TOWARDS A TRANSFORMATORY AGENDA FOR RESOURCE REDISTRIBUTION:

TRIBAL WOMEN'S RIGHTS TO FORESTS IN INDIA

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INTRODUCTION

The global competition over resources driven by neoliberal development policies has compounded the historical conflict between the Indian state, international market players and indigenous communities. Resource diversion and exploitation, such as through mineral extraction and construction of dams, are considered the engines of economic growth. In this paradigm, natural resources fulfill a predominantly economic function. Thus, the law distributes resources to market-based entities in different ways to maximize profitability and efficiency.

In doing so, Indian law neglects the social dimensions of property, and attempts to obfuscate the historical political contestations over the distribution of land and resources. Contemporary economic policies continue to divert these resources from the control of marginalized indigenous communities to different private and public actors, feeding into processes of intense concentration and accumulation of natural wealth in the hands of elite actors. Resultantly, these resource-dependent communities already grappling with underdevelopment are further impoverished on account of mass displacement, violence and exclusion from their livelihood base.[1] Even as indicators of national economic growth persistently climb upwards, so does inter- and intra-group economic and social inequality.

In this paper, I attempt to frame the problem of development as a problem of resource

[1] Ministry of Tribal Affairs, Government of India, REPORT OF THE HIGH LEVEL COMMITTEE ON SOCIO-ECONOMIC, HEALTH AND EDUCATIONAL STATUS OF TRIBAL COMMUNITIES OF INDIA (May 2014) [hereinafter "Xaxa Committee Report"].

distribution in order to effectively address the gaping and rapidly growing inequality in India. I specifically focus on the distribution of rights over forests and forestlands in India, particularly from the lens of the marginalized sub-group of women from constitutionally recognized indigenous communities, called 'Scheduled Tribes'.

The legal distribution of rights over forests follows a long historical trajectory. Colonial legislations, such as the Indian Forest Acts of 1878 and 1927, as well as the Land Acquisition Act of 1894 first nullified the traditional property rights of tribal communities to forests and vested it in the state. Through subsequent patchwork changes in the legal framework in the colonial as well as postcolonial period, control over forests continued to be redirected away from Scheduled Tribes, first to the colonial power, then to the domestic and tribal elite, and now finally, to domestic and international private industry.

Each of the periods of resource diversion, as discussed in this paper, were propped up by distinct pretexts, but united by the common view of land and forests as capital assets to form the basis of industry and development. This was in furtherance of the goals of colonialism to expropriate the land and resources of the colonized for the enrichment of the imperial power. Much like in other parts of the world, this was attained through the use of force and the legal arrangement of property relations. At different points, the doctrine of *terra nullius* where collective ownership and management of resources were neglected to facilitate land grab, was employed, on the pretext of preventing land

degradation or for ecological preservation.[2]

Transitioning to an independent nation in 1947, land grab was intensified under a model of centralized industrial development for the new postcolonial state. Following the introduction of neoliberal market reforms in 1991, privatization of resources intensified on the pretext of increasing efficiency to drive national economic growth.[3]

The capitalization and accumulation of natural wealth departs from forms of tribal resource use and management. Sharing labor and resources is constitutive of the tribe, such that forests and land are communally managed, used predominantly for sustenance, and the benefits distributed relatively equitably among the distinct members of the tribe.[4] The praxis of the tribal ethos is also a subject of concern in this paper, since this equitable distribution has also skewed over generations. Nevertheless, I identify these characteristics to distinguish the tribal relationship with resources from that of the market, as well as non-tribal agricultural communities.

The fundamental alteration in the nature of natural resources in the exercise of colonial/postcolonial *dominium*, or the rule over things, had a direct correlative

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[2] MADHAV GADGIL AND RAMACHANDRA GUHA, THIS FISSURED LAND: AN ECOLOGICAL HISTORY OF INDIA 99-130 (1993).

[3] Govind Chandra Rath, *Introduction*, *in* TRIBAL DEVELOPMENT IN INDIA: THE CONTEMPORARY DEBATE 15, 18-19 (Govind Chandra Rath ed., 2006).

[4] GOVIND KELKAR AND DEV NATHAN, GENDER AND TRIBE: WOMEN, LAND AND FORESTS 1-27 (1991); Govind Kelkar and Dev Nathan, *Introduction- Forest Societies in Asia: Gender Relations and Change*, *in* GENDER RELATIONS IN FOREST SOCIETIES IN ASIA: PATRIARCHY AT ODDS 13-45 (Govind Kelkar *et al* eds., 2009); Walter Fernandes and Sanjay Barbora, *Tribal Land Alienation in the Northeast: An Introduction*, *in* LAND, PEOPLE AND POLITICS: CONTEST OVER TRIBAL LAND IN NORTHEAST INDIA 1, 4-7 (Walter Fernandes and Sanjay Barbora eds., 2009).

consequence on *imperium* over tribal peoples, that is, rule over persons.[5] On the ground, the legal processes have resulted in alienation of tribal communities from their means of production, criminalization of their livelihood strategies and displacement from their habitus. While there are conflicting figures on the extent of tribal displacement since Independence, government sources estimate that out of the 60 million persons displaced due to development projects between 1947-2000, around 47 per cent belong to Scheduled Tribes.[6] Other figures suggest that at least one in every four tribal persons has experienced displacement.[7]

After decades of agitation for the recognition of customary rights of tribal communities over forests, the Indian Parliament passed The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act [FRA] in 2006. The FRA, for the first time in more than two hundred years, recognizes property rights of tribal communities over the forests of their habitus, and vests in them the authority to manage and control forests as per customary community norms. However, absent from both these frameworks is a considered analysis of the distribution of forest resources to tribal women. The gendered division of roles within families and tribal communities mediates the impact of state appropriation and resource concentration on women.

Mainstream feminist discourse in India conflates interventions for tribal women's land

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[5] *See* Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8 (1927).

[6] Ministry of Rural Development, Government of India, EXPERT GROUP ON PREVENTION OF ALIENATION OF TRIBAL LAND AND ITS RESTORATION (2004); *see also* Sujit Kumar Mishra, *Development, Displacement and Rehabilitation of Tribal People: A Case Study of Orissa*, 6 J. SOC. SCI. 197-208 (2002).

[7] *Supra* note 1 at 258.

rights with those of rural women engaged in agriculture, such that the struggle becomes one of non-discriminatory access relative to men.[8] This grossly overlooks the context of state and market-based appropriation of resources within which tribal women negotiate their livelihoods. It also neglects the structural distinctions in the gendered patterns of resource distribution within tribal and non-tribal communities. Simultaneously, the strong pressures of neoliberal development policies have prevented tribal movements from engaging fully with the rights of marginalized constituencies within their communities.

This paper attempts to bring greater feminist deliberation on what a redistributive agenda for resource rights could look like for tribal women, and greater reflection within tribal movements on addressing internal inequities. What should be the shape of a transformatory agenda for tribal women, which facilitates their negotiation of marginalization from the state, market and community in their struggle for control over resources. I posit a three-pronged intervention in the field of material distribution of resources, political empowerment and cultural change, in order to meet a transformatory and emancipatory agenda of development through redistribution in

[8] Madhu Kishwar v. State of Bihar, AIR 1996 SC 1864; *see* BINA AGARWAL, A FIELD OF ONE'S OWN: GENDER AND LAND RIGHTS IN SOUTH ASIA (1994); BINA AGARWAL, GENDER AND COMMAND OVER PROPERTY: AN ECONOMIC ANALYSIS OF SOUTH ASIA (1994); *see also* Prem Chowdhry ed., GENDER DISCRIMINATION IN LAND OWNERSHIP (2009); Ashok K. Sircar and Sohini Pal, Landesa, WHAT IS PREVENTING WOMEN FROM INHERITING LAND: A STUDY OF THE IMPLEMENTATION OF THE HINDU SUCCESSION (AMENDMENT) ACT 2005 IN THREE STATES IN INDIA (2014), http://www.landesa.org/wp-content/uploads/What-is-Preventing-Women-from-Inheriting-Land-Sircar-Pal-March-2014.pdf (Apr. 30, 2017); Arun Sharma, *Tribal Women gets Right in Ancestor's Property, Breaks age-old Practice,* The Indian Express, Jun. 26, 2015 http://indianexpress.com/article/india/india-others/tribal-women-gets-rights-in-ancestors-property-breaks-age-old-practice/ (Apr. 24, 2017).

favour of tribal women.

This paper marks only the first step in a larger project for the (re)distribution of natural resources to tribal communities and marginalized constituencies within them, including women, *dalits* and other marginal forest-dwellers. It springs from the recognition that tribal women occupy spaces that rely on the interaction of multiple natural resources, such as forests, agricultural land, pastures, rivers. I focus on forests as the first step, since a predominant number of Scheduled Tribes in India have traditionally relied on them for economic and cultural sustenance.

A more complete analysis of this question is possible only with further empirical research on the content of customary laws regarding forest use across the multiple tribes in India; their operation in the current overarching framework of commercialized development; the negotiation of political authorities at the local level. The present analysis founds the platform from which I intend to conduct future research on the subject.

I proceed in three sections. In the first section, I elucidate the deficiencies in the mainstream feminist discourse in advocating for an individual property regime to protect the rights of tribal women, instead of one that advances or protects the control of tribal communities to the resources of their sustenance. I seek to demonstrate that resource rights for women are inextricably tied to secure resource rights of their tribe as a whole, so that the relationship between women and the community can be recast from one of antagonism to one of nuanced complementarity. In the second section, I analyze the impact of the turn to customary tenures under the FRA on the redistributive

agenda for women's rights to forests. I argue that customary tenures act as a double-edged sword in this project. In the third section, I outline the legal and political interventions in the field of material distribution of resources, political empowerment and cultural change. I identify a property framework and processes for political empowerment in order to secure women's rights to and control over forest resources. I also analyze the distributional contours of cultural norms, and articulate preliminary steps for addressing inequalities encoded in them.

SECTION 1: WOMEN'S RIGHTS AS COMMUNITY RIGHTS

Research and policy reforms pertaining to women's property rights in India have traditionally focused on inheritance and marital property.[9] While personal laws governing inheritance have made some strides in securing equal property rights for women, rights in agricultural land have consciously been excluded from the purview of these progressive legislations.[10] Ever since Bina Agarwal's landmark study on land rights for women in 1994,[11] equality in ownership and control over land has assumed centrestage in feminist development initiatives.

These initiatives, while accounting for diversity in patterns of land use, holdings and division of labour, conflate the interests of non-tribal and tribal women under the overarching banner of 'rural women'. A focus on non-discrimination in inheritance, or equal access to marital property does not speak to tribal women's vulnerabilities to exclusion from resources.

