10 acres.³⁰³

In Madhya Pradesh, a report published by an institute of the Madhya Pradesh State Government showed a great degree of variation among districts with regard to the individual claims that were accepted.³⁰⁴ With respect to Community Claims, the report showed Jhabua and Mandla to have the highest number of claims being accepted.³⁰⁵ However, in the interview with representatives of NGOs in the districts of Mandla and Dindori, a common issue was with regard to the kind of community rights being restricted to Nistar rights and non-recognition of rights over Community Forest Resources and habitat rights under Section 3(1) (d) and (e) of the Forest Rights Act.³⁰⁶

5.2 How has the Implementation of Forest Rights Act impacted Adivasi Women

The 34th General Recommendations by the Committee under CEDAW noted that rural women often have only limited rights over land and natural resources.³⁰⁷ This becomes more relevant in light of what we have already explored on how dispossession of traditional lands affects indigenous women and renders them more vulnerable to social and environmental challenges. Therefore, any attempt at improving the lives of Adivasi communities must ensure that women's rights over land are recognised and they are involved in the decision-making processes. The drafters of the Forest Rights Act seem to have also recognised this, given that they had ensured special provisions regarding joint titling and the inclusion of women in decision-making bodies under the legislation.

However, as reported in the citizens' report regarding the implementation of the legislation a decade after it came into force, neither the Ministry of Tribal Affairs nor the state reports present any gender-disaggregated data on the distribution of claims under the Forest Rights Act.³⁰⁸ Therefore, analysis of the

³⁰² *ibid* 19.

³⁰³ *ibid*.

³⁰⁴ Indrani Barpujari, 'Taking Stock and Identifying Challenges in Implementation of the Forest Rights Act in Madhya Pradesh' (Atal Bihari Vajpayee Institute of Good Governance & Policy Analysis 2019) 7 <http://aiggpa.mp.gov.in/uploads/project/Taking_Stock_and_Identifying_Challenges_in_Implementation_of_the_Forest_Rights_Act_in_Madhya_Pradesh.pdf> accessed 11 July 2022.

³⁰⁵ *ibid* 10.

³⁰⁶ 'Regarding the implementation of FRA in Dindori (National Institute of Women, Child and Youth Development)' (7 May 2022); 'Regarding the implementation of FRA in Mandla (Vikalp Samaj Sevi Sanstha)' (7 May 2022).

³⁰⁷ 'General Recommendation No. 34 on the Rights of Rural Women' (Committee on the Elimination of Discrimination against Women 2016) CEDAW/C/GC/34 para 55 <https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_7933_E.pdf> accessed 6 July 2022.

³⁰⁸ Prakash Kashwan, 'Promise & Performance : Ten Years of The Forest Rights Act in India' (The Community Forest Rights - Learning and Advocacy (CFR-LA) Process and Oxfam India 2016) Citizens' Report as part of Community Forest Rights-

gendered impact of the implementation of this legislation would have to be based on NGO reports (where this was considered) and the general observations made by interviewees in the course of this research.

5.2.1 Joint titles under individual claims

Although the legislation requires joint-titles to be granted with the name of the spouse, the reports from the ground tell a different story. A report by Landesa and Samuel Hahnemann Associates & Research Centre (SHARC) shows that in Jharkhand, the claims applied for were mostly in the name of the man, and therefore when the titles were granted, it was also in the name of the man.³⁰⁹ However, some organisations like the Badlao Foundation have been working towards informing Adivasi people of their rights and assisting with the applications for joint-titles in individual claims.³¹⁰ However, responses from organisations in this regard from Chhattisgarh and Madhya Pradesh show that joint-titles are rarely distributed in these two States.³¹¹ This was generally attributed to the patriarchal customary traditions that did not recognise women's right to property, although unlike Jharkhand these States did not have these customs codified.³¹² In the case of Madhya Pradesh, this was also demonstrated in the sample survey where only 11% of the applicants were females.³¹³

5.2.2 Focus on individual claims over community claims

The individuals interviewed in all three states acknowledged that it was the women in the Adivasi communities that did most of the work involving collecting forest resources like tendu leaves, firewood and grazing of cattle. Therefore, the fact that the government has focussed on granting individual rights over rights to community forest resources does not adequately help women meet their livelihood needs.

