

Mobile Indigenous Peoples Use of the 2006 Forest Rights
Act in India: Access to Justice, Gender Equality, and Forest
Governance

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PhD

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Law

August 2016

Abstract

Access to justice remains uneven and elusive for indigenous peoples dispossessed of their lands. The Forest Rights Act of India (2006) promises land security for forest peoples displaced from ancestral lands by the combined forces of colonial forest resource extraction and contemporary free-market economic development, which have disregarded customary indigenous land rights. This research challenges the assumptions: land rights legislation necessarily contributes to access to justice, and governments serve the interests of citizens in a democratic system such as India. I posit that justice is subverted by: a legal chronology of land expropriation during colonial occupation; contemporary neoliberal policies; and administrative injustice.¹ These issues encouraged legal violations and exacerbated land dispossession. Socio-economic and gender inequalities and marginalization of mobile indigenous peoples compounds their land dispossession, and economic, social, legal disenfranchisement.

Against this backdrop of disenfranchisement, the Forest Rights Act revolutionizes the potential of challenging land dispossession, and substantive rights become a metaphor for indigenous empowerment. Offering evidence that indigenous peoples have inadequate access to justice, I contend that economic policies need to collaborate with and reinforce political and judicial aspects. Triangulating scholarships on 1) access to justice, 2) economic policies, 3) forest governmentality, 4) gender discrimination and 5) legal literacy, this study seeks to reconcile these scholarships with empirical data on expropriation of forest land and the effects of the Forest Rights Act on indigenous access to justice in India. This research seeks to establish a new analytical framework which contextualizes control of indigenous forest rights through access to justice.

¹ Administrative injustice, is defined as “when the government, or those working on its behalf, act in ways that appear wrong, unfair or unjust, [and do not ensure] that public bodies and those who exercise public functions make the right decisions [and that] mechanisms for providing redress when things go wrong”

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Preface

The impetus for this research began in 2006, when as a consultant, I stood in the front of a large room, while the participants of a workshop constructed a joint list of recommendations derived from their group work. They were all mobile indigenous peoples. While rapidly classifying their brightly coloured post-it stickers to form priorities, I was struck by the predominance of issues associated with land rights. These ranged from land security, and land tenure, to access to grazing resources. The workshop was a side event² at the United Nations Permanent Forum on Indigenous Issues (UNPFII) in New York, and my role as a consultant³ entailed conducting a capacity building workshop for twenty-two representatives of various mobile indigenous groups from more than a dozen countries.⁴ My remit was to build the capacity of these mobile indigenous peoples to participate in the UNPFII, which at that point did not include nomadic peoples. This was my first exposure to the acute struggle of indigenous peoples for their rights, and was the beginning of a personal journey of involvement which has shaped my professional interest in indigenous land rights and which has informed the topic of this dissertation.

The Dana + 10 Workshop at Wadi Dana in Jordan, was organised in the Spring of 2012. The aim was “to promote the human rights of mobile indigenous peoples in the context of biodiversity conservation and democratic environmental governance in the face of continuing expansion of protected areas, land grabbing, and further dispossession,”⁵ I was invited⁶ to facilitate another capacity building process for mobile indigenous peoples for the Dana + 10 event. Since I was already at the York Law School at the University of York, I designed the capacity building workshop around legal mechanisms for Indigenous land issues. The exposure from both the above workshops, has determined the discussion of land rights of indigenous peoples as the focus of this research.

² The side event was organised by The Standing Committee of the Dana Declaration on Conservation and Mobile Peoples, and the World Alliance of Mobile Indigenous Peoples (WAMIP).

³ As a practitioner in International Development, I had responded to a call from Professor Dawn Chatty from the Refugee Studies Centre at the University of Oxford for a consultant to deliver a capacity building workshop for mobile indigenous peoples

⁴ The countries this group represented included Burkina Faso, Ethiopia, India, Jordan, Kenya, Mali, Inner Mongolia, Mongolia, Morocco, Namibia, Palestine, Senegal, Sudan and the United Arab Emirates.

⁵ Taken from the Workshop report on the Dana Declaration +10, 11-13 April 2012, Wadi Dana, Jordan compiled by Professor Dawn Chatty, Director of the Refugee Studies Centre, University of Oxford.

⁶ For both the 2006 and the 2012 workshops I was invited as consultant by the Refugee Studies Centre of Oxford International Development, University of Oxford.

Acknowledgements

A sincere thank you to each person who helped me in small and big ways with this long research undertaking. I cannot name every person who has helped me along the way, but you know who you are, and please know that I am extremely grateful to each of you.

A huge thank you to: Martin Jones, my thesis supervisor from the Centre for Applied Human Rights at the York Law school for excellent scholarly inputs and detailed feedback; to Professor Dawn Chatty, my external supervisor from the Oxford Department of International Development, University of Oxford, for the experienced feedback and invaluable support starting before my PhD journey had begun till the bitter end, beyond the call of duty; to Salwa Eweis from the York Law School, without whose reliable advice and support this train would have been in danger of being derailed. To John Hawes from IT Support, for the countless hours spent in ironing out the entangled experience of Endnote and Oscola.

A special note of gratitude to Nikhil Wilmink, for constant emotional support, encouragement, and for keeping the pressure on, from Zambia. When at the end, night and day merged into one block of time with brief snatches of sleep in between, Nikhil was present, tirelessly editing through all hours of the day and night, with valuable and insightful suggestions, all done ‘by remote’ from another continent.

In the field in India, I am grateful to all the many people from the Adivasi and pastoral communities whom I visited in Rajasthan, Gujarat, and Maharashtra, who gave of their time and hospitality so freely. Thank you to the staff of all the NGOs and civil society organisations who worked with me closely with my data collection: Astha Sansthan, Seva Mandir, Society for Promotion of Wastelands Development (SPWD); Anthra, Marag, Lokhit Pashu-Palak Sansthan (LPPS), Kalpavriksh, and Campaign for Survival and Dignity.

Specifically I would like to thank: Dr. Ginny Shrivastava who made the crucial long distance phone calls from India to the USA, inviting me to use Astha’s facilities and professional connections with tribal peoples; and who made sure in so many thoughtful ways that I was taken care of; Mangi Lal Gujjar from Astha, and Juned Khan from SPWD whose analytical minds and ability to think outside the box opened my eyes to valuable and alternative perspectives; Mr. Sudhansu from the Ministry of Tribal Affairs (MoTA) Udaipur, Ramesh Bhatnagar, Sarfraj, Mohseen Ahmed and other Astha field staff whose commitment and extremely hard work under strenuous conditions of living and travelling in tribal areas are admirable. Thank you.

Thank you to Jagdish Purohit from SPWD, Suresh Sharma and Shailendra Tiwari from Seva Mandir who so kindly volunteered their professional opinions and time. Thank you to Suresh Sharma who was especially helpful and hospitable, allowing me to accompany the team field visits. And from Astha: RD Vyas, Vinod, Ramesh Nandvana, Bhanwar Singh, and all Astha staff who were so consistently kind and helpful. From Kalpavriksh, thank you to Ashish Khotari, Meenal Tatpati, Sheba Desor and Neema Pathak. Madhu Sarin, from Campaign for Survival and Dignity who was so generously accessible, whether by phone or email – open to discussion and patient with every question. To Roma, for the generous invitation and sincere efforts to help organise my field work in the Himalayan region of Sonbhadra District, which unfortunately could not materialise due to unexpected and severe flooding in the region. I want to mention that when imminent field work plans went seriously awry, and I sent out numerous urgent emails to civil society organisations in India, in desperate search of a new field work possibility at very short notice, just every email I sent out was answered. I will never forget the kindness with which every individual whom I approached (some of whom I never met), rose to the occasion and responded. It was not just the personal magnanimity that was so impressive, but also the strong dedication of Indian civil society organisations to the cause.

A personal note of appreciation to Anisha Wilmlink, who accompanied me in the field the first year, who took beautiful photos of the field work, and who was a great source of encouragement; and to Prof G. Sigamany, without whose nurture and support, this research effort would not have begun.

I have appreciated the beauty of the Rajasthan forests of the Aravalli Hill range, and of Udaipur, the lake city of palaces, which imbued the stress and hardships of field work with a definite pleasure that will stay as a close memory of the data collection phase of my research.

I dedicate this research to my mother, Professor Emeritus G. Sigamany, whose commitment to social justice, and legacy of courage, and professional excellence continues to inspire and offer constant strength in spite of her very recent departure from our lives.

Declaration

I declare that this thesis is a presentation of original work and I am the sole author. This work has not previously been presented for an award at this, or any other, University. All sources are acknowledged as References.

I draw attention to two publications on the initial findings which use material contained in my thesis:

Sigamany I, 'Destroying a way of life: the Forest Rights Act of India and land dispossession of indigenous peoples' in Satiroglu I and Choi N (eds), *Development-Induced Displacement and Resettlement* (Routledge 2015)

Sigamany I, 'Land Rights and Neoliberalism: An Irreconcilable Conflict for Indigenous Peoples in India?' *International Journal of Law in Context IJLC*, (Cambridge University Press 2016) <http://dx.doi.org/10.1017/s1744552316000392>

Chapter One: Introduction

1.1. Introduction

This research aims to provide evidence on the effects of The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (hereafter known as the Forest Rights Act) on the lives of indigenous forest communities in India. These communities, facing land dispossession can, in theory, use the Forest Rights Act to reclaim customary land rights to their forest habitation. In critically examining how the Forest Rights Act has changed the dynamic of land expropriation of indigenous tribal peoples and their access to justice I seek to establish a framework which contextualizes legal control of community forest land rights through access to justice. The intention is to contribute towards the scholarship on access to justice for marginalised indigenous peoples with the introduction of social legislation.

My study specifically pertains to land displacement of indigenous peoples, many of whom are mobile, and whose pastoralist occupations of herding animals or hunting and gathering are a continuation of ancient lifestyles and culture. At the moment, worldwide there are around 370 million indigenous peoples, comprising 5000 groups living in about 70 countries,⁷ many of them struggling to retain possession of ancestral lands and usufruct rights. When examining the topic of indigenous peoples' land rights, the contradictions become clear.⁸ National and international land laws assume private individualistic ownership of land, or land owned by the sovereign state⁹. This is contrary to the collective use¹⁰ of land by indigenous communities, especially mobile¹¹ populations, who do not necessarily own the land they use, abiding instead by the customary practice of using common lands, known as 'usufruct'¹² in legal terminology. Mobile indigenous peoples face a double legal discrimination within the group of indigenous peoples. For instance, human rights instruments such as the UN Declaration for Indigenous Peoples of

⁷ Anne-Marie Impe, *A Convention to Fight Discrimination* (Union view, 2011) 12

⁸ Indrani Sigamany, 'Destroying a Way of Life: Indigenous Peoples, The Forest Rights Act of India and Land Displacement of Indigenous Peoples' in I. Satiroglu and Choi N (eds), *Development-induced Displacement and Resettlement: New Perspectives on persisting problems* (Routledge 2015) 1

⁹ Jeremie Gilbert, 'Land Rights and Nomadic Peoples: Using International Law at the Local Level' (2012) 16 *Nomadic Peoples* 78

¹⁰ Jeremie Gilbert and Cathal Doyle, 'A New Dawn over the land: Shedding Light on collective Ownership and Consent' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the rights of indigenous peoples*, vol 12 (Reflections on the UN Declaration on the rights of indigenous peoples, Hart Publishing 2011) 3

¹¹ The terms 'nomadic' and 'mobile indigenous peoples', which are used interchangeably will be defined in Chapter 2 of this study.

¹² Oxford Dictionaries, *OxfordDictionaries.com* (Oxford University Press 2013)

2007¹³ (hereafter known as “The Declaration”) do not specifically mention mobile or nomadic communities, who are also often invisible to their own governments, making it more difficult to advocate for land rights. The paucity of evidence of rights needed by mobile indigenous peoples in international law has repeatedly been referred to by scholars such as Jeremie Gilbert: “international human rights law does not refer to the specific situation of mobile peoples, and no treaties include any specific rights for mobile peoples. Instead, the focus is on universal human rights applicable to all.”¹⁴ The lack of specific rights for mobile indigenous peoples contributes to an inability to control lands they have historically used, and repeatedly collides with the refusal of governments to relinquish power and to recognise legal rights.

In exploring the various factors that contribute to the historical land dispossession of indigenous peoples, the research triangulates these scholarships with empirical data on an analysis of post-colonial governmentality; the neoliberal economics conducive to extractive industry and land displacement; and the history of laws of the land. This narrative is not new. It has been occurring globally for centuries, though at the moment, it is intensifying for several reasons, which I will be expanding below within this research. Using the empirical data and the scholarship emerging from a broad review of relevant literature, the research constructs an analytical framework to facilitate a critical examination of forest rights legislation, indigenous access to justice, and land expropriation.

1.2 Purpose of Research and Research Questions

The purpose of my research is to examine the internal land displacement debate within a normative framework. I employ critical research methods to examine the effects of national law on the lives of indigenous and mobile indigenous people. I explore the effects of the Forest Rights Act (2006) of India, on the lives of indigenous people in India who are known as Adivasis¹⁵. I describe the Adivasis more elaborately in chapter Five which depicts the field work in the forests of the southern Aravalli Hill range where they traditionally reside. Specifically, I explore the change in the lives of indigenous forest dwellers, and their access to justice since new legislation in India has granted them land rights. Situating this debate in a discourse of poverty of nomadic and tribal populations in India, I analyse socio-legal indicators of positive change, and compare these to evidence of other stakeholders who might be pushing communities into a more

¹³ United Nations Declaration on the Rights of Indigenous Peoples (adopted on 13 December 2007, UNGA Res. 61/295 A (UNDRIP Add 1))

¹⁴ Gilbert, 'Land Rights and Nomadic Peoples: Using International Law at the Local Level' (2012) *Nomadic Peoples* 78

¹⁵ Tushar Dash and Ashish Khotari, 'Forest Rights and Conservation in India' in Harry Jonas, Suneetha M. Subramanian (ed), *Right to Responsibility: Resisting and Engaging Development, Conservation, and the Law in Asia* (Natural Justice and UNU-IAS Institute of Advanced Studies 2013)151

vulnerable position through the inappropriate manipulation of this law in order to promote incursive economic development.

Deeply embedded in the debate tied to displacement of forest peoples from their lands are issues of poverty and inequality. Socio-economic hierarchies divide local communities, and benefits are often distributed unequally depending on local power structures reinforcing inequality. Why are forestlands, which are the richest biodiversity areas, usually also areas of some of the most extreme poverty? On the basis of this rationale, the research study and data collected seek to theoretically and empirically investigate the key research questions of: “How accessible is justice for indigenous peoples in their struggle for land rights since the enactment of new legislation?” My secondary research questions have both informed and have been tested by the social and legal investigation I carried out in the field. The background information that underpinned the data collection of the communities looked at difference aspects of their lives which might impact their access to justice, and was based on the secondary questions listed below: these questions have been answered with a combination of primary and secondary data.¹⁶

- What has been the historical interface between the law and land dispossession of indigenous peoples?
- What is the role of governance and administration in the enactment and execution of land rights laws in India such as the Forest Rights Act?
- Has legislation respecting land rights affected women’s rights within tribal communities?
- How have extractive industries, and the movement on conservation of biodiversity affected the displacement of indigenous peoples from their ancestral lands?

1.3 Indigenous Peoples and the Nature of Displacement

Dependent on land for their survival, indigenous peoples are ancient inhabitants of the land before the land was either colonised or governed by a sovereign state.¹⁷ Their social structures are distinctive from mainstream populations,¹⁸ and one of the characteristics of indigenous populations is their symbiotic relationship with, and the deep respect they share for their lands, “a profound cultural social and spiritual relationship with their lands and territories is characteristic of indigenous peoples and fundamental to their survival.”¹⁹ The UN Declaration of Rights of Indigenous Peoples of 2007 acknowledges the “historic injustices as a result of, inter alia, their

¹⁶ See Appendix 2 for secondary research questions used for field work

¹⁷ Jeremie Gilbert and Cathan Doyle, 'A New Dawn over the land: Shedding Light on collective Ownership and Consent' in Stephen Allen and Alexandra Xanthaki, Reflections on the UN Declaration on the rights of indigenous peoples (Hart 2011) 9

¹⁸ Government of India, 'Ministry of Tribal Affairs' (*NIC/NICSI*, 2012) <<http://tribal.nic.in/>> accessed 2 Feb 37

¹⁹ Ibid 3

colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.”²⁰ Mobile indigenous peoples, a sub-group within the broader category of indigenous peoples,²¹ are dependent on usufruct of land for their survival, earn their livelihoods from activities that rely on a mobile way of life such as: pastoralists who herd animals; slash and burn cultivators; hunters and gatherers. There are also mobile seafaring (and other water-borne) peoples who sail and fish.²² Since the mobile way of life is so physically demanding, a growing number are resorting to either regimes that are semi-nomadic only, or engaging in other settled occupations.

There is no legal definition of indigenous people to which all countries subscribe, nor is the term defined in the UN Declaration. This was a deliberate decision, reflected in Article 33: “Indigenous peoples have a right to determine their own identity or membership in accordance with their customs and traditions.”²³ This decision recognises and reflects the view that the complex and nuanced nature of the politics pertaining to indigenous groups is too broad for a single definition.²⁴ One UN study attempts a definition:

“Indigenous communities, peoples and nations of those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the society now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence of peoples, in accordance with their own cultural patterns, social institutions and legal systems.”²⁵

In many parts of the world, "there are more processes leading to the destruction of habitats than those leading to its conservation."²⁶ Pressure from growing populations, their need for food and in consequence more intense demand for agricultural land often encroaches on forest lands.

²⁰ Ibid 2

²¹ Dana Standing Committee, *Dana Declaration on Mobile Peoples and Conservation* (DSC 2002)

²² Ibid

²³ Jeremie Gilbert, 'Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples' (2007) 14 *International Journal on Minority and Group Rights* 207

²⁴ Most countries employ the term indigenous, but other countries use Aboriginal (Australia or Malaysia), or First Nation (Canada), or Native Americans (as in the USA). The Indian government uses the word Adivasi (or tribal) for the ancient communities who reside in the hills and forests.²⁴

²⁵ UN Sub commission on Prevention of Discrimination and Protection of Minorities, Study of the Problem of Discrimination against Indigenous Populations, U.N. Doc.E/CN.4/Sub.2/1986/7/Add 4, para.369 (1986)

²⁶ Neema Pathak, *Community Conserved Areas in India: A Directory* (Kalpavriksh 2009)

Increasing extractive industries operating in the name of economic development, and governments which collude with them at the expense of conserved lands, pose a real threat. More than 40% of land illegally acquired for development and mining belongs to tribal communities in India,²⁷ and in the five years following 2006, more than 500,000 hectares of forest land were destroyed to make way for mines, dams and industrial projects.²⁸ This process of destruction of habitats is happening worldwide, starting in the 1400s, and is not confined to India or to the developing world.²⁹

1.4 A Normative Framework for Indigenous Rights and the Forest Rights Act of India 2006

The normative framework for indigenous rights, aspects of which, can be used to advocate legally for land rights of mobile peoples, includes both international and national instruments. “These establish principles and minimum rules for administration of justice and offer fairly detailed guidance to states on human rights and justice.”³⁰ What is missing, however, is a body of rights specifically for mobile peoples.³¹ Control of land is a source of contention among indigenous (tribal) peoples, governments, conservationists and extractive industries. The competition for control, coupled with a historical lack of rights of indigenous peoples, which has resulted in displacement and impoverishment of the Indian tribal populations, has also obliged the Indian Government to enact the Forest Rights Act of 2006. This is in keeping with the articulation of new international legal standards on human rights for indigenous peoples. Enacting a progressive law has not necessarily ensured the implementation in a just and equitable manner in India. In violation of human rights, state and central governments in India are ignoring participatory and democratic requirements of the Act, such as informed consent and the right to self-determination. This begs the question of whether the new Act increases the vulnerability of

²⁷ Madhu Sarin, 'Lessons for Govt of India from Australia on respecting the relationship of adivasis to their territories: 'GDP growth' at any socio-economic and cultural costs is a short sighted policy' *The Hindu* (2010)

²⁸ Campaign for Survival and Dignity, *What is the Forest Rights Act about?* (<http://www.forestrightactsactcom/index.php>, 2013)

²⁹ In the USA, for example, under President Obama's first four years his government leased around 6 million acres to the oil and gas industry. This was more than twice as much land as was set aside for protection, as compared to Bill Clinton's administration, which protected 26.9 million.²⁹ To combat this global trend, which has connotations for the disappearance of flora, fauna, and competition for shrinking space between human beings and wildlife, a global movement of conservation has emerged.

³⁰ UNDP, *Access to Justice Practice Note* (2004) UN

³¹ Ibid; Jeremie Gilbert and Cathan Doyle, 'A New Dawn over the land: Shedding Light on collective Ownership and Consent' in Stephen Allen and Alexandra Xanthaki, *Reflections on the UN Declaration on the rights of indigenous peoples* (Hart 2011) 4'

indigenous peoples³² rather than serving as a powerful tool for them to protect and manage their own forests and advocate for their rights.

The Forest Rights Act: Scheduled Tribes and Other Forest Dwellers (Recognition of Forest Rights) Act 2006 recognises customary forest land rights, and usufruct and habitat rights of tribal and indigenous peoples in India. The Act also aims to encourage community participation, and community management and protection and conservation of forests and wildlife. It is framed in progressive, rights based language, and was the result of long and vigorous advocacy by forest dwellers and activists. However, the effectiveness of legal standards protecting the needs of indigenous and tribal populations in India is questionable. The obligation for successful implementation of these standards is not being met satisfactorily by the Indian Government and the Forest Department, leaving open the question of whether the Forest Department could be creating barriers to justice for indigenous and tribal peoples. Two articles of the Act are pertinent here, firstly that land can only be inherited and not transferred by any other means; secondly that any government decision involving forest lands has to be endorsed by the *Gram Sabhas* (local village assemblies) concerned, which is a wonderfully participatory and democratic aspect of the Act. These particular aspects are however repeatedly violated by the government, which continues to transfer vast tracts of land to extractive industries without Gram Sabha permission.

1.5 Methodology

This component is divided into the following sections, which I will name without describing, as they are self-explanatory in nature, and avoids labouring the point.

1. Introduction to the Methodology
2. Research Design and Methods
3. Sampling
4. Reflections of Field Case Study
5. Change in Methodological Approach and Research Design
6. Ethical Issues
7. Risk of Socio/Economic/ Political Harm to Participants
8. The Potential Benefits to Participants
9. Scientific Justification for the Research

³² Campaign for Dignity and Survival (2012) *State of Implementation of the Forest Rights Act - Summary Report* <State of Implementation of the Forest Rights Act - Summary Report>

1.5.1 Introduction to the Methodology

This research is an empirical study, drawing on qualitative primary data and supported by secondary conceptual sources.³³ My research question studies the access to justice for indigenous peoples. Claiming their land rights is a social phenomenon. I use qualitative comparative-case studies analysis to explore what Robson calls the ‘real life’ situation of land dispossession of indigenous forest dwelling communities.³⁴ A Critical Research approach was chosen under the assumption that “social reality is historically constituted and that it is produced and reproduced by people. Although people can consciously act to change their social and economic circumstances, critical researchers recognize that their ability to do so is constrained by various forms of social, cultural and political domination.”³⁵ Myers points to social critique as being the principle job of critical research, focusing on the “restrictive and alienating conditions of the status quo,” and that critical research teases out contemporary societal conflicts, inconsistencies and contradictions, with a focus on eradicating causes of oppression and exclusion with empowering goals.³⁶

This focus occurs within a framework of rights and responsibilities of communities and government, which in turn is grounded in the context of inequality and justice. If justice is the principle underpinning law, then the impact of new laws such as the Forest Rights Act need analysing in reference to whether they have facilitated justice for vulnerable tribal populations dispossessed of their lands. Referring to political morality and ethics as principles for legitimate governance I use ‘egalitarianism’ as a framework of responsibility for the Indian government in implementing new laws such as the Forest Rights Act.³⁷ Jeremie Gilbert’s ³⁸ extensive writings

³³ “Qualitative research methods are designed to help researchers understand people and the social and cultural contexts within which they live.” Michael Myers, 'Qualitative research in information systems' (1997) 21 Management Information Systems Quarterly *ibid*

³⁴ “The ‘real life’ situation refers in part to the actual context where whatever we are interested in occurs, whether it be an office, school, hospital, home, street or sports stadium...In the ‘real world’ – or ‘the field’ that [laboratory] kind of control is often not feasible, even if it were ethically justifiable.” Colin Robson and Kieran McCartan, *Real world research* (John Wiley & Sons 2016) 3

³⁵ Michael Myers, ‘Qualitative research in information systems’ (1997) Management Information Systems Quarterly 21

³⁶ *Ibid*; Management Information Systems Quarterly no page number; Also see Ngwenyama and Lee (1997) and Hirschheim and Klein (1994)

³⁷ Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press for Harvard University Press 2011) Ronald Dworkin’s legal philosophical discussion of morals and political rights within the law, in his book *Justice for Hedgehogs* (2011)

³⁸ Jeremie Gilbert has written extensively on human rights laws in regard to land rights of indigenous peoples. (J  r  mie Gilbert, *Indigenous peoples' land rights under international law : from victims to actors* (Transnational Publishers 2006) Gilbert, 'Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples' Jeremie Gilbert, 'Nomadic Territories: A Human Rights Approach to Nomadic People's Land Rights' (2007) Human Rights Law Review 681 Gilbert and Doyle, 'A New Dawn

discuss the interface between the development of human rights legislation for indigenous populations and the increasing land dispossession that they face. Examining inequality within the context of justice, I reference Wilkinson and Pickett's theory that greater equality makes societies stronger³⁹. That inequality is divisive and socially corrosive is one of their conclusions, which makes the success of implementing the Forest Rights Act more important, because it could theoretically reduce the growing impoverishment of indigenous populations being dispossessed of their lands, and turn around the social problems faced by the Adivasis.

1.5.2 Research Design and Methods

The research design used in this thesis applies social-scientific and historical methods to study access to justice for marginalized groups. This was based on primary and secondary data. The secondary sources included the review and analysis of the Forest Rights Act (2006), existing statistics from online government websites and committee reports; data from existing NGO reports; evaluations; assessments; live information from an online website called Community Forest Rights Learning and Advocacy Process (CFR-LA); and proceedings of National Level Community Forest Rights consultations. These sources, together with the literature review helped further inform the data targeted in the interviews and focus groups and highlighted key issues for the research.

The primary sources comprised the collection of new data through field visits and interviews from a number of different sources and activists connected to forest rights and legislation in India during five months in a period of over two years. The major primary data was gathered with the help of NGO teams who have access to remote tribal communities; and from multiple case studies of tribal peoples in various forest community sites, identified in order to ensure different experiences of the use of Forest Rights legislation. Almost all the communities selected for data collection have been faced with displacement from their lands and were claiming land rights under the Forest Rights Act. There are more types of claims that are being made under the Forest Rights Act, which cover individual claims, and developmental claims and also claims under community forest rights (CFR)⁴⁰. I looked at both types of claims, but concentrate on the CFR, because most tribal communities historically use land communally. The Forest Rights Act does

over the land: Shedding Light on collective Ownership and Consent'Gilbert, 'Land Rights and Nomadic Peoples: Using International Law at the Local Level'

³⁹ Richard Wilkinson and Kate Pickett, *The Spirit Level: Why Greater Equality Makes Societies Stronger* (Bloomsbury Press 2011)

⁴⁰ Individual claims give ownership titles to individuals. Development claims are made by the state for purposes of welfare development such as building schools and roads. Community Forest Rights claims are when the community claims titles to communal lands.

recognise the commons and shared land, which is a break away from the individual private land holding titles introduced in India since colonial times.

I used multiple qualitative methods to develop a conceptual understanding, comprising field observation; open-ended unstructured and semi-structured in-depth interviews with groups of men and women from forest communities; group discussions with village councils (*Gram Sabha*); meetings interviewing key players and local leaders; and my researcher impressions and reactions. I also used visual, participatory research approaches (PRA), and group activities to record the understandings and perspectives of the case study groups, such as PRA⁴¹ tools for mapping with mobile indigenous peoples to derive data of the grazing corridors for their pastoral activities, how the Forest Rights Act was being used by them, and how it changed land use and dispossession. I had successfully tested these methods with indigenous peoples in my previous work, for example, as a consultant for the Refugee Studies Centre, University of Oxford.⁴² Since Adivasis primarily use land as a collective, focus groups were chosen as the most appropriate method of data collection for this particular land rights study. The power dynamics of communal non-homogeneity in forests maintain inequalities reinforced by legislated rights. I documented and analysed these nuanced inequalities through my field visits. The data has been examined for variables such as: Gender, exclusive rules, and power dynamics between community and local government.

I interviewed key civil society activists who are part of the Government of India review committee on FRA, and key NGO / civil society persons and academics who worked intensively on getting the Forest Rights Act passed by the Central Government.⁴³ It was vital that the methodology I had planned to use, not only provided evidence to evaluate the success of the FRA, but also helped me draw out the questions within the debates around access to justice, and around the political morality embodied both in the law and in its implementation.

⁴¹ PRA: Participatory Rural Appraisal tools

⁴² The PRA techniques are not necessarily appreciated by NGO staff, especially when some tools entail drawing and mapping. It could be perceived to be a patronizing method to communicate with populations who may be illiterate. In reality, though I have used this tool with mobile indigenous peoples to collect data for a capacity building exercise, I have also used it for other groups of professionals including civil society practitioners, staff from government ministries⁴², and multinational organisations such as the United Nations.

⁴³ Astha Sansthan, *Astha: A Field Based Resource Organization. Annual Report 2007-2008*) Quote from Astha's Annual Report 2007-2008: "The Resource Unit, working with the Campaign for Survival and Dignity (CSD) conducted a Sit-In ,in New Delhi, in November 2007, and during this period, many M.P.s, senior Political Party leaders and Ministers were contacted to make them aware of just how important it was to get the Rules framed so that the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act could be implemented."

I conducted three interviews with staff from the Ministry of Tribal Affairs (MoTA) in Rajasthan, and the Forest Department of the Ministries of Environment and Forests (MoEF) in the states of Maharashtra⁴⁴ and Rajasthan. I attended a local press conference on the Forest Rights Act in Udaipur which was organised by the local NGO Astha, where I met the lawyer who was addressing the Press, and who represented the Adivasis in the legal process of their land claims. The Press Conference on the Forest Rights Act held on November 2013 provided me with opportunities to network with more civil society practitioners involved in advocating for forest rights, such as meeting representatives from other NGOs who also worked for tribal land rights; and the leader of a cooperative who organised the tribal communities and their livelihoods.⁴⁵ I had two interviews with the lawyer in Udaipur who works with tribal land rights issues, at the beginning and at the end of my four month stay, which I used as a way of validation and replication of the information I had gathered from the four communities. In Bangalore, I had a meeting with Natural Justice,⁴⁶ who were engaged with research of their own on tribal land displacement issues in India. I met individually with NGO staff to talk about their work with the community, their perspectives on the land issues of the community, the strategies used, and their own involvement with the community. Part of the discussion was the legal aspects of land rights that they are involved in. These activities informed a developing evidence of the nature of land dispossession and reclaiming land rights.

I attended *Gram Sabha* (local village councils) meetings in three villages. The numbers for these meetings varied, and the meetings themselves were fluid I accompanied NGO staff to various village meetings, and was allowed to stay in the field for longer periods, once with the local family of one of the NGO staff members, and on another occasion at the training centre in a village, which I used as a base to visit more isolated tribal communities who resided deep in the forest. I always accompanied the NGO staff members who would be visiting these hamlets and villages as part of their land rights work. They in turn acted as interpreters as the language spoken was a dialect local to these indigenous peoples. In the villages, I attended several training sessions that NGOs organised on land rights and legislation, some groups numbered between thirty to forty participants and others up to one hundred people. I interviewed individual

⁴⁴ Pune has offices of the Forest Department where I obtained an interview with an official from the Forest Department who gave me his views on the difficulties encountered by his office in addressing the grazing needs of the pastoralist communities.

⁴⁵ These forest based livelihoods included the collection and sale of minor forest produce

⁴⁶ Natural Justice is an international NGO working with environmental law and facilitating the legal empowerment of Indigenous peoples and local communities. Adhering to the belief in the legal principle that people should be involved in decisions that affect them, Natural Justice assists communities to engage with legal frameworks to secure environmental and social justice. <http://natural-justice.blogspot.co.uk>

community members on the history of their land struggles, and attended meetings held by the NGOs with local community leaders to discuss forest land rights.

The field work evolved as a combination of participating in and observing national level public hearings on Community Forest Rights. I attended the proceedings of the National Level Consultation on Forest Rights Act and Protected Areas, August 2012 in New Delhi,⁴⁷ organised by Future of Conservation Network. The participants included community members of mobile indigenous peoples, NGO staff working with them, and activists, a few of whom I interviewed for my data collection. The New Delhi consultation created a forum for activists, conservationists and mobile indigenous peoples to discuss certain governance disparities that are being challenged. Among these were the policies of “conservation by exclusion” of mobile indigenous peoples - which excludes herders from forests; the fair implementation of the Forest Rights Act by the Forest Department (FD); the coordination between the FD and the Ministry of Tribal Affairs; a lack of “informed consent” relating to the rights of indigenous communities; and illegal relocation of tribal populations from the forests.

Through the CFR-LA group, I was invited to observe a Public Hearing on Community Forest Rights in New Delhi in 2013. This was attended by representatives of communities from almost all the states in India, who delivered testimonials on their experiences of land displacement and the forest rights legislation in front of a panel of judges comprising prominent activists and academics.

I had both telephone and in person interviews with significant activists such as Ashish Khotari and Meenal Tatpati from a national biodiversity organizations called Kalpavriksh;⁴⁸ and Madhu Sarin from the grassroots network called the Campaign for Survival and Dignity.⁴⁹ These activists had spearheaded the campaigns with forest peoples to enact the forest legislation, and Madhu Sarin had contributed to the drafting the legislation of Forest Rights Act. My field visits were organised with NGOs in each of the three states I visited in India. These included Marag,

⁴⁷ The National Level Consultation on **Forest Rights Act and Protected Areas** was organised by the Future of Conservation Network to share policy issues and the on-ground situation of Forest Rights Act implementation in Protected Areas. The objective was to enhance collective understanding of the issues and also explore possibilities of joint action. Participants were civil society organisations, researchers, and officials from states, the Ministries of Environment and Forest and of Tribal Affairs involved directly and indirectly in forest conservation and livelihoods issues in Protected Areas.

⁴⁸ Kalpavriksh is an NGO working on environmental and social issues and they hosted the Delhi legal consultation to which I was invited. The offices of Kalpavriksh are in Pune, India, where I was given an interview with Ashish Kothari, one of the founders of Kalpavriksh.

⁴⁹ With the support of these national activist groups, I joined an online group, campaign for forest rights in India, called CFR-LA (Community Forest Rights Learning and Advocacy Process). The contacts I made here were to become significant for identifying the location of my four-month case study in 2013

LPPS, and Anthra. I interviewed staff from each of these NGO working with mobile indigenous peoples. At Marag I interviewed Lalji Desai, Executive Director, and Neeta Pandya who held a meeting at their head office in Ahmedabad with other staff members to talk about their work with the Maldhari pastoralist community.