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[9] BINA AGARWAL, A FIELD OF ONE'S OWN: GENDER AND LAND RIGHTS IN SOUTH ASIA (1994); KIRTI SINGH, SEPARATED AND DIVORCED WOMEN IN INDIA: ECONOMIC RIGHTS AND ENTITLEMENTS (2013); B. SIVARAMAYYA, MATRIMONIAL PROPERTY LAW IN INDIA (1999); Flavia Agnes, *Conjugality, Property, Morality and Maintenance*, 44 ECON. & POL. WEEKLY 58-64 (2009); Flavia Agnes, *His and Hers*, 47 ECON. & POL. WEEKLY 10-12 (2012); Radhika Chitkara, *Between Choice and Security: Irretrievable Breakdown of Marriage in India*, 21 JURISPRUDENCIJA 847-65 (2014).

[10] LAWYERS COLLECTIVE WOMEN'S RIGHTS INITIATIVE, MAPPING WOMEN'S GAINS IN INHERITANCE AND PROPERTY RIGHTS UNDER THE HINDU SUCCESSION ACT, 1956, http://www.lawyerscollective.org/files/LCWRI%20INHERITANCE%20REPORT.pdf (Apr. 30, 2017); Bindu Jindal, *Are Inheritance Rights of Women in Agricultural Land a Mirage?*, 1 INT'L. J. L. & LEGAL JURIS. STUD. http://ijlljs.in/wp-content/uploads/2014/11/Are-Inheritance-Rights-of-Women-in-Agricultural-Land-a-Mirage-_Bindu-Jindal_.pdf (Apr. 30, 2017).

[11] AGARWAL, *supra* note 9.

Firstly, they assume that land is the only productive natural resource on which rural women rely for economic security and livelihood. For women in several tribal communities, agricultural land is an inseparable component of a larger ecosystem comprising forests, rivers and other natural resources, access to all of which is important for their secure livelihoods.

Secondly, these reform initiatives consider the family and the community as the source of marginalization of women from secure rights to resources. In this matrix, the coercive power of the state is instrumentalized to overcome discriminatory practices within families and communities, through its legal and bureaucratic machinery.[12] Although the postcolonial Indian state quickly lost its reformist zeal in overhauling unequal land relations between *dalits*, marginal farmers, tillers and the landholding castes, it intervened in the zone of the family to equalize inheritance rights between husbands and wives through joint titling,[13] and brothers and sisters through amendments to the Hindu Succession Act in 2005.[14]

As I demonstrate in this section, for tribal women, the Indian state poses the most compelling challenge to their secure forest and land rights. Tribal societies have had a fraught relationship with the modern state since the advent of the British colonizers,

[12] Radhika Chitkara, *Pulling the Wool: The Indirect Reform of Religious Family Laws in India*, 6 INT'L J. JURIS. FAM. 43-65 (2015).
[13] Jayoti Gupta, *Women Second in Land Agenda*, 37 ECON. & POL. WEEKLY 1746-1754 (2002).
[14] LAWYERS COLLECTIVE WOMEN'S RIGHTS INITIATIVE, *supra* note 10.

who first used force and the law to change property relations over forests.[15] This continued into the postcolonial period, when the use of force and law again combined to divert forests for commercial and industrial use and cause large-scale displacement of over a million tribals since Independence.[16] In such a scenario, a return to community-based norms of forest management and use provides a panacea for women struggling against disempowerment through displacement and increased domesticization. While discriminatory practices exist even within communities, this suggests that the relationship between women, communities and the state in the case of tribes requires a more nuanced appraisal.

Thirdly, the antagonistic relationship between families and women's property rights leads feminist advocates to posit a regime of individual property rights, under which women have exclusive ownership (and control) over landholdings and the freedom to alienate unencumbered by their male relatives.[17] Securing title for women over land is assumed to enable equitable distribution of household income between individual family members, access to credit, and entitlement to compensation and rehabilitation in their own right in case of state acquisition of land.[18] Female ownership of private land

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[15] *Supra* note 2 at 113; PEOPLE'S UNION FOR DEMOCRATIC RIGHTS, UNDECLARED CIVIL WAR: A CRITIQUE OF FOREST POLICY 6 (1982); Ramachandra Guha, *Forestry in British and Post-British India: A Historical Analysis*, 18 ECON. & POL. WEEKLY 1882-1896 (1983); Christoph von Fürer-Haimendorf, TRIBES OF INDIA: THE STRUGGLE FOR SURVIVAL 79-96 (1982).

[16] MADHAV GADGIL AND RAMACHANDRA GUHA, *supra* note 2 at 215; PEOPLE'S UNION FOR DEMOCRATIC RIGHTS, *supra* note 15 at 6-7.

[17] AGARWAL, *supra* note 9; LAWYERS COLLECTIVE WOMEN'S RIGHTS INITIATIVE, *supra* note 10; Chitkara, *supra* note 12.

[18] KLAUS DEININGER, LAND POLICIES FOR GROWTH AND POVERTY REDUCTION: A WORLD BANK POLICY RESEARCH REPORT xvii- xxxiv (2003).

also carries positive social change by reducing women's vulnerability to domestic and community violence.[19]

However, the introduction of individual landholdings in tribal societies has been counter-productive to the economic, social and political interests of tribal women. The communal exploitation and regeneration of forest resources locates property rights within a complex social network of relationships. An ideal agenda for economic redistribution for tribal women requires a property regime that enables them to transform these relationships for greater empowerment.

In this section, I seek to demonstrate that redistributing forests and lands to tribal communities is inextricably linked to the project of securing forest rights for women. I do so by first providing a broad strikes overview of the political, economic and cultural ethos of resource use in tribal communities embedded within a network of social relations. I then map the changes in forest tenure through the colonial and postcolonial phases to analyze the changes generated in these patterns of resource use and the rights of access of women.

WOMEN IN TRIBAL SOCIETIES

The 744 Scheduled Tribes in India exhibit tremendous diversity in their economic, social and cultural compositions.[20] Most tribes are patrilineal and patrilocal,[21] while

[19] *Id.*

[20] AK Nongkynrih, *Privatisation of Communal Land of the Tribes of North East India: Sociological Viewpoint, in* LAND, PEOPLE AND POLITICS: CONTEST OVER TRIBAL LAND IN NORTHEAST INDIA 17, *supra* note 4; Xaxa Committee Report, *supra* note 1 at 203; for

some are matrilineal.[22] They may band together either on kinship or (temporary) common residence.[23] Depending on their location, they may be engaged in foraging, agriculture, fishing or all three.[24]

Based on Nathan and Kelkar's anthropological study of gender relations in tribes along the eastern states of India, and Fernandes and Barbosa's of the north-eastern states, two common features relevant to the current analysis can be abstracted. The first is collectivism in economic activities, and the second is relative equality in the status of men and women within society, in comparison with non-tribal societies.[25] Their use of forest resources is geared mostly towards self-consumption and barter, as opposed to

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specific descriptions of social, economic and political formations in distinct tribes in India, *see* M. Parwez, *Searching Space: Women in the Customary Laws and Practices of the Tribal Societies in North-East India*, 3 IND. J. APPLIED RESEARCH 173-177(2013); Sumi Krishna, *Gender, Tribe and Community Control of Natural Resources in North-East India,* 8 IND. J. GENDER STUD. 307-321 (2001); P. Thamizoli and the MSSRF Team, *Integrating Gender Concerns into Natural Resource Management: The Case of the Pichavaram Mangroves, Tamil Nadu*, 8 IND. J. GENDER STUD. 196, 198-201 (2001); Bimola Devi and Saroj Arora, *Women and Inheritance Practices in Manipur*, *in* GENDER RELATIONS IN FOREST SOCIETIES IN ASIA: PATRIARCHY AT ODDS 163-175 (Govind Kelkar *et al* eds., 2009); MN Karna, *Tribal Areas of Meghalaya: Land Ownership of Women*, in GENDER DISCRIMINATION IN LAND OWNERSHIP 176-188 (Prem Chowdhry ed., 2009); Indra Munshi, *Women and Forest: A Study of the Warlis of Western India, in* GENDER RELATIONS IN FOREST SOCIETIES IN ASIA: PATRIARCHY AT ODDS 265-269 (Govind Kelkar *et al* eds., 2009).

[21] GOVIND KELKAR AND DEV NATHAN, GENDER AND TRIBE: WOMEN, LAND AND FORESTS 22 (1991).

[22] Walter Fernandes and Sanjay Barbora, *Tribal Land Alienation in the Northeast: An Introduction*, *in* LAND, PEOPLE AND POLITICS: CONTEST OVER TRIBAL LAND IN NORTHEAST INDIA 1, 5 (Walter Fernandes and Sanjay Barbora eds., 2009).

[23] GOVIND KELKAR AND DEV NATHAN, *supra* note 21 at 33-51.

[24] GOVIND KELKAR AND DEV NATHAN, *supra* note 21 at 33-51.

[25] GOVIND KELKAR AND DEV NATHAN, *supra* note 21 at 22; Walter Fernandes and Sanjay Barbora, *supra* note 22.

marketable exchange,[26] although they are also now increasingly engaged in the sale of forest produce to local markets.