In the case of Badlao Foundation's work in the Godda district of Jharkhand, of the 40 claims for Community Forest Rights that were filed, only 13 were approved. In Dindori district of Madhya Pradesh, the rights granted to the community are generally limited to Nistar rights. And in such situations, when they try to access other forest resources, they face harassment by the personnel from the Forest

Learning and Advocacy (CFR-LA) process 23
<http://www.cfrrla.org.in/uploads_acrvr/X36BEPromise%20and%20Performance%20National%20Report.pdf> accessed 11 July 2022.

³⁰⁹ Deo (n 136) 14.

³¹⁰ 'Regarding the implementation of FRA in Godda, Jharkhand' (12 June 2022).

³¹¹ 'Regarding the implementation of FRA in Mandla (Vikalp Samaj Sevi Sanstha)' (n 306); 'Regarding the implementation of FRA in Dindori (National Institute of Women, Child and Youth Development)' (n 306); Interview with National Coordinator (n 296).

³¹² Interview with National Coordinator (n 296).

³¹³ Barpujari (n 304) 13.

Department. Even in the district of Mandla in Madhya Pradesh, the community has been struggling to gain rights to use forest resources and assert habitat rights over the forest land.

However, in situations where their rights have been granted, this has resulted in women being able to assert their rights and also assist in ensuring the biodiversity of the forest lands they occupy and help in afforestation measures.³¹⁴

5.2.3 Women's representation in decision-making

The Forest Rights Act requires the inclusion of women in the Forest Rights Committees and the Gram Sabha, ensuring the participation of women in these decision-making bodies. Researchers in Jharkhand have recorded a general resistance to women's active participation in these forums.³¹⁵ In Chhattisgarh, the inclusion of women in these forums was generally observed to be only on paper.³¹⁶ In Madhya Pradesh, the interviewee from Vikalp Samaj Sevi Sanstha had similar observations of women's names being mentioned on paper, but in many instances the individuals were not even informed of the same. In contrast, Mr. Balwant from the National Institute of Women, Child and Youth Development (NIWCYD) from Dindori district of Madhya Pradesh noted that when women were able to take on leadership roles in these positions, they were able to better negotiate with Forest Departments and advance the rights for the entire group. In this instance, these roles had the effect of empowering them with a legal right and resulted in greater participation in local governance, and has resulted in positive outcomes for realisation of women's rights in these regions.

Thus, two main observations that come to the fore with regard to the impact of the legislation on women. The first is that the implementation of the provisions greatly vary, even between two districts in the same State. Further, where NGOs and grassroots organisations have taken on the role of informing the Adivasi groups of their rights and assisted them in making their claims and ensuring the implementation of the legislation, they have been able to empower women in the way it was intended in letter and spirit of the legislation.

5.3 Issues that persist

Some of the main issues affecting the implementation of this legislation and its impact on Adivasi women applies to most of the country. These include the lack of political will to consistently implement the

³¹⁴ 'Regarding the implementation of FRA in Dindori (National Institute of Women, Child and Youth Development)' (n 306).

³¹⁵ Deo (n 136) 15.

³¹⁶ Interview with National Coordinator (n 296).

legislation, insufficient training of members at the various levels of leadership regarding their roles, and failure to monitor the implementation.

5.3.1 Lack of political will

Foremost amongst the concerns which emerge from this Chapter is the great reluctance on the part of the Government to actually ensure timely recognition and distribution of claims. Often, the Adivasi is only remembered close to election time, with distribution of rights spiking around that time in order to earn their votes.