In Gujarat, I spent five days in the field, moving from village to village, where the local interpreter from the NGO had organised focus group meetings, and meetings with village leaders. My field work with the Raika community comprised interviews with LPPS's Hanwantji Rathod; in Latada village; two focus groups in Kumbalgarh Forest. Hanwant Singh Rathod, head of LPPS in Rajasthan met with me for two days. He accompanied me to interview Dayalibai, the female leader of the Raika community; and to attend another focus group with camel pastoralists from the Raika community; and also a shepherd community. They were from the villages of Latada and Sadri in Pali District of Rajasthan, and the Kumbalgarh forests which are nestled in the Aravalli Hill Range. I visited a large herd of camels which were resting in a large herd in the Kumbalgarh Forest, belonging to the Raika community. These two days gave me a lot of opportunity to discuss the issues faced by the Raika community with regard to land violations. At Anthra, in Pune, I interviewed Dr. Nitya Ghotke, founder and head of Anthra-Pune. I was allowed to accompany one of the Anthra veterinary doctors Gayatri Rajurkar; and Jitendra a community organizer on one of their field visits to the Deccan Plateau, where I could also interview the nomadic pastoralists.

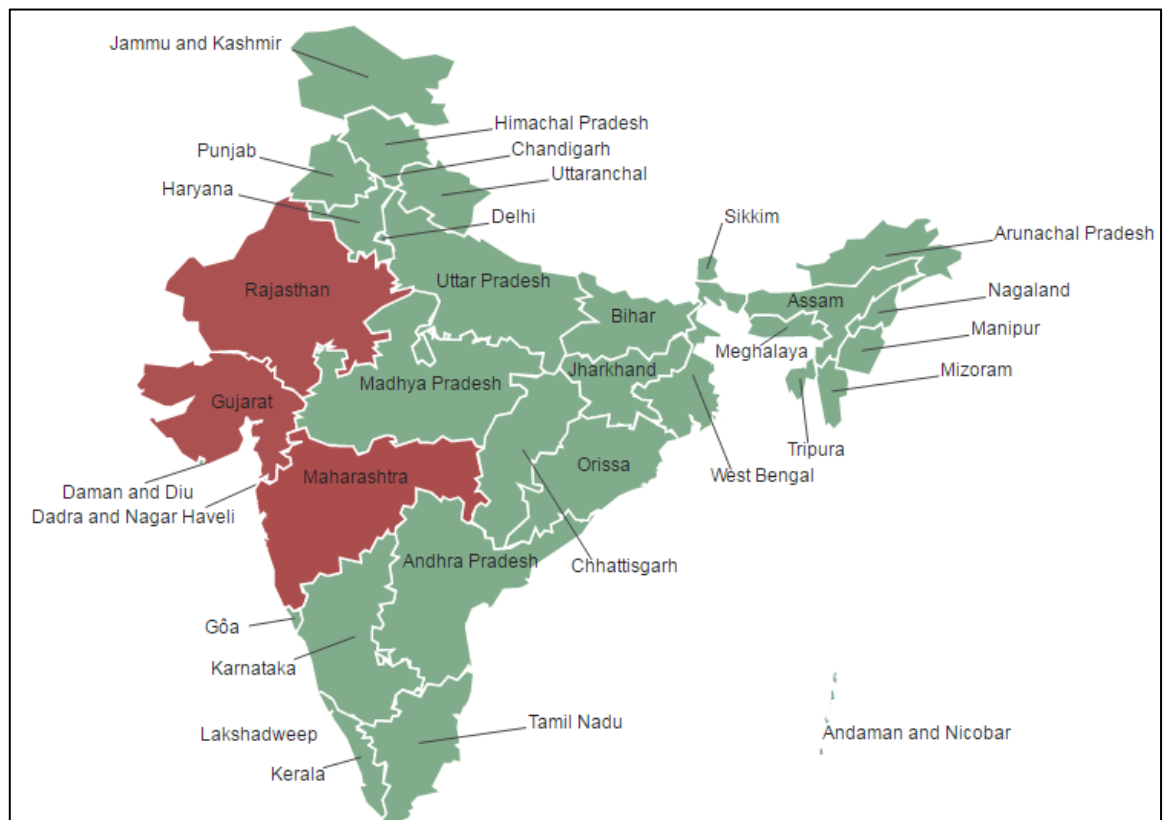
Gender-sensitive data is always more difficult to collect, since access to women necessitates their participation in all the groups, yet there is a chance that they might be dominated by men in the group. It necessitates meeting with women both separately and together with men, in order to get them to communicate aspects of their lives, which they might be reticent to doing if they were only with men in the group. To analyse the gender division of labour, for example, could be a delicate matter for women to discuss in the presence of men. I was however not very successful in meeting with women separately, partly because of their heavy workload, partly because of the language barrier, and mostly because I was dependent on the time schedules of NGO staff which was not necessarily conducive to separate meetings. I therefore met the women in mixed groups. The rigour of my methodology plan was based on the use of my conceptual framework and the empirical data collected in the field to test the research questions I had formulated. The secondary sources focussed mainly on India as a whole country, my primary data focussed on just three states. The secondary data pointed to the fact that at present, each state in India was behaving very differently from the other in how the Forest Rights Act was being implemented. In addition to this, different states had different population densities of Adivasis. Some north-eastern states were predominantly tribal in population, and some have almost no tribal populations, which

skews the national picture. The secondary data, allowing me to triangulate, fill in gaps, and corroborate my primary methodological findings, permitted a broader geographical picture than just the empirical evidence obtained from the three states of Rajasthan, Gujarat and Maharashtra. Studying primarily three states however, created the opportunity for a more in-depth assessment of the impact and consequences of new legislation on a particular community.

1.5.3 Sampling

Using a multiple case study method, I tested the conceptual framework empirically in three states in India through in-depth interviews with stakeholders and field observations. The four indicators that I used for choosing an appropriate community to study, included whether the communities were forest dwellers or dependent on the forests for their livelihoods, namely hunting and gathering minor forest produce; whether they were dealing with issues of land dispossession; whether they used the Forest Rights Act to make claims; and whether they were in contact with an NGO whom I could collaborate with in order to gain access to the communities.

Figure 1: Selected Research States



The three states selected during 2012 to 2014, were Gujarat, Rajasthan and Maharashtra, which fulfilled the criteria above.⁵⁰ The selection was dependent on NGO contacts, which allowed me data collection access to the communities I studied. In 2012 I stayed with and interviewed mobile indigenous populations in all the three states over the course of four weeks. This included the Maldhari community of pastoralists in Mera District, Gujarat;⁵¹ the Dhangar mobile indigenous communities who undertake an annual 300 km migration from Dahanu in the coastal Konkan to the Deccan Plateau in Maharashtra; and the Raika camel herders in the Rajsamand District of the Kumbhalgarh forests in western India's Rajasthan. Later, in 2013-2014, I spent four months in the Aravalli Hill range of Udaipur district in Rajasthan with Adivasi forest peoples, who were engaged in land right struggles. The total population of Rajasthan according to the 2011 Census was 68,548,437.⁵² Rajasthan is geographically the largest state in India, and Tribal groups (called Scheduled Tribes – ST) constitute 12.6 percent of the state population. The tribal population⁵³ in the whole country is 5.5 percent.⁵⁴ The biodiversity rich forests in Rajasthan's Aravalli Hill Range are part of the state of Rajasthan's extensive 34.14%, forest cover.⁵⁵ The state of Rajasthan contains four wildlife sanctuaries, one of which is the Phulwari ki Nal Wildlife Sanctuary in the Mewar region.⁵⁶ This region, home to the Adivasi tribes of Bhil, Garasia, Damor, and Kathodia,⁵⁷ was a focus of my field work, and where the Amba community resides, whose case study is described in Chapter Six.

The communities I studied were economically, socially and politically marginalized and most were in conflict with corporate and government interests over dispossession of their lands. Some of these communities are isolated. Others are part of regional, national and international networks, and have their own websites, and in collaboration with other NGOs and with the Indian government, are publicly advocating for their rights in a sophisticated manner.

⁵⁰ Field visit dates: July 19 to August 31st 2014 and November 19, 2013 to March 14th 2014

⁵¹ "Maldhari" is a generic name of the pastoralist clan in several states in India.

⁵² <http://www.census2011.co.in/census/state/rajasthan.html>

⁵³ J Ramin, *For Forest Land and A Way of Life: The Story of the Adivasis' Struggle in Southern Rajasthan* (Asta Sansthan 2007) 15

⁵⁴ The official statistics for tribal populations in India do not draw a conclusive picture, because the official term 'scheduled tribes' (ST) does not accurately include all the bona fide scheduled tribes of India. Some of them have not been included in the census, and some groups who are described as ST are not necessarily ST.

⁵⁵ The state of Rajasthan's forest cover comprises 34.14%, which is 3,090 sq. km. of the 13,419-sq. km. of the geographical area of the state. In comparison, India's forests cover 23% of the geographical area of the country, which includes reserved areas called National Parks and Wildlife Sanctuaries

<http://rajforest.nic.in/udaipur.html#ss>; <http://egreenwatch.nic.in/>

⁵⁶ Phulwari ki Nal Wildlife Sanctuary comprises 492.68 sq. km.

⁵⁷ S S Katewa and others, 'Traditional uses of plant biodiversity from Aravalli hills of Rajasthan' (2002) 2 Indian Journal of Traditional Knowledge

The research participants were identified through networking with pre-existing contacts from former work in the field, and from capacity building consultancies that I had delivered over the years, where I had met indigenous people.⁵⁸ One community leader who had attended my workshop in Jordan in 2012 introduced me further to the community in Gujarat. Similarly, the staff of the NGOs working with the communities in Pune and Rajasthan introduced me to the respective communities with whom they worked. Since some of these communities, especially the forest peoples were often in interior villages, which were not easily accessible, and because my only access and contact with them was through the NGOs working with them, I was dependent on when the staff visited the field in order to accompany them. The staff and the leaders whom I knew acted as interpreters in most cases, as I was not completely fluent in any of the 3 dialects. The local language of the Udaipur District is the Mewari dialect. Working with an interpreter who was familiar or even part of the community was a big advantage, since the imposition of cultural differences and assumptions were minimized. One aspect however, is that an interpreter who is very experienced, may have strong ideas of methodological approaches that may or may not have complemented my own ideas. A local interpreter could have assumptions of what they thought the community thinks, which could introduce a bias while communicating with the community. This aspect was highlighted during the preliminary field work in 2012, when one interpreter in Gujarat proceeded to assume that the Rich Pictures tool⁵⁹ that I wanted to use was the same as a mapping exercise. I quickly learned that it is important not to assume that the interpreter is ideologically on-board with any 'egalitarian' attempts during interactions with the communities. It was also important to ensure that the interpreter did not patronize the community when trying to collect evidence. I only interviewed adults from the indigenous communities, since the research concerns land rights. I interviewed groups of both men and women from the communities. I focussed on the communities as groups and not as individuals, though I also had a few individual meetings with various people from the community. And I spent a substantial amount of the field work time with practitioners from the NGOs who work with the communities.

1.5.4 Reflections of Field Case Study

For 2013, I had plans for a more extensive study of a pastoralist community's struggle for land rights in a Himalayan state in Sonbadhra District, which was to serve as the main case study for my research. This plan, however, had to be modified when major floods hit the state of Uttar

⁵⁸ The Refugee Studies Centre, Oxford University, had engaged me as consultant to deliver two workshops for mobile indigenous peoples in New York in 2006, and in Jordan in 2012.

⁵⁹ Rich Pictures are a Participatory Rural Appraisal tool in which participants will use drawings and pictures to depict and analyse any given political or social experience.

Pradesh in June 2013; making it impossible for me to access the nomadic community I was to research. Identifying a new community to study, and an NGO working with them who would allow me access to remote forest communities had to take place within a very tight timeframe.

I identified an alternative data collection site with the help of the CFR-LA contacts made in Delhi, and previous NGO contacts established in the 1980s when I worked in India in community development, all of whom responded with a remarkable generosity and willingness to help, for which I remain very grateful. I was invited to research a community which met the criteria listed above, who were resident in the forests of the Aravalli Hill Range of southern Rajasthan in Udaipur District. The criteria they met included that they resided in the forests, they faced land dispossession threats, and they were using the Forest Rights Act legislation. The invitation from the NGO called Astha Sansthan came from one of its founding members, Dr. Ginny Shrivastava, with whom I had worked as an intern during my graduate training at the Masters level in the early 1980s.

The advantages of the new fieldwork environment for me was that I had worked here previously three decades ago with one of the three NGOs in Rajasthan and was familiar with the environment and with the community. Another benefit was that my exposure in Rajasthan was broader than working with just one NGO and one community, which I might not have had, when working with just one nomadic community as had been earlier planned. The first issue of switching my fieldwork to this new environment was that I had to modify my research question, which had been framed around studying specifically mobile indigenous peoples. The indigenous peoples in the Aravalli forest community are not nomadic, and their issues differ slightly from mobile indigenous issues. The nomadic community I was initially studying were transhumant pastoralists, who needed usufruct rights. The difference in communities necessitated adjusting the research question to suit the more settled tribal communities of the Aravalli Forests who had different needs from communities needing usufruct rights. Another change was that I was dependent on being able to shadow NGO staff when they contacted the communities, which restricted the time and frequency of my community contact. I was also dependent on NGO field staff to interpret for me, since the tribal peoples spoke a local dialect. This lack of independence dictated the limits of my data collection.

1.5.5 Change in Methodological Approach and Research Design

As a result of the change in the location of my field study, I was obliged to modify my methodological approach from a single community case study to a broader field experience encompassing four communities. I accessed these communities with the support of three local

NGOs in Udaipur who were also extremely generous with their time, and in their willingness to share their field experiences and to invite me to observe and participate in their work. One of them, Astha Sansthan, a local NGO in Udaipur, which was my main contact, was founded in 1988 to support land rights struggles in local Adivasi communities. Astha was committed to social change and social development with communities in Udaipur, and used rights based and activist strategies. They did not have welfare or service oriented programs in the field where they work in the Southern districts of Rajasthan, but their method of work with the tribal communities was to support people's organisations in their struggle for land, using the Forest Rights Act. Astha was very focussed on women's issues and their rights.⁶⁰ They worked in the "field of adult education, rural development, organizing women's group, drought management and agriculture development." Astha had been working on land issues, rights to forest lands, forest livelihoods, and land displacement issues for almost two decades when I met them.⁶¹ They worked with tribal populations to help implement the FRA, and they helped launch the Jungal Jameen Jan Andolan (Forest Land People's Movement), which focussed on the rules and regulations of implementation of the FRA. Bhanwar Singh Chadana, one of Astha's staff members, "was one of the key NGO / civil society persons who worked intensively for about 5 years on getting the Forest Rights Act passed by the Central Government."⁶² Rajasthan has been one of the worst states for processing legal claims⁶³, which increases the significance of the data I was collecting from the perspective of the legal campaign for forest rights in India.

Seva Mandir, the second NGO had been in the field of development since 1966 and worked with 700 villages of southern Rajasthan.⁶⁴ Seva Mandir worked with poverty issues, and was committed to development and sustainability of the rural, mostly tribal communities. They used a more traditional welfare and service delivery approach, running programs on governance, health, education, sustainable use of natural resources, women's empowerment, youth development, child care and social enterprise.⁶⁵ In addition to interviews at Seva Mandir in Udaipur city, I accompanied the staff of Seva Mandir who worked with forest rights to the field for a two-day visit, over-night in the rural surrounds of the Aravalli Hills. The meetings were with community leaders representing different forest villages, to discuss the status of their forest rights claims. The

⁶⁰ In 2015, a founding member and former Director of the organization, Dr. G. Shrivastava, was awarded one of the six Stree Shakti Puraskar: Rani Rudramma Devi Awards. This is a Presidential honour granted to six women in India on International Women's Day for their distinguished services towards the empowerment of women in India.

⁶¹ Astha Sansthan, *Astha: A Field Based Resource Organization. Annual Report (AS 2007-2008)* d 3

⁶² Excerpt taken from email from G. Shrivastava, founder of Astha

⁶³ Request from Ashish Khotari (leading environmental activist both in India international fora) in email to me dated 25 August, 2012: "It would also be good to get occasional reports from you on how far the claims have progressed. From what we gather Rajasthan has been one of the worst states in processing claims."

⁶⁴ Information from Seva Mandir interviews and meetings.

⁶⁵ Information from Seva Mandir interviews and meetings.

meetings on the second day was with the Panchayat leader and women representatives from that village council. In Udaipur, Seva Mandir invited me to observe a training program they held on the Forest Rights Act for about forty representatives from the villages, who came into the city of Udaipur for the training. The NGO also invited me to attend a meeting of about twenty civil society stakeholders to discuss Community Forest Rights under the Forest Rights Act in Udaipur, Rajasthan.

The third NGO, was called Society for Promotion of Wasteland Development (SPWD). They had worked with ecological systems, water management, and the reclamation of degraded lands in relation to livelihoods of local communities since the early 1980s. 'Wastelands' are part of the grazing corridors of mobile indigenous peoples in Rajasthan, particularly the camel herders who are nomadic pastoralists, and are therefore significant to their livelihoods. The NGO involvement thus included working with the Forest Rights Act and how it affected the local communities' involvement with conservation and the ecological balance with a focus on their livelihoods. SPWD worked through research and partnerships linking communities with government funding and other schemes related to ecological systems and their relationships with livelihoods.

1.5.6 Ethical Issues

In September 2012, the Economics, Law, Management, Politics and Sociology Ethics Committee (ELMPS) of the University of York approved my submission for Ethical approval for my data collection in the field in India. The procedure and information required was extensive, and I have included some of this below to clarify the ethical issues that were managed during my data collection in the field.

The communities I was working with were economically, socially and politically marginalized. Corporate and government interests were in conflict with those of indigenous peoples in some cases. Some of these communities were isolated and others not. The ones which were not were part of regional, national and international networks, and had their own websites, and in collaboration with other NGOs and with the Indian government, were publicly advocating for their rights in a sophisticated manner. These communities have been publicly advocating for their land rights for a long time. The leader of the Gujarat community for example as Secretary General of the World Alliance of Mobile Indigenous Peoples (WAMIP), and had therefore already exposed the group to national and international awareness. He lobbied with the local and regional governments of Gujarat to stop land grabbing, and they were educated and sophisticated in their advocacy campaigns. I have had previous experience in working with mobile indigenous people. In 2006, I facilitated a capacity building workshop at the UN in New York for mobile indigenous peoples, and again in Jordan at the Dana+10 meeting for mobile indigenous peoples. I

had been personally invited to visit these communities by either their leaders, or by the NGO staff working with them because of the pre-existing relationships I had with them from my previous consultancies in international development. These groups were very welcoming, since my presence and/or any potential future publications was seen to be enhancing their cause. I got their informed consent for me to visit their communities for research purposes.

My presence as an outsider/researcher could potentially harm community cohesion, because I could have been introducing ideas which could challenge existing power structures or advocacy strategies. Risk mitigation: I am Indian and familiar with Indian culture. I am a trained social worker and have worked in community development for several years in rural India. I have also carried out community public health research in India for DfiD, and I believe that I have the degree of cultural sensitivity necessary to minimize the risks, and this risk was unlikely to become a reality. The possibility of potential economic harm to the community occurring because of my presence was remote. Potential political harm could have arisen from possible unintended interference with the communities' advocacy strategies, which could have been influenced by my writing about their land issues, and could have increased their vulnerability. This could possibly have made them more vulnerable to attacks from political opponents or remove their anonymity, but was unlikely to happen, and did not occur while I was in the field.

I was travelling to various communities in India, which held a potential risk such as being subjected to criminal activities including assault and robbery, and of physical harm to me as a researcher. In order to mitigate the risks: I received permission from NGO staff involved before I collected any data; and I was accompanied by NGO staff and leaders of the community at all times and attended meetings during the daytime. In order to minimize loss, I did not have anything valuable such as laptops. It also helped that I am a native Indian, having lived in the country until I was a young adult, and have returned almost annually since. I was therefore entirely familiar with the cultural norms and with any health risks (e.g. malaria) which may be present.

1.5.7 The Potential Benefits to Participants

Contributing to raising awareness of land rights violations, and exploring with them their own use of legal mechanisms for their advocacy strategies could be part of the potential benefits to community participants. Another possible element of potential benefit could be capacity building on the lines of the capacity building workshop and the legal capacity building workshops that I delivered in at the UN in New York in 2006, and in Jordan at the Dana+10 meeting in 2012.

Networking is usually reinforced as, for example, I was asked by one of the NGOs in Pune, for contacts to market a new pastoral Alliance - a loose network of groups in India who were making a submission at the (Convention on Biological Diversity) CBD in Hyderabad in October of 2013. I connected them with the Refugee Studies Centre in Oxford, and gave them details for International Union of Conservation of Nature (IUCN).

1.5.8 Scientific Justification for the Research

My research investigates and publicises effective legal strategies and advocacy which may be replicated elsewhere and could contribute to the land rights campaign of indigenous peoples. Indigenous peoples have been advocating for their land rights, and are using many advocacy strategies, which at times include legal mechanisms to retain their lands. In addition to the 1948 Universal Declaration of Human Rights, there have been recent international laws applicable to the land rights for indigenous populations, such as the Dana Declaration of 2002, and the UN Declaration on Indigenous Populations (2007).

This is an area of importance because being dispossessed of their lands has marginalised indigenous peoples and created discrimination against them which is a violation of human rights. Control of their lands is of fundamental important for retention of their way of life and self-determination. My study, in looking at new legal human rights standards in shaping advocacy and strategies for marginalised groups, contributes to efforts towards sustainable development and social justice for a specific group of people, which is important to protect indigenous peoples and their livelihoods and to enhance their land rights campaigns. My research looks at the role of international law, and how international bodies respond to the problems of land displacement, to the ensuing impoverishment, and how governments comply. This makes it an area of importance, because the research could inform government decision makers and policy; contribute an element of accountability; and be instrumental in empowering disempowered communities.

1.6 Outline of Dissertation

Chapter Two critically examines the literature on the Access to Justice debate, which comprises a major theme of this study. The debate analyses the foundations of human rights laws and their impact on rights of indigenous communities, which reveals the premise that these laws, though very welcome, and very important, are still imperfect; that they may contain an inherent bias; and they do not necessarily have the mechanisms required for effective implementation. This actuates the question of whether international legal instruments perpetuate historical bias. Reflecting upon the tension between development, progress, and protecting the rights of individuals and

communities, the debate also exposes ethical issues of development induced displacement of indigenous peoples from their lands, by analysing the access of justice for indigenous peoples.

Salient features supporting the whole dissertation have been expanded in Chapter Three which expands the normative framework of land rights legislation both at the international and the national levels. The Forest Rights Act is analysed in detail in this chapter, which underpins the legal analysis of the empirical data within Chapters Four, Five and Six. International legal norms influence national agendas, but cannot dictate the manner of implementation. I challenge in this chapter, the extent to which national administrative justice⁶⁶ can provide the means for marginalised communities to access justice for land rights.

Administrative injustice, is defined as “when the government, or those working on its behalf, act in ways that appear wrong, unfair or unjust, [and do not ensure] that public bodies and those who exercise public functions make the right decisions [and that] mechanisms for providing redress when things go wrong”⁶⁷ are not accessible for citizens, consumers, individuals or groups. I illustrate my critical analysis of the access to and the use of laws in the next three chapters starting with Chapter Four, which contains an account of three empirical case studies in Gujarat, Maharashtra and Rajasthan, undertaken in 2012 in India which provided a focus for the main data collection on mobile indigenous peoples. This chapter offers an insight on how differently legislation is used to access land rights by different communities, and how the usufruct needs of nomadic peoples needs to be specific addressed by law.

Chapter Five opens with a detailed description of the Adivasi tribal peoples who are indigenous to India. This data collection was carried out in 2013 in Rajasthan’s Aravalli Hill range which is tribal country. I use a case study from a village in which women have used the Forest Rights Act to claim their rights and have experienced an empowering awakening. I have used this representation to trigger a discussion of the gender dynamic in indigenous land rights struggles, and the changes to women’s power wrought by the introduction of substantive rights through legislation. Chapter Five uses the evidence gathered during the fieldwork outlined in Chapter Four as a basis for an analysis in relation to the research questions, and to develop the discourse based on the debate of Access to Justice.

⁶⁶ United Kingdom Administrative Justice Institute, *What is administrative justice? AA discussion paper* (Nuffield Foundation Series 2015) (This definition has been referenced initially in the Abstract)

⁶⁷ *ibid*

Chapter Six recounts two case studies, one of the village of Amba which was facing an imminent threat of land dispossession. The other case study describes a strategic campaign for land based labour rights, which has a successful ending. Preceding the Forest Rights Act and legal backing, this case study engenders an important discussion of land rights struggles using political action. The reality of this case is that it was used as a strong rationale to push the need for legislation onto the national stage in India. In Chapter Seven I conclude by considering national land legislation, namely the Forest Rights Act (2006) of India and its implementation, I challenge whether this provides a powerful tool for indigenous peoples to manage their own forests, and to advocate for their rights,⁶⁸ or whether it in reality increases their vulnerability?⁶⁹ I revisit my research question examining whether legal mechanisms governing land rights in India make it more difficult for indigenous people to get the resources they need to improve their lives. Furthermore, it asks if these legal mechanisms have made them more vulnerable to displacement, or whether new legislation has helped indigenous peoples in their struggle to reclaim their ancestral lands. I draw conclusions by triangulating these research questions, the data evidence, and the contemporary discourse on Access to Justice.

⁶⁸ Indrani Sigamany, 'Destroying a Way of Life: Indigenous Peoples, The Forest Rights Act of India and Land Displacement of Indigenous Peoples' in I. Satiroglu and Choi N (eds), *Development-induced Displacement and Resettlement: New Perspectives on persisting problems* (Routledge 2015) 1

⁶⁹ Campaign for Survival and Dignity, *What is the Forest Rights Act about?* Campaign for Dignity and Survival, State of Implementation of the Forest Rights Act - Summary Report (CDS 2013)

Chapter Two: 'Access to Justice': An Analytical Review of Literature

2.1. Introduction

The debate on 'access to justice' is reviewed in this chapter. The specific context reviewed here is how justice is accessed by communities marginalised by dispossession of their lands. The key research questions that frame the debate in this chapter are:

- 1) How does legislation strengthen indigenous peoples' ability to claim legal rights?
- 2) Does the law provide marginalised groups an effective instrument to access justice for land rights?

These questions relate closely to aspects of this research study that examine the relationship between rights, access to justice, social exclusion and land dispossession.⁷⁰ The significance for this study, is the interrelationship between access to justice, inequity, and poverty, within the context of marginalised indigenous communities who are often dispossessed of their lands

This chapter reveals a polarisation on access to justice within the literature. There are several threads to the debate around access to justice reflected in different sections of this chapter. Each section delineates a specific aspect and outlines how the scholarship develops the access to justice debate. The chapter is structured as follows: Section Two comprises a discussion of how access to justice is defined and how it is used for the purpose of this study. Section Three, explores the evolution and inequality of land laws, and how, driven by the expropriation of land, land laws evolved in ways that produce and maintain inequality. Section Four discusses how this inequality, reinforced by historical bias, continues to be supported in the formulation of land laws, impacting contemporary access to justice especially for certain groups of people on the periphery of societies. In Section Five, on the role of the state and the economics of survival, I challenge the assumed protective role of the state in the fair distribution of justice to marginalized communities. Referring to international legislation such as the ILO Convention on Indigenous and Tribal Peoples 1989, and United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), I discuss the dichotomy in the realisation of these rights inside nation states which are responsible for implementing international human rights norms, within their juridical systems, and who may or may not have ratified or supported the international treaties. In section Six, on neoliberal economics, I illustrate the emerging clash of ideologies between the concept of neoliberal and the rights based approaches to development. Section Seven, examines the

⁷⁰ Michael Anderson, R, 'Access to justice and legal process: making legal institutions responsive to poor people in LDCs' (2003) 178 IDS Working Paper 178 iii

procedural access to justice and the contradictions inherent within this debate. It calls attention to how socioeconomic rights are judicially enforced. The tensions apparent in the systemic disjunction of justice and fairness being implemented for disadvantaged groups by judiciaries which are staffed by ‘elite’ distanced from the poverty experienced by their clientele; and the difference between promise and performance in accessing justice. Gaps to accessing justice, legal literacy, poverty, public interest litigation and legal accountability are all issues that are part of the discussion in this section. The conclusion ties up the various components entailed in access to justice, and how the commitment of governance to inclusivity and fairness is indispensable to legal rights.

2.2. Access to Justice

Access to justice is influenced by various socio-economic, administrative and political factors. Access to justice is defined by the United Nations Development Program (UNDP) as “much more than improving an individual’s access to courts, or guaranteeing legal representation. It must be defined in terms of ensuring that legal and judicial outcomes are just and equitable.”⁷¹ Justice is a moral concept and a legal one and is related to fairness and what is due. Legally, it is relational to institutions which are obligated to dispense justice for the smooth running of society. Legally justice concerns corrective justice and distributive justice. The former deals with the penal corrective systems. The latter deals with the allocation of resources, and the negotiation of rights and obligations, both of which are socially oriented. The notion of ‘fair’ distribution, relates to relationships, wealth, privileges and opportunities in this study, between mainstream and minority communities. The moral aspect of justice underpins the law, but is not synonymous with the law. The law can be framed in an unjust manner, benefitting some groups at the expense of others. The ability to access justice becomes dependent on how equal a society is.⁷² Social justice is the context of my review of access to justice. Access to justice signifies that citizens are able to use legal institutions to obtain solutions to their common justice problems. A politically neutral perspective would regard access to justice as a process that is part of the justice system, which in principle provides all citizens an equal means to use the legal system in order to claim their rights. The contrasting position takes a more politicised stand, recognising that true access to justice is dependent on equality.

The concept of justice is enshrined in national constitutions, and is part of international protocols. Some international protocols are legally binding and others offer guidelines for countries and

⁷¹ UNDP, *Access to Justice Practice Note* (2004) UN

⁷² C Calhoun, *Dictionary of the Social Sciences* (OUP 2002)

regions on political, social and economic justice and equality. Access to justice can be seen as the ability to use legal instruments in order to ensure that legal rights are recognised and awarded, and “the means by which rights are made effective.”⁷³ The existence of a law for example, which grants rights to land, can lead to the assumption that justice will now be fulfilled. The concept of law and justice is inextricably linked therefore to rights, working on the assumption that human rights,⁷⁴ or other rights, such as land rights are conceded by legislation. If rights to land are enacted by law, in order to claim these rights an individual or community needs access to justice. Rights themselves, enshrined within the law, are distinguished between substantive rights and procedural rights. Legislation, especially ones that are rights-based, incorporates substantive rights. For example, land rights incorporate the right to hold the land, to live on it, and to conserve and manage it, which are substantive rights. Procedural rights outline the rules and regulations that allow an individual or a group to be supported by the judiciary. The framing of these rules as legislation, the courts, the lawyers, the government bodies and civil society organisations who assist people to claim their rights are all part of the procedural process. These institutions within the legal system have to be effective and functional in order to provide solutions, which are fair for citizens seeking justice and in order for access to justice to be realised.⁷⁵ The problems arise when these expectations are thwarted by dysfunction and justice becomes inaccessible.

John Rawls, in his *A Theory of Justice*, defines justice as the “first virtue of social institutions, as truth is of systems of thought...each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many. Therefore, in a just society, the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests.”⁷⁶ Rawls focuses on the social contract, and he writes that his theory of social justice, is an attempt to carry “to a higher level of abstraction” the social contract that Locke, Rousseau and Kant refer to.⁷⁷ He qualifies that his ‘justice as fairness’ theory cannot encompass all moral relationships: “Justice as fairness is not a complete contract theory. For it is clear that the contractarian idea can be extended to the choice of more or less an entire ethical system, that is, to a system including

⁷³ Mauro Cappelletti and Bryant Garth, ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’ [1977] BLR183 185

⁷⁴ Rights provide a minimal level of protection for the individual or group against others and the state. The beneficiary of rights could be individuals or groups, such as children, women, and minorities.” Rule of Law Initiative American Bar Association, *Access to Justice Assessment Tool* (American Bar Association, Rule of Law Initiative, 2012) 5

⁷⁵ Ibid 1

⁷⁶ John Rawls, *A Theory of Justice* (Oxford University Press 1999) 9

⁷⁷ Ibid 13

principles for all the virtues and not only for justice.”⁷⁸ Thus, Rawl’s notion of justice includes fairness, a social contract, and trust that the institutional structures of society will work according to a moral framework. This does not however take into account that in any given society, the communities with less control over wealth and resources have less political power, and therefore have less access to justice when governments and powerful corporate industries claim lands and resources belonging to marginalised communities such as indigenous peoples. Examining the theory of justice in his book *The Idea of Justice*, Amartya Sen stresses that the quest for justice has more to do with eradicating injustice than creating a perfectly just world. He discusses the need for impartiality, rationality and reasonableness without “vested interests” or “local preconceptions and prejudices.”⁷⁹ Identifying redressable injustice therefore is the key argument in his critical examination of justice and injustice, which he labels as ethical and political concepts.⁸⁰

Galanter and Cappelletti map a chronology of the origins of the concept of ‘Access to Justice’, and calculate that, in its current form, it dates back to before the 1970s. Prior to that, it connoted “the goal and benefit of legal aid, or of the means to equality before the law.”⁸¹ After the 1970s, the meaning evolved to include “the ability to avail oneself of the various institutions, governmental and non-governmental, judicial and non-judicial, in which a claimant might pursue justice.”⁸² Galanter cites the US as an example of the evolution of the concept of Access to Justice, where public interest law firms were a result of this development.⁸³ Cappelletti cites numerous examples and different forms of providing legal aid, from Germany and England starting in 1919 and 1949 respectively.⁸⁴ These legal aid improvements in the Western world however caused a

⁷⁸ Ibid 15

⁷⁹ Amartya Sen, *The Idea of Justice* (Penguin 2010) viii

⁸⁰ John Rawls, *A Theory of Justice* (Oxford University Press 1999) 9

⁸¹ Marc Galanter, ‘Access to Justice in A World of Expanding Social Capability’ (2010) FULJ 115; Mauro Cappelletti and Bryant Garth, ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’ [1977] BLR183 197

⁸² “This vision of justice in many modalities and diverse institutional settings crystallized with the flourishing of the Florence Access to Justice Project. This project was sponsored by the Ford Foundation, the Italian Research Council (“CNR”), and the Italian Ministry of Education, under the direction of Mauro Cappelletti, a scholar of vast imagination and entrepreneurial energy. The work of the Florence project is embodied in the massive multi-volume series *Access to Justice*, published in 1978 and 1979 and in a small library of satellite volumes and law review articles.” Marc Galanter, ‘Access to Justice in a World of Expanding Social Capability’ (2010) 115

⁸³ For example, Thomas Ehrlich, President of the Legal Services Corporation, testified: “New dispute settlement mechanisms are needed that assure wide access to justice for all citizens ... Ombudspeople, arbitrators, mediators, and conciliators, all those and others can be effective means of dispute settlement in a range of cases-both complex and simple... The major theme is access to the federal courts for the poor, but some witnesses refer to the broader themes that animate the access to justice movement.” Marc Galanter, ‘Access to Justice in A World of Expanding Social Capability’ (2010) 116

⁸⁴ “In 1919-1923 Germany began a system of state compensation for private attorneys providing legal aid; the aid was given as a matter of right to all eligible persons. In England, the major reform began with the 1949 statute creating the Legal Aid and Advice Scheme and entrusting it to the Law Society, the national

contradiction between new expectations and responsibilities and tired legal aid systems which needed updating to keep the pace with the ideological advances, which caused problems.⁸⁵ Starting around 1965-1970, a 'second wave' of major national reform in access to justice, was characterised by 'public law' litigation, which responds to both individuals and to groups. Rights of individuals and groups, became more prominent, with the evolving practice of being served 'notice,' and having a 'right to be heard.'⁸⁶

In discussing the substance of the concept of access to justice, I have tried to situate it within the context of marginalised communities such as indigenous peoples who are striving for land rights, and enquire whether the law provides the necessary instruments to claim these rights and to access justice. In the following sections, further developing the theme, I link the historical development of law with the prevailing inequalities of land rights. The debates around justice and how it links not only to citizens being able to access the courts and legal representation, but also whether this representation is just and equitable. If, as Rawls suggests, that "each person

association of solicitors...Reform began in 1965 in the United States with the Legal Services Program of the Office of Economic Opportunity (OEO), 40 and continued throughout the world in the early 1970's. In January 1972, France replaced its nineteenth century legal aid scheme, based on gratuitous service rendered by the bar, with a modern "securite sociale" approach in which the cost of compensation is borne by the state. In May 1972, Sweden's innovative new program was enacted into law. Two months later the English Legal Advice and Assistance Act greatly expanded -the reach of the system set up in 1949, especially in the area of legal advice, 49 and the Canadian Province of Quebec established its first government-financed legal aid program. In October 1972, the Federal Republic of Germany improved its system by increasing the compensation paid to private lawyers for legal services to the poor. And in July 1974, the long-awaited Legal Services Corporation-an effort to preserve and extend the gains of the by-now-disbanded OEO program-was established in the United States. Also during this period both Austria and the Netherlands revised -their legal aid programs to compensate private attorneys more adequately; several major reforms were enacted in Australia; and Italy came close to changing its own anachronistic system, which was similar to the pre-1972 French scheme. Mauro Cappelletti and Bryant Garth,' Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' [1977] BLR183 199

⁸⁵ Mauro Cappelletti and Bryant Garth,' Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' [1977] BLR183 77

⁸⁶ Another reform of this period was the revolutionary concept of private individuals or groups being able to challenge the government. For example, the USA's environmental protection movement, in which private advocacy forced the Clean Air Act of 1970. The Italian law of 1967 enforced a mechanism used by private individuals to curtail corruption at the municipal level against the granting of illegal granting. And in German Bavaria, citizens could bring action to the Bavarian Constitutional Court disputing land violations under the constitutional Bill of Rights of 1946. Public interest law and lawyers became more mainstream. In the USA in 1973, the Office of Public Counsel, part of the Regional Rail Reorganization Act of 1973, supported the public to have their grievances heard. "This governmental office has organised communities to recognise and assert their legal rights; its task has been to seek, help, mobilize, and at times subsidize private groups which otherwise would be at best weak advocates for the interests of rail users. This public counsel reportedly has been quite effective because of the independent status of the office, an adequate budget, and a sensitive and well-trained staff." In Germany, the "*Stuttgarter Modell*" of German civil procedure "involves the parties, lawyers, and judges in an active, oral dialogue about the facts and the law; it not only accelerates the proceedings, but also tends to result in the decisions that parties will understand and most frequently accept without appeal." Japan is cited as an example of successful use of conciliation, in which lay members and a judge comprise conciliation boards, which hear and recommend fair solutions. Mauro Cappelletti and Bryant Garth,' Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' [1977] BLR183

possesses an inviolability founded on justice that even the welfare of society as a whole cannot override,” it would seem that the expectation of justice for each person is non-negotiable, even if it clashes with the welfare of the whole. Sen calls for refraining from vested interests and local prejudices. Given that the institutions that disburse justice are powerful, and given that historically, rights to land have been revoked from certain communities, it raises the question of how robust and attainable are these rights.