Collectivism in Economic Activities

The tribal collective may be organized according to residence, as in the case of nomadic tribes,[27] or kinship in case of settled tribes.[28] The livelihood of nomadic tribes depends primarily on foraging activities, which includes the collection of minor forest produce for food, shelter, medicine etc.[29] Settled tribes engage in both cultivation and foraging for their livelihood sustenance.[30]

Nomadic tribes share only a temporary relationship with land, and by extension, the collective dependent on it. Accordingly, no one enjoys permanent rights to land, but all members have usufructory rights to forest resources at the site of their residence and to share in the gather of the group.[31] For settled agricultural tribes, land is controlled and managed by the collective, often through a council of male elders, and is categorized according to use.[32] Earlier, land for shifting cultivation (*jhum*) used to be distributed among the households on a needs-basis, vesting heritable but inalienable right in case of actual cultivation. With the passage of time and the prohibition on shifting cultivation from the colonial period, most tribes have turned to settled cultivation. Actual

[26] *Supra* note 3 at 35.
[27] GOVIND KELKAR AND DEV NATHAN, *supra* note 21 at 45.
[28] GOVIND KELKAR AND DEV NATHAN, *supra* note 21 at 35.
[29] GOVIND KELKAR AND DEV NATHAN, *supra* note 21 at 36.
[30] Indra Munshi, *Women and Forest: A Study of the Warlis of Western India, in* GENDER RELATIONS IN FOREST SOCIETIES IN ASIA: PATRIARCHY AT ODDS 265-269 (Govind Kelkar *et al* eds., 2009).
[31] GOVIND KELKAR AND DEV NATHAN, *supra* note 21 at 38.
[32] AK Nongkynrih, *supra* note 20 at 20-33.

cultivation entrenches the household's property rights to the cultivable land, converting it into private property over time.[33] The entrenchment of private property on communal land necessarily impacts the social dynamics in the collective. Earlier, the consent of the collective was a prerequisite for the alienation of cultivable land to outsiders, but it is not so anymore.[34]

Few tribal societies rely exclusively on cultivation, since the cycle of returns here is deferred.[35] Consequently, foraging and grazing in forests and common village areas are crucial to supplement livelihood needs all year round. These constitute the 'common property resources' of the tribal economy- owned collectively by the tribe, with each household allocated usufructory rights subject to constant revision.[36]

The division of labor between men and women varies from tribe to tribe. In nomadic tribes, this division is not fixed. Other tribes adopt a complex distribution of labor. Both men and women contribute to production, and also combine their labor in the construction of the home, cultivation and foraging. However, the tasks in each activity are clearly divided as per cultural norms and taboos. For instance, in some tribes, only men may construct the roof of the house. In households without adult men, other men from the tribe can aid in this task. Both men and women undertake cultivation and foraging for different products. Women are often responsible for the collection of fuel, food and medicinal plants, and exhibit a rich knowledge of plant species in each of these

[33] AK Nongkynrih, *supra* note 20 at 20-33.
[34] AK Nongkynrih, *supra* note 20 at 34-35.
[35] GOVIND KELKAR AND DEV NATHAN, *supra* note 21 at 43.
[36] Purabi Bose, *Forest-tenure reform: exclusion of tribal women's rights in semi-arid Rajasthan, India*, 13 INTL. FORESTRY REV. 220, 227 (2011).

respects. Collection of raw materials for household products is often a joint endeavor. Women collect minor forest produce for household consumption as well as for barter and marketing. In several tribes, they also use the common pasturelands for grazing cattle.[37]

Within the collective, property rights accrue with the investment of labour.[38] The income from foraging accrues to the forager, which grants women an independent source of income unmediated by their husbands.[39] Households, through the male head, acquire the right to retain and inherit land only upon cultivation. Animals hunted in groups are also distributed among the members.[40] The sole exception to this rule is in the case of families, where women's labor does not lead to independent rights in the land and the house.[41] This is because gendered cultural norms make the male the representative of the household in the tribe, while the female enjoys greater authority within the family.[42] However, the social function of property relations within tribal communities is amply demonstrated by the fact that even household property is not considered the sole property of the man, but property for the collective enjoyment of all

[37] For a detailed discussion on the sexual division of labor within tribal societies, *see* SUMI KRISHNA, GENDERSCAPES: REVISIONING NATURAL RESOURCE MANAGEMENT 142-51 (2008); Munshi, *supra* note 30; *see also* GOVIND KELKAR AND DEV NATHAN, *supra* note 21; Madhu Sarin, *Empowerment and Disempowerment of Forest Women in Uttarakhand, India*, in GENDER RELATIONS IN FOREST SOCIETIES IN ASIA: PATRIARCHY AT ODDS, *supra* note 30 at 287-290.

[38] GOVIND KELKAR AND DEV NATHAN, *supra* note 21 at 45.

[39] GOVIND KELKAR AND DEV NATHAN, *supra* note 21 at 45.

[40] GOVIND KELKAR AND DEV NATHAN, *supra* note 21 at 36; Jyoti Sen, *Ethnographic Notes on the Birhor*, BULL. OF THE ANTHROPOLOGICAL SURVEY OF IND. 53-54 (1966).

[41] GOVIND KELKAR AND DEV NATHAN, *supra* note 21 at 45.

[42] Walter Fernandes and Sanjay Barbora, *supra* note 22 at 5; Sampa Sarkar, *Status of Tribal Women in Three Socio Cultural Dimensions,* 74 MAN IN IND. 49, 54 (1994).

members of the family.[43]

In non-tribal agricultural societies, women's labor on land does not lead to an increased status and decision-making authority. Even within tribal societies, greater sedantarization of agriculture, which has led to an increase in individual holdings of land, has correlatively caused a reduction in women's status. This may be due to a cessation of foraging activities, and the concentration of legal and customary authority over land in an individual- the male head of the household.[44] The transition from subsistence-based livelihood to the market also alters the dynamics within the household. Forest produce collected and marketed by women, such as leaves, fiber, fruits etc. command a lower value than forest produce collected by men, such as timber.[45] The diversion of tribal forests for industrial activities has further driven men and women away from production into wage labor. Where women are employed in the labor force, they are segregated into low-paying activities. Women outside the labor

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[43] Walter Fernandes and Sanjay Barbora, *supra* note 22 at 4-7; for a similar view of women's property protections in customary systems in Africa on account of the social function of property, *see* Ann Whitehead and Dzodzi Tsikata, *Policy Discourses on Women's Land Rights in Sub-Saharan Africa: The Implications of the Re-turn to the Customary*, 3 J. AGRARIAN CHANGE 67, 78 (2003).

[44] Sumi Krishna, *Gender, Tribe and Community Control of Natural Resources in North-east India*, 8 IND. J. GENDER STUD. 307, 311 (2001); Deepak K. Mishra and Vandana Upadhyaya, *The Difficult Transition: Economic Development and Gender Relations in Andhra Pradesh,* 19 IND. J. GENDER STUD. 93-126 (2012); Walter Fernandes and Sanjay Barbora, *supra* note 22 at 5.

[45] Meera Velayudhan, *Women's Rights and Entitlements to Land in South Asia: Changing Forms of Engagements*, *in* WOMEN AND LAW: CRITICAL FEMINIST PERSPECTIVES 103-108 (Kalpana Kannabiran ed. 2014); Sagari R. Ramdas, *Women, Forestspaces and the Law: Transgressing the Boundaries*, *in* WOMEN AND LAW: CRITICAL FEMINIST PERSPECTIVES 59 (Kalpana Kannabiran ed. 2014).

force are increasingly limited to the domestic sphere.[46] On account of these processes, tribal women have uniformly experienced a reduction in their status within the tribe and the household.

COLONIAL TENURE REFORMS

Colonial forest legislations marked a paradigm change by characterizing forests as marketable commodities instead of sustenance resources.[47] Colonial policy irrevocably altered the patterns of distribution of forest resources, divesting tribal communities, and vesting rights in the English colonial government for the benefit of the English commercial elite. As Gadgil and Guha argue,[48] one of the core projects of the colonial enterprise was to assert 'global control over resources' to enrich the metropolis in the midst of an industrial revolution. While in the initial stages, this was attained also through negotiation with sovereign rulers, the main methods of gaining this control continued to be through the use of force, law and bureaucratic machinery.

Morris Cohen's insights on property and sovereignty reveal that property law is a function of both economic distribution and political authority.[49] Property rights vest owners not only with the power to possess and exclude others, but also with the authority to determine its use and management, and to reap current and future rewards. Within tribes, the political authority for decisions relating to use and

[46] Meera Velayudhan, *supra* note 45.
[47] Ramdas Rupavath, *The Persistence of Land Alienation: The Experience of Tribal People of Andhra Pradesh*, 50 J. ASIAN & AFR. STUD. 259-61 (2015).
[48] GADGIL AND GUHA, *supra* note 2 at 102.
[49] *Supra* note 5.

management vest first with the tribe, and then with the household. However, the introduction of colonial forest tenures changed not only the unit which held property rights, but also divested the authority of tribal councils to determine use and management of forest resources.

The adoption of European property systems, by which only individual ownership over lands was legally recognized, extinguished community-based rights arising from customary tenures. All forests not privately owned were vested as the exclusive property of the state, through the controversial Government Forest Act 1865.[50] While initially this was subject to existing rights of communities,[51] the increasing need for timber and revenue generation paved the way for the Indian Forest Act 1878 to strictly circumscribe these customary rights. In what Gadgil and Guha call the 'annexationist approach', the British gradually recast these rights as 'privileges' by strictly regulating forest resources, such that the Indian Forest Act of 1927 only makes a reference to the 'rights and privileges of persons'.[52]

The 1878 Act first introduced the three-fold classification of forests into reserved, protected and village, which was retained by the 1927 Act and persists today. Reserved forests were earmarked for commercial exploitation by the government, to be

[50] Lavanya Rajamani, *Community Based Property Rights and Resource Conservation in India's Forests, in* PROPERTY AND THE LAW IN ENERGY AND NATURAL RESOURCES 453, 456 (Aileen McHarg *et al* eds., 2010); PEOPLE'S UNION FOR DEMOCRATIC RIGHTS, *supra* note 15; GADGIL AND GUHA, *supra* note 2 at 110; *see also* K. Sivaramakrishnan, *Colonialism and Forestry in India: Imagining the Past in Present Politics*, 37 ECON. & POL. WEEKLY 3, 31 (1995).

[51] GADGIL AND GUHA, *supra* note 2 at 109; PEOPLE'S UNION FOR DEMOCRATIC RIGHTS, *supra* note 15.

[52] GADGIL AND GUHA, *supra* note 2 at 110.

determined by the Forest Department, with clear delineation of proprietary rights between the government and tribes.[53] All rights over land within reserved forests that were previously expressly recorded and settled within the precincts of the reserved forests were to be extinguished, either through transfer to another block of forests, or by payment of compensation.[54] Communities could retain rights of pasture and forest-produce, albeit only over specified patches of land to a specific extent, and subject to revision by the colonial bureaucracy.[55] These rights were heritable but inalienable. The forest produce so obtained could also be used only for self-consumption,[56] so that the colonial government could exclusively enjoy its commercial benefits. The bureaucracy could also annul communities' rights of way or water-course.[57] Pertinently, all rights that were not recorded at the time of declaring a forest as reserved stood automatically extinguished.[58] Further, no new rights could be acquired within a reserved forest.[59] Lastly, shifting cultivation originally invited criminal sanction, but through an amendment in 1890, was permitted restrictively within specified areas.[60]

Within protected forests, the government was empowered to completely close access to

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[53] GADGIL AND GUHA, *supra* note 2 at 117; Rajamani, *supra* note 50 at 456.
[54] S.10, Indian Forest Act, 1878 [hereinafter "IFA"].
[55] S.12, IFA 1878; GADGIL AND GUHA, *supra* note 2 at 118.
[56] Ramachandra Guha, *supra* note 15 at 1940.
[57] S.24, IFA 1878.
[58] S.6, IFA 1878.
[59] Ramachandra Guha, *supra* note 15 at 1940.
[60] S.25(a) and (b), IFA 1878; Ramachandra Guha, *supra* note 15 at 1940; for an account of colonial legal and economic interventions to settle nomadic tribes and shifting agriculture, *see* K. Sivaramakrishnan, *Colonialism and Forestry in India: Imagining the Past in Present Politics*, 37 ECON. & POL. WEEKLY 3, 27 (1995).

forests, which included prohibiting the collection of forest produce and cultivation.[61] If not closed, the same activities were strictly regulated by the Local Government.[62] Gradually, most protected forests were also converted into reserved forests.[63]

The third category, of village forests, was that which was assigned for management to village communities.[64] This, too, was a discretionary assignment, which could only be made once the forest had previously been declared a reserved forest. The assignment permitted villages to collect forest produce and graze cattle, but subject to the discretion of the administration. Even in the absence of rights-based use, villages were assigned duties for the proper management of these forests. The 1927 Act further imposed a levy on collection of forest produce in all classifications of forests, as well as private forests.[65]

The transfer from communal to bureaucratic management of forest resources was a core aspect of the conversion of forests from subsistence to commercial use. Whereas patterns of subsistence use permitted entry of several different rightholders (including women, nomads, pastoralists) through cooperative sharing and management, colonial legislations permitted exclusive state ownership with reduced access for communities.