Reports by various organisations and interviews show that the Forest Department is the largest hurdle that the NGOs and grassroot organisations face as they work on ensuring the implementation of Forest Rights. Further, the government's policies under the MoEFCC continue to be at cross-roads with the rights of Adivasi communities.³¹⁷

The capacity of the nodal agency for the implementation of the Forest Rights Act (the Ministry of Tribal Affairs) also leaves much to be desired. Its efforts to contend the harm caused by the MoEFCC in the lives of Adivasi people could be compared to David standing up to Goliath. Based on information from its website, the Ministry of Tribal Affairs has three dedicated staff to look into the implementation of Forest Rights Act across the country.³¹⁸ In the Citizen's Report documenting the 10 year performance of the legislation, it comments on the under-resources and under-staffed Ministry, where the task of supervising this exercise falls on "one Secretary, assisted by two Joint Secretaries, one Deputy Director General and an Economic Advisor" who handle the Forest Rights Act related work on top of other responsibilities.³¹⁹ In states like Jharkhand, this gets compounded by the fact that, despite having one of the largest tribal populations in the country, it does not have a dedicated department concerning tribal development but the Department of Scheduled Tribe Scheduled Caste, Minority and Backward Class Welfare.³²⁰

5.3.2 Insufficient training of people in leadership

Another area of concern is that members from the Adivasi communities represented in the committees under the Forest Rights Act are often reported to not be clear on their roles. Although the government's

³¹⁷ Kashwan (n 308) 25.

³¹⁸ 'Ministry of Tribal Affairs - Work Allocation' <<https://tribal.nic.in/downloads/Tribal/Workallocation270422.pdf>>.

³¹⁹ Kashwan (n 308) 20.

³²⁰ 'Department of Scheduled Tribe, Scheduled Caste, Minority and Backward Class Welfare' (*Government of Jharkhand*) <<https://www.jharkhand.gov.in/welfare>> accessed 11 July 2022.

monthly progress reports claim that trainings have been conducted for these committee members at the Gram Sabha, District and Sub-Divisional level,³²¹ they continue to be unclear of their real roles. As a result, these meetings often end up being guided and managed by the Forest Department, to the detriment of the real objectives of these bodies.³²²

Further, the reports by organisations also point to efforts by the Forest Departments to obfuscate the roles of committees under it and the Forest Rights Committee.³²³ In this instance, the example cited was that of the Joint Forest Management Committees at the village level, where the Forest Department works with the villages for sustainable management of forest resources with cash incentives, which is pitted as an alternative to their legal right to those lands.³²⁴

Interviews with people working at the grassroots also paint a similar picture. In the interview with the lawyer in Jharkhand, he expressed this by sharing how the member who sat on the Biodiversity Management Committee (under a Statutory body of the MoEFCC), were also members of the Forest Rights Committee. In such instances, the result was often confusion regarding their actual role.³²⁵ Similar observations were shared by Mr. Pawar regarding the Forest Rights Committees in Mandla. He noted that they lacked proper training and while their names were included on paper, many hardly even knew about their roles in these committees. He also explained that, instead of making decisions by holding meetings, many of these were instances where a file was passed for signature to the members of the Committee.³²⁶

5.3.3 Failure to monitor the implementation

Perhaps out of the incapacity of the nodal agency or due to the sheer lack of will on the part of the government, very little has been done with regard to regular monitoring of the implementation of this legislation. Some of the main concerns that stood out were the lack of proper update of records on rights that had already been recognised,³²⁷ and the claims getting stagnated in the process of appeal. In such situations, the Forest Departments have continued to evict those who were granted rights under the Forest Rights Act.³²⁸

³²¹ 'Monthly Progress Report - March 2022' (n 285).

³²² Interview with National Coordinator (n 296).

³²³ 'Patriarchies in the Forests in India: Communities in Peril' (n 164).

³²⁴ *ibid.*

³²⁵ 'Regarding the Implementation of FRA in Jharkhand' (1 June 2022).