2.3. The Inequality of Land Laws

Laws have been used to regulate social living within communities from the beginning of history, and range from local, customary laws to national, regional and international laws. They unintentionally reflect the biases of the political thinking of their time. Property laws have discriminated against women for instance, and legal theories on land titles, such as *terra nullius*,⁸⁷ have reflected racial attitudes towards indigenous communities. The concept of *terra nullius* or ‘empty lands’ was used by European immigrants and colonials to expropriate indigenous lands in the past. The Europeans treated indigenous peoples occupying their ancestral lands as if they had no rights to the lands and as if the lands belonged to no one.⁸⁸ *Terra nullius* is a principle that indigenous peoples are still fighting against in an effort to reclaim lost ancestral lands. Laws can contradict each other within nations and between nations, where state laws can differ from national laws, and national laws can contradict international laws.⁸⁹ This makes the indigenous struggle to negotiate the legal systems even more complex, and therefore makes the laws less effective.

One of the themes surfacing from this critical analysis of justice surrounds two aspects, mainly the principles and semantics of the law while it is being formulated, and compliance by government organs once it has been enacted. The principles of justice underpinning a new piece of legislation is of particular significance when dealing with the rights of populations facing exclusion and marginalisation, such as for example women’s rights or indigenous rights. Normative human rights instruments, whether international or national, have contributed positively to alleviating the marginalisation of peripheral groups.⁹⁰ It can be argued however, that they embody structural biases and inequalities towards these groups, which may negatively influence their compliance. The historical rationale for new laws such as many land acquisition

⁸⁷ *Terra Nullis* means vacant lands

⁸⁸ James S Anaya, *Indigenous Peoples in International Law* (OUP 2004);

⁸⁹ American Bar Association, *Access to Justice Assessment Tool* (ABAROLI 2012) 6

⁹⁰ Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Policy* (Cambridge University Press 2009)

laws, created a hegemony of foreign laws and generated disparities between communities. I will be developing this analysis in my study to demonstrate how historical laws in India have adversely affected land rights of indigenous communities in the tribal belt.

The premise of this dissertation is, however not based on challenging whether the existence of human rights or other social justice legislation is important or positive. My presupposition is that human rights legislation is a constructive method of challenging inequities, and my argument does not question the premise, as some critical legal scholars have done of the international legal system of human rights.⁹¹ Rather, my line of argument considers the colonial origins of international law, as being constructed with a systemic bias against certain peoples and countries.⁹² The threads of this bias, even if not part of the principles of new rights based legislation, continue to be reflected in the compliance to the law by implementing bodies, resulting in reinforced inequities. The assertion that I therefore arrive at, is that it is not the framing of national and international law but the implementation process of such laws which present the greatest barrier to access to justice; the governance structures and compliance mechanisms which cater to the implementation of legislation can often conflict with legislation aim of supporting human rights.

Legal awareness of human rights has slowly been evolving since the transgressions of the Second World War forced an international commitment⁹³ called The Universal Declaration of Human Rights (UDHR 1948).⁹⁴ This was the beginning of a moral and legal response to the recognition of human rights followed by numerous normative developments, both national and international. The new treaties include specific legislation for different groups such as women, children, and indigenous peoples,⁹⁵ and have been heralded as tools to counter historical social, political and economic injustice. “At their foundation, human rights are a set of moral principles about how people should treat each other, particularly how people should be treated by the state

⁹¹ Ibid

⁹² B.S Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 30 EJIL ; James S Anaya, *Indigenous Peoples in International Law* (OUP 2004); Third World Approaches to International Law. See: ‘What Is TWAIL?’ Makau Mutua and Antony Anghie, *Proceedings of the Annual Meeting (American Society of International Law)* Vol. 94 (APRIL 5-8, 2000), pp. 31-40

⁹³ Denis Galligan and Deborah Sandler, 'Implementing Human Rights' in Simon Halliday and Patrick Schmidt (eds), *Human Rights Brought Home Socio-Legal Perspectives on human rights in the National Context* vol 3 (Human Rights Brought Home Socio-Legal Perspectives on human rights in the National Context Hart Publishing 2004) 23

⁹⁴ United Nations, *Universal Declaration of Human Rights* Universal Declaration of Human Rights (adopted 10 December 1948, UNGA Res. 217 A (III) (UDHR art 5)

⁹⁵ United Nations, *Convention on the Rights of the Child* (UNICEF 1990); The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979);

authorities.”⁹⁶ Since I will be looking at how legal mechanisms have affected and changed the situation on the ground for indigenous peoples with regard to land displacement, this literature review analyses the developments around specific legislation enacted to protect the human rights of indigenous peoples.

Under the Universal Declaration of Human Rights, human rights standards are developed by agencies at a supra-national level that formulate policies on human rights. This produced international bodies which formulate and implement the policies.⁹⁷ While human rights standards are developed at the international level, responsibility for the implementation of the international standards lies with individual nation states. This both weakens accountability to human rights standards and results in an uneven interpretation and implementation of human rights norms across nations.⁹⁸ International bodies engaged in setting human rights standards used to try to facilitate national implementation. Recently, however, direct implementation of international law with discrete legal systems are being introduced. Galanter, connecting the Human Rights movement and the development of Access to Justice, points out how both domestic policy by governments and civil society organisations, and international development departments of states are prioritising “unmet legal needs,”⁹⁹ with legal literacy programs, and trying to make courts and legal representation more accessible to the community.¹⁰⁰ The United Nations Committee on Economic, Social, and Cultural Rights describe a “minimum core” of social economic rights,¹⁰¹ which has to ensure a minimum essential level of social economic rights such as the right to housing.¹⁰²

Amartya Sen identifies the weakness within the policy of the minimum core of social economic rights, in which individual states are expected to comply, indicating the lack of coherence within this human rights approach. He outlines three critiques of what he calls “the intellectual edifice of

⁹⁶ Galligan D and Sandler D, 'Implementing Human Rights' in Halliday S and Schmidt P (eds), *Human Rights Brought Home Socio-Legal Perspectives on human rights in the National Context* vol 3 (Hart Publishing 2004) 23

⁹⁷ Ibid 26

⁹⁸ Galligan and Sander bear witness to this: “The nation state is the greatest threat to human rights, but on the other hand, an effective system of protection depends on it.” Ibid 48

⁹⁹ Marc Galanter, 'Access to Justice in A World of Expanding Social Capability' (2010) 122

¹⁰⁰ Government departments such as DfID in the UK and USAID in the USA for example, who are bilateral donor organisations are committed to the concept in their programs. Ibid 121

¹⁰¹ Varun Gauri and Daniel M. Brinks, *Courting Social Justice* (CUP 2008) (xii)

¹⁰² The minimum core has been described as, “the floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation. Each right has a 'minimum essential level' that must be satisfied by state parties...Minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question it is in this context that the concept of minimum core obligation must be understood in international law.”Quote by Justice Yacoob in the housing case of *Grootboom*, described in ibid xii

human rights.”¹⁰³ Since human rights are based on ‘pre-legal principles,’ and not justiciable rights, he questions their legitimacy, claiming that they add confusion to the legal system. Since human rights are entitlement which have to be sanctioned by the state being the ultimate legal authority, Sen opines that this creates a weakness. The right to food or water for example, which have to be authorised by the state, become a “hollow concept” if the state does not fulfil its obligation to provide. Thirdly, he points out the difficulty in the universality of human rights, given that they are valued differently by dissimilar cultures.¹⁰⁴

The success of human rights standards reflected in legislation is dependent on the compliance of nation states and governments who have their own legislation, which sometimes comes into conflict with different norms of the international legislation, causing tension and non-compliance. Whether sovereign states have ratified treaties or adopted legislation is also significant for international compliance. Ratifying treaties is dependent on the political attitudes and motives of governments, which intersect with economic interests of states. For example, mining, logging and other extractive industries in which a government has invested, will influence whether or not they ratify a treaty concerning land rights. Governments may ratify an international treaty, while simultaneously formulating similar national legislation on land rights of indigenous peoples, such as India’s Forest Rights Act¹⁰⁵. However, as in the case of India, there can be a disparity between the commitment to ratify or formulate legislation, and the actual compliance and implementation of the legislation, which in turn negatively affects the access to justice for the communities concerned.

In 1949, when the United Nations was acknowledging indigenous rights, the strong objection of the United States to the Sub-Commission’s planned study of the conditions of indigenous Americans, put a stop to the inquiry, and even caused the temporary suspension of the Sub-commission.¹⁰⁶ Examples such as this hegemonic misuse of power still occurs, though international law and the morals that shaped it are shifting, and it could be argued that in spite of tensions and anomalies, it is moving in the right direction, with a new body of international law

¹⁰³ Amartya Sen, *The Idea of Justice* (Penguin 2010) 227

¹⁰⁴ Indrani Sigamany, 'Land Rights and Neoliberalism: an Irreconcilable Conflict for Indigenous Peoples in India?' (2016) *International Journal of Law in Context*. Cambridge University Press; Gilbert J and Doyle C, 'A New Dawn over the land: Shedding Light on collective Ownership and Consent' in Allen S and Xanthaki A (eds), *Reflections on the UN Declaration on the rights of indigenous peoples*, vol 12 (Hart Publishing 2011)

¹⁰⁵ Government of India, The Scheduled Tribes And Other Traditional Forest Dwellers (Recognition Of Forest Rights) Bill (adopted on 15 December 2006, No.158-C of 2005)

¹⁰⁶ The Working Group on Indigenous Populations is an organ of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities 1985. This was the first time that a formal commitment had been made since 1977 when indigenous civil society organisations took their concerns to the international level. Barsh, R.L., *Indigenous Peoples: An Emerging Object of International Law*. AJIL (1986) 370

for indigenous peoples.¹⁰⁷ The power balance of the international community of states has altered since the 1940s, with Asia, Africa, Latin America, the Caribbean and the Pacific now in the majority population compared to Europe, which is now increasingly on the periphery of global decision making.¹⁰⁸ The world has accepted concepts such as human rights within international law. This has engendered a greater inclusiveness, with more participation by civil society and the corporate world, and includes agendas of peace and human rights with a markedly reduced Western cultural bias. The human rights agenda has shifted the focus away from sovereign states towards people and communities. The aftermath of the two world wars which gave birth to the United Nations and other international organisations have influenced the change in international law, and moved it away from a Eurocentric bias. This is highlighted by the *United Nations Declaration on the Rights of Indigenous Peoples* of 2007¹⁰⁹, known as ‘The Declaration’, which has had a game-changing effect internationally. Although though it has ‘no teeth’ or sanctions, unlike the ILO Conventions 107 and 169,¹¹⁰ showing there is still room for improvement, it provided a legal platform for influential changes on indigenous rights. These legal frameworks outline that more attention is now being paid to aspects such as cultural patterns which are outside state structures, and therefore includes priorities of indigenous and minority communities. This does however, create a tension between state agendas and those of individuals and groups, especially around the rights to self-determination.

Historically, the development of an international body of law was founded on the legal philosophy and imperialistic interests of colonial powers during their search for new territories, in which the concept of ‘justice’ was determined by their agendas of conquest.¹¹¹ In developing the question in this study of whether justice is enacted through laws in our society, and whether we

¹⁰⁷ Four countries voted against UNDRIP: United States, Canada, Australia and New Zealand. Eleven countries abstained: Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russia, Samoa and Ukraine. UNDRIP

¹⁰⁸ James S Anaya, *Indigenous Peoples in International Law* (OUP 2004) 50

¹⁰⁹ UNDRIP Preamble states: “control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.” United Nations Declaration on the Rights of Indigenous Peoples (adopted on 13 December 2007, UNGA Res. 61/295 A (UNDRIP Add 1))

¹¹⁰ International, regional and national legislation embodies the principle of self-determination in, for example, the 2007 UN Declaration of Rights for Indigenous Peoples, the 1948 United Nations Charter, and several regional declarations. Anaya, *Indigenous Peoples in International Law* 99 “*Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,*” Resolution adopted by the General Assembly 61/295. United Nations Declaration on the Rights of Indigenous Peoples (adopted on 13 December 2007, UNGA Res. 61/295 A (UNDRIP Add 1)) 2

¹¹¹ *Ibid* vii

can we assume that these laws are just, I advance in the following section, the argument that present day laws have evolved from a skewed rational. This rational reflects historical power imbalances, developed during a world order when colonial powers were advancing across foreign continents, framing laws to benefit their territorial expansion, such as *terra nullis*. These laws, used as “instruments of colonialism”¹¹² were intrinsically biased against indigenous peoples and their rights to their ancient lands, and “sought to do away with or suppress indigenous identities.”¹¹³ I assert that despite considerable progress, contemporary laws have not been able to fully reject the mantle of colonial legacies, whether in aspects of the black letter of the law, or in how they are implemented.¹¹⁴ This legal hegemony does not obscure the fact that human rights mechanisms in themselves are positive, as they offer an acknowledgement of power imbalances and the need to protect minority rights.¹¹⁵

2.4. Historical Bias in The Formulation of the Law

2.4.1 History of Laws shaped by Land Acquisition

When describing the historical context of the development of international human right laws and how it pertains to indigenous peoples, Anaya illustrates the land encroachment of the indigenous peoples by colonial powers referring to the "slaughter of the children, women and men who stood in the way."¹¹⁶ This was happening simultaneously in many parts of the world causing "human suffering in turmoil on a massive scale." The historical context includes a Eurocentric bias: "the patterns of empire and conquest that engulfed indigenous peoples...and a state centred system, strongly grounded in the Western world view it developed to facilitate colonial patterns promoted by European states and their offspring, to the detriment of indigenous peoples."¹¹⁷ In the age of Christopher Columbus, and the zealous search for the "new world", with its accompanying brutal settlement patterns, the Spanish school of international law of the sixteenth century¹¹⁸, which included Dominican clerics de Las Casas, and Vitoria, were the first to challenge the Spanish

¹¹² James S Anaya, *Indigenous Peoples in International Law* (OUP 2004) 3

¹¹³Ibid vi

¹¹⁴ Ibid vi

¹¹⁵ Alexandra Xanthaki, 'Indigenous Rights in International Law over the Last 10 Years and Future Developments' (2009) 10 *Melbourne Journal of International Law* 27130

¹¹⁶ Ibid vii

¹¹⁷ James Anaya, *Indigenous Peoples in International Law* (OUP 2004) 15 Bartolome de la Casas (1474 – 1566), Francisco de Vitoria (1486 – 1547), Hugo Grotius (“the most prominent of the ‘fathers’ of the Law,”) Francisco Suarez (1548-1617), Domingo de Soto (1494-1560), Balthasar Ayala (1548 – 1584), and Alerico Gentilis (1552-1608), are the important European theorists who contributed to the origins of international law, and its Eurocentric bias.

¹¹⁸ Geir Ulfstein, *Indigenous Peoples' Right to Land*, in Armin von Bogdandy, Rüdiger Wolfrum (eds.) (2004) *Max Planck UNYB Vol 8* (2004)2 Kluwer Academic Publishers 2. The sixteenth century Spanish school of international law, besides Bartolome de Las Casas, and Francisco de Vitoria, included Domingo de Soto, and Francisco Suarez.

encomienda system, "which granted Spanish conquerors and colonists parcels of land and the right to the labour of the Indians living on them."¹¹⁹

The law has the capacity to change and also to be an agent of change in spite of the historical power imbalances. Vitoria, one of the founders of international law,¹²⁰ tries to establish the governing normative and legal parameters. "His prescriptions for European encounters with indigenous peoples of the Western Hemisphere contributed to the development of a system of principles and rules governing encounters among all peoples of the world." However, in spite of his theory of legal authority resting on legal consciousness which recognized a higher, natural or divine law, Vitoria also generated a theory of "just war."¹²¹ Perceiving war as 'just' allowed it to be acceptable to the colonial moral framework, and sanctioned killing communities and seizing their lands. Vitoria's works influenced the 17th-century work of Hugo Grotius, "the most prominent of the "fathers" of international law."¹²² These early international law theorists were prepared to challenge authority, including monarchs.¹²³ Theories of just war, coloured by a European world view, provided enduring support for patterns of colonization and empire that exerted control over indigenous peoples and their lands."¹²⁴

2.4.2 Rationale Used for the Formulation of International Laws

The colonizers of the Americas chose to perceive the Native Americans as "fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness,"¹²⁵ in the words of the Chief Justice John Marshall from the U.S. Supreme Court in the early nineteenth century. In

¹¹⁹ De la Casas was a missionary living among indigenous Indians, who "vividly describe[ed] the enslavement and massacre of indigenous people in the early 16th century in his history of the Indies." Ibid

¹²⁰ Francisco de Vitoria is recognized as one of the founders of international law. His contribution was inconsistent in that while asserting that the Indians were entitled to their lands and that the Europeans were bound to respect this, at the same time he defined the terms with which Europeans could acquire Indian lands validly. Ibid

¹²¹ Since Indian resistance continuously impeded these activities, Vitoria decided that this was cause for the "just war." To add to his confused message, he argued that the Spaniards could take over Indian lands for the 'benefit' of the Indians, while at the same time rejecting "title by discovery or by papal grant." This theory rationalized the encroachment and seizure of lands from native inhabitants on grounds of the Roman *jus gentium*, that the Indians were "bound to allow foreigners to travel their lands, trade among them, and proselytize on favour of Christianity." Anaya, *Indigenous Peoples in International Law* 19

¹²² Grotius approached the law of nature in a more secularly moral manner, following the thread of the early international law theorists' "secular characterization of the law of nature," which were of a fundamentally humanist and moral perspective.

¹²³ Grotius endorsed Vitoria's just war theory, under the "justifiable causes for war: defense, recovery of property, and punishment." Anaya points out that "This early affirmation of rights also can be seen reflected in the ensuing pattern of treaty making between the European powers and indigenous peoples. James Anaya, *Indigenous Peoples in International Law* (OUP 2004) 19

¹²⁴ Ibid 19

¹²⁵ Ibid 23

addition to this, the colonizers employed a principle of *terra nullius*, wherein indigenous lands were considered ‘unoccupied’ territories before colonization.¹²⁶

Using the term ‘new discoveries’ for land previously occupied by indigenous populations provided “the legal mechanism for consolidating territorial sovereignty over indigenous lands by colonizing states.”¹²⁷ This unchallenged ability to rationalize their illegal land acquisitions and the European belief in their own racial superiority, coupled with the evolution of the concept of nation-states and law of nations, consolidated the role of international law which became “a legitimizing force for colonization and empire rather than a liberating one for indigenous peoples.”¹²⁸ The slowly eroding rights of indigenous peoples allowed for the later unmitigated retraction by European colonizers of territorial treaties made with indigenous peoples. “Shaped by Western perspectives and political power, international law developed a complicity with the often brutal forces that wrested lands from indigenous peoples, suppressed their cultures and institutions, and left them among the poorest of the poor.”¹²⁹

The formulation of international law was based on major premises from Vattel’s framework in 1700 to 1800.¹³⁰ These premises ensured that indigenous people could not participate in the formulation of the laws, neither could their rights be protected under these laws. “By deeming indigenous peoples incapable of enjoying sovereign status or rights in international law, international law was thus able to govern the patterns of colonization and ultimately to legitimate the colonial order, with diminished or no consequences arising from the presence of aboriginal peoples.”¹³¹ International law was constructed with norms based on the belief that all peoples who were non-European were inferior, at the same time as social and cultural “reengineering” was taking place all over the colonies, led by European countries. This comprised ‘re-educating’ the local populations from ‘savagery’ to ‘civilised’ norms, called ‘civilizing missions’, and

¹²⁶ Ibid 29, Gilbert J and Doyle C, 'A New Dawn over the land: Shedding Light on collective Ownership and Consent' in Allen S and Xanthaki A (eds), *Reflections on the UN Declaration on the rights of indigenous peoples*, vol 12 (Hart Publishing 2011)

¹²⁷ Ibid 30

¹²⁸ Ibid 26

¹²⁹ Ibid 49

¹³⁰ The formulation of international law was based on major premises from Vattel’s framework, the most detrimental of which was the fourth premise that the “states that make international law and possess rights and duties under it make up a limited universe that excludes *a priori* indigenous peoples outside the mold of European civilization.” In introducing the historical context for international law, Anaya refers to four major premises derived from Vattel’s framework: the first being that international law is “concerned only with the rights and duties of the state;” the second that “international law upholds the exclusive sovereignty of states, which are presumed to be equal and independent, and thus guards the exercise of that sovereignty from outside interference;” and the third premise was that “international law is law *between* and not *above* states, finding its theoretical basis in their *consent*.” Taken from James Anaya, *Indigenous Peoples in International Law* (OUP 2004) 26

¹³¹ Ibid 29

autonomous structures of tribal governance were destroyed.¹³² This ideology was complicated by the biased belief that settled people were more sophisticated than those who moved, and most indigenous peoples were traditionally nomadic, who thereby faced discriminatory attitudes. The law was written for people who were settled and controlled by the state. Indigenous peoples did not have a fixed place of abode, and were not accessible by the state.

Through carefully tracing its historical trajectory, Anaya the establishment of international law as an instrument of colonialism. International law, according to Anaya, “rooted in negative regard for indigenous cultural attributes – translated into more of a justification for colonial patterns than a force against them.”¹³³ Indigenous political, social and cultural patterns and practises were being destroyed, while land was being systematically expropriated¹³⁴. The legal construction “denied sovereign status to indigenous peoples, international legal discourse and related decision processes developed historically to support the forces of colonization and empire that have trampled the capacity of indigenous peoples to determine their own course under conditions of equality. Early affirmations of indigenous peoples’ rights succumbed to a state-centred Eurocentric system that could not accommodate indigenous peoples and their cultures as equals.”¹³⁵

2.4.3. The Emergence of Human Rights Trends in the Law

Anaya focuses on trends within the international system with which he seeks to understand and evaluate a normative framework for indigenous rights.¹³⁶ These trends are reflected in significant developments such as “the establishment of the United Nations Permanent Forum of Indigenous Issues; several decisions by UN treaty-monitoring bodies, International Labour Organisation committees, the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights; ongoing discussions around efforts within the United Nations and the Organisation of American States to articulate declarations on indigenous rights.”¹³⁷

¹³² Ibid 29

¹³³ After Asia and the Americas, the “scramble for Africa” transpired in 1885 at the first Berlin Conference. A dissenting voice was that of M.F. Lindley, the British writer, who argued that “even if indigenous peoples were not themselves considered full subjects of international law, states could become obligated vis-à-vis each other as a matter of general international law for the benefit of native peoples over which they exercised control.” This proposition clashed with the principles of state sovereignty behind which states concealed their behaviour within their own domestic borders. James Anaya, *Indigenous Peoples in International Law* (OUP 2004) 33.

¹³⁴ Hugh Brody, *Maps and Dreams: A journey into the lives and lands of the Beaver Indians of Northwest Canada* (Penguin 1983)

¹³⁵ James Anaya, *Indigenous Peoples in International Law* (OUP 2004) 34

¹³⁶ Ibid 94 vii

¹³⁷ Ibid vii

Authors such as Anaya and Jeremie Gilbert, set a context for the origins of international law by describing the colonial bias within the first laws that were framed, and analysing how this has shaped the current use of these laws.¹³⁸ They detail the evolution of the law from “instruments of colonialism”¹³⁹ to tools for indigenous peoples to pursue recognition and respect for their unique and ancient cultures and ways of life, and especially for rights to their ancestral lands. Gilbert adds that laws such as the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007 showed that: “The recognition of indigenous peoples’ specific claims to land in the Declaration was seen as an important step for international law as, historically, international law had been a major factor in the alienation of indigenous peoples’ land rights.”¹⁴⁰ Though UNDRIP is a landmark rights-based legislation recognizing indigenous land rights, it is still relatively recent in trending away from the negativity of colonial land expropriation.¹⁴¹ Anaya emphasises the positive trend of the law from what was once undisguised insensitivity for the preservation of prehistoric cultures. He acknowledges that though the law is as yet imperfect, the connection of laws for indigenous peoples to human rights adds an important dimension that is independent of an exclusive state-centred orientation. This dimension is particularly empowering for local communities fighting for their land rights, as Simmons defends, when she argues that “treaties and the question of their ratification exogenously introduce new issues into domestic politics that, but for its international provenance, would not have been on the national agenda at that point in time or possibly at all,” and that “treaties assist in the process of political mobilization of groups who stand to gain from their provisions.”¹⁴² These positive aspects, especially requisites such as Free and Prior Informed Consent, occur in spite of the negative history of human rights laws.

2.4.4 The Evolution from Traditional Human Rights to Contemporary Human Rights Discourse

In describing the present day Human Rights discourse, Anaya's analysis is unconventional. For example unlike conventional international law, in which "black letter law" takes precedence, he embraces a broader connection between traditions, customs, cultural norms and customary laws, referring to the "ongoing multi-faceted processes of decision that have enacted and are continuing to enact change in the normative system that functions within the international domain."¹⁴³ International law in the 19th century viewed non-European indigenous people as unqualified for

¹³⁸ Jeremie Gilbert, 'Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples' [2005] *International Journal on Minority and Group Rights* 207

¹³⁹ James Anaya, *Indigenous Peoples in International Law* (OUP 2004) 94 vii

¹⁴⁰ Jeremie Gilbert and Cathal Doyle, 'A New Dawn over the land: Shedding Light on collective Ownership and Consent' in Allen S and Xanthaki A (eds), *Reflections on the UN Declaration on the rights of indigenous peoples*, vol 12 (Hart Publishing 2011) 4

¹⁴¹ UNDRIP is not a Treaty, it does not have the means to hold states accountable of violations.

¹⁴² Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Policy* 357 (CUP 2009)

¹⁴³ James Anaya, *Indigenous Peoples in International Law* (OUP 2004) 6

statehood and favoured consolidating power over them by the European states and their colonial offspring.¹⁴⁴ Gilbert, reflecting the same approach, illustrates the ethnic superiority of the European policies of the new imperialist period (1880-1914), by what was called ‘Commerce, Christianity and Civilization,’ was used to ‘civilize’ local populations, and deliberately not recognize indigenous customary land laws. The communities to be hit hardest by this land expropriation were the mobile indigenous peoples, whose lands were deemed as *terra nullius*, or empty lands.¹⁴⁵ Only as recently as 2002, were nomadic land rights validated in the Dana Declaration.¹⁴⁶ Traditional human rights systems which focused on the rights of individuals rather than on the collective rights of groups, which is now being challenged by indigenous peoples many of whom exist collectively in communities.

2.4.5 Embedded Patriarchy

Finally, an analysis of legal frameworks, through a gender lens, reveals that historical laws enacted with a Eurocentric colonial bias also embodied a patriarchal element congruous with the times, which affected and continues to affect women’s access to justice. If access to justice differs between different communities and groups, it also differs inside communities. For example, it can be argued that an indigenous tribe has less access to justice than a community who is not indigenous. However, if disaggregated, data of the tribal group itself might show that in that tribe, women may have less access to justice than men. In general, women tend to be less literate; less exposed to public institutions, and have been known to face more discrimination from public officials when seeking justice. Formal and customary laws often reflect cultural structures such as patriarchy, within which women have less land rights, and less financial power in households and in communities. Both women and men might accept gender power differentials in a household, and in a wider context, within legal institutions without challenging this inequality. Laws and the ability to use these laws correspond to the inequality inherent in patriarchal cultures, in which expectations of women to use legal institutions to claim their rights are low. Land and property rights differ between women and men, and patriarchal traditions dictate land inheritance laws. This has had negative consequences for economic independence of women that remains disempowering for many groups of women. In tribal societies, some of which are matrilineal for example in India, with the North East tribal groups such as the Khasis, land inheritance laws are not traditionally patriarchal, which contributes to shifting the gender balance of power. In general, however, globally, ownership of land in indigenous groups also

¹⁴⁴ Ibid

¹⁴⁵ Jérémie Gilbert, *Indigenous peoples’ and rights under international law: from victims to actors* (Transnational Publishers 2006)(no page)

¹⁴⁶ Dana Standing Committee, *Dana Declaration on Mobile Peoples and Conservation* (DSC2002)

follow patriarchal lines of inheritance, which has to be borne in mind during any discussion of access to justice for minority groups. This indicates that within marginalised societies, marginalisation itself is not homogenous. As my case studies show there can be further divisive marginalisation on gender lines, mobility, caste or other hierarchies.

2.4.6. Concluding remarks

The historic power imbalances in the law that is cited by Anaya, which was rationalised from the sixteenth century by philosophers such as Hobbes, Pufendorf, Wolff and Vattel, used a reference point of morality that did not respect equal rights of races to ancestral lands. Human rights have become an acceptable norm which has moral foundations that was (mis)used to justify imperialistic policies. Rawls cites Aristotle's conception of justice of avoiding taking advantage of other people, whether it is taking what belongs to them or depriving them of what is owed to them. The term for this is 'pleonexia,'¹⁴⁷ and Rawls derives the principles of justice from this, and calls it a 'fair' manner in which to cooperate socially, and conceives the regulation of this justice as being advanced by institutions set up by society. "Laws and commands are accepted as laws and commands only if it is generally believed that they can be obeyed and executed. If this is in question, the actions of authorities presumably have some other purpose than to organise conduct."¹⁴⁸ This interpretation is echoed by Amartya Sen's grounds for critical assessment of justice in the context of human rights, which rests on "judgements about justice" which he bases on "freedom, capabilities, resources, happiness, well-being..." and other "diverse considerations that figure under the general headings of equality and liberty, the evident connection between pursuing justice and seeking democracy seen as 'government by discussion, and the nature, viability and reach of claims of human rights.'"¹⁴⁹ The above discourse illustrates the emergence of human rights norms that offer legal recourse for indigenous communities to reclaim lost land rights. I posit that the historical evolution of the law, has an embedded bias due to the imperialistic policies of land expropriation by colonizers. This has long residual consequences, which can influence contemporary state attitudes and policies and hinder the course of justice.

2.5. The Role of the State

Anaya proposes that the rise of the modern state in Europe, consolidated by the Westphalia Agreement of 1648, changed the legal framework, from the existing concept of natural law as a

¹⁴⁷ John Rawls, *A Theory of Justice* (Oxford University Press 1999) 9

¹⁴⁸ Ibid

¹⁴⁹ Amartya Sen, *The Idea of Justice* (Penguin 2010) ix

“universal moral code for humankind, into a bifurcated regime comprising the natural rights of individuals and the natural rights of states. This transformation has been called ‘the most important intellectual development of the seventeenth century subsequent to Grotius.’¹⁵⁰ A subsequent list of philosophers¹⁵¹ accepted and contributed towards this new development of laws of states or nations, which subsumed the universal moral code for humankind. This contradiction between laws of the individual and the state influenced all future Western liberal thought into an unfortunately restrictive new order.¹⁵² The consequences of this, as Anaya asserts is that is eliminated traditional cultural patterns of society, followed by indigenous groups, therefore erasing their rights: “it is not alive to the rich variety of intermediate or alternative associational groupings actually found in human cultures, nor is it prepared to ascribe to such groupings any rights not reducible either to the liberties of the citizen or to the prerogatives of the state.”¹⁵³

Historically, access to justice, in the late eighteenth and nineteenth Western liberal states, indicated an “individual’s *formal* right to litigate or defend a claim.”¹⁵⁴ The individual had a right, which the state was not necessarily proactively defending. The state offered legal services, and whether the individual, or group used the services, or could access these services, it was not perceived as the duty of the state. So “relieving ‘legal poverty’ – the incapacity of many people to make full use of the law and its institutions – was not the concern of the state. Justice, like other commodities in the laissez-faire system, could be purchased only by those who could afford its costs. Those who could not afford it were considered the only ones responsible for their fate.”¹⁵⁵ This passive legal approach by the state later endured a transformation with the development of human rights and the rise of the welfare state.¹⁵⁶ Expectations of the state included a more active role in the realization of individual and social rights.