Secondly, operation of existing rights of communities under the forest legislations of 1878 and 1927 was contingent upon their prior settlement, as well as discovery of those rights during the period of notification. Illiterate tribal communities could

[61] Ramachandra Guha, *supra* note 15 at 1941.
[62] S.31, IFA 1878.
[63] GADGIL AND GUHA, *supra* note 2 at 117.
[64] S.27, IFA 1878.
[65] PEOPLE'S UNION FOR DEMOCRATIC RIGHTS, *supra* note 15 at 6.

scarcely participate in these processes of an alien legal system.[66] Even if they could, the eventual nullification of community-based property regimes incentivized a consolidation of individual property rights, triggering a lasting process of change in the relations of production within tribal societies. Land came to be controlled increasingly by men, particularly form the elite factions, within the community.

Thirdly, reduced access to common property resources alienated women as resource-users and gradually drove communities into sedentary agricultural practices. Flexible need-based allocation of usufructory rights to resources were commuted to the 'privilege' of extracting a discretionary predetermined measure, hampering women's foraging rights and an equitable distribution of resources within the community.[67] Women were further vulnerable to violence and displacement in the exercise of their traditional livelihood strategies, through the combined might of the colonial administration as well as criminal machinery. The 'unauthorized' collection of forest produce was now subject to criminal sanction, the disproportionate burden of which fell on women. Limiting resource-use to self-consumption also cut off women's independent source of income in the sale of minor forest produce, increasing their dependence on the male head of the household.

POSTCOLONIAL TENURE REFORMS

In the postcolonial period, the distribution of land and natural resources was the

[66] K. Sivaramakrishnan, *Colonialism and Forestry in India: Imagining the Past in Present Politics*, 37 ECON. & POL. WEEKLY 3, 14 (1995).
[67] GADGIL AND GUHA, *supra* note 2 at 118.

subject of intense political contestation. The abolition of *zamindari* (landlordism) and restitution of the land to the tiller was one of the first agendas of the newly independent state. For the Scheduled Tribes, the Fifth and Sixth Schedule of the Constitution granted them the right to self-governance and autonomy over resources. Subsequently, the Panchayat Extension (Scheduled Areas) Act further devolved authority over management of resources to local institutions.[68]

Simultaneously, the imperative of economic reconstruction caused forests and dams to take centrestage in India's industrial development policy. This demanded the opposite distributional agenda, of resource concentration in the hands of the state and the domestic commercial elite. Eventually, distribution for industrial growth won the contest.

These processes were enabled by the employment of colonial land and forest legislations, such as the 1927 Act and the Land Acquisition Act. The 1927 Act empowered the government to grant licenses to contractors and middlemen for the collection of timber and non-timber forest produce to connect to private markets,[69] generating a distinct non-tribal economy on the same resources. The brunt of the acquisition process was also borne disproportionately by tribal communities. As tribal forests are rich in mineral deposits, their acquisition has displaced over 1 million

[68] Hereinafter "PESA".

[69] Ramachandra Guha, *Colonialism, Capitalism and Deforestation*, 11 ECON. & POL. WEEKLY 62-63 (1983).

people since Independence.[70]

State ownership of forests also provided the impetus for commercial forestry, by which fast-growing high-yield tree species replaced those most useful for tribal communities.[71] Non-timber forest produce, the traditional source of income for tribal women, also became commercially valuable in the development process. Forestlands became the site for the construction of big dams, and later, for the exploitation of mineral resources embedded in them. This required large-scale acquisition of land through the exercise of the state power of eminent domain, thereby displacing entire villages. Communities that were displaced, and those that remained *in situ*, witnessed different but related impacts. The fact of displacement itself intensifies the process of tribal alienation from forests.

Contemporary national and international debates pertaining to eminent domain and land acquisition focus on the absence of free, prior and informed consent of affected communities,[72] whether it is through violence or fraught bureaucratic procedures, and on the exclusion of women from compensation and rehabilitation. Certainly, market-based development processes even in India carry the same threats. The Land Acquisition Act denotes the worst facets of the conflict between European

[70] Ministry of Rural Development, Government of India, *supra* note 6; Sujit Kumar Mishra, *supra* note 6.

[71] Ramachandra Guha, *supra* note 15 at 1889; Walter Fernandes, *Tribal Customary and Formal Law Interface in North-Eastern India: Implications for Land Relations, in* LAND POLICIES FOR INCLUSIVE GROWTH 422-24 (T. Haque ed., 2012).

[72] Mudunuri Bharathi, *Tribal Women's Perspective on the Land Acquisition Bill*, 47 ECON. & POL. WEEKLY 73 (2012); KB Saxena, *Land Acquisition and Peasant Resistance Critique of Policy Interventions, in* LAND POLICIES FOR INCLUSIVE GROWTH 439, 443 (T. Haque ed., 2012).

individualized property regimes and customary tenures. The Act proceeds on the assumption that all land is 'marketable'. Accordingly, while it mandates prior consent of 'persons interested', it includes only those with recorded individual rights within the category.[73] This invisibilizes all households that do not have recorded rights, as well as marginal resource users who may otherwise have rights under customary law or in practice. This includes women, since individual titling is predominantly in the name of the male head of the household. By the same stroke, it excludes the requirement of prior consent over forests and common property resources that are legally the property of the state, but in practice are under community and not individual ownership.[74] As we have seen earlier, uninhibited access to common property resources is core to independent income of women, but in the acquisition of which they cannot participate. Secondly, compensation is calculated on the basis of the market value of land,[75] neglecting its centrality in the household economy and income of women. In both regards, concerns for women's secure livelihoods go unrepresented in the acquisition process.

In essence, these reforms seek to make an unjust process of distribution more humane, instead of challenging the distribution itself. Transferring resources from marginalized communities to economically elite actors (whether through the instrumentality of the

[73] KB Saxena, *supra* note 72; De Debasree, *Development-Induced Displacement: Impact on Adivasi Women of Odisha*, 50 COMMUNITY DEVP'T J. 448-462 (2014); *see also* Sujit Kumar Mishra, *supra* note 6 at 206.

[74] KB Saxena, *supra* note 72 at 443; for a discussion on the impact of titling in marginalizing derivative users such as women, *see* Ann Whitehead and Dzodzi Tsikata, *supra* note 43 at 79.

[75] KB Saxena, *supra* note 72443.

state or private businesses) does not alleviate underdevelopment, but creates it. The Xaxa Committee Report notes that the rate of poverty reduction in Scheduled Tribes far lags behind the general rate of poverty reduction.[76] This is due, in part, to "*[t]he deprivation of STs of cultivated land…This warrants the prevention of all kinds of tribal land alienation…*"[77]

The loss of the sole resource base of tribal communities is not adequately recoverable through one-time compensation for the market value of the land, or employment in low-paying work in the industries. The acquisition of land for national economic development must, therefore, be viewed through the lens of a redistributive agenda, which is able to transform the conditions of marginalized groups such as Scheduled Tribes. This transformatory agenda should target not only arresting the underdevelopment of Scheduled Tribes, but by positively ushering an improvement in living conditions and enjoyment of human dignity.

The commercialization of land and marketability of forest produce also distorts distribution of resources within communities for those that remain *in situ.* Here, tribals compete with contractors and elite interests within the community for control over resources and their benefits. Contemporary tribal movements also struggle to wrest control from private contractors in the sale of forest produce, to have better access to markets, and conduct commercial exchange on better terms and prices.

In 1980, the Indian Government passed the Forest Conservation Act to replace the

[76] Xaxa Committee Report, *supra* note 1 at 149.
[77] Xaxa Committee Report, *supra* note 1 at 152.

Indian Forest Act, 1927. Guha argues that conservation became a euphemism for tightening state control against tribal communities and in favour of contractors. While forestry and non-forestry activities of communities came to be very strictly regulated, the state was more generous with granting licenses to contractors for commercial exploitation.[78]

Simultaneously, commercialization of land also increased private accumulation and alienation. Elite constituencies within the tribal communities brought even common village lands under private ownership, depriving resource users, pertinently women, of communal use.[79] The capital returns from the sale of land also incentivized alienation of tribal lands to non-tribal persons and corporations, thereby distorting internal economic, social and political relationships relating to the communal management of land.[80]

To preserve tribal autonomy over resources in such a context, several states passed legislations prohibiting alienation of tribal lands to non-tribal entities.[81] The Fifth Schedule and PESA also provided the grounds for a strong affirmation of tribal sovereignty over land and resources by even prohibiting alienation of tribal lands to

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[78] *Supra* note 69 at 62-63.
[79] AK Nongkynrih, *supra* note 20 at 33-35; Xaxa Committee Report, *supra* note 1 at 260-261, 263, 276; Walter Fernandes, *supra* note 71 at 429-30.
[80] *Supra* note 47 at 262-64.
[81] T. Haque, *Land Policies for Social Inclusion in India, in* LAND POLICIES FOR INCLUSIVE GROWTH, *supra* note 72 at 27, 34-35; S. Laxman Rao *et al*, *Tribal Land Alienation in Andhra Pradesh: Processes, Impacts and Policy Concerns,* 41 ECON. & POL. WEEKLY 5401-07 (2007); Jagannath Ambagudia, *Tribal Rights, Dispossession and the State in Orissa,* 45 ECON. & POL. WEEKLY 60-67 (2010); Xaxa Committee Report, *supra* note 1 at 279-283.

state entities for mineral exploitation.[82] However, the imperative of economic development upheld by national forest and legislations trumped these legal claims, by which the alienation of tribals from forest resources continued.[83]

Until the introduction of the FRA in 2006, therefore, the legal framework governing land and forests favored a distributive agenda that enhanced resource concentration, thereby increasing inequality. Collectivization, through common property resources and communal management, provided greater security and access to women as members of the tribe in recognition of the social function of distribution. The turn to imagining forests as purely economic assets impairs collectivization in multiple ways and further marginalizes women's access to resources.