³²⁶ 'Regarding the implementation of FRA in Mandla (Vikalp Samaj Sevi Sanstha)' (n 306).

³²⁷ Kashwan (n 308) 29.

³²⁸ 'Regarding the implementation of FRA in Mandla (Vikalp Samaj Sevi Sanstha)' (n 306).

There have been reports that the committees at the Sub-Divisional and District level have not been constituted, and even where they had been formed, meetings were not taking place regularly.³²⁹ This leads to stagnation of the claims process as the appeals are not getting processed in a timely manner.

Other concerns include the Forest Department's conversion of land within tribal villages for development processes, circumventing the process of consultation with the Gram Sabhas or Forest Rights Committees as the legislation provides for.³³⁰

Based on findings of NGO reports, it also becomes clear that the government's statistics regarding the recognition of Community Forest Rights also consider the development rights under Section 3(2). However, when the Adivasis assert their rights to Community Forest Resources, they have to contend with being implicated in cases for violating legislation to protect wildlife. This unnecessary criminalisation of Adivasi people by the Forest Department was also recorded in the 11th report of the NCST.³³¹

5.4 Way Forward

Based on an analysis of the implementation of the domestic legislation in place and India's compliance with its commitments in international law, it becomes apparent that India is currently failing at its own goal of remedying 'historical injustices' toward the Adivasi people.

As already established in Chapter 3, the Adivasi woman's life is intricately linked to her traditional land, and the non-recognition of her right to use the community forest resources has an impact on her basic needs and her ability to make a living. While the implementation of the Forest Rights Act along with the PESA Act definitely holds the promise of a solution to climate change or other threats that Adivasi women might be vulnerable to, there are numerous hurdles that stand in the way of that.

5.4.1 *Shedding the Colonial Attitude towards Forest Lands*

One of the main obstacles in the implementation of the Forest Rights Act comes in the form of the colonial attitudes that are still entrenched in the working of the Forest Department. As with most resources in the country, the colonial Administration looked at forests as a means of revenue. The legislations and institutions they created were channelled towards this goal. However, what becomes apparent from the reports is that the bureaucrats in independent India chose to keep these institutions and

³²⁹ Kalpavriksh and Vasundhara (n 292) 71.

³³⁰ Kashwan (n 308) 22.

³³¹ Oraon, '11th Annual Report of the National Commission for Scheduled Tribes' (n 127) 179.

their perspective on forests, as lands that were under their control, and as something that was at the disposal of the Forest Department to gather timber and other products and create revenue for the government.

Over seven decades after independence, India has failed to streamline its policies regarding conserving forests in a way that is more aligned to its objective of ensuring the rights of Adivasi people. Despite constitutional protections and legislations like the Forest Rights Act and PESA, the implementation of this routinely faces resistance from the Forest Department.

There is a crucial need to reconsider the implementation of these legislations. And political will would play a huge role in realising this. It would also require the Government of India to increase its resources and staffing for the Ministry of Tribal Affairs and ensure similar departments at the State level to facilitate the implementation of the legislations on mission-mode.

5.4.2 Ensuring a bottom-up approach in policies affecting Adivasi communities in Scheduled Areas

While ratifying international law treaties and signing declarations might have value in holding the country accountable, India's engagement with treaty bodies regarding indigenous rights shows a general indifference towards criticism or recommendations from these bodies. There has been a general dissonance between what it undertake at an international forum, and what it finally does. For example, its commitments regarding measures to combat climate change specifically rely on afforestation and sustainable cultivation of forest resources by citing the Forest Rights Act. The earlier sections of this Chapter make it abundantly clear that the country's efforts towards its realisation has been lackadaisical at best. Hence, merely ratifying another Convention would add very little value unless it is fuelled by a commitment to implement these international best practices back home.