A discussion on the concept of justice and how it relates to law, the state and wealth distribution, is incomplete without a reference to John Rawls. He writes: “A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. When these rules are just, they establish a basis for legitimate expectations. They constitute grounds upon which persons can rely on one another

¹⁵⁰ Ibid 20

¹⁵¹ Hobbes (1588-1679), Pufendorf (1632-1694), Wolff (1679-1754), and Vattel (1714-1769). Ibid

¹⁵² Ibid 20

¹⁵³ Ibid 20

¹⁵⁴ Mauro Cappelletti and Bryant Garth, ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’ [1977] BLR183 183

¹⁵⁵ Ibid

¹⁵⁶ The new human rights were inscribed in the Preamble of the French Constitution of 1946, which Cappelletti claims are necessary for justice to be accessible to all. Ibid 184

and rightly object when their expectations are not fulfilled.”¹⁵⁷ He also points out when the judicial system fails citizens in applying or interpreting laws and rules in an impartial or fair manner, it becomes “unjust,” especially as a consequence of “subtle distortions of prejudice and bias as these effectively discriminate against certain groups in the judicial process.”¹⁵⁸ The state therefore has a duty to implement the laws in respect to rights, and international institutions in turn are responsible for framing these norms and ensuring that they are implemented.¹⁵⁹

In terms of indigenous people, ¹⁶⁰, the role of the state is set out very clearly both in UNDRIP and in the ILO Convention No. 169 of 1989 framed to protect the rights of indigenous and tribal peoples. It is the “foremost international legal instrument which deals specifically with the rights of indigenous and tribal peoples, and whose influence extends beyond the number of actual ratifications.”¹⁶¹ Gallagin and Sandler focus attention on several obstacles to state protection of human rights. They outline how when rights originate outside a national system, as the ILO Convention does, they are then dependent on the nation state and its political processes to implement them. This can often generate tensions between the capacity of the state’s institutions to implement human rights standards and the entrenched internal attitudes of local authorities and cultures.¹⁶²

I argue that these ‘entrenched internal attitudes of local authorities and cultures’ are the residual aspect of the colonial policies. Given that the international and national regulatory bodies are different and behave differently, enforcing human rights has an added dimension of complexity, and the international orders have little enforcement capacities, inserting a weakness in execution of human rights at the national level. In addition to this, human rights standards often have an inclusion of escape clauses.¹⁶³

¹⁵⁷ John Rawls, *A Theory of Justice* (Oxford University Press 1999) 207 & 9

¹⁵⁸ Ibid

¹⁵⁹ Anaya details other major goals being advocating for as being cultural integrity; indigenous self-determination; protection of indigenous cultural patterns; and nondiscrimination, "which precludes inferior treatment of indigenous individuals or attributes of indigenous group identity;" and lastly, their rights to land, resources, land tenure and usufruct rights. Anaya 9

¹⁶⁰ United Nations Declaration on the Rights of Indigenous Peoples (adopted on 13 December 2007, UNGA Res. 61/295 A (UNDRIP Add 1)

¹⁶¹ ILO, *ILO Convention on Indigenous and Tribal Peoples 1989 (No. 169)A Manual* (Project to Promote ILO Policy on Indigenous and Tribal Peoples, 2003)

¹⁶² Denis Galligan and D Sandler 'Implementing Human Rights' in Halliday S and Schmidt P (eds), *Human Rights Brought Home Socio-Legal Perspectives on human rights in the National Context vol 3'* (Hart Publishing 2004) 26

¹⁶³ Ibid 28. CEDAW has opt-out clauses in the Protocol. See <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightsconceptsideasandfora/>

2.5.1 Customary Law and the National Juridical System

One persistent issue within nation states is the balance between formal mainstream law and customary law. In his discussion of the use of customary law Perry highlights the continuing tensions within a legally pluralistic environment, between formal mainstream and customary laws: “The right to use customary systems of law (CSL) is a core expression not only of indigenous identity but also of indigenous sovereignty.¹⁶⁴ It is an attempt to retain autonomy in the face of a monolithic state seeking to exercise its authority over a diverse geographical space through formal state laws, among other things.”¹⁶⁵ Perry refers to the tensions between the “Westphalian nation-state system and the multiplicity of autonomous ethnic groupings that have been subsumed within it,”¹⁶⁶ referring to the alienation of groups in countries with the conflicting systems, which are often resolved by the states resorting to formal state laws. Perry cautions that formal state law “exacerbates resentment towards the often-corrupt urban elite that administers them.”¹⁶⁷ This is a familiar scenario in countries such as India, with large numbers of people living below the poverty line, and the transnational capitalist class ignoring the traditional rights of indigenous tribal populations. Africa, Asia, Australia and the Americas, following the European colonial traditions of laws ties in with the analysis of Chimni and Anaya, that legal norms are inherently biased against excluded groups, and reinforce neo-colonial power imbalances.

In an attempt to be more user-friendly to marginalized peoples, Perry advocates for a pluralistic approach of recognizing customary systems of law rather than maintaining a “closed, fixed system” and emphasizes the importance of the right to self-determination for indigenous peoples.¹⁶⁸ The most important legal principle for indigenous rights, which is repeatedly reflected

¹⁶⁴ UNDRIP, recognises the rights of indigenous peoples “to promote, develop and maintain their ...distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.” Declaration, supra note 2, art. 34. Taken from Robin Perry, 'Balancing Rights or Building Rights - Reconciling the Right to Use Customary Systems of Law with Competing Human Rights in Pursuit of Indigenous Sovereignty' (2011) 24 Harvard Human Rights 71

¹⁶⁵ Ibid 72

¹⁶⁶ Ibid 71

¹⁶⁷ Ibid 71

¹⁶⁸ International, regional and national legislation embody the principle of self-determination in, for example, the 2007 UN Declaration of Rights for Indigenous Peoples, the 1948 United Nations Charter, and several regional declarations. (Anaya, 99) “*Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,*” Resolution adopted by the General Assembly 61/295. United Nations Declaration on the Rights of Indigenous Peoples (adopted on 13 December 2007, UNGA Res. 61/295 A (UNDRIP Add 1) 2

in international discourse¹⁶⁹ is that of the right to self-determination¹⁷⁰, in which people have control over their own lives, can develop freely in ways that they choose to do so, and enjoy equality under the law and under their government.

Using India as an example of the loss of self-determination, Galanter points out how informal tribunals which “represented a multiplicity of systems with no fixed authoritative body of law, no set binding precedents, no single legitimate way of applying or changing the law.”¹⁷¹ With the colonial introduction of English law and the foreign systems of litigation, the informal tribunals lost their power and applicability which remains till today, alienating sections of the population especially those who are not familiar with English, such as the majority of the Adivasis. The traditional tribunals favoured mediation methods and contentious litigation with a win or lose outcome alienated local Indian people. “The new courts not only created new opportunities for intimidation and harassment and new means for carrying on old disputes, but they also gave rise to a sense of individual right, not dependent on opinion or usage, and capable of being actively enforced by government, even in opposition to community opinion.”¹⁷² One positive change was that traditional sanctions were made obsolete, in which individuals or groups were boycotted or turned into ‘outcastes.’

The “expropriation of law”¹⁷³ occurred with imperial domination, which decolonised societies have had to purge themselves from. The classic Western legal traditions still exist, though it continues to alienate local legal traditions in many countries in Asia, Africa and Latin America which have had a history of colonization. Galanter writes: “Foreign in origin and in inspiration, notoriously incongruent with the attitudes and concerns of much of the population, [the Western legal tradition] displaced a major intellectual and institutionally complex one within a highly

¹⁶⁹ International, regional and national legislation embodies the principle of self-determination in, for example, the 2007 UN Declaration of Rights for Indigenous Peoples, the 1948 United Nations Charter, and several regional declarations. Anaya, *Indigenous Peoples in International Law*

¹⁷⁰ “Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,” Resolution adopted by the General Assembly 61/295. United Nations Declaration on the Rights of Indigenous Peoples (adopted on 13 December 2007, UNGA Res. 61/295 A (UNDRIP Add 1); Indrani Sigamany, ‘Destroying a Way of Life: Indigenous Peoples, The Forest Rights Act of India and Land Displacement of Indigenous Peoples’ in Irge Satiroglu and Narae Choi (eds) *Development-induced Displacement and Resettlement: New Perspectives on persisting problems* (Routledge 2015) 2

¹⁷¹ Marc Galanter, ‘The Displacement of Traditional Law in Modern India’ (1968) 14 *Journal of Social Issues* 71

¹⁷² Bernard Cohn, ‘Some Notes on Law and Change in North India’ [1959] *Economic Development and Cultural Change* 67; *ibid* 71;

¹⁷³ *Ibid* 1968, 67

developed civilization.”¹⁷⁴ In India, for example, the discrete and numerous kingdoms, large and small, with different languages and cultures, were relinquished with the introduction of colonial dominance, and the new governance included a foreign legal system. The Hindu, Muslim and other indigenous Indian legal traditions were alienated by the foreign protocols and administration. “Given that tribal communities in India are for the most part unexposed to the Western/British legacy either through education or through the law, attempting to engage with such a culturally unfamiliar legal structure serves to impede their own legal empowerment. This is further exacerbated by high rates of illiteracy and often by geographical isolation. Taken within this legal context, Adivasis, when faced with dispossession of their lands have had recourse to a legal tradition that is intrinsically alien to local informal tribunals. This raises the question of whether the externally imposed legal tradition in India results in an obstruction to access to justice for indigenous groups.”¹⁷⁵

It can thus be argued that legal systems imposed by colonizing regimes have alienated local legal pluralism, negatively affecting access to justice and local self-determination. Anaya describes self-determination as “identified as a universe of human rights precepts concerned broadly with peoples, including indigenous peoples, and grounded in the idea that all are equally entitled to control their own destinies. Self-determination gives rise to remedies that tear at the legacies of empire, discrimination, suppression of democratic participation, and cultural suffocation.”¹⁷⁶ Ulfstein explains the two legal approaches towards self-determination of indigenous peoples as: claiming the status of “nations” predating existing states, which trumps state sovereignty; and requiring rights framed as international human rights, while accepting state sovereignty.¹⁷⁷

Chimni advocates an ideal of a ‘universal and homogenous state’, to evolve “not through tyranny or empire, but through legal integration between states that results in a kind of supranational constitutional order, informed and unified. Concentrating specifically on international institutions by which he means institutions that span economic, social and political interests and commitments, and which he feels have evolved “at the initiative of the first world,”¹⁷⁸ Chimni writes, that international institutions are definitely not “neutral actors in hot pursuit of the common good”¹⁷⁹ By ‘common good’, he is referring to the “legitimacy or justness of rules and

¹⁷⁴ Ibid; Robert Kidder, ‘Western law in India’ (1977) *Sociological Inquiry*

¹⁷⁵ Indrani Sigamany, ‘Land Rights and Neoliberalism: an Irreconcilable Conflict for Indigenous Peoples in India?’ (2016) *IJLC* (Forthcoming)

¹⁷⁶ James Anaya, *Indigenous Peoples in International Law* (OUP 2004) 94

¹⁷⁷ Ulfstein, Geir, *Indigenous Peoples’ Right to Land*, in A. von Bogdandy and R. Wolfrum, (eds.), (2004)

¹⁷⁸ B.S Chimni, ‘International Institutions Today: An Imperial Global State in the Making’ (2004) 30 *EJIL* 321

¹⁷⁹ Ibid

policies” and their impact on the working class(es); the landless and poor peasants; women and other marginal sections.¹⁸⁰ He advocates reform by changing the rules and policies by which international institutions abide, and also by holding them responsible in international law for “the wrongful consequences that ensue from their acts of omission and commission,” by developing the law of international responsibility of international institutions. Chimni’s defines ‘responsibility’¹⁸¹ as “a general principle of international law concerned with the incidence and consequences of illegal acts, in particular the payment of compensation for losses caused.”¹⁸²

Examining preconditions such as socioeconomic equality is part of the complexity of the answer to the question of whether the rule of law is synonymous with whether a community can access justice. For example, it can be argued that if communities such as indigenous peoples are dispossessed of ancestral lands, it impacts their livelihoods and habitat, and impoverishes them. Fighting for social and economic rights is increasingly frequent in court cases. This constitutes a positive use of the justice system to change political traditions and societal rules towards social economic rights. However, “legal and administrative institutions and processes are not themselves neutral or unproblematic. They are involved in power relationships.”¹⁸³ The theory that governments could be held accountable if courts were involved in social and economic policy, especially over issues relating to poverty, is belied by the fact that courts are often staffed by professionals representing different ideologies such as “conservative elite interests.”¹⁸⁴

Argentina and India provide two constructive examples of affirmative rulings governing social and economic rights. In 1981 in India, the Supreme Court, acting on moral obligation, used constitutional guiding principles to frame rights relating to bonded labour, education and housing, which became judicially enforceable. In Argentina in 1998, after the *Vincente* case, it was ruled that the state had a responsibility to marginalised communities in providing medical services and essential medicines.¹⁸⁵ The 2000 *Grootboom* ruling by the South African Constitutional court on the right to social housing for informal settlers is another example of social and economic rights prevailing.¹⁸⁶ As Anderson points out, goods and services within a society are generally acquired

¹⁸⁰ Ibid

¹⁸¹ Chimni contends that the globalization process is not spontaneous, but has been shaped by the global ruling elite through the adoption of appropriate economic, social and political international laws. Ibid 32

¹⁸² Ibid 34

¹⁸³ Denis Galligan and Deborah Sandler, 'Implementing Human Rights' in Simon Halliday and Patrick Schmidt (eds), *Human Rights Brought Home Socio-Legal Perspectives on human rights in the National Context* vol 3 (Hart Publishing 2004) 48

¹⁸⁴ Varun Gauri and Daniel M. Brinks, *Courting Social Justice* (CUP 2008) vii

¹⁸⁵ For more on this point see forthcoming journal article: Indrani Sigamany, 'Land Rights and Neoliberalism: an Irreconcilable Conflict for Indigenous Peoples in India?' (2016) IJLC (Forthcoming)

¹⁸⁶ Government of the Republic of South Africa v. *Grootboom*, 2001 (1) SA 46 (CC) Varun Gauri and Daniel M. Brinks, *Courting Social Justice* (CUP 2008) 2 and 23

with ease by the socio-economically powerful segments. If these vital goods and services, such as housing, water and electricity are less attainable by poorer sections of a society, they could be forced to acquire facilities illegally. They therefore encounter the legal system through criminal prosecution. Poverty limits peoples' access to justice, and it can also criminalise communities.¹⁸⁷

The main debate from this sub-section is around the tension caused by the formation of the nation state, which subsumed autonomous ethnic groups. Part of what is subsumed is the customary legal system. Loss of legal pluralism and customary laws leads to an alienation of certain communities and obstructs their access to justice. This is especially stark for groups such as indigenous communities or legally illiterate groups when they are dependent on laws that are administered by an educated elite who are at times corrupt. Perry's advocacy of a legally pluralistic approach, which embraces customary laws is one strategy to improve access to justice. Another strategy is changing the law for the common good, so that it legitimizes the just and fair aspects of rules and policies, and is a concrete way to acknowledge and target the expropriation of laws that began with colonisation. Both the ILO Convention on Indigenous and Tribal Peoples 1989, and United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) are laws which introduce a definite change in substantive rights. However, these international laws are not administered locally, adding to the tension between administering internationally agreed human rights principles at national levels, compounded by the loss of legal pluralism and customary laws within the national levels.

2.6. Economic Dynamics of Land Rights

Oishik Sircar clarifies that legal emancipation is what citizens strive for when they believe that the judicial system within their government will 'emancipate' them from social and economic exclusion, and enable access to justice. Sircar calls the practice of undermining of rights an illusion of "legal emancipation." It is assumed that laws guarantee justice and can grant rights. This assumption, writes Sircar, is not a 'linear progression,' but an illusion through which the culture of rights being emancipatory is erroneous. Because the law does not always deliver justice, justice remains elusive. The rights based culture that is being nurtured by international norm, according to Sircar, is contradicted by state neoliberalism, which the state is using to justify the "liberal statecraft and market craft, both of which operate through a seamless intersection of managerial and militarised agendas." Under free-market capitalism, the government, the judiciary, the market forces, civil society and political society are competing for

¹⁸⁷ Michael Anderson, R, 'Access to justice and legal process: making legal institutions responsive to poor people in LDCs' (2003) IDS Working Paper 1

resources. David Harvey captures the essence of neoliberalism when he defines it as a “theory of political economic practices that proposes that human wellbeing can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterised by strong private property rights, free markets, and free trade”¹⁸⁸ Sircar believes “neoliberal statecraft” has led to the “privatisation of state accountability”¹⁸⁹ and to “the militarisation of the state.” Social justice legislation raises expectations that justice will be accessible. The neoliberalism which profits motivated priorities, can thereby simultaneously deny the needs of communities. Indigenous peoples historically have suffered most from thwarted land rights, and within the vulnerable populations faced with “state violence,”¹⁹⁰ the most neglected of which have been women. Sircar’s critique of how economic development based on neoliberal ideology has not enhanced access to justice is shared by Anderson, Gauri and Baxi.¹⁹¹

Gauri and Brinks explain how socioeconomic rights have been ‘defensive’ in nature, which means that litigants tend to assert their rights mainly when their rights are threatened, rather than if the rights have not been realised.¹⁹² Gauri and Brinks illustrate how in some countries such as South Africa, which is a new democracy, constitutional reform was revolutionary. “Under apartheid, however, South Africa law recognised the supremacy of Parliament. Opportunities for using the law and legal processes to hold the state to account were few and far between...not only was the law largely hostile to the dreams, aspirations, and needs of the majority, but so too were most of those tasked with its interpretation and implementation. Democratic South Africa, on the other hand was fundamentally different. Any law or conduct that is inconsistent with the constitution is invalid, whether an act or an omission. Constitutional obligations must be fulfilled – they ‘must be performed diligently and without delay.’ In many respects, therefore, constitutional reform in South Africa was indeed revolutionary.”¹⁹³ This example however challenges the differences in justice that exist between countries, for example, why democratic South Africa is so “fundamentally different?”¹⁹⁴ And why India, also a democratic country since independence, does not demand accountability and conscientious fulfilment of Constitutional

¹⁸⁸ (Harvey, *A Brief History of Neoliberalism*. 2005, OUP 2)

¹⁸⁹ Oishik Sircar, 'Spectacles of Emancipation: Reading Rights Differently in India's Legal Discourse.' (2012) 49.3 *Osgoode Hall Law Journal* 527

¹⁹⁰ *Ibid* 527

¹⁹¹ See: Varun Gauri and Daniel M. Brinks, *Courting Social Justice* (CUP 2008); Anderson, 'Access to justice and legal process: making legal institutions responsive to poor people in LDCs'(2003) IDS Working Paper; Upendra Baxi, 'Taking Suffering Seriously: social Action Litigation in the Supreme Court of India' (1985) *Third World Legal Studies* 107; Upendra Baxi, 'Postcolonial Legality' in Henry Schwarz and Sangeeta Ray (ed), *A Companion to postcolonial Studies*, vol 2 (A Companion to postcolonial Studies, Blackwell Publishing 2000)

¹⁹² Varun Gauri and Daniel M. Brinks, *Courting Social Justice* (CUP 2008)67

¹⁹³ *Ibid* 41

¹⁹⁴ *Ibid*

obligations? Could it be argued, that though the law in India is framed in a progressive spirit, inclusive of the needs of the marginalised majority; many who are responsible for the interpretation and implementation of the law are in general, hostile to the needs and aspirations of the communities who stand to benefit from the law, as used to be the case in apartheid South Africa? In a critical analysis of the elements for successful access to justice, could the easy approachability of citizens to the judiciary, and socio-economic inequalities become major obstacles?

Within a free-market setting in which the state prioritises the health of the market over the welfare of marginalised citizens; the role of courts and the constitutional values are compromised. It indicates justice and state protection for vulnerable communities remains unaccounted for. Sircar proposes that when the courts collude with the neoliberal state, it legitimises state violence. Police representing the state have been accused of violence towards economic and social minority communities and women. Legal literacy and financial constraints exacerbate poor access to the legal machinery. Sircar highlights how delusional is the assumption that more laws equal more rights, and more rights would deliver more justice.¹⁹⁵ Anderson outlines the ways in which poverty is exacerbated by lawlessness, which he writes are part of the principal factors contributing to denying access to justice for poor people. He ties this aspect to the importance of the legal system being accessible to the poor and marginalised communities, and how uneven access to justice within society is dependent on unequal power. Anderson introduces the concept that ‘lawlessness’ contributes to poverty. Lawlessness occurs when there is corruption in the government, police brutality and violence, “unchecked abuses of political power”¹⁹⁶, human rights abuse, land dispossession and loss of property. These aspects impact the poor communities the most, and exacerbate poverty by loss of livelihoods and by contributing to mental illness and other forms of poor health, and “different forms of illegality or lawlessness contribute to the creation and reproduction of poverty.”¹⁹⁷ The rule of law is an obligatory condition for the smooth economic management of a nation, which should guarantee rights and obligations for individuals and investors, and ensure political and personal security. “A legal system that protects property rights and enforces contractual obligations also fosters the development of markets in land, labour, and capital, thereby enhancing economic efficiency.”¹⁹⁸ However, these economic advantages do not necessarily work in the favour of minority and poor people, which is a fine difference that is better understood within Partha Chatterjee’s theoretical

¹⁹⁵ For more on this point see forthcoming journal article: Indrani Sigamany, 'Land Rights and Neoliberalism: an Irreconcilable Conflict for Indigenous Peoples in India?' (2016) IJLC (Forthcoming)

¹⁹⁶ Michael Anderson, R, 'Access to justice and legal process: making legal institutions responsive to poor people in LDCs' (2003) IDS Working Paper 178 3

¹⁹⁷ Ibid 1

¹⁹⁸ Ibid 2

framework of “political society” as comprising the peasantry, artisans and petty producers in the informal sector, with the hegemonic role of the bourgeoisie in “civil society”. This division of society into ‘civil’ and ‘political’ is particularly helpful for explaining the exclusion that the marginalised sections of society face, which affects their legal empowerment. Members of ‘civil society’ do not face the same because of their “greater knowledge of and influence over the system.”¹⁹⁹

The 1997 World Development Report (World Bank 1997: 41) found that property rights are important for markets to function, and depend on three conditions: a) ‘protection from theft, violence, and other acts of predation’; b) ‘protection from arbitrary government actions – ranging from unpredictable, ad hoc regulations and taxes to outright corruption – that disrupt business activity’; c) ‘a reasonably fair and predictable judiciary’. The Report describes the absence of these conditions as “the lawlessness syndrome” and highlights the negative effects that the syndrome has for business. Lawlessness raises costs, discourages risk-taking, and depresses the velocity of economic transactions.”²⁰⁰ Justice Goldstone feels that there is a toleration for social economic rights violations that does not occur necessarily for violations of political and civil rights. “The magnitude, severity and constancy of the deprivation [of economic, social and cultural rights] have provoked attitudes of resignation, feelings of helplessness and compassion fatigue.”²⁰¹ One theory is that courts getting involved in social and economic policy can be a means for making governments more accountable for their policies on poverty and marginalization. An opposing view takes into account that courts are staffed by citizens who have been exposed to ‘elite’ education, which Galanter writes about in more detail below.

2.7. Procedural Access to Justice and the Contradictions within the Debate

In new democracies, the majority of citizens are less interested in first-generation rights which give them freedom of speech and freedom of assembly than they are with their rights to food housing and education for their children. Constitutions need to reflect the priorities of people in terms of their rights. In some modern constitutions, second-generation rights (social and economic rights) are reflected, but relatively few states have begun to establish these rights in their constitution or to create corresponding legislation or regulations to ensure the enforceability

¹⁹⁹ Partha Chatterjee, *The Politics of the Governed: Reflections on Popular Politics in Most of the World* (Columbia University Press 2004) 39

²⁰⁰ Michael Anderson, R, 'Access to justice and legal process: making legal institutions responsive to poor people in LDCs' (2003) IDS Working Paper 178 2

²⁰¹ Quote by the United Nations Committee on Economic, Social, and Cultural Rights used in Gauri's *Courting Social Rights*. V Gauri and DM Brinks, *Courting Social Justice* (CUP 2008) xiii

of social and economic rights.²⁰² This raises questions of whether judges are equipped to adjudicate socio economic rights. The government comprises the branch and the executive branch.²⁰³ These determine the allocation of national budgets. Are judges equipped to adjudicate on the way that legislative and executive branch allocate national budgets? Another important decision making maze occurs when rights become polycentric. This is when budgets compete between aspects for example such as education, health and welfare versus defence for example.

The question raised by Gauri and Brinks is whether judges have enough knowledge and skills to make such decisions based on choosing priorities. Justice Goldstone, writes of four key steps in the impact of social and economic rights. These include court intervention and negotiation of legal mobilization of demands, whether through litigation or not; the consequences of intervention by courts; the response of the government (or other body) that a court intervention triggers; and the attempt at enforcing the order.²⁰⁴ Goldstone points out that though judges are usually concerned with the second step of negotiation litigation, the first, third and fourth step are the most important for the would-be beneficiaries. People seem less interested “in costly, time-consuming, and often risky litigation.”²⁰⁵ The crucial issue is how social and economic rights are enforced after the legal procedures. Litigation can have unintended consequences which could be either negative or positive. Goldstone emphasizes that the enforcement of the social and economic rights is most crucial, and that judges all over the world are increasingly being expected to enforce these rights.²⁰⁶ Using India as an example, because within India’s constitution, social and economic rights were included. But for some reason it was also included that these were not to be enforceable by the courts. Goldstone, writes: “Activist Indian judges carved out enforceable social and economic rights from the right to life that was judicially enforceable. In this way, they have recognized the right to health care, nutrition, clothing, and shelter. The Supreme Court held that a lack of financial resources does not excuse a failure to provide adequate medical services. In this way, the judges of India have imaginatively fused social and economic rights with civil and political rights.”²⁰⁷

²⁰² Ibid vii

²⁰³ “Formal justice system refers to the court, the judiciary, and prosecutors. A court consists of an official public justice institution authorised by state laws to adjudicate disputes and apply laws. The judiciary is made up of judges and magistrates. The prosecution is the legal party responsible for presenting a case against a citizen accused of a crime in a criminal proceeding. Prosecutors will also enforce the judgements of a court.” American Bar Association, *Access to Justice Assessment Tool 4*

²⁰⁴ V Gauri and DM Brinks, *Courting Social Justice* (CUP 2008) ix

²⁰⁵ Ibid ix

²⁰⁶ Ibid viii

²⁰⁷ Ibid viii

Most societies, especially capitalist democracies, reveal a gap between the rich and the poor. This difference is intrinsic to aspects such as education, and income. Both these aspects influence the power of individuals and communities to either understand or have the means to take advantage of the legal order. Furthermore, the judiciary is usually staffed with educated 'elite' with vested interests in supporting the status quo. Since the judiciary is a passive organ, which is triggered by an individual or community introducing grievances, the judiciary's influence on judicial morality is only dependent on whether individuals have the power and knowledge to use it as a body. Galanter opines that existing legal systems should function as long as lawyers are "committed and willing to persevere."²⁰⁸ Without this commitment and willingness, the law becomes difficult to implement and encourages misuse and manipulation, especially if laws are numerous and complex. "For the poor and disadvantaged the law and its personnel are present as agents of oppression; its promises of improving their lot and protecting them from the oppressors seem empty, if they are known at all."²⁰⁹ Delivering legal services of particular importance when legal services are delivered to the poor and marginalised. The way in which legal services are organised can make a difference between "promise and performance."²¹⁰ Barriers include the cost of legal services that immediately excludes poorer communities, impediments to the delivery of legal services, which Galanter refers to as "the structure and organisation of professional life itself effect what services are provided and to whom," and services which might not meet the needs of certain communities.²¹¹ In order to reach marginalised groups Galanter writes about "new forms of protection and participation, and for systematic but flexible regulation."²¹²

If inequality creates differences in the manner in which the law within a country can work for different segments of society, what are the variations of how countries approach this issue? Strategies differ between countries. Marc Galanter addresses these differences and examines potential strategies that may help overcome inherent inequalities. In poor countries, such as India, Galanter suggests collaboration between lawyers, flexibility, pragmatic problem-solving approaches, committing to regulations, in order to develop expertise and mobilize skills to respond to problems of access to justice. Advancing approaches for better adaption and creativity, such as "more differentiated, complex and widely distributed legal services," he refers to Public interest litigation (PIL) which would fill the gaps to access created by poverty, where inability to miss work to attend court, language barriers and intimidation of the unfamiliar and

²⁰⁸ Marc Galanter, 'Making law work for the oppressed' (1983) III *The Other Side* 7

²⁰⁹ *Ibid* 8

²¹⁰ *Ibid* 8

²¹¹ *Ibid* 8

²¹² *Ibid* 6

formality of courts and lack of information.²¹³ As Rawls iterates, “In enforcing rules, a legal system cannot regard the inability to perform as irrelevant.”²¹⁴

The legal accountability of members of the government is undermined by three aspects outlined by Anderson. These include the constitution, the role of the judiciary, and legal reform. The constitution and how it is interpreted and directed is dependent on politics, causing an inherent conflict of roles and interest. In India, these conflicts have led to “debates about land reforms, secularism, women’s rights, and positive discrimination,”²¹⁵ which have generated battles and clashes, sometimes violent. The consequences for poor communities of this inherent conflict of roles for the constitution is a dependence on the educated class and their support, and also on the capacity of the judiciary to convert their support of constitutionalism into the delivery of legal services accessible to everyone.²¹⁶ The judiciary is part of the government, but also has to hold the government accountable for its actions. Judicial independence is thus subject to certain unreliability. Judicial independence necessitates a degree of impartiality, political independence, institutional autonomy, legal authority, judicial legitimacy, and probity – in which judges are not vulnerable to bribery and corruption. Legal reform in many countries has the additional burden of trying to ameliorate the inappropriateness of the legal structure left over from colonial rule. These colonial legal systems allowed no room for human rights, and were by nature both authoritarian and exploitative of the local populations and unaccountable. They have left behind a legacy of inconsistency, in which a country which has arrived at independence from colonial rule, might still have contradictions between left over legal statutes and the new constitution.²¹⁷

In most parts of the world, economic and development decisions are made by the political arm of the government. However, because of poor governance practices which could be contrary to good practice in planning, whether economic or social, the judiciary is being increasingly drawn into holding governments accountable, and concerning itself with judicial reviews of administrative and executive actions. Anderson highlights the dichotomy of the judiciary, the staff of which is appointed and resourced by the government, while being operated by “social and

²¹³ Ibid 9

²¹⁴ John Rawls, *A Theory of Justice* (Oxford University Press 1999) 208

²¹⁵ Michael Anderson, R, 'Access to justice and legal process: making legal institutions responsive to poor people in LDCs' (2003) 178 IDS Working Paper 178 10

²¹⁶ Michael Anderson, R, 'Access to justice and legal process: making legal institutions responsive to poor people in LDCs' (2003) 178 IDS Working Paper 178 13

²¹⁷ For example, “in Jamaica and many other Caribbean states the constitution was drafted to protect existing (colonial) laws from judicial scrutiny under the fundamental rights provision of the constitution. Constitutional rights were made inapplicable to colonial criminal statutes in particular, to prevent the interference of constitutional rights with law and order. In Tunisia, “statutes curbing the right to travel, freedom of association, and freedom of the press existed for decades alongside the Constitutional guarantees of those very rights.” Ibid 14

market forces, and thus inevitably reflect[s] the agenda of those forces in their decisions.”²¹⁸ Anderson uses India as an example in which the agrarian landholders, the urban professional groups and the corporate sector are the most economically powerful groups in society. They therefore influence the decisions and services of the courts, which affects necessary judiciary reformation that is oriented towards the poor communities. The poor people themselves have very little legal clout, and as Anderson emphasizes, are usually in contact with the court in criminal prosecutions.²¹⁹

Galanter uses the United States of America as an example to show the many models of legal services delivery that can be used for public interest law. They have the services of skilled and dedicated lawyers, but in addition to this they have a variety of other inputs such as: “operation of the large-scale, scope, and continuity to reap the advantages conferred by this sort of large-scale lawyering. These advantages include the ability to pursue a long run strategy by acquiring specialised expertise, coordinating efforts on several fronts, selecting targets and forums, managing the sequence, scope and pace of litigation, monitoring developments, and deploying resources to maximise long-term advantage (including educational and organisational effects as well as favourable awards).”²²⁰ But he points out that though the USA has “comprehensive, highly skilled and wide-ranging service to large enterprises and organisations,” these services are not extended to the poor who are also therefore legally marginalised.²²¹ The author also differentiates between service legal programs and strategic legal programs. The service programs are “reactive” and “Paternalistic” and respond to clients who approach the legal services. They are restricted to the conventional representation of clients in court, as courtroom advocates and representation in litigation by lawyers. These include “oral and written argumentation,” which keep clients passive, dependent on the lawyers, and not able to participate in the legal decision-making of their cases.²²² In some countries such as Bulgaria and other socialist countries where the normal judiciary is so accessible and financially user-friendly, that special procedures and attempts to reduce costs are unnecessary.²²³ Sweden is also cited as having the most successful access to justice.²²⁴ In many other countries such as Western Europe and North America, judicial

²¹⁸ Ibid 7

²¹⁹ Ibid 9

²²⁰ Galanter, 'Making law work for the oppressed' (1983) *The Other Side* 10

²²¹ Ibid 10

²²² Ibid 11

²²³ Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' [1977] *BLR* 183 230

²²⁴ In Sweden, however, about eighty five percent of the population has legal insurance which covers, inter alia, most of the costs of losing a lawsuit. Hence, the winner can easily recover his costs from a poor adversary if the latter is insured. Obviously this development has important implications for access to justice in Sweden; indeed, it reflects a move beyond the simple legal aid solution. Mauro Cappelletti and

reform has been occurring and has taken many forms such as legal aid. The focus has been on making legal institutions accessible to everyone.

Strategic programmes reach out to people and publicise the availability of services, educate clients on how services were and provide supportive services to make things easier for clients. The strategic programme, “is oriented to the longer run as well as to immediate advantage relief and to matters that affect groups rather than isolated individuals. It also “engages in research, negotiation in a variety of settings, citizen education, media relations and so forth.” It leads to “client participation in decision-making both for its educative value and because the client participation is needed to choose between competing versions of the goal is to be pursued.”²²⁵ Galanter does stress that both models have disadvantages and advantages, but that it is important for public interest litigation to help to develop the capacities of people to sustain effective use of the law. Such programs focus on those complaints with the public dimension where a whole class of persons are potential beneficiaries. Rather than operate exclusively through litigation, the Strategic programme pursues the interests of its clients in legislative, administrative, media, educational and political arenas.