In its interaction with the prevailing economic and political landscape, collectivization by itself, however, is also insufficient to meet a radical redistributive agenda that grants equal rights to women to forests. in In the next section, I analyze this further in the context of the FRA, the recognition of customary tenures, and restitution of tribal authority in management of forests.

[82] Samatha v. State of Andhra Pradesh, AIR 1997 SC 3297.

[83] Xaxa Committee Report, *supra* note 1 at 255-256; Kamal Nayan Choubey, *The Public Life of a Progressive Law: PESA and Gaon Ganarajya (Village Republic)*, 3 STUD. IN IND. POL. 247-59 (2015).

SECTION 2: CUSTOMARY TENURE AS A DOUBLE-EDGED SWORD

The FRA has a redistributive impulse in its recognition of the traditional 'forest rights' of Scheduled Tribes and return to customary tenures, albeit mediated by the formal administrative machinery. Invoking Cohen,[84] the FRA transfers economic and political decision-making back to the communities.[85] *First*, it grants legal recognition to both individual and community rights over land for habitation, self-cultivation, as well as community forestlands for grazing etc. It also grants Scheduled Tribes the rights of ownership, collection and use of forest produce. This bundle of 'forest rights'[86] is heritable, inalienable and non-transferable.[87] The move from shifting to settled agriculture had already entrenched families in individual plots of land for cultivation, with ownership with the male head of the household and inheritance along the male line. The FRA mandates that these individual titles be vested jointly in both spouses, or

[84] *Supra* note 5.

[85] For a broad overview of the features of the FRA, *see* Purabi Bose, *Forest Rights: the micro-politics of decentralization and forest tenure reform in tribal India* (May 29, 2012) (PhD thesis, Wageningen University) (http://edepot.wur.nl/212101 Apr.29, 2017); Madhusudan Bandi, *Forest Rights Act: Towards the End of Struggle for Tribals?*, 42 SOC. SCIENTIST 63-81 (2014); Lovleen Bhullar, *The Indian Forest Rights Act 2006: A Critical Appraisal*, 4 L. ENVT. & DEVPT. J. 20 (2008) http://www.lead-journal.org/content/08020.pdf (Apr. 29, 2017); Kamla Khanal, *Forest Land Rights for Forest-Based Women/Men in India and Unaccounted Gender Perspectives*, (2013) (PhD Thesis, University of Nottingham).

[86] S.3, FRA.

[87] S.4(4), FRA.

the single head of the household.[88] In addition, the FRA enables the management of forest resources now treated as individual or community property as per community ethos.

Second, it vests the authority for mapping claims and use patterns to the village council (*gram sabha*).[89] However, the gram sabha is not co-terminus with the tribe or clan council which traditionally makes allocations of land. It is a body of local self-governance created under the PESA, comprising all adult members of the village, with 'full and unrestricted participation of women'.[90] The *gram sabha* maps and verifies the claims to individual or community land, to be eventually confirmed by the District Level Committee (DLC). The DLC is composed of officers from the Revenue Department, Forest Department, and Tribal Affairs Department of the state government, along with three members of the local self-government institution. Out of these, two must be members of a Scheduled Tribe and one must be a woman.[91]

The FRA supplants previous forest legislations as the basis on which tribal women negotiate their rights with the government and the community. However, this does not suggest a straightforward transplantation of one legal regime for another. Instrumentalities of the state, such as the Forest Department, have not withdrawn from forest management. Customary tenures are capable of protecting women's interests as members of the tribe, but also simultaneously shield inequities within the community. This section delves into the nature of customary tenures as a 'double-edged sword'.

[88] S.4(4), FRA.
[89] S.6, FRA.
[90] S.2(g), FRA.
[91] S.6, FRA.

Recognizing households and communities as rights-holders secures their livelihood strategies of cultivation, grazing and foraging. Granting secure title enables communities as a whole to contest diversion of their traditional lands towards commercial forestry, extractive industries etc. Women, as joint title-holders in individual plots, and as legitimate users of forest resources, are empowered to participate in consultation processes for land acquisition, and are entitled to compensation in their own right and as members of the village.

The Niyamgiri incident best illustrates this process of empowerment. The Government of Orissa and Vedanta Alumina had formed a joint venture, the Orissa Mining Corporation, for bauxite mining in forestlands around the Niyamgiri hills in two districts of Orissa. The Dongaria and Kutia Kondhs, two primitive tribal groups, had acquired community rights to these forests and the hills under the FRA. Mobilization within these communities ensured that the process of seeking *gram sabha* consent under the PESA could not be side-stepped by the government.[92] While 104 Dongria Kondh villages had rights in the hills, the government convened *gram sabha* meetings in only twelve. In historic resolutions, all *gram sabhas* rejected the diversion of their traditional forestlands for the mining operation. The tribes articulated their claims through the language of religious rights and cultural preservation, and successfully instrumentalized property rights to meet these claims.[93]

[92] *See Niyamgiri Triumph*, 45 ECON. & POL. WEEKLY 7-8 (2010); *see also* Geetanjoy Sahu, *Mining in Niyamgiri Hills and Tribal Rights*, 43 ECON. & POL. WEEKLY 19-21 (2008).
[93] *Niyamgiri Triumph*, 45 ECON. & POL. WEEKLY 7-8 (2010).

The aftermath of the Niyamgiri further illustrates the interface of the FRA with prevailing development policy on land use. Three years after the resolution, the Odisha government approached the Supreme Court in 2016 with a plea to set aside the resolutions prohibiting mining, or alternatively, to refer the matter to the *gram sabhas* afresh. The Odisha government argued that the resolutions had originally exceeded their mandate in prohibiting mining operations altogether, when the Supreme Court directive only required deliberation on the cultural and religious rights of the communities in the region.[94] The government also argued a change in circumstances since the original joint venture stood dissolved, and the Odisha Mining Corporation intended to operate the mine independently.[95] The Supreme Court refused to entertain the petition, directing the Odisha government to approach 'appropriate forums', in this case, the National Green Tribunal (NGT). The proceedings before the NGT are still pending.

In the meanwhile, the central government and several state governments have passed circulars and orders translating the Forest Department's authority on the use and

[94] Chitrangada Choudhury, *Mining at any Cost: The Odisha Government's Continued Dismissal of Adivasi Rights*, The Wire, May 16, 2016 https://thewire.in/35711/mining-at-any-cost-the-odisha-governments-continued-dismissal-of-adivasi-rights/ (Apr.29, 2017); *Niyamgiri: Supreme Court Rejects Odisha Plea on Gram Sabhas*, The Financial Express, Apr. 02, 2016 http://www.financialexpress.com/economy/niyamgiri-supreme-court-rejects-odisha-plea-on-gram-sabhas/231858/ (Apr. 29, 2017).

[95] Chitrangada Choudhury, *supra* note 94.

management of forests under the Forest Conservation Act over the *gram sabhas*,[96] such that land acquisition can proceed without substantial roadblocks.

Simultaneously, nodal agencies have been implementing the legislation in a manner that constricts usufructory rights as well. As of 2009, the DLC had approved only 0.2% claims for community rights approved by the *gram sabha*.[97] The dismal rates of approval of community lands disproportionately impacts women's foraging activities.

Exclusive titles, regardless of the names on the deeds, centralize control in the male heads of the household. Community management of forest use accounts for the differing labor investment of different actors. Denial of control over community resources keeps them free from encumbrances for acquisition, while excluding women from their foraging and grazing roles. This retention of control over common property resources maintains the Forest Department's authority over species and plantations for better

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[96] Chitrangada Choudhury, *Making a Hollow in the Forest Rights Act*, The Hindu, Apr. 07, 2016 http://www.thehindu.com/opinion/columns/Making-a-hollow-in-the-Forest-Rights-Act/article14226592.ece (Apr. 29, 2017); Vishakh Unnikrishnan, *Forest Rights Act is being Diluted. What does that mean for Millions Depending on Forests?*, CatchNews, Feb. 14 2017 http://www.catchnews.com/india-news/forest-rights-act-is-being-diluted-what-does-that-mean-for-millions-depending-on-forests-1452510382.html/2 (Apr. 29, 2017).

[97] Sagari R. Ramdas, *Women, Forestspaces and the Law: Transgressing the Boundaries*, *in* WOMEN AND LAW: CRITICAL FEMINIST PERSPECTIVES 65 (Kalpana Kannabiran ed. 2014); for state-wise data on the implementation of the FRA, *see* VASUNDHARA & KALPAVRIKSH, A NATIONAL REPORT ON COMMUNITY FOREST RIGHTS UNDER FOREST RIGHTS ACT: STATUS & ISSUES (2012); SAMARTHAN- CENTRE FOR DEVP'T SUPPORT, RECOGNITION OF COMMUNITY RIGHTS UNDER FOREST RIGHTS ACT IN MADHYA PRADESH AND CHHATTISGARH: CHALLENGES AND WAY FORWARD (2011); M Gopinath Reddy *et al.*, *Issues Related to Implementation of the Forest Rights Act in Andhra Pradesh*, 46 ECON. & POL. WEEKLY 73-81 (2011); Ursula Munster and Suma Vishnudas, *In the Jungle of Law: Adivasi Rights and Implementation of Forest Rights Act in Kerala*, 47 ECON. & POL. WEEKLY 38-45 (2012).

commercial use. Accordingly, even if foraging rights are granted, the species available for use are marketable commodities whose benefits accrue to the male members of the community.

The Forest Department's authority is further entrenched by the introduction of the Compensatory Afforestation Fund Management and Planning Authority Act (CAMPA), which guarantees replantation of trees at alternative sites wherever forestlands are acquired for mining activities. Under the garb of forest conservation, once again the claims of forest-dwelling communities to ecosystems and useful species are denied to incentivize marketability.

The elimination of access to common property resources is exacerbated by intra-community dynamics as well. The gradual individualization of property regimes within tribal groups on account of prior legal interventions had already transferred large tracts of common property resources to elite factions in the pursuit of accumulation of capital. The steady growth of a land market in the regions thus places the FRA in the midst of a legislative and policy framework in conflict with its goals.