In this particular case, India's legislations already recognise sufficient rights that, if implemented, would be sufficient to ensure the rights of Adivasi communities. Further, empowering Gram Sabhas and ensuring local self-governance in Adivasi forest lands, coupled with actual recognition of the myriad rights protected under the Forest Rights Act would be sufficient to help Adivasi women better adapt to the climate crisis.

However, what is of utmost importance in this scenario, is the recognition of the fact that policies affecting Adivasi communities should be made by them. While it might be tempting for the government to reject suggestions for increased local self-governance citing security reasons, it is also worth considering that there are several groups of Adivasis within the same State and even the same district,

with their unique cultures and traditions. Their heterogeneity mandates that the government desist from adopting a one-size-fits-all solution.

5.4.3 Legal literacy and shift in traditional and cultural practices that denied women's rights over land

One of the observations from the implementation of the individual forest rights is plagued by traditional patriarchal practices, such as only applying for claims in the name of the male member of the family, despite the legislation calling for joint titles to be issued.

The intervention of civil society organisations in improving legal literacy and assisting in the process of filing for claims has had a positive impact in ensuring that the titles were issued in the name of both spouses. However, measures still need to be taken in terms of recognition of single women's rights over land, but such interventions are a step in the right direction.

Conclusion

The Adivasi woman's claims over land are steeped in legal and cultural impediments. At the very outset, she faces the challenges of being part of a group that has faced marginalisation over the years; both from the caste-based mainstream society, as well as the discriminating colonial-era legislations that criminalised the Adivasi way of life and limited their access to forest resources. Their situation has not drastically improved despite the government's efforts of recognising them as 'Scheduled Tribes' and providing reservations in education and employment. As a further challenge, the inheritance of property in India is governed by personal laws based on the religion that the Adivasi population practices. In almost 90% of the case, it is the customary laws codified under the Hindu Succession Act, with small sections of the indigenous peoples also practising Islam or Christianity. Therefore, for the majority of Adivasi women, their right to inherit property is determined by laws that have traditionally been averse to granting women rights over land.

As observed in Chapter 2, seven decades after India's independence, the current marginalisation has largely been a result of dispossession of land for development projects. In the Adivasi context, the dispossession of land in the context of policies on natural resource extraction by the government disproportionately affects tribal women. And these issues would only be compounded in the face of the challenges they face in terms of food security and safety when they are affected by droughts and floods caused due to climate change.

Being at the forefront of these struggles, many Adivasi women risk violence by the State as it tries to quell dissent against its developmental and mining activities. However, the dispossession of their lands due to these projects also deprives them of their traditional livelihood through the sale of forest produce like tendu leaves and minor forest produce. The result has been increased migration to urban areas where Adivasi women are mostly employed as domestic workers. Further, the weakening of traditional kinship ties between Adivasi families due to displacement has also resulted in increased vulnerability that women in these communities face, forming the second highest offence committed against the Scheduled Tribes population was related to assaults on women. Additionally, Adivasi women are often victims of witch-hunts, mostly as a ploy to grab their land or as an act of revenge. In these circumstances, ensuring the land rights of Adivasi women become the best way to reduce their vulnerability to environmental and social challenges. This has been backed by recommendations of various international bodies like the ILO and the Committee under CEDAW.

When analysing the domestic legislations relating to Adivasi lands in Chapter 3, we are confronted by the parallel regimes of the laws regulating forest conservation and those recognising the rights of Adivasi people to govern themselves and access various forms of rights over forests including individual rights, community forest lands, use of forest resources, and habitat rights. While the former has retained much of the colonial attitudes of looking at forests as a source of revenue for the State, the latter was an attempt to redress the negative consequences that resulted from these forest policies over the years. When the Forest Rights Act of 2006 came under the scrutiny of the court as a threat to India's ecology, the initial response was to evict the Adivasi communities whose claims had been rejected. The court's order came under much criticism and based on further prayers by the parties, it stayed the previous order. However, a final decision on the matter is yet to take place. The Forest Rights Act also recognised the specific vulnerability of Adivasi women and took measures to ensure their rights over individual property by requiring joint-titles to be registered in the names of both spouses. Another positive step was mandating women in the bodies formed to ensure the enactment of the legislation.