In his article on Access to Justice: *The Newest Wave in The Worldwide Movement to Make Rights Effective*, Cappelletti highlights numerous creative methods adopted by several countries in an effort to make justice more accessible to individuals with less means, either social or economic.²²⁶ He points out that there are more ways to access justice other than courts, and considers the ‘barriers’ to be overcome in order for effective access to justice to happen. These include the costs of litigation competence of an individual to pursue a claim or defense, which is also referred to as legal literacy by Cappelletti, and as ‘social capability’ by Galanter. In a discussion about how Access to Justice versus Injustice has been broadened, Galanter describes how, with the advancement of ‘social capabilities,’ events such as famine, disabilities, sexualities, and social subordination, are no longer accepted as unchangeable. Remedies and protection are now perceived to be responsibilities and duties of social governance, and justice.²²⁷ Cappelletti refers to a pattern that emerges on examination of barriers to access to justice, “the

Bryant Garth,’ Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’ [1977] BLR183 207

²²⁵ Galanter, ‘Making law work for the oppressed’ (1983) *The Other Side* 11

²²⁶ Cappelletti describes the context for access to justice as the legal system “by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state.” Within this context, Cappelletti asserts that the two main purposes of the legal system are that it “must be equally accessible to all;” and that it “must lead to results that are individual and socially just.” Mauro Cappelletti and Bryant Garth,’ Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’ [1977] BLR183 196

²²⁷ Marc Galanter, ‘Access To Justice In A World Of Expanding Social Capability’ (2010) *FULJ* 125

obstacles created by our legal systems are most pronounced for small claims and for isolated individuals, especially the poor; at the same time, the advantages belong to the “haves,” especially to organisational litigants adept at using the legal system to advance their own interests.”²²⁸

Thus, social capability affects the marginalized populations the most, and they may not even be aware that they have rights which they can claim against land violations. This creates the intersection between human rights and access to justice, since access to justice protects the rights of vulnerable groups of citizens.²²⁹ “Unless citizens have access to justice, the rights and duties enshrined in international treaties, constitutions and laws are meaningless and fail to provide any protection to vulnerable groups.”²³⁰ When legal aid systems caught up with the ideology in the early 1900s and Western European countries began to invest realistically in their legal aid programs, it was referred to as the ‘judicare’ system, “whereby legal aid is established *as a matter of right* for all persons eligible under statutory terms, with *the state paying the private lawyer* who provides those services. The goal of judicare systems is to provide the same representation for low income litigants that they would have if they could afford a lawyer.”²³¹

Cappelletti does point out however that though judicare responds to the financial gap for poorer people, it does not deal with the legal literacy aspect, where some people are either unaware of their rights, or of the process of claiming their rights, or they don’t have the confidence to utilize the facilities. In addition to this, if marginalized people as a group are facing legal problems, the law in many respects only deals with individuals and not with groups. Property ownership law for example rarely recognises communal ownership rights.²³² In contrast, the United States, developed a system called the *public salaried attorney model*, which in addition to helping poor people with their legal issues, it had a planned education and awareness of rights element.²³³ The movement in the US was labelled “War on Poverty”, and “clearly attacks other barriers to

²²⁸ Mauro Cappelletti and Bryant Garth, ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’ [1977] BLR183 196

²²⁹ Rule of Law Initiative American Bar Association, *Access to Justice Assessment Tool* (American Bar Association, Rule of Law Initiative, 2012) vii

²³⁰ Ibid vii

²³¹ Mauro Cappelletti and Bryant Garth, ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’ [1977] BLR183 199

²³² “Probably the most cogent objection to the judicare approach to legal aid is that judicare does nothing except give service to the individual client. It does not effectively provide for law reform, for community action, or for community education.” Klausner & Riegert, *Legal Assistance in the Federal Republic of Germany*, 20 *Buffalo L. Rev.* 583, 604 (1971) in Mauro Cappelletti and Bryant Garth, ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’ [1977] BLR183 202

²³³ “The staff attorneys sought to extend the rights of the poor by test cases, lobbying, and other law reform activities on behalf of the poor as a class. Indeed, they often helped to organise the poor to present their interests more effectively inside and outside the courts.” Mauro Cappelletti and Bryant Garth, ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’ [1977] BLR183 203

individual access besides cost, particularly the problems of the personal legal competence of the poor... In sum, besides just handling the individual claims of the poor that are brought to lawyers, as in the *judicare* system, this American model (1) reaches out to the poor to help them vindicate their rights, and (2) creates an effective advocate for the poor as a class.”²³⁴ And then there is the combined model of legal aid, as indicated in Canada and Sweden, where the choice of advocating for and mobilizing the marginalised as a group, or getting support for individual claims are both in existence.²³⁵ In all the above examples, barriers to access to justice are being eliminated in some ways. Legal aid however, addresses only one aspect of access to justice. It tends to be expensive, and heavily dependent on funding.

The judiciary is an institution that is not proactive in distributing justice equally. It is activated by individuals seeking justice. If the judiciary is best utilized by educated and informed individuals, its agendas are automatically prescribed by their priorities. This marginalizes the poor even further, making the legal system unapproachable. This could validate the evidence that access to justice could be seen as a clear indicator of strengths and weaknesses of a judiciary. Anderson confirms that “access to justice is therefore not only central to the realisation of constitutionally guaranteed rights, but also to the broader goals of development and poverty reduction.”²³⁶ Justice Richard Goldstone points out that judges can use discretion that specifically takes into consideration that socioeconomic circumstances can impede access to justice.²³⁷ It is important that the access to justice debate is situated within the context of inequalities. Unequal access to justice is an experience that is consigned to communities who are marginalised, such as indigenous people or women or economically disadvantaged communities. I argue that any attempt to improve access to justice, such as judiciary reform will be incomplete without corresponding commitment and investment in socio-economic change.

2.8. Conclusion

There are several major strands of reflection emerging from the above debate of whether international legal norms are inherently biased against excluded groups in any country.¹ These include the consequences of empowerment and of protection for many marginalized peoples

²³⁴ Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' [1977] BLR183 203

²³⁵ Ibid 207

²³⁶ Michael Anderson, R, 'Access to justice and legal process: making legal institutions responsive to poor people in LDCs' (2003) 178 IDS Working Paper 178 1

²³⁷ V Gauri and DM Brinks, *Courting Social Justice* (CUP 2008) preface

which in turn comprise the moral orientation of human rights norms; a history of imperialism weighting international laws towards the benefit of northern/western states; and a nascent global economic order which simultaneously offers aspirations to the “transnational capitalist class” (TCC)¹ of third world countries with capitalist leanings,¹ while reinforcing the north-south economic power imbalance. These developments have had direct consequences on both the livelihoods of indigenous peoples who have been displaced from mineral-rich lands by the drive to develop extractive industry, and of the development of international and national legislation towards their protection.

The four major aspects of accessing justice that have emerged from the scholarship on the subject outlined above are that historically, the ways in which the law has been created, and by whom it has been both drafted and enacted, has not only provided us a framework that give people rights, but has also denied people their rights. This has led to the uncomfortable existence of judicial imperialism, in which the laws do not change the lives of people in the ways they were intended. The second aspect highlighted has been how socio-economic inequalities within countries, have impaired legal literacy and capacities of individuals and communities to use legal institutions on a more equal basis, and therefore how access to justice is shaped both by the socio-economic culture of a country and by other inequalities such as class or gender. This in turn is tied to the third aspect of the evolution of human rights norms. These norms have institutionalised the concept and created a global awareness that every individual and community has rights that need to be legally protected, and which base the concept of justice on a social contract. The last point that has emerged from the scholarship is that differences in how legal rights are either recognised or enacted by judiciaries or governments, boils down to a moral framework of whether human beings are entitled to certain rights at all. This morality, as outlined above by thinkers such as Rawls, Sen and Cappilletti, influences the framing of international and national laws, and more important, how these laws are implemented at all levels whether global, national or local. If the moral beliefs of individuals who hold power in governments do not respect these rights, access to justice to ‘just’ laws that respect land rights become untenable. Egalitarian and inclusive governance therefore is basic to legal rights and access to justice.

Chapter Three: Legal Mechanisms for Indigenous Peoples and the Forest Rights Act of India

“Land is the foundation of the lives and cultures of Indigenous peoples all over the world... Without access to and respect for their rights over their lands, territories and natural resources, the survival of Indigenous peoples’ particular distinct cultures is threatened.”

Permanent Forum on Indigenous Issues

Report on the Sixth Session

25 May 2007

3.1. Introduction

This chapter concentrates on the Forest Rights Act of India, 2006 viewed within the context of indigenous land rights, and situated against the background of a broader international rights based normative framework. The Forest Rights Act 2006 precedes the UN Declaration of Rights of Indigenous Peoples 2007 (UNDRIP)²³⁸ by one year. UNDRIP does mirror some of the land rights reflected in the Forest Rights Act of India such as FPIC, proving the global recognition of indigenous rights. The chapter, built on an analysis of the Forest Rights Act legislation, creates a hook to hang the analysis from the case studies that follow in the next three chapters. The case studies in turn illustrate and substantiate the arguments for access to justice for indigenous peoples and the effects of the Forest Rights Act on the lives of forest peoples in India. The discussion of the Forest Rights Act here is connected to the international legal legislation later in the chapter, through an analysis of the extent to which expansion in international rights based approaches for indigenous communities complement the development of national legislation. I argue that national legislation and policies do not necessarily improve access to justice for communities and individuals on the national stage, unless strongly supported by administrative justice. I also question whether the international laws on indigenous land protection can counter the discrimination faced by indigenous communities when being displaced from their ancestral lands.

The discourse on indigenous peoples’ land rights is complex, especially when situated within the legal frameworks of national land laws. Historically, many indigenous communities were nomadic, herding animals to pasture and employing agricultural techniques such as slash and burn agriculture which allows land to regenerate while the communities moved on. Many

²³⁸ UN Declaration of Rights of Indigenous Peoples 2007²³⁸ (no. 61/295)

indigenous communities have since settled and chosen either agriculture or other livelihoods. Culturally however, indigenous peoples still tend to live communally and use land collectively. National and international land laws assume private individualistic ownership of land, or land owned by the sovereign state²³⁹. This contrasts with the collective use²⁴⁰ of land by indigenous communities, especially mobile²⁴¹ populations, who do not necessarily seek to own the land they use, abiding instead by the customary practice of using vast swathes of common lands for grazing corridors.

3.2. Chapter Outline

In order to unpack indigenous land dispossession, I start Section 2 with an explanation of *Terra Nullius* and how this concept has been endorsed for the expropriation of indigenous lands. Section 3, entitled 'The Forest Rights Act: Scheduled Tribes and Other Forest Dwellers (Recognition of Forest Rights) Act 2006, provides an overview of the history of tribal rights and law in India. This section examines the historic loss of land experienced by forest peoples in India, and the birth of the Forest Rights Act. It traces the imposition of Western law as a result of colonization, which created a fragmented and multi-layered legal incongruence, further excluding marginalized communities from accessing justice. I describe the Forest Rights Act in four segments: In 4.1 in Substantive Rights and Access to Justice, I outline the human rights and social justice ideologies that underpin the Forest Rights Act in India, and examine whether it provides adequate substantive rights and access to justice. In 4.2 Salient Features of the Forest Rights Act, I trace the principal features of the Act, connecting it to the substantive rights mentioned above. In 4.3 in the Analysis, I critically examine the judicial administration of the Forest Rights Act and analyse the issues faced by the forest communities when claiming their land rights. In 4.4 Deeply Divided Activists and Environmentalists, I investigate the contemporary debates between the two camps of supporters and critics of the legislation.

Section 5 outlines A Normative Framework for Indigenous Rights, which reviews international legal frameworks protecting land rights of indigenous peoples. I identify the laws, which have a direct bearing on indigenous land rights. The following section 4, connects the international laws to national laws on land rights. The final section concludes by revealing the contradictions between human rights in international laws and national flaws in administrative justice. This

²³⁹ Jeremie Gilbert, 'Land Rights and Nomadic Peoples: Using International Law at the Local Level' (2012) 16 *Nomadic Peoples* 78

²⁴⁰ Jeremie Gilbert and Cathan Doyle, 'A New Dawn over the land: Shedding Light on collective Ownership and Consent' in Stephen Allen and Alexandra Xanthaki, *Reflections on the UN Declaration on the rights of indigenous peoples* (Hart 2011)3

²⁴¹ The terms 'nomadic' and 'mobile indigenous peoples', which are used interchangeably was defined in Chapter 2 of this study.

contradiction is very apparent in how the Forest Rights Act is being administered in India, despite the sound substantive rights that it incorporates.

3.3. Terra Nullius

“Indigenous identity is often tied to a collective relationship to lands and resources, a relationship which is central to ensuring the physical well-being of present and future generations as well as providing the resources that enable their social, cultural and spiritual lives”²⁴² Land displacement of tribal peoples began under colonial rule when forests were recognised as a rich source of revenue and converted to sovereign territory. The concept of *terra nullius* or ‘empty lands’ was used to expropriate indigenous lands in the past.²⁴³ *Terra nullius* is a principle that indigenous peoples are still fighting against in an effort to reclaim lost ancestral lands. Land struggles focus on “...threats from large-scale, industrial methods of extractive, production and development (for example, monoculture plantations, industrial fishing and logging, and large-scale mines and dams) and, on the other hand, threats from exclusionary environmental and conservation frameworks that undermine the rights of Indigenous peoples and local communities.”²⁴⁴

The *Terra nullius* attitude and lingering expropriative mentality of overriding indigenous land rights is illustrated in these two relatively contemporary examples in India: In 2013 a struggle occurred between the Kondh tribes of Orissa and a global mining company called Vedanta, which was mining for bauxite in partnership with the Indian government. The Central Government of India filed an affidavit in an attempt to acquire Kondh land arguing that it would be in the public interest, which would effectively remove tribal rights.²⁴⁵ It would also displace tribal peoples from the Niyamgiri hills, which was sacred to them, and destroy their livelihoods.²⁴⁶ Another high profile case in which thousands of tribal communities were displaced was the Sardar Sarovar Dam and Power Project on the Narmada River in Gujarat in India. The social and environmental costs were very high because no adequate measures were taken by the government to protect the tribal communities whose habitat and livelihoods would be wiped out

²⁴² Helen Tugendhat and Eleanor DICTAAN-BANG-OA, *Realizing Indigenous Women's Rights : A Handbook on the CEDAW* (Tebtebba Foundation, Forest Peoples Programme, Asia Indigenous Women's Network (AIWN), 2013) 2

²⁴³ Jeremie Gilbert and Cathan Doyle, 'A New Dawn over the land: Shedding Light on collective Ownership and Consent' in Stephen Allen and Alexandra Xanthaki, *Reflections on the UN Declaration on the rights of indigenous peoples* (Hart 2011)5

²⁴⁴ Harry Jonas and others, *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas conserved by Indigenous Peoples and Local Communities* (Natural Justice in Bangalore and Kalpavriksh in Pune and Delhi, 2012)

²⁴⁵ Indrani Sigamany, 'Destroying a Way of Life: Indigenous Peoples, The Forest Rights Act of India and Land Displacement of Indigenous Peoples' in I Satiroglu and Choi N (eds), *Development-induced Displacement and Resettlement: New Perspectives on persisting problems* (Routledge 2015) 163

²⁴⁶ Kumar S Sambhav, *Centre set to dilute tribal rights over forestland* (Down to Earth Magazine 2012)

when the plains would be flooded by the dam waters. The project was highly controversial since the late 1980s, and the World Bank withdrew its funding in the 1990s.²⁴⁷

These examples reveal that the lack of responsibility and accountability that states, international institutions, and multinational corporations have towards the rights of indigenous peoples. Often this pro-profit development at the expense of livelihoods and habitats of marginalized indigenous communities has encompassed a lack of political morality and political will of the government in India, and has culminated in an inability to abide by international legal norms for the protection of indigenous peoples. The normative framework outlined below explicates the national and international response towards the long history of land dispossession that continues to be driven by a corporate commitment to free-market capitalist values often concealed under the justification for ‘development’.²⁴⁸

3.4. The Forest Rights Act: Scheduled Tribes and Other Forest Dwellers (Recognition of Forest Rights) Act 2006

3.4.1 Substantive Rights and Access to Justice

The Forest Rights Act: Scheduled Tribes and Other Forest Dwellers (Recognition of Forest Rights) Act 2006, of India, which will be referred to as the Forest Rights Act in this paper, grants enhanced rights to forest peoples in lands that they have occupied or used, often for generations.²⁴⁹ The Forest Rights Act is framed in progressive rights-based language; it recognises that the “historical injustice” of land dispossession of indigenous peoples of India, called Adivasis,²⁵⁰ needs to be addressed.²⁵¹ The Forest Rights Act reflects a global move towards the recognition of human rights, is founded on principles of social justice, and was formulated on

²⁴⁷ Ibid

²⁴⁸ Fimi, I. I. W. S. F, Mairin iwanka raya : Indigenous Women Stand Against Violence. *A Companion Report to the United Nations Secretary-General's Study on Violence Against Women.* (UN 2006)

²⁴⁹ Government of India, The Scheduled Tribes And Other Traditional Forest Dwellers (Recognition Of Forest Rights) Bill (adopted on 15 December 2006, No.158-C of 2005)

²⁵⁰ ‘Adivasi’ is the Indian name for the original inhabitants of the Indian subcontinent. The Indian government uses several terms interchangeably: Adivasi, or tribal, Schedule Tribes, or SC for the ancient communities who reside in the hills and forests. Tushar Dash and Ashish Khotari, 'Forest Rights and Conservation in India' in Harry Jonas, Suneetha M. Subramanian (ed) *Right to Responsibility: Resisting and Engaging Development, Conservation, and the Law in Asia* (Right to Responsibility: Resisting and Engaging Development, Conservation, and the Law in Asia, Natural Justice and UNU-IAS Institute of Advanced Studies 2013) 151

²⁵¹ Government of India, The Scheduled Tribes And Other Traditional Forest Dwellers (Recognition Of Forest Rights) Bill (adopted on 15 December 2006, No.158-C of 2005)

the cusp of evolving international laws for indigenous peoples,²⁵² creating a powerful tool for indigenous peoples in their struggle to reclaim lost land and usufruct rights.

The main purposes of the Act were to revoke historical injustice endured by the Adivasis in relation to lost lands, and to restore customary rights to them, to increase tribal participation in the management of forest lands, and to contribute to a more structured conservation approach.²⁵³ One of the strongest aspects of the Forest Rights Act is that it recognizes community forest rights. This is especially significant given that most tribal and pastoralist communities behave communally. The Forest Rights Act 2006 is part of India's legal system, and recognises usufruct and habitat rights of tribal and indigenous peoples in India.²⁵⁴ It was the result of long and vigorous advocacy by forest dwellers and activists.

The Forest Rights Act “is a result of the protracted struggle by the marginal and tribal communities of our country to assert their rights over the forestland on they were traditionally dependent. This Act is crucial to the rights of millions of tribal people and other forest dwellers in different parts of our country as it provides for the restitution of deprived forest rights across India, including both individual rights to cultivated land in forestland and community rights over common property resources. The notification of Rules for the implementation of the Forest Rights Act, 2006 on 1st Jan 2008, has finally paved the way to undo the ‘historic injustice’ done to the tribals and other forest dwellers.”²⁵⁵

In India, the customary ancestral ownership and occupation rights of tribal forest peoples were disregarded under colonial rule in 1874, when the colonial administration deemed all the Adivasi areas as being “outside the jurisdiction of the normal administration,” and called them ‘scheduled areas’. The tribal populations of India are still referred to as ‘scheduled tribes’. The Scheduled Districts Act XVI, 1874, the Government of India Act 1919 and the Government of India Act, 1935, facilitated control of Adivasi lands, which were abundant in natural and mineral

²⁵² United Nations Declaration on the Rights of Indigenous Peoples (adopted on 13 December 2007, UNGA Res. 61/295 A (UNDRIP Add 1)

²⁵³ Purabi. Bose, Bas. Arts and Han. van Dijk, 'Forest governmentality': A genealogy of subject-making of forest-dependent 'scheduled tribes' in India' (2012) 1 Land Use Policy 664 1; Government of India, The Scheduled Tribes And Other Traditional Forest Dwellers (Recognition Of Forest Rights) Bill (adopted on 15 December 2006, No.158-C of 2005)

²⁵⁴ Indian Tribal Heritage, 'The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 Reports & Articles ' (2013) The Forest Rights Act: Scheduled Tribes and Other Forest Dwellers(Recognition of Forest Rights) Act 2006; Tushar Dash, 'Redefining Biodiversity Conservation in India' Policy Matters (2010)

²⁵⁵ Government of India, *The Forest Rights Act Website*. <http://fra.org.in/>

resources.²⁵⁶ In the 1950s, the ‘schedule’ or list of forest and hill tribes compiled by the British in 1874 was incorporated into the constitution of independent India. Colonial laws strongly influenced the legal environment in the postcolonial period, as shown by laws such as the Wild Life (Protection) Act 1972 and Forest Conservation Act 1980. Both laws continued the exclusion of indigenous peoples in India, in which wildlife protection took priority over housing and livelihoods of forest people. Other policy mechanisms such as the National Forest Policy of 1988, and the Joint Forest Management programme reinforced the control of the Forest Department²⁵⁷ over the lives of indigenous peoples, perpetuating ecological imperialism and dispossession. ²⁵⁸

Contemporary law in India, as it developed, initially followed the classic legal traditions of the West. Decolonised societies, however, have had to jettison the traditions that kept them controlled under imperial domination and repression, which Galanter refers to as the “expropriation of law.”²⁵⁹ Galanter also points out that this legal tradition is alien to Indian traditions, “Foreign in origin and in inspiration, notoriously incongruent with the attitudes and concerns of much of the population, [the Western legal tradition] displaced a major intellectual and institutionally complex one within a highly developed civilization.”²⁶⁰ It was only after colonisation that modern India was unified into a single ‘nation’ governed by a foreign power, from formerly discrete kingdoms of varying sizes, characterised by different cultures and languages. Part of this governance system was the establishment of a unified modern legal system. The new legal system shared certain characteristics with the foreign ruler, the bureaucracy, mechanics, and protocols of which were alien to the local Hindu, Muslim and other Indian legal traditions. Given that tribal communities in India are for the most part unexposed to the Western/British legacy either through education or through the law, attempting to engage with such a culturally unfamiliar legal structure serves to impede their own legal empowerment. This is further exacerbated by high rates of illiteracy and often by geographical isolation.

Local law in India operated through informal ‘tribunals’, which “represented a multiplicity of systems with no fixed authoritative body of law, no set binding precedents, no single legitimate

²⁵⁶ R Bhengra, C.R. Bijoy and S Luithui, *Report on the Adivasis of India Report of the Adivasis of India* (Minority Rights Group 1999); Tushar Dash and Ashish Khotari, 'Grabbing: Dangers of the Green India Mission' in K Kohli and M Menon (eds), *Banking on Forests: Assets for a Climate Cure?* (Banking on Forests: Assets for a Climate Cure?, Kalpavriksh and Henrich Boll Stiftung 2012); Madhav Gadgil and Ramchandran Guha, *This Fissured Land: An Ecological History of India* (Oxford University Press 1992); Krithi K Karanth and Ruth Defries, 'Conservation and management in human-dominated landscapes: case studies from India' Biological Conservation

²⁵⁷ This Department is an agency of the Indian national government that traditionally has had jurisdiction over forests nationwide.

²⁵⁸ {Springate-Baginski, 2008 #3}

²⁵⁹ Galanter, 'The Displacement of Traditional Law in Modern India' (1968) *Journal of Social Issues* 67

²⁶⁰ *Ibid*, 65; Robert Kidder, 'Western law in India' (1977) *Sociological Inquiry*

way of applying or changing the law.”²⁶¹ When referred on to the government’s courts, these tribunals were transformed and curtailed. Informal systems of dispute settlement were and still are influence by unwieldy foreign systems of litigation since colonization, to which the Adivasis are subjected. Some of this litigation, inevitably contentious in nature, might have been peaceably settled through traditional tribunals. The new Western principle of ‘equality before the law’ dismissed the status and communal ties of the parties involved, and traditional ‘mediation’ methods were rejected for the contemporary ‘win or lose’ culture. “The new courts not only created new opportunities for intimidation and harassment and new means for carrying on old disputes, but they also gave rise to a sense of individual right, not dependent on opinion or usage, and capable of being actively enforced by government, even in opposition to community opinion.”²⁶² On the other hand, a positive aspect of the decline of tribal tribunals was the decrease of traditional sanctions such as boycotting and “outcasting” of persons or groups. Taken within this legal context, Adivasis, when faced with dispossession of their lands have had recourse to a legal tradition that is intrinsically alien to local informal tribunals. This raises the question of whether the externally imposed legal tradition in India results in an obstruction to access to justice for tribal groups. New land rights legislation, such as the Forest Rights Act discussed below, however revolutionary and people-centric remains alien to the indigenous traditions

The Forest Rights Act of 2006 has been “India’s largest statutory development” in the field of Adivasi rights.²⁶³ The Act has generated continuing polarized debates in India, with some heralding it as the long awaited legal mechanism that the Adivasis and other forest dwellers need, not only to re-claim their ancestral lands, but also as a means to eventually pull themselves out of the economic deprivation that displacement has induced. The arguments in favour of the Forest Rights Act are that tribal peoples’ ancestral claims to their lands have been recognised. “It is estimated that at present about 40 lakhs²⁶⁴ tribal and forest dwellers [had] no legal status to their land. Without any legal documents to the lands they occupy, cultivate, graze their cattle on, they are extremely vulnerable. For any development purpose or industrial project, they may be evicted without compensation, as has happened several times before.”²⁶⁵ Firstly, the previous legislation, the Forest Conservation Act of 1980, and the Indian Forest Act of 1927, were not conservation friendly. Both used the legislation to expropriate land for government revenue and timber industries. “In fact, it is estimated that since 1980, 40,000 hectares of land has been

²⁶¹ Ibid (1968) 71

²⁶² *ibid*, 70

²⁶³ Velayutham Saravanan, 'Political Economy of the Recognition of Forest Rights Act 2006: Conflict between the Environment and Tribal Development' (2009) 29 South Asia Research 199 199

²⁶⁴ One lakh is one hundred thousand. 40 lakh would be 4,000,000

²⁶⁵ Madhu Ramnath, 'Surviving the Forest Rights Act: Between Scylla and Charybdis' (2008) 43 Economic and Political Weekly 37) 38

diverted annually for non-forestry purposes; in the period 2001-06 alone, 5.73 lakh hectares were diverted for non-forestry projects.”²⁶⁶ Secondly, it is thought that secure tenurial rights correlate with sustainable management of land.²⁶⁷

Others see it as a politically motivated law which “will neither benefit the tribal communities nor enhance conservation. Rather, it serves as a cloak to justify non-tribal intervention, with potentially disastrous consequences.”²⁶⁸ In contrast, there exists an unease by government officials from the Ministry of Environment and Forests and from the Forest Department who have had to relinquish control over forest lands. This aspect of loss of control by the state is illustrated at length below. Having previously identified this dichotomy in the Literature Review of Chapter Two of this study, I examine in this Chapter Three and in Chapter six whether the Forest Rights Act has improved access to justice of tribal communities, or made them more vulnerable. The expectation from new social legislation such as the Forest Rights Act in India is that it should increase justice for those whom the legislation seeks to protect. This newly acquired social and economic justice should theoretically, according to the terms of the Forest Rights Act, enable indigenous forest peoples to claim ancestral land rights, to continue their forest based livelihoods, and to conserve the forests. In practice, however, a very different narrative of social justice emerges.²⁶⁹

3.4.2 Salient Features of the Forest Rights Act

In India, in response to the expectation of a ‘minimum core’ of social economic rights stipulated by UN Committee on Economic Social and Cultural Rights (UNCESCR),²⁷⁰ the Forest Rights Act 2006 provides a legal framework for the protection of substantive rights for tenurial security of vulnerable forest peoples and indigenous groups. The Forest Rights Act, framed in rights based language, “can in some way, be called contemporary India’s largest land regime change—

²⁶⁶ Madhu Ramnath, ‘Surviving the Forest Rights Act: Between Scylla and Charybdis’ Economic and Political Weekly (2008) 38

²⁶⁷ Ibid

²⁶⁸ Velayutham Saravanan, ‘Political Economy of the Recognition of Forest Rights Act 2006: Conflict between the Environment and Tribal Development’ (2009) South Asia Research 199

²⁶⁹ For the purpose of this article, the term ‘Justice’ is defined as “1) fairness. 2) moral rightness. 3) a scheme or system of law

<http://dictionary.law.com/Default.aspx?typed=justice&type=1>

The term “social justice” will be defined as “Justice in terms of the [distribution](#) of wealth, opportunities, and [privileges](#) within a society.”

<http://www.oxforddictionaries.com/definition/english/social-justice>

²⁷⁰ UNCESCR is referred to earlier in this chapter when outlining a normative framework for indigenous rights.

from the forest administration to the rightful owners of forestland.”²⁷¹ It has the potential to change forest governance and to empower forest communities. The Forest Rights Act was passed 2006 and became effective on 1 January 2008. The law notes that it is intended to address the “historical injustice” suffered by tribal peoples and other forest dwellers who have lived for generations in the forests yet whose “rights on ancestral lands and their habitat were not adequately recognised in the consolidation of State forests during the colonial period as well as in independent India.” The law also explicitly states that its purposes include addressing the consequences of development by the State: the Act is meant to address the “long standing insecurity of tenurial and access rights of forest dwelling Scheduled Tribes and other traditional forest dwellers including those who were forced to relocate their dwelling due to State development interventions.”

The Indian government maintained for several decades, the economic policies that the British had pursued, starting with the expropriation of the forest lands for British timber economy, and continuing after independence. One departure from colonial policy by the Indian government was an attempt to protect biodiversity and to counter the deforestation that had occurred during the colonial era. This set in motion extensive conservation efforts,²⁷² supported by new legislation.²⁷³ The nature of the new conservation legislation however, further excluded forest peoples from their lands, while mainstream populations and industrial interests encroached steadily.²⁷⁴ In 1988, as part of the National Forest Policy the Supreme Court ordered a regularization of forest encroachment. They required that any regularization first be cleared by Supreme Court. The Ministry of Environment and Forests (MoEF), however, misinterpreted this order and used it as an excuse for forest evictions through the whole country, triggering mass protests before the 2004 elections. The new UPA (United Progressive Alliance) government promised to address the issue. In response to the advocacy efforts of Adivasi communities, other forest dwellers, pastoralist communities, and civil society tribal rights organisations, the Ministry

²⁷¹ {Sambhav, 2013 #5} no page

²⁷² Gadgil and Guha, *This Fissured Land: An Ecological History of India* (OUP 1992) 109

²⁷³ New legislation for conservation such as Forest Conservation Act of 1980 was passed. “The Wild Life Protection Act of 1972 had already severely restricted the rights of Adivasis in the wildlife sanctuaries and removed their rights in national parks. The 1991 amendment to the Act took this a stage further. The 147 wildlife sanctuaries and 75 national parks (of which 18 are tiger reserves) covering 4.26 per cent of the land mass are planned to increase. These moves, with the financial backing of the World Bank and other international agencies, have forced Adivasis to further restrict or altogether abandon their survival activities in the forests.” R Bhengra, C.R. Bijoy and S Luithui, *Report on The Adivasis of India*, 1999) 10

²⁷⁴ Purabi Bose and Bas Arts and Han van Dijk, Bose, Arts and van Dijk, 'Forest governmentality': A genealogy of subject-making of forest-dependent 'scheduled tribes' in India' (2012) Land Use Policy; Madhu Ramnath, 'Surviving the Forest Rights Act: Between Scylla and Charybdis' Economic and Political Weekly (2008) 37; Lovleen Bhullar, 'The Indian Forest Rights Act 2006: A Critical Appraisal' (2008) 4 Law, Environment and Development Journal (LEAD)

of Tribal Affairs (MoTA) began drafting the Forest Rights legislation. The Forest Rights Act of 2006²⁷⁵ is a legal mechanism that tribal and other forest people can use to access justice and to reclaim ancestral land from which they have been displaced. The Act was welcomed by many in India, especially Adivasi tribal communities, other traditional forest people such as mobile indigenous peoples, and activists who were part of the struggle for justice for indigenous peoples in India dispossessed of their lands. A great number of people in India may benefit from the Forest Rights Act. “Twenty-three percent of [India’s] geographical area has been designated as forest, upon which an estimated two hundred million people depend for their livelihoods to varying degrees. The Forest Rights Act has particular significance for the forested, tribal inhabited, and mineral rich but most impoverished belt of central and eastern India. Here ancestral tribal lands, despite being protected by the Constitution, have largely been declared state forests without following the due legal process of enquiring into the pre-existing rights of the customary tenure holders. It is this population of the country’s poorest people, numbering perhaps one hundred million, who have suffered institutionalised disenfranchisement during colonial rule and after independence, who stand to benefit the most from proper implementation of the Forest Rights Act.”²⁷⁶

3.4.3. Analysing the Forest Rights Act

The government ministry responsible for implementing the Forest Rights Act is the Ministry of Tribal Affairs (MoTA), rather than the Ministry of Environment and Forest (MoEF). The MoEF may be required to surrender significant power, revenue and land under the Forest Rights Act causing a conflict of interest and many advocates for forest dwellers questioned the likelihood that the MoEF would administer the law fairly. Thus, the assignment of responsibilities under the law to the MoTA was viewed as a victory for forest dwellers and their supporters.

Who does the Act cover?

Two groups of people are granted substantive rights under the Forest Rights Act: “Forest Dwelling Scheduled Tribes” who are defined as “members or community of the Scheduled Tribes who primarily reside in and who depend on the forests and forest lands for bona fide

²⁷⁵ The full name of the Forest Rights Act is The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Rights) Act. Government of India, The Scheduled Tribes And Other Traditional Forest Dwellers (Recognition Of Forest Rights) Bill (adopted on 15 December 2006, No.158-C of 2005)

²⁷⁶ Madhu Sarin and Oliver Springate-Baginski, 'India Forest Rights Act - The anatomy of a necessary but not sufficient institutional reform' in IPPG Discussion Papers (ed), *Research Programme Consortium for Improving Institutions for Pro-Poor Growth* (Research Programme Consortium for Improving Institutions for Pro-Poor Growth, IDPM School of Environment and Development University of Manchester 2010), 6

livelihood needs and includes the Scheduled Tribe pastoralist communities.”²⁷⁷ This definition caused a controversy, as it excluded “the majority of potential tribal and non-tribal claimants who may not be dwelling on forest land but are dependent on it. The Ministry of Tribal Affairs (MoTA) had to issue a special clarification that those dependent on but not necessarily living on forest land were also eligible.”²⁷⁸ The semantics of the Forest Rights Act has caused problems for mobile indigenous communities because initially the Act only described ‘scheduled tribes’ (Adivasis) and excluded pastoralists. Pastoralists and civil society organisations all over India took up this issue, and the wording of the Act was changed to include “other traditional forest dwellers” which includes pastoralists.²⁷⁹ “Other Traditional Forest Dwellers,” are now defined as any member or community who has from 1930 and before “primarily resided in and who depends on the forest or forests land for bona fide livelihood needs.” It is important to note that not only individual, but also community rights are recognized.