However, the uni-dimensional focus on community rights as the vehicle for empowerment of all within tribal communities also serves to strengthen inequities within these regimes. The underlying ethos of equitable distribution of resources based on the investment of labour often takes exception to the productive and reproductive labour of women. The arrangement of kinship rules in patrilocality inducts women into the household, or the family, through which membership of the community is derived. Membership is a *sine qua non* for use of resources and share labour of other members of

the tribe, although tribes may distinctly also form resource-sharing arrangements with other tribes in the area.[98] Women's access to resources is thus determined at two levels, first within the household, and then within the community. In this set-up, Kelkar and Nathan describe women as the 'non-owner' members of the tribe.[99]

The appropriation of women's productive and reproductive labor underlies membership rules in tribes. In patrilineal tribes, all males are primary members of the tribe. Women gain membership only upon marriage into the tribe. Unmarried daughters employ labor for generation of household income, but do not have independent rights to it. Upon the death of the husband, the widow acts as a custodian of the household property until the son comes of age. In the absence of any males in the family, the widows retain a life-interest in the land, and are entitled to the labor of other members of the tribe to aid in production. Even so, they continue to retain foraging rights in their own respect. In case of divorce, which is not heavily stigmatized in tribal communities, the woman returns to her natal tribe. In the process, she loses all rights to the resources of her husband's tribe, including those that she generated with her labor, as well as to foraging rights. In her natal tribe, she does not have any rights to land.

The juxtaposition of join-titling provisions in the FRA with customary law has the effect of granting title to women during their lifetime, but without any entitlement to

[98] K. Sivaramakrishnan, *Colonialism and Forestry in India: Imagining the Past in Present Politics*, 37 ECON. & POL. WEEKLY 3, 30-31 (1995).
[99] GOVIND KELKAR AND DEV NATHAN, *supra* note 21 at 45.

bequeath or inherit property.[100] Rules of inheritance continue to devolve property through the male line, to the exclusion of women. The centralization of control in the male head of the household also continues unaffected by the diktats of formal law.

However, this does not describe the variegated arrangements across all tribes in India, which is also home to numerous matrilineal tribe, such as such as the *Khasis* and *Garos*. Matrilineal tribes operate on the principle of matrilocality and of tracing descent (and membership) through the female line. Here, household property passes to the youngest daughter, though debates persist on whether she becomes the owner or custodian. This authority for the management of the property lies with the maternal uncle, in which the husband of the youngest daughter also plays a role. The youngest daughter is meant to ensure preservation of the property, and to act as insurance for her elder sisters in case of destitution or divorce, since the elder daughters do not inherit any rights.[101]

Influenced by liberal feminist movements elsewhere, men in matrilineal communities are now demanding inheritance rights equal to the youngest daughters.[102] This neglects the specific context of matrilineal communities, in which ownership of property is split from the right of control and management of property. While the former vests in females, the latter vests in males. Even so, the interaction of such demands with the

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[100] *Gender Justice Eludes Adivasi Women*, The Hans India, Oct. 22, 2016, http://www.thehansindia.com/posts/index/News-Analysis/2016-10-22/Gender-justice-eludes-Adivasi-women/260345 (Apr. 29, 2017).

[101] For a discussion on customary land laws in matrilineal societies of *Garos* and *Khasis*, *see* MN Karna, *Tribal Areas of Meghalaya: Land Ownership of Women*, in GENDER DISCRIMINATION IN LAND OWNERSHIP 176-188 (Prem Chowdhry ed., 2009).

[102] *Id*.

joint-titling provisions of the FRA currently lacks empirical evidence for reasoned comment.

Lastly, household allocation of usufructory rights to forests also tends to prioritize access for males over that of females. Purabi Bose narrates the case of the *Bhil* tribe in Rajasthan, where the *gram sabha* attributes the destruction of forest resources to women's unsustainable use. Accordingly, they prohibit some forms of women's foraging activities outright. In other instances, the council limits women's use rights either expressly, or by placing a ceiling on the collection rights of the household as a whole. Male collection of commercial products often exhausts the household quota on account of its increased returns. As a result, women need to invest greater time, labor and resources to collect fuel, firewood, medicine etc., which are important for self-consumption. Most women report spending an extra 4 hours everyday only to meet their domestic responsibilities in the collection of firewood.[103]

The non-participation of women in political bodies exacerbates this problem of allocation, since the priorities of women are not represented.[104] This signifies the contradiction in tribal societies where women are deeply embedded in mobilization against destruction of forest resources, but scarcely participate in official institutions. The FRA mandates the full participation of women in *gram sabha* and provides for reservation in District Level Committees. Absent customary acceptance of women's

[103] Purabi Bose, *Forest-tenure reform: exclusion of tribal women's rights in semi-arid Rajasthan, India*, 13 INTL. FORESTRY REV. 220-232 (2011); Bhawana Upadhyay, *Women and natural resource management: Illustrations from India and Nepal*, 29 NATURAL RESOURCES FORUM 224, 229 (2005).
[104] Purabi Bose, *supra* note 103.

political participation, the formal diktat remains ineffectual.[105] Even so, women's participation in political bodies on its own is unlikely to transform the distribution of resources.

[105] Landesa, INDIA: GENDER IN A FOREST RIGHTS PROJECT IN JHARKHAND 8-9 (2016).

SECTION 3: TOWARDS A TRANSFORMATORY AGENDA

Colonial and neoliberal land tenure systems move towards entrenching resource concentration at multiple levels in the pursuit of economic efficiency and profit maximization. Capitalization of land and forest resources casts them as purely economic assets intended for exploitation. This provides the impulse for private accumulation of resources for exclusionary enrichment, whether for the European empire, global and domestic capitalist elite, or dominant members within communities. As the previous chapters demonstrate, the trajectory of resource distribution in India also follows a similar trajectory.

This drive towards accumulation and resource concentration strikes at the heart of tribal ethos, where the tribe is constructed around the sharing of resources and labor. European property systems, on the other hand, are predicated on and directed towards extracting the economic value of resources through 'improvements in land'.[106] This dominant conception of 'improvement in land', which persists in contemporary discourses on economic development as well, is highly colonized and gendered. Tenure reforms springing from this conception set economic efficiency as one of their prime objectives. Within this paradigm, efficiency can only be guaranteed through the undisturbed monopolistic control of individuals or entities, who release themselves from the wastefulness of the 'tragedy of the commons',[107] and are able to successfully defend their control against interference from others. Accordingly, security and

[106] HERNANDO DE SOTO, THE MYSTERY OF CAPITAL WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 1-13 (2000).
[107] Garrett Hardin, *The Tragedy of the Commons,* 162 SCIENCE 1243-43 (1968).

certainty of tenure become lodestars for tenure reforms. Free transferability of resources is encouraged as a means to move resources into the control of the entity that is best able to exploit its economic potential. In practice, however, the logic of exclusivity and free transferability inevitably leads to accumulation, whether or not it is 'economically efficient'.[108]

This regime is dissonant from tribal patterns of resource use, where sharing common resources, pooling of labor and cultural cohesiveness constitutes tribal communities. Supplanting European property systems in their stead provides an impetus to dominant factions within the community as well as outside, thereby accelerating class differentials and further entrenching patriarchy.

Tenure reforms to secure the rights of tribal women to forests, then, must be undertaken in the context of accelerated resource diversion for market-based economic growth, combined with the strengthening of patriarchal institutions within tribal societies. This context frames tribal women's rights as not merely for non-discriminatory access, but for equitable redistribution and disaggregation of resources wreaked by the logic of accumulation in the pursuit of efficiency. This project requires multiple interventions for the redistribution of material resources and political power, as well as changes in cultural norms that legitimize certain patterns of distribution over others.

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[108] Walter Fernandes, *Tribal Customary and Formal Law Interface in North-Eastern India: Implications for Land Relations, in* LAND POLICIES FOR INCLUSIVE GROWTH 422-24 (T. Haque ed., 2012).

While the precise content of forest tenures to meet the objective of redistribution requires further empirical research on the functioning of the FRA and its interaction with other land and forest legislations, forms of customary tenures across different communities, and the extent of resource control vesting in women, this section sketches the minimum parameters based on which forest laws should be constructed.

SECURITY OF TENURE

The need for guaranteeing security of tenure arises strongly on account of competing rules in plural legal systems governing forest resources in India. Customary laws have been in operation in tribal areas on a quasi-formal *de facto* basis for management of resources within communities. The Fifth and Sixth Schedules of the Indian Constitution, read with the PESA, formally recognize the political authority of local units of self-governance to manage tribal resources through customary laws. Formal state laws provide title to tribal communities by way of the FRA, but retain base ownership with the state through the retention of eminent domain under the LAA and other forest legislations. Preliminary assessments of the interaction between the two formal legal paradigms suggest that the constitutional Schedules have been undercut with expansive interpretation and implementation of formal state laws to facilitate acquisition of natural resources for privatized development.[109] For contestations internal to the communities, however, the relationship between the two is more dynamic. Local tribal authorities continue to assert customary rules, reflective of the fraught constitutional arrangement between tribes and the Indian nation-state. However, parties often

[109] Kamal Nayan Choubey, *supra* note 83.

leverage both formal and semi-formal legal systems to negotiate their property rights.[110]

There are two distinct, yet inter-related, impulses behind securing tenure of rights-holders in such a plural legal context. One impulse imagines security of tenure as proxy for sovereignty of sub-state entities over resources, and mediates 'public' relationships.[111] This protects the rights of sub-state entities to determine the form, substance and flow of property relationships and patterns of resource use, which is then validated by formal legal processes. This project transcends formal legal titling to one of political negotiations.

The other impulse imagines security as a *sine qua non* for efficient, undisturbed exploitation of resources. In this scheme, security is co-extensive with clear and certain title, which identifies the rightsholder, and the bundle of rights associated with it.[112] This is attained through formal titling processes, where the title document acts as conclusive proof of ownership. Secure titles are crucial for the operation of the liberal free market, whereby property owners can legally contest forceful occupation of resources, and can also freely transfer them for exchange. 'Security' of tenure, therefore, mediates exchange between private parties.

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[110] D. Parthasarathy, *Law-breakers and Law-makers: Critical Legal Pluralism, Normative Subjects and Ecological Regimes in India*, *in* CONFLICT, NEGOTIATIONS AND NATURAL RESOURCE MANAGEMENT: A LEGAL PLURALISM PERSPECTIVE FROM INDIA (Maarten Bavinck and Amalendu Jyotishi eds., 2015).
[111] *Supra* note 5.
[112] *Supra* note 106.