Following this, India's obligations under international law were considered in Chapter 4. While the ILO Convention No. 107 on Indigenous and Tribal Populations has been criticised for its policy of assimilation and paternalism, this is the only binding international treaty that India has signed in relation to indigenous peoples. However, an analysis of the observations by the CEACR and CAS shows that the Indian government has not actively taken action based on the recommendations of these Committees. While the revised Convention No. 169 provided for much more autonomy and better recognition of rights to land and better compensation in case of dispossession from ancestral lands for indigenous peoples, the Indian government has objected to recognising certain segments of its populations as 'indigenous' and considered the terminologies used as causing issues relating to law and order. The statements placed before the country's NCST also demonstrate a reluctance to consider compensations to tribal populations as a value of the minerals and sub-soil resources that are mined from the lands they are dispossessed of.

Although India signed the UNDRIP, it again expressed reservations stating that all Indians would be considered 'indigenous peoples'. Nevertheless, even if parts of the UNDRIP were to be considered customary international law, India has objected to such an interpretation to it. While India's obligations under other treaties such as the CEDAW and UNFCCC are briefly analysed, the findings under Chapter 4 irrefutably point to the unlikelihood of effective implementation of the rights of Adivasi women through international treaty bodies.

Chapter 5 moves on to analyse the implementation of the rights over forests granted under the Forest Rights Act. While the latest available monthly report by the government might suggest that the government has granted more rights under claims over community forest rights, observations by the NCST and reports by NGOs tell a different story. The Community Forest Rights recognised are often what has been termed as ‘developmental rights’ for constructing amenities in the village. Further, on average only about 2.5 acres of land have been granted under individual claims, often much smaller than the lands they had traditionally farmed on.

A major limitation with respect to analysing the gendered impact of this legislation has been the lack of gender-disaggregated data on the implementation of the Forest Rights Act. Based on reports from the ground, the grant of joint-titles to individual claims has been more effective in situations where civil society members assisted the claimants with their applications. Individuals interviewed in the course of this research expressed the importance of community forest rights over resources for Adivasi women. Recognition of these rights helps towards ensuring the supply of water and firewood, as well as sources of livelihood like the tendu leaves, and production of mahua. With regard to women’s representation in decision-making, this research shows that often their names are included only on paper. The government needs to take active steps to monitor the implementation of the legislation. Further, the government should also ensure that the members in the various committees under the legislation are adequately trained and empowered to actively take part in these meetings and contribute to the decision-making process.

However, the greatest impediment that stands between the Adivasi woman and her access to land rights seems to be the colonial attitudes of the Forest department, which continues to look at the forest as a revenue-making tool. The fact that the nodal agency for the implementation of the Forest Rights Act is expected to coordinate this mammoth task while being severely understaffed and under-resourced further underscores this point.

An important learning point from the analysis of the three states that have similar histories has been the immense heterogeneity of the Adivasi population. Therefore, any efforts by the government to promote development must be focused on empowering the local self-government and improving the legal literacy of the Adivasi women. the first step towards this could be through the implementation of PESA.

The implementation of the 2006 legislation remains India’s best opportunity for realising the land rights of Adivasi. This would help secure their livelihoods and help improve their resilience to climate change.

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- The Constitution (Scheduled Tribes) Order 1950
- The Constitution (Seventy-third Amendment) Act, 1992

- The Forest (Conservation) Act 1980
- The Hindu Succession Act, 1956
- The Indian Forest Act 1927 (16 of 1927)
- The Provisions of the Panchayats (Extension to the Scheduled Areas) Act 1996
- The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 52
- The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules 2007
- Unlawful Activities (Prevention) Act 1967