Proof of residence:

The time requirement that land must have been occupied prior to December 13, 2005 in the case of eligible Scheduled Tribes. For Other Traditional Forest Dwellers, the requirement is for: “*any member or community who has for at least three generations [75 years] prior to the 13th day of December, 2005] primarily resided in and who depends on the forest or forests land for **bona fide** livelihood needs*”²⁸⁰ Seventy-five years is going back until at least Dec 13, 1930 which makes this provision restrictive as it “would render the claims of nomadic tribes and members of the more vulnerable non-ST forest dwelling tribes, who may have relied on other means of livelihood since the year 1930, ineligible. The discriminatory nature of this provision is borne out by the fact that no such requirement is imposed on the FDSTs.” (Forest Dwelling Schedule Tribes).²⁸¹

It is difficult for forest people to legitimately produce evidence of residence going back to colonial recording days of the 1930s especially when many of them have not been literate. The Act may exclude certain groups of people if they do not satisfy all the conditions for rights. If this happens, it could be used to evict forest dwellers and be a barrier to seasonal pastoralists who do

²⁷⁷ The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 Chapter One, Section 2 (c) Government of India, The Scheduled Tribes And Other Traditional Forest Dwellers (Recognition Of Forest Rights) Bill (adopted on 15 December 2006, No.158-C of 2005)

²⁷⁸ O Springate-Baginski and others, 'The Indian Forest Rights Act 2006: Commoning Enclosures' (2008) Overseas Development Group, University of East Anglia 6

²⁷⁹ The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006
²⁸⁰ *ibid*

²⁸¹ Loveland Bhullar, 'The Indian Forest Rights Act 2006: A Critical Appraisal (2008) 4 Law, Environment and Development Journal (LEAD)

not occupy the land in the traditional sense, but need usufruct rights. “In fact, the Forest Rights Act created new restrictions on the use of forest resources, which were previously easily accessible to the community. The new restrictions, which cover grazing and collecting dry fuel woods, fodder, and other non-timber forest products, may affect the livelihood of the marginalised forest-dependent people and may in practice lead to new types of forest tenure conflicts,” illustrating this lack of power and poor access to justice that tribal communities have despite legislation.²⁸²

In order for pastoralists to use the land the Government requires papers dating back seventy years under the Forest Rights Act. This is very difficult for mobile indigenous peoples who had not engaged in the traditional legal system of filing deeds and paying taxes. “International and local legislation is too removed from groups such as mobile indigenous peoples. The aim of such legislation should be to help groups live together. At present [the Forest Rights Act] is divisive and only considers the needs of states and of individuals. They don’t consider collective groups such as mobile indigenous peoples and they don’t create horizontal links within communities.”²⁸³

Many non-tribal people quickly bought up land in tribal settlement areas, before the legislation had been approved, proving the law to be ineffective, and consequently engendering a “massive displacement of tribals who were pushed into positions as labourers on their own lands.”²⁸⁴ Rule 13 issues a detailed list of both documentary and oral evidence. However, the Gram Sabha has the decision-making power to determine proof of residence, which could introduce an arbitrary aspect into the decision and could in principle be discriminatory towards the claimant.²⁸⁵

Free Prior and Informed Consent (FPIC)

FPIC which is considered a very significant right in land rights legislation such as UNDRIP,²⁸⁶ is mentioned in the Forest Rights Act, Chapter Three, Section 4 (e) : “*the free informed consent of the Gram Sabhas in the area concerned to the proposed resettlement and to the package provided has been obtained in writing;*”

²⁸² Purabi Bose, ‘Individual tenure rights, citizenship, and conflicts: Outcomes from tribal India's forest governance’ 2012 Forest Policy and Economics 8

²⁸⁴ Saravanan, ‘Political Economy of the Recognition of Forest Rights Act 2006: Conflict between the Environment and Tribal Development’ 203

²⁸⁵ Loveland Bhullar, ‘The Indian Forest Rights Act 2006: A Critical Appraisal (2008) 4 Law, Environment and Development Journal (LEAD) 26

²⁸⁶ United Nations Declaration on the Rights of Indigenous Peoples (adopted on 13 December 2007, UNGA Res. 61/295 A (UNDRIP Add 1) “Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the **free, prior and informed consent** of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return (**Article 10**);”

Community Forest Rights and Individual Forest Rights (Chapter Two of the Forest Rights Act): Both individual and community forest rights are recognised in Section 3 (1). The fact that the Forest Rights Act also respects community forest rights in addition to individual rights is a revolutionary advance in land rights, changing the concept of generic property laws. Property laws that are conventionally based on individual ownership are now incorporating the recognition of communal land rights.

Forest Rights Act Chapter Two Section 3 (1). The substantive rights include:

“(a) right to hold and live in the forest land under the individual or common occupation for habitation or for self cultivation for livelihood...” This refers only to habitation or cultivation by oneself for one's livelihood, and not for other uses, and encompasses both individual and community tenure.

“(b) community rights such as *nistar*...”²⁸⁷ which intends to restore customary usufruct rights.²⁸⁸

“(c) right of ownership, access to collect, use, and dispose of minor forest produce²⁸⁹ which has been traditionally collected within or outside village boundaries;”

“(d) other community rights of uses or entitlements such as fish and other products of water bodies, grazing (both settled or transhumant)²⁹⁰ and traditional seasonal resource access of nomadic or pastoralist communities;”

“(e) rights, including community tenures of habitat²⁹¹ and habitation for primitive tribal groups and pre- agricultural communities;” None of the rights to land granted under the Act can be either sold or otherwise transferred.

“(f) rights in or over disputed lands under any nomenclature in any State where claims are

²⁸⁷ “*Nistar* rights secure such traditional access and entitlements over local forest resources of local communities which were recognized by different regimes or exercised as customary rights. *Nistari* claims need to be understood as traditional rights of access and usufruct rights over forest produce such as timber, firewood, grazing, minor forest produce or other specific resource uses mentioned in the claim.” Government of Orissa Welfare Department. Frequently Asked Questions on community Forest Rights under Forest Rights Act. 2010

²⁸⁸ Madhu Sarin and Oliver Springate-Baginski, 'India Forest Rights Act - The anatomy of a necessary but not sufficient institutional reform' in IPPG Discussion Papers (ed), *Research Programme Consortium for Improving Institutions for Pro-Poor Growth* (Research Programme Consortium for Improving Institutions for Pro-Poor Growth, IDPM School of Environment and Development University of Manchester 2010), 69

²⁸⁹ “‘minor forest produce’ includes all non-timber forest produce of plant origin including bamboo, brush wood, stumps, cane, tussar, cocoons, honey, wax, lac, tendu or kendu leaves, medicinal plants and herbs, roots, tubers, and the like;” Forest Rights Act Ch.1 section 2 (i) Government of India, The Scheduled Tribes And Other Traditional Forest Dwellers (Recognition Of Forest Rights) Bill (adopted on 15 December 2006, No.158-C of 2005)

²⁹⁰ “The action or practice of moving [livestock](#) from one [grazing](#) ground to another in a [seasonal](#) cycle, typically to [lowlands](#) in [winter](#) and [highlands](#) in [summer](#).”

<http://www.oxforddictionaries.com/definition/english/transhumance>

²⁹¹ “habitat” has been defined as including “the area comprising the customary habitat and such other habitats in reserved forests and protected forests of Primitive Tribal Groups and pre-agricultural communities and other forest dwelling Scheduled Tribes” India, *The Forest Rights Act Definitions*

disputed;”

Sarin and Springate-Baginski²⁹² comment that these rights are “meant to enable people to reclaim their rights over lands disputed between them and forest departments arising out of faulty or non-existent forest settlements”; the authors also remark: “The notified Rules, however, have not clarified this and the wording of this right does not make the link with disputed claims arising out of forest settlements clear.”

“(g) rights for conversion of Pattas or leases or grants issued by any local authority or any State Government on forest lands to titles;” Sarin and Springate-Baginski point out that “this is based on MoEF’s FP (3) guideline of September 18, 1990 and is meant to enable people granted pattas (titles), leases or grants by the revenue department. But this is not recognised by the forest department due to the same land also being classified as forest land in poorly compiled official land records, to claim secure legal titles over such lands.” This is an example of a conflict of interest and poor judicial administration on the part of the Forest Department.

“(h) rights of settlement and conversion of all forest villages,²⁹³ old habitation unsurveyed villages and other villages in forest, whether recorded, notified, or not, into revenue villages;” It is important to convert villages and settlements into revenue villages, as the latter are eligible for development and welfare resources, while forest villages are not. Sarin and Springate-Baginski clarify that ‘forest villages’ were “created by the forest departments themselves in the past to ensure availability of bonded labour for forestry operations.” This reveals another conflict of interest in judicial administration of the Forest Rights Act for the Forest Department.

“(i) right to protect, regenerate, or conserve or manage any community forest resource,²⁹⁴ which they have been traditionally protecting and conserving for sustainable use;” A key purpose of the Act, besides recognition of land rights, is to acknowledge the traditional role of forest peoples in the conservation and management of forest resources.²⁹⁵ Besides the recognition of the ecological contribution of indigenous peoples to their environment, this “is amongst the most powerful and significant rights for re-commoning the enclosures and restoring community

²⁹² O Springate-Baginski and others, 'The Indian Forest Rights Act 2006: Commoning Enclosures' (2008) Overseas Development Group, University of East Anglia 6 and 10

²⁹³ Forest villages are defined in the Forest Rights Act as “the settlements which have been established inside the forests by the forest department of any State Government for forestry operations or which were converted into forest villages through the forest reservation process and includes forest settlement villages, fixed demand holdings, all types of taungya settlements, by whatever name called, for such villages and includes lands for cultivation and other uses, permitted by the Government.” Government of India, The Scheduled Tribes And Other Traditional Forest Dwellers (Recognition Of Forest Rights) Bill (adopted on 15 December 2006, No.158-C of 2005) Definitions

²⁹⁴ “community forest resource” is defined in the Forest Rights Act as “customary common forest land within the traditional or customary boundaries of the village, or seasonal use of landscape in the case of pastoral communities, including reserved forests, protected forests and protected areas such as Sanctuaries and National Parks to which the community had traditional access.” {Government of India, 2012 #2} Definitions

²⁹⁵ Lovleen Bhullar, ‘The Indian Forest Rights Act 2006: A Critical Appraisal (2008) 4 Law, Environment and Development Journal (LEAD) 24

controlled democratic forest governance within customary village boundaries.”²⁹⁶

“(k) right of access to biodiversity and community right to intellectual property and traditional knowledge related to biodiversity and cultural diversity;” Though this right recognized the “rich indigenous knowledge of biodiversity,” the procedural Rules of the Act do not specify how this will be realised in practice.²⁹⁷

“(l) any other traditional right customarily enjoyed by the forest dwelling Scheduled Tribes or other traditional forest dwellers, as the case may be, which are not mentioned in clauses (a) to (k) but excluding the traditional right of hunting or trapping or extracting a part of the body of any species of wild animal;” This provision allows for customary practices which are not specified.²⁹⁸

“(m) right to in situ rehabilitation including alternative land in cases where the Scheduled Tribes and other traditional forest dwellers have been illegally evicted or displaced from forest land of any description without receiving their legal entitlement or rehabilitation prior to the 13th of December 2005.” This is the significant recognition of past government development schemes causing the excessive and unfair displacement of forest peoples without compensation or rehabilitation, and the clawing back of forest land rights for displaced communities. The procedures however do not specify how the loss of land can be restored or compensated.²⁹⁹ Economic development schemes are essential for any country, and for any government to be able to implement. It is when economic development schemes are implemented in an unjust manner that neoliberal values usurp human rights. Communities do not have control over the ‘experts’ who make decisions on the basis of impact evaluations or assessments. Adivasis have no control if these are manipulated to serve the interests of the powerful.³⁰⁰ Violence, including state violence is regularly used as a mechanism to circumvent the legal process and to validate state decisions to expropriate land for extractive industries and economic development. Adivasis have been regularly evicted, or their houses burned down.³⁰¹ This dovetails into the neoliberal framework analysed in the last chapter reviewing the literature.

²⁹⁶ O Springate-Baginski and others, 'The Indian Forest Rights Act 2006: Commoning Enclosures' (2008) Overseas Development Group, University of East Anglia 10

²⁹⁷ Madhu Sarin and Springate-Baginski, 'India Forest Rights Act - The anatomy of a necessary but not sufficient institutional reform' in IPPG Discussion Papers (eds), *Research Programme Consortium for Improving Institutions for Pro-Poor Growth* (IDPM School of Environment and Development University of Manchester 2010)10

²⁹⁸ Rights not specified such as sacred areas, shifting cultivation and others. Springate-Baginski and others, 'The Indian Forest Rights Act 2006: Commoning Enclosures' (2008) Overseas Development Group 13

²⁹⁹ Madhu Sarin and Springate-Baginski, 'India Forest Rights Act - The anatomy of a necessary but not sufficient institutional reform' in IPPG Discussion Papers (eds), *Research Programme Consortium for Improving Institutions for Pro-Poor Growth* (IDPM School of Environment and Development University of Manchester 2010) 13

³⁰⁰ Ibid 61

³⁰¹ Ibid 61

Forest Rights Act Chapter Three Section 4 (8)

“The forest rights recognized and vested under this Act shall include the right of land to forest dwelling Scheduled Tribes and other traditional forest dwellers who can establish that they were displaced from their dwelling and cultivation without land compensation due to State development interventions, and where the land has not been used for the purpose for which it was acquired within five years of the said acquisition.” The contradiction emphasised is that claimants whose land has not been used for the specified purpose within five years cannot claim compensation, even if they can show that they were displaced without compensation.³⁰²

Other rights include the prohibition of Scheduled Tribes and Other Traditional Forest Dwellers from forest lands, including protected areas except with conferral of rights and the provision of land in compensation; title deeds can be claimed for up to four hectares of land; and the registration of land titles in joint names of both spouses.

The land rights that can be claimed under the Forest Rights Act include both individual land rights and Community Forest Rights (CFR) which are claims made by the community for shared forest lands. The procedure for claiming rights under the Forest Rights Act begins at the village level. The Gram Sabha, which is a village assembly, which under the Forest Rights Act rules must include not less than one-third women, invites claims, verifies them and prepares a map outlining the area of each claim it recommends for recognition. “This is a key although diluted provision of the Act designed to provide a democratic, accessible and transparent forum for claiming rights instead of the normal vesting of such authority in inaccessible and unaccountable officials.”³⁰³ The rules still have many omissions, including no clarification on either how to claim rights or restrictions on rights claimed. Procedures are lacking in how to claim complex rights such as usufruct rights. This is harmful to pastoral and transhumant communities and communities called Primitive Tribal Groups (PTGs). Another obstacle to the decision process for claims is that the Gram Sabha, which technically consists of all the adult voters within a certain administrative boundary, can entail requiring thousands of villagers from different settlements which would comprise their ‘village’. This becomes unmanageable and a cause for yet another impediment to the process.³⁰⁴

³⁰² Madhu Sarin and Springate-Baginski, ‘India Forest Rights Act - The anatomy of a necessary but not sufficient institutional reform’ in IPPG Discussion Papers (eds), *Research Programme Consortium for Improving Institutions for Pro-Poor Growth* (IDPM School of Environment and Development University of Manchester 2010)13

³⁰³ Ibid, 16

³⁰⁴ Ibid, 18.

With the Forest Rights Act in Rajasthan where my field work took place, the experience has been that the awards have been uneven. The process to file a claim itself is not simple, which restricts access to justice for individuals and communities with a limited grasp of literacy, and who are dependent on civil society organisations to protect them. The claim forms are called *prepatra* and comprise *Proforma A* for individual forest rights (IFR), and *Proforma B* for community forest rights, and it is the responsibility of the claimants to complete these forms and file them. Claimants are called *panchnama*. The form has to be attested by five neighbours, and the claimant has to seek an Affidavit, which is usually given by two elders of the village in favour of claimant. The land then has to be recorded by the claimant, and the record has to include boundaries, trees, wells and so on which is called ‘evidence’.

The government’s responsibilities include filling the land record called *kulak*. This has to be filled in by the village accountant or *Patwari*,³⁰⁵ the Forest Department, Revenue Department, and the Forest Rights Committee (FRC).³⁰⁶ The land record has to be co-signed by the Secretary and President of the *Gram Sabha* and its thirteen elected members, and by the Panchayat Secretary. The FRC has to evaluate the land to confirm the evidence, which has to be certified. A formal survey called *Najari Naksha* takes place with the *Patwari* confirming the land record number. The Forest Department and *Patwari* will help the FRC to map the land, which is then signed off on by all FRC members. The Forest Department’s responsibility is to confirm the

³⁰⁵ The village accountant, called *Patwari* in Rajasthan, is known by other names such as *Talati, Patel, Karnam, Adhikari, Kulkarni, Shanbogaru*, depending on the state in India.

³⁰⁶ Press Information Bureau, Government of India, Ministry of Tribal Affairs

<http://pib.nic.in/newsite/PrintRelease.aspx?relid=87105>

The responsibilities of the Forest Rights Committee (FRC) are not part of the Forest Rights Act 2006, rather, the constitution of the Forest Rights Committee by the *Gram Sabha* for assisting it in its functions are part of the Provisions of the Forest Rights Act 2008. The FRC is to: (i) receive, acknowledge and retain the claims in the specified form and evidence in support of such claims; (ii) prepare the record of claims and evidence including maps; (iii) prepare a list of claimants on forest rights; (iv) verify claims as provided in the Rules; (v) present their findings on the nature and extent of the claim before the *Gram Sabha* for its consideration; (vi) acknowledge every claim received, in writing (vii) prepare the claims on behalf of Gram Sabha for community forest rights in the prescribed Form.

The Rules also provide that the Forest Rights Committee shall, after due intimation to the concerned claimant and the Forest Department – (a) visit the site and physically verify the nature and extent of the claim and evidence on the site; (b) receive any further evidence or record from the claimant and witnesses; (c) ensure that the claim from pastoralists and nomadic tribes for determination of their rights, which may either be through individual members, the community or traditional community institution, are verified at a time when such individuals, communities or their representatives are present; (d) ensure that the claim from member of a primitive tribal group or pre-agricultural community for determination of their rights to habitat, which may either be through their community or traditional community institution, are verified when such communities or their representatives are present; (e) prepare a map delineating the area of each claim indicating recognizable landmarks; and (f) record its findings on the claim and present the same to the Gram Sabha for its consideration.

The Rules further provide that if there are conflicting claims in respect of the traditional or customary boundaries of another village or if a forest area is used by more than one Gram Sabha, the Forest Rights Committees of the respective *Gram Sabhas* shall meet jointly to consider the nature of enjoyment of such claim and submit the findings to the respective *Gram Sabha* in writing.

Patwari's map; to confirm the forest area; and to carry out the GPS survey in order to authenticate the latitude and longitude. After the FRC confirms the process, the Gram Sabha makes a decision of 'yes' or 'no' with a 50% quorum. The decision is sent for examination to the SDLC (sub-divisional level committee), which is constituted by the State Government. The SDLC agreement is signed by SLDC chairperson sign, the FD ranger, the Block Development office BDO, or the tribal welfare officer plus three Panchayat *Samiti* (publicly elected representatives) have to sign together. This has to be a six-member collective decision. The final decision on the validity of the claim is made by the District Level Committee (DLC). This comprises the District Collector who is the chair person; the concerned Divisional Forest Officer or the concerned Deputy Conservator of Forest who is a member of the FD; and three nominated members of the district panchayat. Two of them have to be from a Schedule Tribe (ST), preferably forest dwellers of an official Primitive Tribal Group (PTG).³⁰⁷ If no members of a Schedule Tribe are present, then they have to be from traditional forest dwellers groups, with at least one woman. In addition to this, the DLC has to be represented by an officer of the Tribal Welfare Department in charge of the district or in charge of tribal affairs.

If the DLC rejects a claim, the claimant can appeal to the High Court. This would cost them money, which would also be a restriction to accessing justice. So far, till 2014, when the data for this study was collected, no-one had approached the High Court. The DLC rejection rate was low in Udaipur District, with 7 rejections of roughly 13,000 claims. According to the Forest Rights Act, the Sub District Level Committee is not empowered to reject claims. They only have a right to examine claims. In Udaipur District, according to Mangilalji from Astha, the SDLC had assumed the responsibility to reject claims, which is illegal. Since those seven claims were rejected illegally, those seven people can appeal against the rejections. The Gram Sabha can reject a claim, which has to be sent to the SDLC which scrutinises the Gram Sabha rejections. The SDLC can in turn send the claim to the DLC for a final decision. If the claimant does not agree with the DLC, they can complain to the state level monitoring committee within sixteen days of rejection

The unfortunate articulation of how the Forest Rights Act relates to other existing laws reflects an incompatibility between rights of tribal communities, and conservation and wildlife laws. Forest peoples have always lived in areas which are now labelled as wildlife habitats. Conservation and biodiversity protection laws are often at variance with rights of forest peoples. The Forest Rights Act does not provide adequate clarification on these contradictions, nor therefore adequate

³⁰⁷ PTG is a category that was officially used to describe isolated tribes, by the colonial government who coined the term Schedule Tribes for forest communities, when the government expropriated forest lands.

protection for forest peoples. Section 13 of the Act states “*Save as otherwise provided in this Act and the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996 (PESA), the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.*” Under the Forest Rights Act, Gram Sabha is defined as a village assembly. The PESA however defines Gram Sabha as ‘hamlets’, or ‘a group of hamlets’ or ‘forest villages’, or ‘traditional villages’ etc. The inconsistency has created a lot of harm and confusion, and has given the government officials who oppose the decentralized decision making, a loophole to disregard Gram Sabha decisions. That the government officials are searching for a loophole in order to circumvent compliance with the law is an indication of poor judicial administration.

Under the PESA, Joint Forest Management (JFM) committees were set up with community members and the forest department. In principle this was to empower the community to share decision-making. In reality however, the forest department dominated the relationship that either disempowered the community, or reinforced historical subjugation. The devolution of power to the Gram *Sabha* has given them statutory rights to manage, conserve and protect forests. In many areas of the country however, the forest departments continue to interact with JFM committees which had already been set up, as do some NGOs who had encouraged JFMs for the right reasons, but do not seem to be able to relinquish this model of forest management for the more empowering one of Gram Sabha authority.

As one can see from reviewing this list, a number of significant substantive rights are granted by the terms of the Forest Rights Act. If implemented as written, the Forest Rights Act has the potential to improve the lives of many who live in the forests and rely on its produce to live, but who have been treated unjustly in the past. To sum up, the inconsistencies within the Forest Rights Act are many, which creates an inadequacy for the law to be perceived as successful land reform.

3.4.4 Deeply Divided Activists and Environmentalists

The Act itself, couched in rights-based language acknowledges: “WHEREAS the forest rights on ancestral lands and their habitat were not adequately recognized in the consolidation of the state forests during the colonial period as well as in independent India resulting in historical injustice (emphasis mine) to the forest dwelling Scheduled Tribes and other traditional forest dwellers who are integral to the very survival and sustainability of the forest ecosystems;”³⁰⁸ Ramnath³⁰⁹,

³⁰⁸ Government of India, The Scheduled Tribes And Other Traditional Forest Dwellers (Recognition Of Forest Rights) Bill (adopted on 15 December 2006, No.158-C of 2005)

claims that the Act is “an excellent attempt at trying to appease two warring parties”, referring to both the conservationists, and tribal rights activists.

Parties critical of the Forest Rights Act feel that it will contribute to further loss of biodiversity and degradation of forests and wildlife. They feel that giving tribal peoples their land back will amount to no land in the government keeping. They are against the Gram Sabhas having decentralised authority over the lands. There is fear that non-tribal forest dwellers will deceive forest dwellers and will dominate them, creating more social tensions, not only between tribal and non-tribal communities, but also within tribal communities. The Act bans all hunting, and does not allow traditional rights of hunting or trapping for forest peoples.³¹⁰ There are certain drawbacks in implementing the procedural aspects of the Forest Rights law.³¹¹ The major aspect is that India is a very large, diverse country, with federal and state divisions, and each state presents different cultural, geographical and administrative complications for implementation. The states themselves implement the Forest Rights Act in widely varying degrees. The North Eastern frontier states, with their predominantly tribal populations have had collective jurisdiction over their lands since the colonial times.³¹² Certain tribal communities in the North East collectively exercise jurisdiction over forest lands which comprise between three hundred to four hundred kilometres at times.³¹³ These states, in order to protect their historical customary tenurial agreements, arranged with the Ministry of Tribal Affairs to clarify and confirm their customary ownership rights of most of the forest lands, making the relevance of the Forest Rights Act insignificant in their territories.³¹⁴

Several mechanisms which have impaired administrative justice have been outlined by Wani.³¹⁵ New regulatory procedures use evidence which Wani calls ‘reductionist’, which “break down complex environmental and ecosystem functions into a set of services.³¹⁶ Cost-benefit studies use

³⁰⁹ Madhu Ramnath, ‘Surviving the Forest Rights Act: Between Scylla and Charybdis’ *Economic and Political Weekly* (2008)

³¹⁰ Madhu Ramnath, ‘Surviving the Forest Rights Act: Between Scylla and Charybdis’ *Economic and Political Weekly* (2008); Velayutham Saravanan, ‘Political Economy of the Recognition of Forest Rights Act 2006: Conflict between the Environment and Tribal Development’ (2009) *South Asia Research*; Milind Wani, *Nought Without Cause* (Global Forest Coalition Kalpavriksh and Vasundhara 2008)

³¹¹ “The part of the law which deals with practice, process and procedure, as distinct from substantive law, which prescribes the content of the rights and duties dealt with in the law.” [Dictionary of Law - Oxford Reference](http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100347458) <http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100347458>

³¹² The North East states of India are Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, Tripura and Sikkim.

³¹³ Lovleen Bhullar, ‘The Indian Forest Rights Act 2006: A Critical Appraisal (2008) 4 *Law, Environment and Development Journal (LEAD)* 27

³¹⁴ Oliver Springate-Baginski and others, ‘The Indian Forest Rights Act 2006: Commoning Enclosures’ *Overseas Development Group, University of East Anglia* 10

³¹⁵ Milind Wani, *Nought Without Cause* (Global Forest Coalition Kalpavriksh Vasundhara 2008) 60

³¹⁶ *Ibid* 60

arbitrary evidence that suits the government stakeholders, and do not necessarily take into consideration cultural impacts of projects. Another mechanism used is ‘mitigation and not prevention’: “Market instruments such as monetary compensation of resources lost, based on arbitrary valuation of their environmental services and compensatory offsets, are used to justify decisions that result in large scale and irreversible environmental impacts. Mitigation measures, however, such as the ones to curb pollution of forest losses have the potential to have their own impacts as they come in the form of restricting access to land and changing land use by restricting access to those whose livelihoods depend on them.” Wani points out that these are never mentioned in reports or impact evaluations. He says “in the entire process of impact assessment, developers and bureaucracy – those with the money and power, decide what are acceptable impacts and if mitigation is adequate.”³¹⁷

The Forest Department officials charged an unofficial “fee” to the mobile indigenous peoples to enter the forest for grazing. This was a practice grown since Independence in the early 1950s, when the forests were part of the eminent domain of the government. Mobile indigenous peoples considered this as a “tax” and not as a “bribe.” The pastoralists claimed that “taxes” such as this, paid to their local officials, were more efficient than using legal mechanisms since settlements at court using the Forest Rights Act did not happen quickly and, in their experience, lawyers “cheated” them. National legislation therefore held very little interest for mobile indigenous peoples, which validates the assertion that administrative justice is not complied with.

Administrative injustice, is “when the government, or those working on its behalf, act in ways that appear wrong, unfair or unjust, [and does not ensure] that public bodies and those who exercise public functions make the right decisions...[and that] mechanisms for providing redress when things go wrong” are not accessible for citizens, consumers, individuals or groups.³¹⁸ India’s Forest Rights Act 2006, one of the goals of which, is to rectify the sort of administrative injustice outlined above, occurs within a larger backdrop of an international progression on human rights. Though the Forest Rights Act 2006 did not flow in any automatic sense from international legislation and agreements and was an Indian response to a national issue, it did mirror international normative changes in indigenous rights the most significant of which are outlined below.

³¹⁷ Ibid 60

³¹⁸ United Kingdom Administrative Justice Institute, *What is administrative justice? AA discussion paper* (Nuffield Foundation Series 2015)

3.5 An International Normative Framework for Indigenous Rights

International standards are applicable to all countries including India. India ratified the first ILO Convention 107 (1957), and the Forest Rights Act 2006, recognised for its progressive rights, incorporates the spirit of such international treaties as the Committee on the Elimination of Racial Discrimination (CERD), International Covenant on Economic Social and Cultural Rights (ICESCR), and the ILO Convention 107 1957. There is evidence however, as outlined in this chapter, of a disjunction with this growing international awareness of indigenous land rights within national legislation and of access to justice being realised. International laws address aspects such as self-determination, self-governance, recognition of customary laws and rights to territories and lands. These rights are not necessarily reflected in national judicial administration and how laws are implemented at the national levels. While there is large-scale land expropriation in line with extractive industries, development and conservation movements, there are also some successful national struggles.

Social justice norms, which guide national and international normative frameworks, are increasingly influenced by human rights norms. Human rights, “the dominant normative conception in the contemporary globalized world,” have similarly shaped international history.³¹⁹ The French Revolution, the discontinuation of the slave trade in the USA and in Europe, independence from colonial imperialism and the US civil rights movement, exemplify paradigm shifts in human rights norms. It was only in 1948, in response to the atrocities of WWII, however, that the Universal Declaration of Human Rights laid out moral foundations of justice and freedom and was accepted internationally as a mainstream legal norm. International instruments, in line with these international legal norms and human rights frameworks, allow states to establish rights and obligations between themselves.³²⁰ Below, I have listed of the most important legislative enactments that comprise a normative framework for indigenous rights:

³¹⁹ Varun Gauri and Siri Gloppen, 'Human Rights-Based Approaches to Development: Concepts, Evidence and Policy' (2012) 44 *Polity* 485

³²⁰ “Declarations: The term “declaration” is used for various international instruments. However, declarations are not always legally binding. The term is often deliberately chosen to indicate that the parties do not intend to create binding obligations but merely want to declare certain aspirations. An example is the 1992 Rio Declaration. Declarations can however also be treaties in the generic sense intended to be binding at international law. It is therefore necessary to establish in each individual case whether the parties intended to create binding obligations. Ascertaining the intention of the parties can often be a difficult task. Some instruments entitled “declarations” were not originally intended to have binding force, but their provisions may have reflected customary international law or may have gained binding character as customary law at a later stage. Such was the case with the 1948 Universal Declaration of Human Rights. Declarations that are intended to have binding effects could be classified as follows: (a) A declaration can be a treaty in the proper sense. A significant example is the Joint Declaration between the United Kingdom and China on the Question of Hong Kong of 1984. (b) An interpretative declaration is an instrument that is annexed to a treaty with the goal of interpreting or explaining the provisions of the latter. (c) A declaration

Box 1 A Normative Framework for Indigenous Rights

- *Universal Declaration of Human Rights 1948 (No. 217)* ³²¹
- *International Convention on the Elimination on Racial Discrimination 1965 (No. 9464)* ³²²
- *ILO Convention on Indigenous and Tribal Peoples 1989 (No. 169)* ³²³
- *The Convention on the Rights of the Child 1989 (No.1577)*³²⁴
- *The Convention on Biological Diversity 1992 (No.30619)*³²⁵
- *The Vienna Declaration 1993*³²⁶
- *UN Declaration of Rights of Indigenous Peoples 2007 (no. 61/295)* ³²⁷

Since the Universal Declaration of Human Rights, human rights standards are developed at a supra-national level that formulate policies on human rights. This produced international bodies, which formulate and implement the policies.³²⁸ While human rights standards are developed at the international level, responsibility for the implementation of the international standards lies with individual states. This both weakens accountability to human rights standards and results in an uneven interpretation and implementation of human rights norms across nations. Galligan and Sander bear witness to this: “The nation state is the greatest threat to human rights, but on the

can also be an informal agreement with respect to a matter of minor importance. (d) A series of unilateral declarations can constitute binding agreements. A typical example are declarations under the Optional Clause of the Statute of the International Court of Justice that create legal bonds between the declarants, although not directly addressed to each other. Another example is the unilateral Declaration on the Suez Canal and the arrangements for its operation issued by Egypt in 1957 which was considered to be an engagement of an international character.” <https://treaties.un.org>

³²¹ United Nations, *Universal Declaration of Human Rights* Universal Declaration of Human Rights (adopted 10 December 1948, UNGA Res. 217 A (III) (UDHR art 5)

³²² OHCHR, *International Convention on the Elimination of All Forms of Racial Discrimination 1965* (UNOHCHR 1965)International Convention on the Elimination of All Forms of Racial Discrimination (adopted 12 March 1969, UNGA Res 2106 (XX) (CERD art 19)

³²³ ILO, *ILO Convention on Indigenous and Tribal Peoples 1989 (No. 169)*A Manual 4

³²⁴ Nations, *Convention on the Rights of the Child*The Convention on the Rights of the Child (adopted 20 November 1989, UNGA Res 44/25 (CRC art 4)

³²⁵ The Convention on Biological Diversity (adopted on 21 December 1992, UN Treaty Series No. 30619 (CBD Agenda 21)

³²⁶ Vienna Declaration and Programme of Action (adopted on 25 June 1993,UNGA Res 48/121)

³²⁷ United Nations Declaration on the Rights of Indigenous Peoples (adopted on 13 December 2007, UNGA Res. 61/295 A (UNDRIP Add 1)

³²⁸ Galligan and Sandler, 'Implementing Human Rights'Denis Galligan and Deborah Sandler, 'Implementing Human Rights' in Simon Halliday and Patrick Schmidt (eds), *Human Rights Brought HomeSocio-Legal Perspectives on human rights in the National Context* vol 3 (Hart Publishing 2004) 26

other hand, an effective system of protection depends on it.”³²⁹ International bodies engaged in setting human rights standards attempt to direct and facilitate the implementation at national levels.

The Universal Declaration of Human Rights (UDHR 1948)³³⁰ recognizes equality, dignity and respect for all individuals, and these rights are ‘inalienable’ and absolute. It was conceived in the hope that the atrocities of the Second World War would never be repeated,³³¹ and has informed international and national legislation through moral foundations of justice and freedom.³³² The Convention on the Elimination on Racial Discrimination 1965 ³³³ applies to every individual and group which includes mobile indigenous peoples, and every state is required to submit a report every two years to the UN Office of the High Commission for Human Rights (OHCHR) on the status of discrimination in their country.

The United Nations Committee on Economic, Social, and Cultural Rights (UNCESCR) describes a “minimum core” obligation by which a state has to ensure an indispensable set of social economic rights such as the right to housing. The state has to comply with the essential level for each right, which is “determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question...[and] must be understood in international law”.³³⁴ I will refer to this minimum core obligation later in this chapter, when analysing the Forest Rights Act 2006, India.

The International Labour Organisation (ILO) Convention on Indigenous and Tribal Peoples of 1989, No. 169 on the right to continue traditional occupations, and the 2007 UN Declaration of the Rights of Indigenous Peoples, are major legal contributions to land rights of indigenous people.³³⁵ The International Labour Organisation (ILO) Convention on Indigenous and Tribal

³²⁹ Denis Galligan and Deborah Sandler, 'Implementing Human Rights' in Simon Halliday and Patrick Schmidt (eds), *Human Rights Brought Home Socio-Legal Perspectives on human rights in the National Context* vol 3 (Hart Publishing 2004), 26

³³⁰ Universal Declaration of Human Rights 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71

³³¹ Denis Galligan and Deborah Sandler, 'Implementing Human Rights' in Simon Halliday and Patrick Schmidt (eds), *Human Rights Brought Home Socio-Legal Perspectives on human rights in the National Context* vol 3 (Hart Publishing 2004), 26

³³² UN, *The International Bill of Human Rights* (UN 1996) The International Bill of Human Rights 1996

³³³ International Convention on the Elimination of All Forms of Racial Discrimination 1965 number 9464 GA res 2106 (XX) of 21

³³⁴ Government of the Republic of South Africa v. Grootboom, 2001 (1) SA 46 (CC) at para. 31 in Varun Gauri and Daniel M. Brinks, *Courting Social Justice* (CUP 2008)

³³⁵ J Gilbert and C Doyle, 'A New Dawn over the Land: Shedding Light on Collective Ownership and Consent' in Stephen Allen and Alexandra Xanthaki (eds), vol 12 *Reflections on the UN Declaration on the rights of indigenous peoples* (Hart Publishing 2011)

Peoples 1989 (No. 169)³³⁶, contains a substantial component on land rights, which was not only groundbreaking at the time it was formulated, but is also legally binding, and which creates a crucial legal tool for displaced indigenous communities.³³⁷ It is a revision of the ILO Convention 107 of 1957, adopted as the Indigenous and Tribal Peoples Convention, (no.169) and was the first important international legal treaty protecting indigenous and tribal populations.³³⁸ The ILO Convention addresses the need for respect of “distinctive ways of life, and their traditions and customs. It is also based on the belief that indigenous and tribal peoples have the right to continue to exist with their own identities and the right to determine their own way and pace of development.”³³⁹ The ILO Convention also uses the term ‘self-management’³⁴⁰ which is incorporated into newer legal standards such as the 2007 UN Declaration of the Rights of Indigenous Peoples (UNDRIP). UNDRIP is a convention and not a treaty is legally non-binding which means it is neither ratified by states, nor can the states be held legally accountable.