Development discourse promotes land titling as a tool to guarantee security of tenure to promote efficiency while simultaneously overcoming vulnerabilities of tribal peoples to displacement.[113] The FRA too follows this model, in the belief that title will empower communities against forceful dispossession from their lands and resources. It enables the government to identify rightsholders to conduct consultation processes to obtain their free, prior and informed consent, and to distribute compensation for acquisition for land. In other words, titling is intended to facilitate 'lawful' private transfer of resources. It neither affirms autonomy of tribal communities over resources, nor does it imagine alternative forms of development and resource use that prevent concentration.

Template initiatives to guarantee security of tenure do not interrogate who they are geared to provide security from, and to whom. In the case of tribal communities, the most compelling insecurity arises from eminent domain, which regards the state as the ultimate 'owner' all land and resources, even if the law vests property rights in persons and communities. Resources that are not already under acquisition continue to dwell under the threat of acquisition on account of legislative and executive policies. It is for this reason that the FRA remains largely unimplemented over common property resources. For tribal women particularly, insecurity of tenure also arises from the derivative nature of their claims over resources and their exclusion from local political bodies that determine questions of allocation and use.

The goal of security, therefore, needs to be re-imagined from economic efficiency and certainty, to one that guards against impoverishment and enables equitable distribution

[113] *Supra* note 18.

of resources for alternative paths of development. Such a transformatory process places the needs and interests of the most marginalized centerstage in development discourse. In the case of tribal women, this implies securing their autonomy to determine their own path to development, and guarantees their control and participation in the benefits accruing from the use of forest resources. This distribution of benefits can take multiple forms, and includes control over production and foraging, direct access to markets on improved terms of exchange. International jurisdictions have also experimented with different models that grant indigenous communities a stake in mineral exploitation, either by granting licenses to tribal corporations, or through royalties.[114] The methods to be adopted should be left to the judgment of tribal communities as political actors through active negotiations.

For tribal women, these benefits can be guaranteed through the following overarching legislative and policy framework:

1) Abolishing, or heavily circumscribing, the doctrine of eminent domain to limit the power of the state to deprive tribal communities of their resources. While laws facially do not discriminate between different kinds of lands that the state can acquire, in practice, the doctrine has been invoked predominantly for the acquisition of tribal land.[115] This measure requires amendments to laws covering the field of land and resource rights, creating the environment within

[114] *See* Malcolm Lavoie, *Why Restrain Alienation of Indigenous Lands?* 49 UNIV. BR. COLUM. L. REV. 997-1060 (2016).
[115] KB Saxena, *supra* note 72.

which the FRA operates, including the Land Acquisition Act, Forest Conservation Act, etc.

2) Due implementation of the Fifth and Sixth Schedules of the Constitution and PESA, to protect autonomy of Scheduled Tribes over resources, and devolve decision-making over their use to local communities.
3) Recognizing women's claims to resources based on membership of the tribe independent of their marital status. The rules for membership should be based on their investment of labor, residence and *de facto* reliance on common resources.
4) Building capacities of formal political forums to mainstream women's interests and concerns in decision-making processes. This requires interventions in both the political and cultural spheres.

MULTIPLE USER PROPERTY RIGHTS

As the previous sections have demonstrated, patterns of resource use reveal immense inter-community and gendered diversity. Women's status within the household and the community has a direct correlation with their contribution of labor to the communal economy through cultivation and extraction of forest produce. Movement towards settled agriculture and the diversion of tribal men to the private workforce have simultaneously increased the domesticization of women, with a concomitant loss in control over family income, resources and status. While settled agriculture as a practice is now deeply entrenched in almost all communities, further disempowerment of tribal

women can be prevented by promoting property rights on the principle of equitable distribution of entitlements for collective use, instead of on the basis of exclusion.

Property rights by definition are exclusionary. As Morris Cohen[116] and Singer[117] argue, 'property' describes relationships between *persons*, and not between a person and a thing. The holder of property has the authority of permitting varying levels of access and exclusion of other persons to a thing. In the case of a collective, rights of different kinds are distributed to members, to the exclusion of non-members.

Membership within the tribe, therefore, is of central concern in this project. In non-matrilineal tribes, the rules of membership are gendered, as per which men gain entry into the tribe based on residence or kinship, while women do so upon marriage with another member. It is in this sense that husbands and other clansmen mediate property rights of women to forests. This works to the exclusion of single, separated and divorced women, who do not have rights in their natal tribe, and who lose rights on re-location. For tribes that practice patrilocality, women's membership can be re-evaluated on the basis of kinship and residence for non-discriminatory access.

Often, multiple tribes and non-tribal communities use the same resources in common. While precise patterns of distribution in these circumstances require further research, I posit that some commonality may be found in the method of distribution to women *within* these communities.

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[116] *Supra* note 5 at 11-12.

[117] Joseph William Singer, *Property and Social Relations: from Titles to Entitlement, in* PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP 1, 8-17 (Charles Geisler & Gail Daniker eds., 2000).

This method is rooted in Rocheleau and Edmunds' proposal of a '*multiple user approach to the treatment of property in agriculture and forestry research and development that is informed by gender analysis, rather than using gender analysis to "gender-equalize" the existing tenure framework with respect to trees and forests.*'[118] They argue for the recognition of 'nested rights of use and access to land or specific resources'.[119] In other words, tenure systems that view the physical land and resources as units of property overlook the various stratifications of use, access, withdrawal, cultivation, management and ownership rights existing simultaneously on the resource, all of which are distributed in gendered ways. Rocheleau and Edmunds cite the inadequacy of the classical analysis of hierarchical gendered structures in landholding to understand property relations in the context of trees, forests and animals. The latter demonstrate immense 'complementarity' instead of hierarchy in gendered property relations,[120] rendering an analysis limited to legal titling inaccurate in reflecting customary forms of distribution. According to Meinzen-Dick *et al*,[121] a gender analysis of roles and resource uses within households enables a study of complementarity and conflicts in intra-household interests of men and women.

For instance, in the case of the Muslim Swahili living along the Kenyan coast, women have the right to own cashew trees on land that is otherwise held by their male relatives. The right of women to cashew production limits the use of land by their male

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[118] Dianna Rocheleau and David Edmunds, *Women, Men and Trees: Gender, Power and Property in Forest and Agrarian Landscapes,* 25 WORLD DEVP'T 1351, 1352 (1997).
[119] *Id.*
[120] *Id*.
[121] Ruth S. Meinzen-Dick *et al*, *Gender, Property Rights and Natural Resources*, 25 WORLD DEVP'T 1303, 1304 (1997).

relatives.[122] Similarly, Gambian women have independent rights to a patch of rice fields on the family landholdings otherwise held by their husbands or male relatives.[123] As these and other examples illustrate, property rights of men and women within households often overlap the same resource in time and space, which operate on a simultaneous collectivization of resources and impose mutual limitations on the rights of use of others.

Such a multiple user approach can be sustained only within tenure regimes that are undergirded by social ties of kinship or residence, as opposed to the 'neutrality' of the market. Kinship provides the basis of collective use of resources, where distribution is motivated by the need and labor investment of members to varying degrees. Social ties emerging from these kinship networks permit an inclusionary paradigm of access, absent from the objectivity of the market where all players are treated at an arm's length. In the consideration of resources as marketable commodities, it is also uneconomic and inefficient to parcel out rights in the manner suggested by Rocheleau and Edmunds.

Based on the multiple user approach, Meinzen-Dick *et al* point out that these complex stratifications of rights for marginal users are erased in the reduction of property to a unitary right of ownership through titling processes.[124] At the same time, they warn against the idealization of the equity of customary resource allocation, since the ability

[122] *Supra* note 118 at 1354.
[123] *Supra* note 118 at 1355.
[124] *Supra* note 118 at 1309.

to harness these rights often depends on complementary means of production and access to markets.[125]

To this, I add a further note of caution. Encoding customary norms certainly wedges greater space for women's resource control, but this still lacks a transformatory agenda. The objective of tenure reforms should not be crystallize this allocation, but to use this as a basis for the transformation of intra-household and intra-community gender relations. Accepting a regime built on the complementarity of multiple users over the same resource still does not speak to the substantive rules of allocation within it.

Already in tribal communities, there exists a direct correlation between labor and property rights. This rule does not extend uniformly to families, where the labor of women is rewarded with independent property rights in some circumstances but not in others. Foraging activities for exchange are one source of independent income for women, and which are protected by independent rights under customary tenures based on the multiple user regime. Foraging for household consumption enables women to fulfill their roles within the family and community, concomitantly elevating their status and decision-making within the household. However, for settled cultivation, foraging for building houses, grazing of animals, among others, women's labor is subsumed within the household property under the control of the male heads of households.

The same intra-household dynamics regarding women's labor also underlie inheritance regimes in patrilineal communities, where property is inherited through the male line of descent. The multiple user regime presents a way of managing common property

[125] *Supra* note 118 at 1308.

resources, and not plots of settled cultivation or residence within tribes, which have converted to a form of individual property over time. Under the FRA, joint titling of plots of land facilitates a mere life interest for women, absent provisions that also enable women to acquire resources through inheritance. Equalizing inheritance rights for sons and daughters within patrilocal communal economies, though desirable, requires further deliberation on two issues. First, how will equal inheritance rights interact with the formal law provision mandating joint titling in the name of the husband and wife? Second, what form will equal inheritance rights take in a property regime predicated on residence/kinship, use and labor investment?

POLITICAL PARTICIPATION

Property, as relations between people, cannot come into existence in the absence of a legal and political authority distributing, recognizing and enforcing those rights. The existence of the state, or a quasi-state body, is a *sine qua non* for the existence of property.[126]

Particularly, common property resources require collective action to prevent the 'tragedy of the commons'.[127] The inability of the colonial government to recognize collective management as a legitimate basis for rules led it to gradually replace it with centralized formal state laws in the interest of 'efficiency' and ecological preservation. Previous sections have demonstrated that both these objectives were not met.

[126] Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470-494 (1923).

[127] *See* Elinor Ostrom, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990).

This collective action is predicated on group affinity, as opposed to the isolated individual property owner in the market. Kinship ties in the group are not only constitutive of the tribe, but also the institution for the management of resources. Women's exclusion from political bodies of resource management prejudices their interests in the allocation and defence of their property rights. Women's exclusion also carries the threat of the community replacing the position of the state in its paternalistic rule-making power, instead of being an institution that mediates the relationship between the state, market, tribe and family.