Once a government ratifies a treaty recognizing rights of indigenous and tribal peoples, it has a responsibility to protect these rights, and implement the legal principles fully.³⁴¹ The vulnerability of indigenous peoples necessitates protecting their distinctive way of life from extinction. The ILO Convention No.169 calls for a ‘special measure’ of protection of cultures, environment, identity and properties,³⁴² though nomadic peoples use land and property collectively, which complicates their property rights. It also calls for the right to ‘participation’ and to be ‘consulted’ on any policies which may affect them, whether to do with land, the constitution, or welfare services. Only twenty-two states have ratified the ILO Convention No.169, and India is not one of them.

The Convention on Biological Diversity (CBD) of 1993 is a significant legal instrument for conservation of ecosystems by indigenous peoples and local communities. Advocating a ‘rights and incentives’ approach to conservation, it “seeks to recognize certain rights over genetic resources and associated traditional knowledge while ensuring the fair and equitable sharing of benefits arising from the commercial and research utilization of such resources and knowledge.”

³⁴³ The basic principles behind the CBD is that biodiversity is best conserved and managed by

³³⁶ ILO, *ILO Convention on Indigenous and Tribal Peoples 1989 (No. 169)A Manual* (Project to Promote ILO Policy on Indigenous and Tribal Peoples, 2003) 4

³³⁷ Ibid 4

³³⁸ Ibid 4

³³⁹ Ibid 5

³⁴⁰ Ibid 10

³⁴¹ Ibid 11

³⁴² Ibid 14

³⁴³ Articles 8(j) and 10(c) recognizes the “rights of communities to their knowledge, innovations, practices, and customary sustainable use of stewardship affirming the rights of communities to local ecosystems and

communities who depend on these resources. Article 8(j) states:” Subject to its national legislation [state parties shall] respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.”³⁴⁴

The rights contained in the ILO Conventions have been expanded in the 2007 UN Declaration of Rights for Indigenous Peoples (UNDRIP).³⁴⁵ The 2007 Declaration is a landmark for indigenous peoples, especially for pastoralists, since it refers to collective land rights, usufruct rights, and also customary land laws.³⁴⁶ The articles that pertain to indigenous peoples and their lands are as follows:

- *(Article 8, 1 and 2 b) Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture; and States shall provide effective mechanisms for prevention of, and redress for: (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources.*
- *(Article 25) Indigenous peoples shall not be forcibly removed from their lands or territories.*
- *(Article 10) No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return. Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard;*
- *(Article 26): Indigenous peoples have the right to the lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples have the right to own, use, develop and control the lands, territories and*

ways of life that nurture these ecosystems.” E Abrell and others, *Bio-Cultural Community Protocols. A Community Approach to Ensuring the Integrity of Environmental Law and Policy* (United Nations Environment Programme (UNEP) and Natural Justice, 2009)

³⁴⁴ Harry Jonas and others, *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas conserved by Indigenous Peoples and Local Communities* (Natural Justice in Bangalore and Kalpavriksh in Pune and Delhi, 2012) 8

³⁴⁵ United Nations Declaration on the Rights of Indigenous Peoples (adopted on 13 December 2007, UNGA Res. 61/295 A (UNDRIP Add 1)

³⁴⁶ Gilbert and Doyle, ‘A New Dawn over the land: Shedding Light on collective Ownership and Consent’ in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the rights of indigenous peoples*, vol 12 (Hart Publishing 2011) 13

resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

- *(Article 29) Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.*
- *(Article 32): Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources* ³⁴⁷

Among the significant principles within this legislation are self-determination, and Free, Prior, Informed Consent (FPIC), requiring governments to inform and obtain the consent of indigenous peoples before taking any action involving their lands. It gives the latter veto rights. The 2007 UN Declaration of Rights for Indigenous Peoples does not, however, mention nomadic or mobile peoples in the text.

Human rights instruments such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) of 2007 do not specifically mention mobile or nomadic communities, who are also often invisible to their own governments, making it more difficult to advocate for land rights.³⁴⁸ The paucity of evidence of rights needed by mobile indigenous peoples in international law has repeatedly been referred to by scholars such as Jeremie Gilbert: “international human rights law does not refer to the specific situation of mobile peoples, and no treaties³⁴⁹ include any

³⁴⁷ Universal Declaration of Human Rights 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71; Harry Jonas, Eli J Makagon, Stephanie Booker, Holly Shrumm, *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas conserved by Indigenous Peoples and Local Communities*, United Nations Environment Programme (UNEP) and Natural Justice (2012) 8

³⁴⁸ United Nations Declaration on the Rights of Indigenous Peoples (adopted on 13 December 2007, UNGA Res. 61/295 A (UNDRIP Add 1)

³⁴⁹ “The term “treaty” has regularly been used as a generic term embracing all instruments binding at international law concluded between international entities, regardless of their formal designation... In order to speak of a “treaty” in the generic sense, an instrument has to meet various criteria. First of all, it has to be a binding instrument, which means that the contracting parties intended to create legal rights and duties. Secondly, the instrument must be concluded by states or international organizations with treaty-making

specific rights for mobile peoples. Instead, the focus is on universal human rights applicable to all.”³⁵⁰ The Dana Declaration of 2002, is the first declaration unique to mobile indigenous peoples, and therefore is crucial to the recognition of mobile indigenous rights. The Dana Declaration brings together a “comprehensive approach” to conservation and mobile peoples.³⁵¹ Framed during the first World Decade on the Rights of Indigenous Peoples (1994-2004) declared by the UN,³⁵² it calls for the inclusion of indigenous peoples’ knowledge in the development of policies of conservation in adaptive and collaborative management, drawing on the breadth of indigenous conservation knowledge in a democratic and transparent manner.³⁵³ Though not legally binding, since it is a declaration of civil society, it establishes the context for mobile indigenous peoples’ rights, and it also raises awareness of a group that has been unjustly marginalised through history.

The Coordinating Body for Indigenous Peoples’ Organisations of the Amazon Basin (COICA,) in 1988, called for the recognition of forest peoples’ rights in 1988. In 1992, rights to ‘ancestral domains was supported in the Global Biodiversity Strategy.³⁵⁴ The same year, the International Alliance of the Indigenous-tribal peoples of the Tropical Forests pronounced the Forest Peoples Charter that recognised the right to conserve their own lands, and to control government and corporate development interventions.³⁵⁵ The charter recognises the forest people’s right to conservation of their forest lands, and to regulate development activities by government and corporate stakeholders. The Earth Summit of 1992 recognised the importance of indigenous participation for future conservation.³⁵⁶ The World Conservation Union (IUCN) in 1996 adopted seven different resolutions on Indigenous Peoples.³⁵⁷ In 1996, the Worldwide Fund for Nature International adopted a Statement of Principles on Indigenous Peoples and Conservation (WWF 1996), and an important agenda item at the United Nations Summit on Sustainable Development 2002 was conservation and people’s impact on the natural environment, which remains part of customary land use of indigenous peoples. ³⁵⁸

power. Thirdly, it has to be governed by international law. Finally, the engagement has to be in writing. Even before the 1969 Vienna Convention on the Law of Treaties, the word "treaty" in its generic sense had been generally reserved for engagements concluded in written form.” <https://treaties.un.org/>

³⁵⁰ Jeremie Gilbert, 'Land Rights and Nomadic Peoples: Using International Law at the Local Level' (2012) 16 *Nomadic Peoples* 78

³⁵¹ Dana Standing Committee, *Dana Declaration on Mobile Peoples and Conservation* (DSC 2002)

³⁵² Ibid

³⁵³ Ibid

³⁵⁴ Janice Alcorn, 'Indigenous Peoples and Conservation' (1993) 7 *Conservation Biology* 424

³⁵⁵ Ibid 424

³⁵⁶ Dawn Chatty, 'Mobile peoples and conservation.' (2002) Vol 18 *Anthropology Today* 2

³⁵⁷ Ibid

³⁵⁸ Ibid

The laws listed above demonstrate that there is more international recognition of indigenous rights to conserve the integrity of their lands, and that the international normative trajectory is moving in the right direction. It is not clear however, whether the increased international legal instruments positively parallel national rights of indigenous people. That is, can they access international laws to help their national land rights?

3.6. Conclusion

By large there is an inconsistency and contradiction between the growing international legal instruments on indigenous rights and land laws, and the national experience of land expropriation experienced by tribal and indigenous communities. The significant issue to be addressed is how law can support the national indigenous efforts and struggles to protect and continue to conserve their lands for their own use. International laws are extremely useful, and can hold nation states accountable to some degree. International laws however, are enacted in order for nation states to abide by good practice norms and allow them room to reform their norms in line with international ones. There is seemingly a gap here that needs to be recognised and addressed in how this can happen and what strategies individual states can take to respect these rights and access to justice.

Forest communities are predominantly indigenous. It is no secret that ancient indigenous practice of having conserved forest lands; and the nomadic strategies of allowing fragile desert lands to regenerate by mobility; and practices such as slash and burn correlate to the preservation of forests. These customary practices have preserved forests inhabited by indigenous people and sustained “sophisticated customary systems of caring for territories and resources.”³⁵⁹ Yet, at national levels, legal recognition of and access to justice to international treaties and declarations is absent,³⁶⁰ and indigenous peoples still face discriminatory actions by their own governments, leading to displacement from their lands. The rights of indigenous communities that are committed to international laws are often not within reach in national laws. Stakeholders and activists are advocating for more legal movement and access from “international-to-local levels, particularly towards making international treaties and declarations increasingly relevant for and

³⁵⁹ Harry Jonas and others, *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas conserved by Indigenous Peoples and Local Communities* Harry Jonas, Eli J Makagon, Stephanie Booker, Holly Shrumm, *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas conserved by Indigenous Peoples and Local Communities*, United Nations Environment Programme (UNEP) and Natural Justice (2012) 4

³⁶⁰ *Ibid* 7

useful to Indigenous peoples and local communities who want to defend their rights to and responsibilities” in relation to the integrity of their own local lands.³⁶¹

The grassroots reality of the implementation of the Forest Rights Act is the product of competing political interests and conflicting values, as is often the case when injustice occurs. The impact of the Forest Rights Act for indigenous access to justice is impeded by two central factors. Firstly, the legal framework of the Forest Rights Act is alien to Adivasi’s legal traditions, thereby impeding the use of the Forest Rights Act as a tool to access justice. “Indigenous peoples suffer the continued marginalization from legislative and judicial systems and decision-making processes at all levels, as well as the impacts of discriminatory and fragmented legal and institutional frameworks.”³⁶² These aspects directly undermine access to justice for indigenous communities. Secondly, the legal response towards any demands for justice is driven by underlying political and economic ideologies of the elected government, which can similarly hinder justice. In principle, newly enacted progressive legislation promises justice.

I question whether this promise of justice is being realised through the Forest Rights Act, and whether administrative justice the government determines access to justice of marginalised groups in India. Economic necessity is often an argument used by the government to appropriate forest lands, and thereby disregard the Forest Rights Act. This argument, however, is problematic due to two principal concepts. Firstly, the key is whether appropriating land for legitimate development is done in a just and fair manner. If not, injustice often disproportionately affects the most marginalised in society, thereby exacerbating inequality and poverty in society. Furthermore, any consideration, whether economic, or whether it pertains to political interests of the judiciary, should not stop the law from being upheld. These two arguments conflict with the neoliberal view that any laws impeding economic development should be reviewed due to economic development being seen as an absolute good. Sircar points out that in India, the assumption that more laws mean there will be more rights, and that rights automatically deliver justice is “an equation that has informed and been informed by fundamental rights jurisprudence and law reform, the enactment of legislation to guarantee socio-economic rights, and many of the strategies of social movement activism in contemporary India.”³⁶³ This neoliberal privatization ideology underpins the unceasing displacement of indigenous forest-dwellers from their land in India, despite the Forest Rights Act. The case studies in this thesis in the next three chapters

³⁶¹ Ibid 4

³⁶² Ibid 4

³⁶³ Oishik Sircar, ‘Spectacles of Emancipation: Reading Rights Differently in India’s Legal Discourse.’ (2012) 49.3 Osgoode Hall Law Journal 527

illustrate a few of many examples of this continuous land dispossession. The displacement of people from their lands by the government thus raises another more complex question in relation to administrative justice: what characteristics of the legal and political system enable those charged with carrying out the law to circumvent existing legal frameworks?

In practice the implementation of this rights-based law echoes Sen's critique of the inherent weakness of the human rights based approach. In many cases, the central and state governments in India ignore the requirements of the Act. This both violates the Forest Rights Act itself, and the principles of human rights on which the Act is founded. In India, committing itself to free-market capitalist economic policies which violate laws that the government enacted themselves can be perceived as unbalanced and confused. It leads the analysis to a dichotomy which demonstrate the 'hollowness' of human rights with suspect political commitment, alluded to by Sen's critique of human rights.

Chapter Four: A Critical Examination of Forest Rights Legislation, Indigenous Access to Justice, and Land Expropriation

Case Studies of Mobile Indigenous Peoples

4.1. Introduction

This chapter is the first of three case study chapters, namely Chapters Four, Five and Six which describe findings from empirical data collection during time spent among indigenous forest peoples' in India. These chapters provide an exploration of the immediate effects of the Forest Rights Act on the lives of forest peoples in the discrete geographical areas that this study focuses on, which comprise three states in India. These are Gujarat, Rajasthan and Maharashtra. The three case studies below pertain specifically to mobile indigenous peoples, who are pastoralists, and move with their herds through specific regional grazing corridors. The seasonal migratory aspect is different from forest peoples who are settled and base their livelihoods on gathering minor forest produce and small scale agriculture. The case studies in all the chapters below are analysed through the lens of a theoretical framework which emerged from the Literature Review in Chapter Two of this study. In interpreting this analytical framework, I portray a broader analysis of how access to justice is experienced by indigenous peoples in India, mostly mobile indigenous peoples and Adivasi tribes living in or using the forests.

The field visits to collect data for these case studies to these nomadic communities were shorter in duration because the communities moved physically with the seasons. Indian camel herders had usufruct access over a wide terrain before 1947. Usufruct, a key concept with regard to mobile indigenous peoples, refers to a right of access to communal lands for grazing of their herds. This land right is especially important for hunting and gathering forest peoples, and for nomadic pastoralist communities who do not necessarily own land but move seasonally. Previously migratory corridors stretched from Afghanistan through present day Pakistan³⁶⁴ into India.³⁶⁵ Pastoralists in India since independence in 1947 have had their migration routes severely restricted. The legal systems in India have changed over time. The current Forest Rights Act of 2008 was initiated by the tribal Adivasis who did not have a deep understanding of pastoralist politics according to the NGO staff in Pune.³⁶⁶ Historically, the British proclaimed forest land to

³⁶⁴ Some pastoralists even today, have secret trading arrangements with Pakistan across the border according to the interviews I had with the Maldhari community in Gujarat.

³⁶⁵ Interviews with Lalji Desai, Maldhari community member, and with Hanwant Singh Rathod, *Raika Camel Herders of Sadri, Rajasthan* (2012). In 1938, the British in India fought their first war in Afghanistan in an attempt to consolidate their Indian borders against the threat of Russian imperialism in central Asia.

³⁶⁶ interview with Nitya Ghotke (2012) Pune

be known as “Revenue Land,” as a way of extracting money from people who used the forest. Revenue land was therefore economically beneficial as opposed to “Wasteland” which was unproductive.³⁶⁷ The Indian Government continued this practice after Independence. The pastoralists, however, having alternate, usufruct needs, used land differently and therefore did not recognize the new government-set boundaries. The concept of “land alienation” had been generally unfamiliar to mobile indigenous peoples in India since they have not owned land from which they could be dispossessed. More recently, activists in India have been working with pastoralists, raising awareness of the Forest Rights Act since its enactment in 2006. During pasturing, they were and still are persecuted by Forest Department officials and settled populations. Pastoralists, who are on the move and therefore less likely to be part of a coordinated “movement”, have found it more difficult to organize for their own rights.

4.2. Chapter Outline

The division of this chapter reflects the three mobile indigenous case studies that were part of my data collection in 2012. After a short introduction in the first section, on the background of the problems faced by mobile indigenous peoples in India in relation to land dispossession, I describe findings from three case studies that are specific to pastoralist land needs. Each section comprises an introduction followed by a community profile, which is succeeded by an analytical discussion of land violations faced by the community within the context of the Forest Rights Act. The second section on the Maldhari³⁶⁸ community of pastoralists in Mera District, Gujarat, with their magnificent herds of Kankrej and Gir cattle, are represented in their political struggle against the erosion of the gauchar lands, which are grasslands used customarily as common grazing lands. The Dhanger Pastoralists of Ahmednagar, Parner Block, Maharashtra are part of the third section of the chapter and have been displaced from their grazing territories by the Indian military’s firing range, and by a sugar factory set up by a politician under dubious circumstances. The fourth section on the Raika pastoralists of Rajsamand District and Pali Districts of Rajasthan, describes the struggle of camel herders to reclaim forest rights as part of their grazing corridors.

These three diverse pastoralist communities used significantly different strategies to lay claim to their land rights: The Madlharis were not using litigation to access justice at all, rather, they were using political activism as a strategy; the Dhanger were being introduced to the Forest Rights Act, but were not as yet using litigation to claim their land rights; the Raika were using the justice

³⁶⁷ Waste land is a term used by the government to denote barren and unused land.

³⁶⁸ “Maldhari” is a generic name of the pastoralist clan who inhabit several states in India. The Maldharis and Rahabari clans, as well as the Bharvad, Ahir, Charan /Gadhvi, and Jat communities, are all traditionally pastoralists.

system to fight land displacement. I conclude the chapter with an overview of how the case studies highlight the particular aspect of the justice protection of marginalised communities by the Indian government ministries, and an analysis of the interface of access to justice with administrative justice.

4.3. Historical overview

In the pre-colonial Himalayan regions, communities often had different collective roles. Pastoralist communities were generally highly valued members of communities due to their contributions of milk, dairy, wool and fertilising the farmlands using their animals. This high regard was fragile and not homogenous, however, with different regions of the country valuing them differently. The British introduced a land based concept of political economy, based on a newly introduced taxation system which criminalized people who did not pay.³⁶⁹ This introduced a legal “structural violence” to which nomadic tribes are subjected, which is reinforced by “development hegemony”.³⁷⁰ Pastoralists were marginalized during this period and communities such as the Yadavs, the Patels, and Jats became sedentary. In Gujarat for example, all cattle herding was traditionally dominated by the Patel community. When these communities settled, they became prominent and slowly alienated the mobile populations, who had no land and no permanence. The “home village” was linked with a temple and their deities. This village was base camp from which the nomadic communities migrated and returned. The semantics of “indigenous” is different in India since the pastoralists came in waves over the centuries and were not necessarily ethnically indigenous to India.³⁷¹ It might be evidence of just how marginalised the mobile indigenous peoples really are in India by the dearth of population statistics for them, which I have not been able to include in this study.

Though pastoralist groups such as those described in this chapter are socially marginalised, not all are economically poor. Major omissions in FRA rules hinder access to justice for pastoralists. This is outlined by Sarin and Springate-Baginski who indicate that the rules are particularly

³⁶⁹ Rudolf C. Heredia, *Denotified and Nomadic Tribes: The Challenge of Free and Equal Citizenship* (Occasional Papers, University of Poona, 2007)

³⁷⁰ Ibid 6

³⁷¹ The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) Article 8 states: 1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. 2. States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; (c) Any form of forced population transfer United Nations Declaration on the Rights of Indigenous Peoples (adopted on 13 December 2007, UNGA Res. 61/295 A (UNDRIP Add 1)

unclear about rights and restrictions of usufruct claims for land. They argue there are not provisions “for claiming more complex rights such as community tenures over their habitats by PTGs³⁷² or claims by nomadic and pastoral communities for whom the single village based Gram Sabha procedure is inadequate.”³⁷³ This omission has major consequences for the mobile indigenous communities in the chapter because transhumant communities moving seasonally across district and state boundaries are facing immense difficulties in claiming their rights. The three case studies below provide context to this argument by describing the challenges that are particular to the nomadic lifestyles of mobile indigenous communities when accessing land rights in certain parts of India.

4.4. Case Study One: “All Land is God’s Land”³⁷⁴

4.4.1. The Maldhari Pastoralist Community of Mera District, Gujarat

The pastoralist Maldhari communities existed in Gujarat, Rajasthan, Pakistan and Afghanistan. “Mal” means livestock and “dhari” means owner, a name that is still in use from Iran to Mongolia, where the word for these pastoralists is also Maldhari in Iran, and in Mongolia it is Malchain. Mal therefore is a common word in stretching across these Indian subcontinental regions. Maldhari’s, like many pastoralists, are intensely communal with a deep conceptual understanding of land as shared. Maldharis³⁷⁵ have a saying that “all land is God’s land.”³⁷⁶ Maldharis exist as a collective, with customs such as “bij” which is a free distribution of milk with community members, as well as a sharing of boundaries, territories and other resources. Maldhari communities are nomadic and semi-nomadic pastoralists³⁷⁷ who herd cows, and in some areas, keep goats, buffalo, sheep and camels. They are spread around several states in northern India,³⁷⁸ and migrate seasonally. Published literature seems to differ on how long the Maldharis have lived in India, dating between 700 years 2000 years.³⁷⁹ Before Indian

³⁷² PTG: Primitive Tribal Groups which is an official term used by the Government of India to describe certain indigenous groups who live in relative isolation.

³⁷³ Sarin and Springate-Baginski, 'India Forest Rights Act - The anatomy of a necessary but not sufficient institutional reform' 28

³⁷⁴ Maldhari proverb

³⁷⁵ While “Maldhari” is a generic name of the pastoralist clan who inhabit several states in India, India is home to many distinct pastoralist communities including the Maldharis and Rahabari clans, as well as the Bharvad, Ahir, Charan /Gadhvi, and Jat communities, are also traditionally pastoralists.

³⁷⁶ Maldhari quote

³⁷⁷ Oswin D Stanley, ' "Wetland Ecosystems And Coastal Habitat Diversity In Gujarat, India". ' (2004) VII Journal of Coastal Development, 49 Oswin D Stanley, (2004) Wetland Ecosystems And Coastal Habitat Diversity In Gujarat, India. Journal of Coastal Development, VII (2). pp. 62.

³⁷⁸ Maldharis are found in the states of Maharashtra, Uttar Pradesh, Maydha Pradesh, Andhra Pradesh and Orissa.

³⁷⁹ Madhav Gadgil, 'Conserving Biodiversity as If People Matter: A Case Study from India ' (1992)Ambio - Economics of Biodiversity Loss; Gadgil and Guha, *This Fissured Land: An Ecological History of India* (Biodiversity of India 2011)

independence their migratory corridors included Sind in Pakistan, and they migrated to the Indian states of Gujarat and Rajasthan prior to 1940. After independence, however, they could not cross the borders into Pakistan, which severely limited their pastoral migratory routes.

The Maldharis in Mera district whom I studied were watching their lifestyle eroding with the corporatization of milk production in India initiated in the state of Gujarat. Changing land requirements of farmers who had had a mutually interdependent relationship with pastoralists added to the exclusion of the latter; and the changing political landscape of contemporary India has not been kind to the nomadic choice of life. Responding to these developments which have threatened their livelihoods and existence as pastoralists, the Maldharis of Mera district have organised themselves with the support of an organically initiated NGO called Marag. Marag was founded by a member of the Maldhari community, and has begun activist political strategies to reclaim their land rights.

4.4.2. Maldhari Community Profile

“Maldharis were traditionally tall, energetic and healthy,”³⁸⁰ with a diet rich in milk and dairy, including ghee, supplemented with millet, garlic, chillies and ancient grains such as “banti” and “kodra”. Conventionally the Maldharis only kept certain numbers of animals in relation to their own capacity to support them and did not expand beyond this capacity. If someone lost their livestock accidentally, the other pastoralists were required by community custom to support them. Their livelihood was based on preparing ghee from milk and if they had surplus milk it was sold in the open market. Every 30 km they held big markets and every 50 km they held small markets facilitating quick sales of their surplus. Every three or four days, the women pastoralists sold the ghee and milk in the open market and bought other household goods. In addition to ghee, they sold some of their cattle to be used as transport as an additional source of income. The camels were only owned by communities who lived in sandy soil areas, for example in Kutch. The community that I visited in the Mera District owned sheep, goats and cows. Other sources of income included the collection and the sale of wool, and cows, which were used for agricultural purposes, not only for dairy. The two main breeds of cows in Gujarat were the *Gir* and *Kankrej*.³⁸¹

³⁸⁰ Quote by Lalji Desai, Maldhari community member

³⁸¹ In Gujarat there are two main breeds of Gir and Kankrej. The Kankrej cattle are identified by magnificent curved horns. In India the Gir is only found in Saurashtra. When the Portuguese held Goa, Daman and Diu as protectorates on India’s west coast, during the colonial era, Saurashtra fell under the Portuguese protection geographically and the Portuguese exported the Gir cows to Brazil. The Brazilians expanded this industry and today export Gir semen and embryos all over the world and have developed the

The cultural traditions called 'bij' required the free distribution of milk to neighbours at least two days in a month. This milk was not allowed to be sold for money by convention. Another communal custom obliged relatives to give livestock as a start-up to newly married young couples to start their own herds. When animals are old and stop yielding, they are not discarded, but the community has to care for them until they die. The value of livestock is reflected even in the Maldhari language where they greet one another with "are your animals healthy, with no illness?" and their second question is "how much milk is your animal giving?" The White Revolution,³⁸² based on principles of profit, eliminated traditional caring practices such as bij, which had provided a safety net within the community for people in need, who had no means to produce the milk themselves or afford it. The loss of the safety net increased poverty at the Maldhari community level for some.

Lalji Desai, one of the leaders of the pastoralist NGO Marag³⁸³ was my host in Gujarat. Lalji is of Maldhari ancestry whose family is from Becharaji town, close to Meru. Lalji's family had cattle all of which they lost in the 1985 drought. Consequently, they moved to Ahmedabad, the capital of Gujarat where the family bought two buffaloes from the mother's brother. Lalji's mother took care of the buffaloes, which comprised the family income at that point as his father had no income. His father went into community leadership and began a struggle against landlords who were encroaching on common property used for livestock grazing by Maldharis. Dependence on climatic conditions is one part of the story. The other is dependence on the current political scene in which the Maldharis of Mera District have decided to participate, in order to be able to employ political activism to shape their own struggle for land rights.

The Bharatiya Janata Party (BJP) party, a right-leaning party under the now Indian prime-minister Narendra Modi,³⁸⁴ had been in power for 15 years in Gujarat when I was visiting in 2013. Gujarat had a two-party system with Congress and BJP. In Gujarat, Keshubhai Patel, who

Gir milk productivity to a maximum of 50 litres per day. In India the Gir cow still produces only half that amount and has remained undeveloped as an industry.

³⁸² Operation Flood also known as the White Revolution refers to the highly successful dairy cooperation movement in Anand, Gujarat begun in 1970, which created a National Milk Grid connecting milk producers and consumers throughout the county, "reducing seasonal and regional price variations while ensuring that the producer gets fair market prices in a transparent manner on a regular basis." Begun as a rural development initiative to create jobs and income for rural communities, it considered a major economic success for India's rural milk producers, and for facilitating easy access for the purchase of dairy products for the consumer, with more than 70,000 dairy cooperatives in the country by the late 1980s. <http://www.nddb.org/about/genesis/flood>

³⁸³ I had met Lalji in Jordan, at the Dana +10 workshop I was facilitating for mobile indigenous peoples in 2012.

³⁸⁴ Later the same year of 2013, Narendra Modi won the national elections to become Prime Minister of India.

was a senior BJP leader, rebelled against the party leadership, and resigned from the BJP in August of 2012, launching a new political party called "Gujarat Parivartan Party (GPP)."³⁸⁵ The Patel community are traditionally pastoralists, who in turn are part of the marginalized communities which also includes Dalits, Adivasis (tribals), Kohlis, and other marginalised communities, many of whom joined the newly formed GPP.³⁸⁶ In Gujarat, a part of the civil society has been trying to get rid of Modi's BJP ever since the notorious 2002 Hindu-Muslim riots in which more than 1000 people, predominantly Muslim were killed by Hindu mobs.³⁸⁷ After the riots, the civil society in Gujarat campaigned for the Congress as a strategy to avoid splitting the vote. In spite of this, BJP won with a big margin and the Congress lost in 2007. Subsequently a movement was spawned in order to create alternative leadership independent of either Congress or the BJP, headed up by Dr. Kanubhai Kalsaryia, a Member of Legislative Assembly (MLA).³⁸⁸ Marag, was part of an organization of marginalized communities in this area of Kutch area in Gujarat, which included pastoralists, who have protested against land violations by the government in collaboration with Dr. Kalsaryia.

4.4.3. Land Violations

Land violations included land expropriation by private individuals and the sale of *gauchar* lands by the government to private individuals and industries. This particular community I studied did not use legal mechanisms, but used political action such as protests in order to assert their land rights. One such example being the action by Mahuva farmers to protest a Bhartiya Janata Party (BJP) government land violation in 2011. The BJP had sanctioned fertile farmlands with reservoirs for building a cement factory, which would destroy local livelihoods, pastoral grazing lands, and a rich ecosystem.³⁸⁹ The pastoralist NGO Marag, joined the mobilization efforts to re-

³⁸⁵ Traditionally the Patels formed the leadership of the Maldhari community. It was an inherited title. The Patels have since become a sedentary community. Lalji Desai, also of the Maldhari community, and part of the NGO working with the Maldharis whom I was visiting, aspired to politically represent the marginalized communities in this district of Gujarat.

³⁸⁶ Other marginalised communities in India are officially named by the Indian Government as Other Backward Classes (OBC).

³⁸⁷ Narendra Modi, elected as Prime Minister of India in 2013, has been accused of encouraging sectarian violence and as being complicit in the Gujarat riots <http://www.bbc.co.uk/news/world-south-asia-13170914>; <http://www.theguardian.com/commentisfree/2012/mar/14/new-india-gujarat-massacre>

³⁸⁸ An MLA is a representative from a specific district elected to a State Legislature in India.

³⁸⁹ The Indian Government policy of 2012 on *gauchar* lands:

-No pastoral land to be given to industrial or commercial purpose. Government will also ensure these are not encroached against the interest of local community; If *gauchar* land is in middle of an urban area, the government will denotify and sell the land and develop pastures at an alternate site; New *gauchar* (pastoral) land policy to comply with the last year's Supreme Court order asking state government to not sell government owned pastoral land for industrial or commercial use; If *gauchar* land is in middle of an urban area, the government will denotify and sell the land and develop pastures at an alternate site; In some cases, the government has given land for some public purposes, for instance, schools, which require adjoining *gauchar* land. In such cases, we will sell the land to them and use the money in developing new pastoral land. Taken from: *Desh Gujarat*, 'Gauchar land not to be allotted to industries: ' *Desh Gujarat* (Ahmedabad

claim their lands, and with the help of the local Member of Legislative Assembly, Dr. Kalsaryia,³⁹⁰ took the battle for their lands to the Supreme Court, eventually winning their case. In the Saurashtra region of Gujarat, in the Taluk of Mahuva, cultivation was widespread on lands that had been de-salinated and recharged through government efforts of building reservoirs. Besides providing irrigation for agriculture, these reservoirs engendered rich ecosystems populated by more than forty species of birds. The most significant change for the community was their increased affluence. In 2006, the state government under Narendra Modi sanctioned 3,460 hectares of this land for the building of a cement factory, which would threaten livelihoods and the ecosystem of this area. The threat to the main water source for farmers was prohibited by law. The sanctioning of the land to the Nirma cement factory was unbeknownst to the farmers, who discovered it when the date of the environment public hearing was announced. The farmers with women leading, began to mobilize to reclaim their lands. This included a now celebrated 350 km protest march which lasted fifteen days and ended at the state assembly to voice their concerns. Their struggle was supported by civil society organisations and prominent activists. Eventually the farmers won their case when the Supreme Court of India ruled against the Nirma cement factory's right to environmental clearance. ³⁹¹

The White Revolution of milk production in Anand in India, though very successful for mainstream communities, broke the traditional pastoralist marketing system as all their produce went to the dairy cooperatives. The newly enforced dependency on the dairy cooperatives also pushed them into a more semi-nomadic lifestyle. Earlier they were migratory pastoralists and used their livestock for the production of milk. The traditional division of labour between the pastoralists and the Maldharis had maintained a system in which the Maldharis had animals and the Choudaris, another non-mobile tribe, had land. The Choudaris however, were more powerful and had taken over the selling of milk products to Anand and had pushed the Maldharis out of this market. Traditionally the Maldharis had provided veterinary care to the animals. The Choudaris also took over this community task, and the Maldharis lost this source of income.

Pastoralists, like other farmers are reliant on the weather. The year I was visiting, the rains were too little and too late. In previous years, the pastoralists were able to rely upon a predictable

<<http://deshgujarat.com/2012/04/22/no-gauchar-land-allotment-for-industry-commercial-activity-gujarat-govt-coming-up-with-a-new-policy-on-pasture-land/#print>> accessed 24/3/16

³⁹⁰ Dr. Kanubhai Kalsaryia a member of the local community, who had been educated as a surgeon and had returned to assume a leadership role in his community, including becoming a state legislator. The Mahuva farmers' protest against land violations was led by him.

³⁹¹ Manisha Desai, *Subaltern Movements in India; Gendered Geographies of Struggle Against Neoliberal Development* (Routledge 2015)76; http://www.dnaindia.com/india/report_mahuva-farmers-march-in-gujarat

three-year cyclical weather pattern, with one year of good rains, followed by a year of adequate rains, and a third year of drought. Between 1985 and 1987, however, they had three consecutive years of drought during which large numbers of livestock died and they had to keep migrating in search of water. Between 2001 and 2011 they had no drought in any year. In 2012, while this data was being gathered, there was no rain. The drought was severe with no rain from Jamnagar to Kutch, both of which were points along their seasonal migratory route. Life was uncertain, and land violations added to the problems caused by natural weather conditions.

4.4.4. The Role of Panchayats in Land Violations

Gujarat law states that pastoral lands, known locally as *gauchar* land cannot be changed, and that the privatization of *gauchar* land is illegal, as I have outline above.³⁹² All *Panchayats*³⁹³ have a register of all the livestock in the district.³⁹⁴ The reason for this is to ensure the ratio of grazing land. By legislation, there must be 40 acres of grazing land for every hundred animals. The *Panchayats* in this area of Kutch have not honoured this law, and changed this rule unilaterally, which compelled the Maldharis to file a police charge called FIR to oppose this new regulation.³⁹⁵ The powerful landlords threatened to file a counter FIR, which would disallow the Maldharis from the communal tradition of grazing on their fields after harvest. The Maldharis stayed their ground, and eventually the landlords promised to let them graze elsewhere. However, this promise was not honoured. In addition to this, the landlords also arbitrarily decided that the Maldharis were not allowed to graze on temple land. Temple land traditionally belongs to the whole community, and Maldharis have always grazed their livestock on temple lands in the past.

Initially the Maldharis requested the Panchayat to urge the landlords to stop these new arbitrary restrictions, but the *Panchayat* did not comply. When the Maldharis started a protest, in reaction, the police tried to mediate, promising to “stop the action, and we will sort other grazing lands.” When the Maldharis stopped their protest, no grazing land had been provided. Previously, the landlords used to request the Maldharis help in other agricultural work. Post conflict source of income was rescinded with landlords no longer requesting for Maldhari labour. Now the Maldharis, having lost their *gauchar* grazing land, can only graze on the edges of farms, which is also causing problems, and the landlords have lodged a new police complaint against grazing on

³⁹² Gujarat, 'Gauchar land not to be allotted to industries: '

³⁹³ 'Panchayat' is the term used to describe a village council made up of five governing members who have been elected as an organ of village self-government.