A common dichotomy within Scheduled Tribes is women's strong and vocal mobilization in non-formal organized spaces, but their absence from formal political bodies. Tribal women are at the forefront of resistance against land acquisition, displacement, over-exploitation by private contractors and environmental degradation.[128] The gender and development discourse, in fact, capitalizes on the political and cultural agency of tribal women to promote sustainable use of forest

[128] Maria Costanza Torri, *Power, Structure, Gender Relations and Community-Based Conservation: The Case Study of the Sariska Region, Rajasthan, India,* 11 J. INT'L WOMEN'S STUD. 1-18 (2010); Krishna, *supra* note 44 at 310; Shiney Varghese, *Women, Resistance and Development: A Case Study from Dangs, India,* 3 DEVP'T IN PRACTICE 3-15 (1993); Sagari R. Ramdas *et al, Changing Livelihoods, Livestock and Local Knowledge Systems" Women Stake their Claim in Andhra Pradesh and Maharashtra,* 8 IND. J. GENDER STUD. 175-194 (2001); Terry Sunderland *et al., Challenging Perceptions about Men, Women and Forest Product Use: A Global Comparative Study,* 64 WORLD DEVP'T S56, S57 (2014); Dolly Kikon, *Gender Justice in Naga Society- Naga Feminist Reflections*, Raiot, Feb. 23, 2017 http://raiot.in/gender-justice-in-naga-society-naga-feminist-reflections/ (Apr.26, 2017).

resources.[129] This political and cultural agency, however, does not translate to participation in formal bodies.

The FRA, like other laws on democratic governance in India, mandates reserved positions for women on bodies of governance. This identity-based model of affirmative action continues to be adopted in Indian legislations, despite evidence of their ineffectiveness in bringing about transformatory change. Often, female members are nominated symbolically, or after nomination, are systematically excluded from exercising authority within bodies.[130]

Studies have shown that collective action by women's groups (formal and informal) has had a tremendous impact in improving women's access to resources within communities. This may be by way of direct management and control of certain resources, or by way of coordinated representation before political bodies.[131] For policy formulation, this presents a dilemma, since identity-based reservations are inadequate in redistributing political power, and co-option into formal, state mechanisms often diffuses the ability of women's collectives to bring about transformatory change.

If independent political collectivization and mobilization by women is a core strategy to defend their resource rights, what kind of policy interventions can states and civil society actors make? Already, development agencies organize women for funded projects towards certain program goals. Development aid is crucial to develop public

[129] AM Larson and J Ribot, *Democratic Decentralization through a Natural Resource Lens: An Introduction*, 16 EUR. J. DEVP'T RESEARCH 1-25 (2004).
[130] *Supra* note 128.
[131] *Supra* note 128; Sumi Krishna, *Introduction: Towards a 'Genderscape' of Community Rights in Natural Resource Management*, 8 IND. J. GENDER STUD. 151, 161-66 (2001).

infrastructure and provide services to citizens. However, they also threaten the liberatory potential of organic, independent collectives by distorting autonomous agendas. Instead, this is a field where the human rights movement can make effective interventions, by pushing strongly for the protection of human rights defenders, the rights of political prisoners, freedom of speech, expression and association.

CULTURAL NORMS

Lastly, a transformatory agenda cannot be attained or sustained without encouraging cultural norms that legitimize and endorse equitable distribution of resources and authority to marginalized constituencies. In addition to the pressures of maldistribution and violence from the 'outside', tribal women's use of forest resources as well as political participation is mediated by cultural codes that determine relationships between people within communities, through the establishment of status, hierarchies, values, and norms on 'how things are done'. Here, I look at culture as the production of what Nivedita Menon calls 'common sense'.[132]

Menon uncovers the coercion underlying 'voluntary' *sati* (widow immolation) by elucidating the existence of collective pressures in forms that may be religious or ideological, and not necessarily *physical*, which legitimize the practice.[133]

I extend Menon's analysis of the function of cultural or ideological norms as 'common sense', to the legitimization of certain patterns of distribution, roles and value systems.

[132] NIVEDITA MENON, RECOVERING SUBVERSION: FEMINIST POLITICS BEYOND THE LAW 209-210 (2004).
[133] *ID*. at 210-212.

For instance, women's strong mobilization against private contractors, displacement and deforestation amply demonstrates their political agency, yet they are excluded from formal political institutions. I understand this as the operation of cultural values that determine the 'proper' avenues for women's participation. Similarly, collectivization in economic activity is also upheld by cultural values, as is the *actual* distribution within collectivized economies.[134] Culture also plays a role in the sexual division of tasks, such as in taboos against some forms of women's labor. Accounting for such divisions is critical for the construction of the theory of redistribution based on labor, residence and *de facto* that I posit above. Here, the constituent condition of property rights does not accrue for women due to cultural practices and norms.[135]

It is also critical for an understanding of culture as *emancipatory* instead of oppressive. Feminist interventions, particularly within the human rights discourse, normally focus on harmful cultural practices that perpetrate violence against women, such as female genital mutilation and *sati*, or are symbolic of women's oppression, such as the veil and dowry. Pushback from 'third world' postcolonial feminists prods this dominant discourse to be more critical of interventions in the fields of cultural practices and violence against women, since these are often tainted with the colonizing, imperialist gaze of the western 'saviour'.[136] They externalize 'culture' as something that only

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[134] Celestine Nyamu. Gender, Culture and Property Relations in a Pluralistic Social Setting, 38-44 (Oct. 2000) (SJD thesis, Harvard Law School).

[135] Ruth S. Meinzen-Dick *et al*, *Gender and Property Rights: Overview,* 25 WORLD DEVP'T 1299, 1300 (1997).

[136] Chandra Talpade Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses,* 12 BOUNDARY 2 333-58 (1984); Miriam Cooke, *Saving Brown Women*, 28 SIGNS: J. WOMEN IN CULT. & SOC. 485-487 (2001).

resides in peoples of color as the 'Other', and is the source of oppression of women of color. Such interventions do more harm than good, since often women harness the same cultural metaphors towards liberatory projects, as in the case of Muslim women interpreting *sharia* through a feminist lens.[137]

Accordingly, I distinguish between articulations of culture as principles or base values, as social practice, and as rituals and symbols. I bracket human rights interventions in the field of cultural practices as rituals and symbols, and invite greater engagement with culture as value systems and as social practices. Culture is therefore not a static condition of oppression, as a focus on symbols and rituals would suggest. Instead, it exists in a dialectical, co-constitutive relationship with ideology, value systems and social practices.

Culture is political because it serves a legitimizing function for certain patterns of distribution of authority and entitlements. As Farida Shaheed argued at a South Asia Plus Consultation on the intersections between women's equality and culture, "*[c]ulture is, therefore, not so much about the objects constructed by human beings, but rather about the significance attached to particular objects. In this sense, it is like a prism through which we perceive and engage with the world, both human and natural.*"[138]

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[137] *See* Musawah- Global Movement, http://www.islamandfeminism.org/musawah.html (Apr.30, 2017); Bharatiya Muslim Mahila Andolan (Indian Muslim Women's Movement), https://bmmaindia.com (Apr.30, 2017).

[138] Farida Shaheed, former UN Independent Expert on Cultural Rights, *Promoting Women's Equality through Cultural Diversity and Cultural Rights*, in INTERSECTIONS BETWEEN WOMEN'S EQUALITY, CULTURE AND CULTURAL RIGHTS: REPORT OF THE SOUTH ASIA PLUS CONSULTATION ON CULTURE, WOMEN AND HUMAN RIGHTS, 11, 12 (2011).

Because culture is political, it is contested, fragmented, plural and unstable.[139] Different actors compete to establish their values as cultural norms, in order to justify specific kinds of entitlements. The ability of an actor to influence culture is further determined by the role or status attributed to them within a specific cultural universe, where not everyone has the same power.[140]

To push for a transformatory agenda, it is therefore important to challenge dominant cultural distribution of entitlements. Even if patterns of material distribution change, consistency in social hierarchies will continue inequality, disempowerment and cyclically distort the effects of redistribution. I expect to unpack the operation of specific cultural patterns through further empirical research on customary laws, to frame a more precise policy agenda. Nevertheless, progressives should aspire to support local women's collectives that advocate for more liberatory reinterpretations of culture to gain greater access to authority and resources for marginalized sub-groups.

[139] *Id*.
[140] *Id* at 13.

CONCLUSION

The first agenda for the redistribution of forest rights to tribal women is to secure their property rights to enable legal and political contestations on resource diversion. The first section of this paper demonstrated the manner in which the rights of women are inextricably tied to security of tenure for tribal communities at large. Feminist interventions on land and forest rights, thus, need to recognize that the most compelling challenge to this agenda is mass resource diversion and accumulation for privatized development, whether by the state or private actors. Advocating for non-discriminatory individual property rights for women will be incomplete at best, but likely to be further harmful for women's interests.

The method of attaining this agenda stands complicated with over 200 years of the introduction of private property rights also governing landholdings within the community. Consequently, it is not just the market or the state that drives resource accumulation, but also elite factions within communities. The conversion of forests to marketable commodities, as opposed to sustenance resources, incentivizes this drive towards accumulation and alienation even within communities. The agenda is further complicated by changes in resource use and allocation within communities, such that framing an idealized version of tribal resource use empowers existing dominant actors within communities.

The need for further research, both empirical and normative, to frame a property regime that capitalizes on the security of tenure for women provided by customary

norms, while also enabling a transformatory agenda within it, cannot be over-emphasized. At the bare minimum, policymakers and advocates of the cause should push for a tripartite agenda, requiring interventions at the legal, economic, cultural and political levels. This will include security of tenure to tribal communities against assaults by state or private acquisition with due recognition of *de facto* rights. This will also require a paradigm shift from advocating for individual rights to one based on multiple users over the same resource. Preliminarily, users can be identified based on their membership within the community. For women, this requires equalizing membership criteria between men and women, along with its interaction with factors of kinship and residence. This needs to be a cautious and balanced exercise, which accounts for, and attempts to transform, prevailing cultural taboos and stereotypes against some forms of women's labor and status within families. I advance this proposition only preliminarily, since it is common for multiple tribal and non-tribal communities to rely on the same resources, in which case additional bases need to be introduced to permit negotiations between them.

Lastly, it bears recognition that property rights cannot exist in the absence of a political authority for their recognition, enforcement and validation. The exclusion of women from local formal or semi-formal political bodies greatly hampers their ability to validate their needs and interests, despite their capacity for political action in non-formal spaces. Identity-based reservations of seats for women within bodies have historically proven to be an inadequate response across contexts. Accordingly, activists working on the ground should consider assisting local women's collectives and groups towards political action directed at formal bodies.