³⁹⁴ The livestock register does not include goats.

³⁹⁵ First Information Report is the first step for a civilian in reporting a crime or offence in the Indian Police rules.

edges of farms. The farmers have also lodged false police cases, charging the Maldharis with encroaching, which has caused the police to arrest the Maldharis. These issues are increasingly marginalizing Maldhari's and severely restricting their access to justice.

4.4.5. Gender Dynamics in the Maldhari Community

The loss of gauchar land for grazing had increased Maldhari women's workload. They had to gather fodder, adding to a workload which started between 4 a.m. or 5 a.m. in order to complete women's domestic chores such as cooking, gathering fodder and laundry. The ponds, which had dried up due to the conversion of pond area into private cultivated fields no longer provided the Maldhari animals with drinking water. The farmers began charging the Maldharis a fee to water their animals by using tube wells. Since the farmers have seized the grazing lands, the animals have to be grazed far away, adding to the time spent by the women when grazing the animals. This had all caused new tensions within the community because the farmers appointed security guards who chased away and intimidated the women. The women had to resort to gathering fodder for the animals rather than allowing them to range free. They began carrying between 50 to 60 kilos of fodder and walked about 4km a day, which was detrimental to their health, and added to their workload. When the cows started giving less milk, due to a change of nutritional status, the women were blamed for this. The seasonal migration with the cattle, which occurred at the start of the monsoon seasons, was undertaken by the men, forcing a gender division of labour, with the women at home caring for the domestic work, the children, and the elderly. The general division of labour had men herding the livestock every day and the women going the market. There were small markets every 7 km from every village and big markets, which were 18 km away from every village. Traditionally the women pastoralists in Gujarat traded in the markets and therefore controlled the money. However, the Amul milk cooperatives from Anand in Gujarat have changed the dynamic negatively for Maldharis since they can't control the marketing of their milk produce like they used to. This has a direct gender connotation for women who lose control of finances and economic independence.

Lalji explained that the assets that a woman owns and brings to marital home has diminished since the White Revolution. The custom for married women was that after marriage the woman would go back and forth from her own family to the marital home on visits. This is called "Ana." The final return to the marital home, which is called "Jiana", occurs six months after the birth of the first baby. During the Jiana, the woman brings back livestock given formally to her by her relatives, which are her own assets. The White Revolution has destroyed this livestock exchange in several ways, and how livestock is valued. Now instead of livestock, people desire television sets and other electronic goods. The White Revolution has also changed the value of milk

animals because now each milk animal has a price. Prior to this, animals were not priced individually. Instead value was placed on the herd as a whole. Animals were therefore given freely to newly married girls by their relatives. This rarely happens now, which has diminished the financial worth of the assets a newly married woman can contribute.

The villages I visited included Finchdi and Sitarpur, where the NGO Marag supports the activities of the Maldhari pastoralists. Residing near the Maldhari villages in huts built in the traditional pastoralist dwellings, where the NGO worked, I met with groups of pastoralists, both women and men, though the women did not play an active role in the discussions. The head of one of the Maldhari families, whose home I visited, accompanied us on the village visits. The group discussions entailed descriptions of how the community had advocated for their grazing lands - lands that are steadily being encroached upon. The language was a local dialect of Gujarati and a staff member of the NGO acted as an interpreter. The village was crowded and busy, with lots of activity and numerous heads of cattle with remarkable long horns. We sat in a circle with a group comprising members of the tribe, mostly men and children. There were no signs of affluence. Gender differences were starkly apparent in the children. The boys were well groomed, with neatly combed, oiled black hair. All the girls looked unkempt in contrast, and their untidy hair dry and brown; a sign of malnourishment. Traditionally in these communities men and boys eat first, girls eat second and women eat last. The boys had solid silver bracelets, a traditional piece of jewellery worn by men of the Maldhari caste, while the girls wore only cheap plastic bangles.



Figure 2 *Gathering for a focus group at Sitarpur Village, Gujarat with the Maldhari pastoralists*

4.4.6. The Economics of Maldhari Livestock Rearing

The economics of Maldhari livestock rearing was described to me in detail. The cost of fodder was Rs.15.00 per kilogram. Each animal needed either eight kilograms of dry fodder or thirty kilograms of green fodder, which was approximately Rs.120 per animal. In the autumn of 2012, while I was visiting, the cost of feed because of drought was Rs.12.00 per kilogram. Cattle feed was normally lower than the cost of fodder, but now, with the drought, it was the opposite. Instead of costing Rs.120.00 per day to feed an animal, due to the drought it now cost between Rs.150.00 and Rs.170.00 per day to feed one animal, creating a financial loss for the Maldharis. Traditionally, the farmers followed a custom in which they were not allowed to cultivate after the harvest without offering free grazing rights to pastoralists for one or two days after harvest. This was a customary right. One or two days were called “one round” of grazing. If the farmer did not give permission for the pastoralists to graze freely, traditionally the pastoralists could allow his or her animal to destroy the farmer’s crops.

Before the White Revolution, the Maldharis of Kutch were mostly making ghee³⁹⁶ from their milk to sell. By custom, buttermilk that they produced was not allowed to be sold but was kept as food for the calves and for free distribution to the neighbours, a solicitous aspect of communal living. Raw milk was also not allowed to be sold in the past, the custom being that only a value-added product from milk, such as ghee, could be sold. Even in contemporary times camel milk was generally free, though this practice was changing. Traditionally, during a wedding, the celebrating family invited camel owners who came and distributed free camel milk. The main income of camel owners was from transportation. Pastoralists believed that Momai, the Gujarati goddess who rides a camel and whom pastoralists worship, does not allow the sale of camel milk. A camel, which feeds on trees, is traditionally entitled to feed on whatever trees it encounters for free. In 1935 the price of one sheep, and the price of the wool of one sheep, was the same value. No one, therefore, ever killed an animal. Eighty years ago, before independence, when the silver coin with Queen Victoria’s head called “*rani chaap rupiya*” was in use, the price of one silver coin (one *bigha*) and one cow was the same.

The White Revolution had encroached on land because the Anand dairy needed land to grow fodder. This encouraged a bigger market for cattle and many farmers who only grew crops started investing in livestock, which had always been the exclusive occupation of Maldharis, creating competition and reducing the income of the Maldharis. In addition to this, traditionally pastoralists received free fodder in the form of wheat and other grasses from farmers when the

³⁹⁶ Ghee is clarified butter, traditionally made at home.

latter had an excess. Farmers had no tractors then and they used the bullocks and organic manure from pastoralists. The pastoralists would graze their herds to get rid of weeds that grew after the monsoon. While the herds grazed on the weeds they would drop their dung, which farmers then used as fertilizer. The increased competition created by Anand had destroyed the mutual interdependence between farmers and pastoralists. Because of all these changes pastoralists were slowly facing increasing impoverishment. Pastoralists for example, use local breeds of livestock; the White Revolution introduced the Holstein, Friesian and Jersey cows. These foreign cows are not free range, which pushed out the pastoralists. There are 18 district-level dairy unions, only two of which have pastoralists.

Land was not valued very highly amongst the traditionally nomadic Maldhari community. Finchdi village comprised thirty-nine families, of which only three owned enough land to survive sustainably. Three or four families owned only between one to four “*bighas*.”³⁹⁷ The rest of the community was landless. We visited the home of Vihabha and Akhabai, residents of the Finchdi village, who had been so involved in land issues, that they were invited to represent Maldhari land issues in a global gathering in Sweden. In the Finchdi areas there were three hundred Maldharis and the village, with the help of Marag NGO, had carried out research on changes in land and crops. The quality of certain crop called *jejwa*, which used to be used for fodder, had greatly diminished for several reasons: there was less land to grow seasonal crops; failed monsoons and increased drought; and too much pressure on a small area of land. Previously, this family had owned one hundred and fifty cows. They now only owned ten to fifteen cows. Previously they had had access to six or seven square km of *gauchar* land, which was traditionally collective grazing land. Now, all that collective grazing land was under cultivation with castor oil beans. The cows gave them an income of Rs. 6,000.00, which was now halved due to the rising costs of fodder. Traditionally the Maldharis had a good life, they made lots of ghee from the milk from their cows, and sold it. A bull was sold then for one hundred rani chaap (silver coins), which was a lot of money compared to what a bull brought in now.

During the focus group meeting at Finchdi village, the group explained that the *gauchar* land, which used to be collective grassland, has now been broken up and privatized. The privatization of *gauchar* land is illegal. Starting twenty-five years ago, Babul trees had been planted in grassland, and these thorny trees now cover twenty-seven acres next to the jungle, terminating the grazing for their cattle. Another change was the illegal conversion of pond area into private, cultivated fields. Some of the collective grasslands had been fenced for a government grant

³⁹⁷ A bigha is a local unit of land measurement in square meters in India, which varies considerably, but in Rajasthan it is roughly 2,500 square meters.

scheme for the planting of vegetables and other crops. Due to the encroachment by these powerful individuals, both private and government, there was no longer collective property in Finchdi. Wanting to avoid conflict, the Maldharis did not challenge these changes. There were also future plans for a Maruti auto plant to be built in this area. The local *Panchayat* also changed part of the *gauchar* land into a fenced plantation called Panchwati. In Gujarat, the law says that *gauchar* land is protected, but the plans for change were processed illegally by the *Panchayat*. The increasing impoverishment of the Maldhari community as a consequence of loss of land and constrained livelihoods was very apparent.

Sitarpur village has three hundred and fifty acres of *gauchar* land. The first community here were the Thakurs. They now also had Patels and Maldharis who occupy Gaikwad District, Mehsana, Surendranagar, Ahmedabad, and Pattan. Sitarpur was the centre for the above-four districts. In 2009, one powerful landowner called Puraji Darbar, with the help of his own community, took over the *gauchar* land for about ten years. The Maldharis protested with the help of Marag. The Maldharis leaders, who are called Patels³⁹⁸ called for a meeting with the Darbaris (to which this powerful man belonged) but this meeting was unsuccessful because the Darbaris refused to give up their land. The night of the refusal, the Maldharis met amongst themselves twice. All of them, including men, women and children, decided that they wanted their *gauchar* land back at all costs even if it included violence. They resolved to stay united. In July of 2009 in cooperation with Maldharis of three other villages, including Finchdi, Hasalpur, and Naviani, they organised a sit-in action on the *gauchar* land with seventy people, men and women, and five hundred animals. The leaders called the people together with the communication “whoever has pastoralist blood must arrive at 8 a.m.”, making it a matter of community pride and responsibility to attend. The Darbar quickly sought the aide of the local police and the police came to threaten the Maldharis. The NGO Marag, however, attended the Maldhari sit in with a video camera which forced the police to withdraw for fear of being held accountable for unfounded harassment of the Maldharis. This movement snowballed into activism in six or seven villages adding Mera, Manavada and Tuvad to the original list of four villages. The Darbaris filed an FIR at the police station and reported the names of all the Maldharis at the sit in. ³⁹⁹ Marag supported the Maldharis by dealing with the police red tape and explaining the injustice of the situation, and within two days they managed to obtain grazing access to the *gauchar* land. The fact that Maldhari community had representatives in the local panchayat, also further strengthened their land claims as they had the necessary political clout for the success of such land activism.

³⁹⁸ Each Maldhari community has one or two leaders called “*Patel*” which is an inherited title.

³⁹⁹ FIR: First Information Report which is filed by a victim of a crime with the police. It’s important because it sets in motion the process of criminal justice and investigation in motion.

Ninety households of Maldharis have been in this Mehsana for about four hundred years. Between October and May fifty households migrate seasonally to Kutch, which is a hundred km away. The full family migrates, but before 1985 only the men and animals migrated, and the women stayed back to look after the young and the old. After 1985 they had three years of drought so the whole family started migrating in search of food and grazing land. In 2012, during my visit, they were facing drought again. Another problem was that gauchar land is government land, but the government had recently been giving this land away for privatized ownership. About four Maldhari families have bought land, the rest only have income from their livestock. The Maldharis recently started selling milk through cooperatives to the Mother Dairy which was centralized in the whole state. They were not supported by any NGOs except Marag.

There were many “false” FIRs filed every year against the Maldharis which costs them thousands of rupees to fight these unfounded cases. The police demand bribes, which adds to the cost, to which the many Maldhari people and NGO staff I spoke to attested. Many Maldharis were too busy with their livestock to enter into legal action. In addition, the lack of education results in an unawareness of the potential protection offered by land legislation. After the sit-in with three other villages, Sitarpur village, with the support of Marag, united with the other villages to form a local support organization. Previously the Maldharis were not united, had no strategy and lacked trust among themselves. Marag has brought them together to form a united front to challenge the continuing land violations.⁴⁰⁰

The lack of protection towards a minority of being able to pursue their traditional livelihoods and lifestyles is referred to in Chapter Two’s Literature Review as ‘state violence.’ The shared traditions of the Maldhari pastoralists of *bij*, the free distribution of milk, and the custom of community contribution of cattle as a startup investment for newly married couples, guaranteed security that no community member was in need. Reliant on customary traditions to protect each other from calamity or accidents, and caring for each other, with a modest lifestyle of only rearing enough animals that matched their capacity of animal husbandry, ensured a strong in-built non-hierarchical community welfare system.

Traditionally, gender dynamics were relatively equitable, with women controlling income from the sale of produce at the market. Women also brought their own assets to the marital relationship

⁴⁰⁰NGO staff recounted a strategy they used to encourage unity among the Maldharis to facilitate Maldhari language and local songs such as “There’s Something Wrong with Your Water.”

that remained their own assets. Both these traditions offered women economic independence. But these traditions of a communal safety net were being eroded by the economic squeeze caused by the erosion of the pastoralist livelihood and by the various forms of modernisation such as the corporate milk production of the White Revolution in India. Private industries such as the cement factory mentioned above, would also destroy the delicate eco-balance of former fertile farmlands.

The Mera district Maldharis rebelled against the socially divisive politics that the state of Gujarat experienced which culminated in 2002 in Hindu Muslim riots where a frightful number of Muslims, a minority religious community the state, were massacred while the government stood by and took no protective action of the vulnerable community. Forming a new political party, the marginalised communities in Gujarat, including Maldhari pastoralists, religious minorities, Dalits, Adivasis and Kohlis came together in protest against the prevailing discordant politics of the state. The Maldharis, in participating in this new political party, have taken a strong stand against mainstream politics that has colluded with the economic elite to displace them from their lands and further marginalise them.

The Maldharis had not adopted the legal system to help them in their land claims, preferring to use the political route. One of the reasons might have been that in their seasonal migration with their cattle, they did not use forest lands, and the FRA applies to forest lands. Another reason was that the choice of strategy to claim land rights was often dependent on the priorities of the NGO working with communities. In this case, the NGO Marag was interested in using political action as a strategy. This theme of NGO influence runs through each case study.

4.5. Case Study Two: “Look for a Yellow Turban”

4.5.1. The Dhanger Pastoralists of Ahmednagar, Parner Block, Maharashtra

The Dhanger pastoralists herded sheep and goats, with their migratory corridors ranging from the Konkan coast in Western India, through the forests and into the Western Ghats, which are the hills of the Deccan Plateau. This particular group were slowly being edged out of their ancestral migration routes by the government and private industry. I was visiting them in the Deccan Plateau of Maharashtra. The hilly Deccan Plateau⁴⁰¹ looked thickly green and wooded, belying the actuality of the rain deprived dryness of that year's failed monsoons. The monsoons are vital for watering the herds. Gayatri, the veterinarian doctor from the NGO called Anthra,⁴⁰² was

⁴⁰¹ Deccan Plateau: Ahmednagar, Parner Block, Autumn 2012

⁴⁰² ANTHRA was an idea developed by a group of women veterinary scientists, who work specifically with rural livestock farmers and pastoralists focussing on women. The NGO was started in 1995 with an

driving out to check the goats of the Dhanger pastoralist community. She described the situation of the failed monsoons which had turned the annual migration plans of this Dhanger community completely on its head that year of 2012. Four hours after departing from the large city of Pune, we left the road, and the jeep bumped along the dry grassy terrain for a while. The vague directions we had were simply to “look for a yellow turban.” After stopping a few times while Gayatri tried to connect to the pastoralist community on her mobile phone, two vividly yellow turbaned men atop a motorbike, approached us in a cloud of dark dust. Mahindra Khatal, one of the yellow turbaned men on the bike, joined us in the red jeep, and piloted us to a pastoralist camp in the distance. Abandoning the jeep at some point, we continued on foot towards a group of bright blue tarpaulin covered tents. Leaping over a stream where a few horses browsed, we approached the Dhanger community of women, men and children.



Figure 3 Dhanger pastoralists in the Deccan Plateau, Maharashtra

4.5.2. Community Profile

The Dhanger mobile indigenous communities were the main sheep raising community in Maharashtra. They were pastoral even 500 years ago and might then have had cattle in addition to the sheep and goats they had at present. They no longer had cattle but the “hero stones,”⁴⁰³ depict cattle being stolen from the pastoralists in Maharashtra. Their migratory routes from Maharashtra took them towards the Konkan along the coast, up to Goa and on to Gujarat. Their eastward migration varied dependent on the quality of the grazing. The sheep clear stubble in farmers’ fields after the harvest and leave their dung behind as fertilizer. Dhangers rear black

all-women governing board. Anthra carries out research on veterinary science; build local capacity and advocate on behalf community issues in regard to livestock, livelihoods and biodiversity.

⁴⁰³ Hero Stones are historic, inscribed, stone tablets, which record heroes in battles and are found all over India.

Deccanese sheep plus new breeds, for e.g. Madgyal sheep from other parts of Maharashtra. The origin of the breeds is scientifically unclear. The British brought breeds such as Suffolk and Merino, among others, and established a research centre in Pune, in Maharashtra.⁴⁰⁴ The traditional *gairann*, the local name for fields such as *gauchar* land, which is the name for grazing fields for cattle, was part of every village which had open greens for this purpose. The government re-allocated this *gauchar* land to private individuals and industries, which destroyed access of the pastoralists to traditional grazing lands.⁴⁰⁵ The Dhangar community in 2012 did not use legal mechanisms to claim their rights; however, they were being made aware and supported by Anthra, a local veterinary NGO, to educate themselves on legal avenues for redress using the Forest Rights Act.

Sitting on mats strewn under the trees, where tiny goat kids and lambs tethered to the trees were closely watched by the guard dogs,⁴⁰⁶ we met the community in a group. While the veterinary doctor gathered test tubes of evidence to be taken back to her laboratory, Jitendra was raising awareness in relation to land claims and advocating for access to their traditional grazing lands. Jitendra, an Anthra staff member dedicated solely to advocacy work, explained to the group the importance of land deeds and the consequences of not having them. He talked about the Forest Rights Act of which they knew very little. The Dhangers had been paying house tax (*ghar patti*) for as long as they can remember. The place they pay the taxes on was outside the military area. The community had to prove that they were residents here for a long time in order to reclaim their grazing rights. They were not interested in ownership rights because they were not interested in settling or building homes. They needed to continue to have access to this land and they wanted their children to continue to have grazing rights and seasonal lodging. Since this is the dry area they only stayed here for 4 months during the monsoons and then returned to the Konkan. They wanted rights of all the grazing routes they used and Anthra planned to map their traditional grazing routes and help them place their land claims.

The Dhanger community, despite their spartan, nomadic existence, was a wealthy community. Mahindra Khatal, one of the community members explained that the group had seven hundred head of sheep. The community also owned a few horses, used only as pack horses for their annual migration. Mr. Khatal had three children and had known three generations of life on this land. His youngest girl was about four years old and travelled with the group. His other two

⁴⁰⁴ Taken from interview with Ghotke

⁴⁰⁵ Taken from interview *ibid*, Anthra, Pune, India
Autumn 2012

⁴⁰⁶ When we entered the camp, escorted by a couple of the men from the community, we were met by very noisy, aggressive barking sheepdogs. These dogs protected the sheep from wolves and the pastoralists told us that they rear these crossbred mongrel dogs from birth.

children were ten and twelve years old and attended school in the Konkan, living with extended family and grandparents. Since the 300 km trek was undertaken by foot the only people on the Deccan Plateau were young able-bodied families with their children; the older members of the community no longer migrated, but stayed in the Konkan which is on the western coast of India in the state of Maharashtra. Schooling and old age lifestyles separated families during the migratory period. The community suggested to us that they thought their mobile lifestyle might change in the near future since some of the educated children may not want to remain pastoralists. While in the long term this appears an eventuality, some of the children in this community who were not schooled would probably continue this nomadic lifestyle in the near future.

After Hindu festival of *Dassera*⁴⁰⁷ in October, the group travelled three hundred km back to Dahanu on the west coast of the Konkan and stay until June, when the monsoons hit. During the four monsoon months they returned to the dry lands of the Deccan Plateau, settling in the rainshadow of the foothills of the Ghats, as the wet in Dahanu during the monsoons can affect their herds with disease. The community's homes comprised only tents. The tents were covered by bright blue and yellow tarpaulin held up by bamboo poles. Surrounding three sides of the tent was a small mud wall with an open front. The square tents⁴⁰⁸ were lined on one side with large, highly polished brass pots containing water and possibly food. Wicker baskets contained clothes and were neatly positioned against the wall. In the front of the tent near the opening was a mud built stove fed by firewood. That day of our visit was the bull festival and on arrival in the village we were invited to sit down in one of the huts, and were served a sweet dish cooked with broken wheat, peanuts, coconut, ghee made from goat's milk, and *jaggery*.⁴⁰⁹ After the dish, we were served rice with lentils and vegetables. The cooking pot was enormous and served the whole community of tents of roughly 12 households.

Despite the relative affluence that their seven hundred head of sheep afforded them, the non-material, ancient Dhanger nomadic lifestyle remained a choice and tent habitation was a definite preference over a fixed and more permanent abode. They showed us several interesting objects such as many home-made woven rope catapults which they used to keep the wolves, which prey on their sheep herds, at bay and large pendants of pressed silver imprinted with different Hindu deities, each accumulated over the years from city jewellers. The jewellery was further evidence of their relative affluence which was superficially contradicted by their nomadic and very basic

⁴⁰⁷ The Hindu festival of Dassera celebrates the festival of Victory of Good over Evil

⁴⁰⁸ The square tents are roughly 340 to 510 cms on each side.

⁴⁰⁹ *Jaggery* is pure, unrefined brown sugar, with a distinct caramel flavour.

lifestyle where water had to be fetched daily from nearby streams and the outdoors was used for sanitary purposes, emphasizing that their nomadic lifestyle remained a very definite choice, rather than something externally imposed. Even in Konkan where older community members lived year-round in extended families with school-going children, they chose to live in tents and not in concrete and brick traditional structures, which they could have afforded if they saw the necessity of owning a house. Though economically not wanting, they could be perceived as being socially deprived since the members who migrate had no easy access to either healthcare or education.

The community speaks a dialect of Marathi. The conversation I had with them centered around the present failed monsoon of 2012 which they said feels like a repeat of the very severe 1972 drought. Their migration that year from Dahanu in the Konkan was disrupted by the failed monsoons and they got stuck somewhere en route of the three hundred km trek, unable to proceed due to lack of water in the Deccan Plateau. Eventually they decided to continue the trek and had been here for a few weeks having set up their tents. However, the rains remain elusive and there is not enough water for their pack horses who need a lot more water than the sheep. Each family has about 5 horses. The horses don't get enough grass to graze on, while the goats consume the fine grasses and so the lack of the normal monsoon vegetation has not affected them as much as the horses. Given the lack of water, they may have to turn around and start retracing their three hundred km journey by the end of that week. Their daily grazing is limited to 15 to 20 km in total; they do not stray out of this grazing boundary on a daily basis and other groups do not encroach on their limits. This is part of their customary laws.

4.5.3. Land Dispossession

Two hundred years ago, before their great grandparents, the military gave the Dhanger community very little compensatory money and took away their land. Now the military used it as a firing range, and the Dhangers had no freedom of movement anymore. They had recently built a little wall in order to retain what little water they had left after the failed monsoons. The military was now questioning them about the wall.

This community had bought land in Karjat and Ahmadnagar in Maharashtra. Two politicians, Ajit Pawar (Deputy Chief Minister) and Babanrao Pachputa (ex-Forest Minister), however owned sugar factories in that area and were encroaching onto the grazing land of the Dhanger community trying to claim it illegally. The government declared this grazing land as an Indian Conservation Area which they were calling the Black Buck Sanctuary. While declaring it as a conservation area, however, the government officials have excluded their own sugar factory land

from the sanctuary. The mobile indigenous peoples' land had been demarcated as part of the conservation area and the government had sent them a notice indicating they will be compensated with Rs.15 lakhs per acre⁴¹⁰ for irrigated land, and non-irrigated land would only get a small amount of compensation. On the 30th of August Anthra had planned a meeting for the Dhanger community to educate them on their land rights. This meeting was dependent on whether the community would return to the Konkan if the rains continued to evade them.

Land dispossession, first by the military and then by local politicians and government officials mirrored the same dramatics with different actors as the case of the Maldharis. The NGO working with the Dhanger community, Anthra, from Pune, were committed to using the legal system with the Forest Rights Act and were raising awareness and mentoring the Dhanger community in their legal rights. The role of civil society was vital in the struggle for land rights in India. They were taking over this role from the government who were invisible as protector of the people's rights in these case studies. The challenge to the Indian government was to comprehend their role of protecting the rights of India's communities. And to recognize whether they had the capacity to administer the procedural rights of the Forest Rights Act.

4.6. Case Study Three: Changing Gender Perspectives among the Raika Pastoralists

4.6.1. Rajsamand District and Pali District, Rajasthan

In the Rajsamand District and Pali Districts of Rajasthan, the fight to protect the usufruct rights of the Raika camel herders was led by Dayalibai Raika, a capable community leader whose community is using the Forest Rights Act with the support of a local veterinary NGO. Unusual in Rajasthan's patriarchal history, was the fact that Dayalibai Raika was a woman leader who was a visible symbol of the successful recognition of gender equality and leadership within a community, and the community's potential to advocate for their land rights.

Daylibai Raika no longer wore her *dupata*⁴¹¹ purda fashion, as many Hindu Rajasthani women did, covering their faces with their veils and watching the world through a film of thin colored cloth. She now looked people directly in the eye, while leading her community in advocating for land rights and challenging government discrimination against her Raika community of camel pastoralists in Sadri, in Rajsamand District, Rajasthan. She was also a member of the board of the

⁴¹⁰ One Lakh is 100,000.

⁴¹¹ Dupatta is a veil worn around the shoulders by women, or thrown over their heads, and in some parts of western India such as Rajasthan and Gujarat, states where women respond to a more patriarchal convention than their sisters in many other Indian states, used to veil their faces.

NGO called LPPS⁴¹², the local NGO supporting the Raika camel herding pastoralists. Dayali Devi, built a small “kachcha”⁴¹³ house twenty years ago in her small village on Ranakpur Road, in spite of much local opposition. The opposition focused on her being a newcomer to the village and therefore an “outsider.” LPPS supported her, and recognizing her strength and potential, later trained her to be the community leader she had developed into. Capable and well travelled, Dayalibai had advocated for mobile indigenous land rights both in India and abroad, including in Canada, Germany, Kenya, the Netherlands, Spain and in Switzerland.

4.6.2 Community Profile of Rajsamand and Sadri

The Rajsamand District Rajasthan, where the Raika camel herders resided, was arid and drought-prone, near the Thar Desert. Camels as livestock comprised a sustainable livelihood for pastoralists, as they played a socio-economically significant role in Rajasthani lives. Local folklore traces the Indian camel as originating from Afghanistan.⁴¹⁴ The grazing corridors for Raika camels included the Kumbhalgarh forests in western India. Most of the forest had been converted into the Kumbhalgarh Wildlife Sanctuary situated in the Aravalli Range of hills.⁴¹⁵

⁴¹² LPPS: Lokhit Pashu Palak Sansthan is Hindi for "welfare organization for livestock keepers," and is an NGO supporting Raika camel pastoralists since 1996. It works towards people-centered livestock development and the sustainable management of biodiversity rich agro-ecosystems.

Taken from <http://www.lpps.org/>

⁴¹³ ‘Kachcha’ house is used to depict a ‘rough’, unrefined house usually built of a mixture of mud and wood and thatch. The opposite of this is the usage of ‘pukka’ house which means a sturdier house built of concrete and brick.

⁴¹⁴ Interview with Rathod, *Raika Camel Herders of Sadri, Rajasthan*

⁴¹⁵ New legislation for conservation such as Forest Conservation Act of 1980 was passed. “The Wild Life Protection Act of 1972 had already severely restricted the rights of Adivasis in the wildlife sanctuaries and removed their rights in national parks. The 1991 amendment to the Act took this a stage further. The 147 wildlife sanctuaries and 75 national parks (of which 18 are tiger reserves) covering 4.26 per cent of the land mass are planned to increase. These moves, with the financial backing of the World Bank and other international agencies, have forced Adivasis to further restrict or altogether abandon their survival activities in the forests.” Bhengra, Bhengra, Bijoy and Luithui, *Report on The Adivasis of India* (MRG1999) 10



Figure 4

photo credit: Anisha Wilmink

The Latada Forest, is known locally as Sandiya Dhari Took, an old Raika name which simply means “where the camels sit.”

The historic Fort of Kumbhalgarh was visible from our camp.⁴¹⁶ The campus where we stayed, which belonged to the LPPS, bordered the forest which was home to diverse wildlife and birds including leopards, wolves and antelope, along with many others which were endangered species. LPPS was a support organization for the Raika camel herders of Rajasthan, and advocated for the conservation of livestock biodiversity and land rights. They also provided veterinary services and encouraged income generation from camel breeding, sheep and goats. LPPS emphasized ecologically sound methods of dryland use and livestock rearing and also sought to raise awareness of Raika practices and to preserve the heritage of the Raika community. They promoted indigenous knowledge and pastoralism as a sustainable form of livelihood. LPPS engaged in participatory research into camel rearing practices; and desert ecology focused on “bringing the camel back.”

Hanwant Singh Rathore, head of LPPS, explained that the camel was not indigenous to India and was brought by Mahmud of Ghazni from Afghanistan when he invaded India repeatedly starting in 1000 A.D.⁴¹⁷ The Raika community was said to have come with Ghazni, and are considered indigenous pastoralists, but not necessarily indigenous to India. Before 1941/1942 the Raika were migrating only within Rajasthan. Raika is a specific name for the pastoralist communities of camel herders in Rajasthan. In the last five years, sixty percent of Raika have settled and are semi-nomadic. Before 1941/42 there was little agricultural activity in Rajasthan, with the only

⁴¹⁶ Our host Hanwantji claimed that the impressive walls of the fort, which extend for thirty-six kilometres, were the second longest in the world after the Great Wall of China.

⁴¹⁷ Ashirbadilal Srivastava, *History of India (1000 A.D.- 1007 A.D.)* (Shiva Lal Agarwala 1971)13

crop locally grown during monsoon season being millet.⁴¹⁸ The Rajputs, a warrior clan, also had livestock. The Rajput maharajas used the camels for warfare, and also for trade and transportation, rendering the camel a very valuable commodity, owned by the wealthy.⁴¹⁹ Prior to 1940 the Maharaja of Bikaner constructed a canal in Ganga Nagar, using camels as draught animals, before which most areas except Pali District and Udaipur were desert. The Raikas had always been the camel breeders in Rajasthan,⁴²⁰ and the camel population, in the 1940s was very high. There were about ten thousand camels in any one village⁴²¹ for example, and now there were only about eight hundred camels in one village. This decline began partly with the decrease of grazing land due to conservation and the lack of interest of the younger generation in herding, which forced them into a sedentary pastoralism. They now had a varied source of income which included cotton and dill cultivation, and the sale of buffalo milk and butter. They herded buffalo, goats and sheep in addition to camels, though they were once purely camel specialists. Some Raika, who purely herd camels, continued to practice nomadic pastoralism. Today the Raika communities generally have low levels of education, and adhere to conservative gender roles.

4.6.3. Community Profile of Latada

Gumnarao, a camel breeder from a Latada village owned between thirty to thirty-five camels. His family was semi-nomadic and used the same route traditionally. More recently however, the family only migrated one hundred kilometres during the hot summer season in search of grazing pastures, going anywhere where the farmers invited them to graze. During the harvest, pastoralists were invited to graze their animals on the refuse from the harvested crop, which helped the farmer to 'clean up' the post-harvest remnants. Today a camel was sold for between forty to forty-five thousand rupees, while only ten years earlier, a camel cost Rs. 5,000.00 to buy. Camels were therefore more lucrative today, and besides camel manure, their milk and their wool was also sold. Gumnarao's family sold camel manure to farmers for fertilization.

⁴¹⁸ The wealthier people only ate wheat which is imported into the state, but poorer people and pastoralists only ate millet. Wheat crops were introduced only after the 1950s.

⁴¹⁹ Ilse Kohler Rollefson and Singh Hanwant Rathore, 'Participatory Approaches to Using the Camel in Combating Desertification' in Faye and Esenov (eds), *Desertification Combat And Food Safety: The Added Value Of Camel Producers* (Desertification Combat And Food Safety: The Added Value Of Camel Producers, (IOS Press 2005) 36

⁴²⁰ Taken from Ilse Kohler Rollefson and Singh Hanwant Rathore *ibid* 36. Raika were vegetarian and did not use their camels for meat. They believed that their role in God's eyes was to look after the camel. They regarded themselves as "guardians of the Camel." The community had outlawed the sale of female camels, and female camels were used as part of a dowry in a marriage. The Raika had accumulated over the centuries a large body of indigenous knowledge about camel breeding and management, veterinarian science related to camels. "For this reason, they were referred to as 'native camel doctors' by colonial veterinarians."

⁴²¹ "Camel populations are decreasing in most Asian countries. The majority of camels in India are found in Rajasthan." *Ibid* 35



Figure 5

photo credit: Anisha Wilmink

Over steaming brass bowls of camel milk, served by Raika men wearing their splendid traditional turbans of bright red, we met with a village focus group on the edge of the Latada forest. The resident Raika group recounted a story of a successful protest using the Forest Rights Legislation.

In another part of the Latada Forest the next day of my data collection, we visited a family home in a village with Hemantji Rathod of LPPS. The village was thickly wooded and I recognized Neem trees, the leaves of which are used in India for Ayurvedic medicinal purposes, and the twigs for cleaning teeth. The house we visited bordering the Latada Forest, was a large, rough mud house painted white with red tiles placed on roofs made of sticks and twigs. The old wooden string cots which were stacked against the wall outside the house, were evidence that the family slept under the stars in the cooler night temperatures of the hot summer. Seated on attractive brown, black and white patterned blankets woven from camel wool outside the house, we discussed the pastoral way of life and its accompanying dependence on land, with Ramji and his family of two brothers called Babutharam, Ravtharam and their mother. A little six-year old daughter of one of the brothers sat nestled close to her grandmother who sorted through a platter of fresh green chillies and peeled garlic during the discussion. Two ten-year old boys joined the group and ran around freely unlike the little girl who played quietly with an empty purple plastic bottle of the sort one buys vitamin tablets in. I wondered if the freedom the boys had to run

around while the little girl sat quietly with her grandmother was indicative of differing gender roles, with expected docile and passive gender roles. After the focus group meeting, however as we were leaving the village, we encountered the little girl leading the goats and sheep to pasture, with her grandfather bringing up the rear of the herd. The little boys were nowhere in sight. Maybe they were in school? Was the little girl in school too? These remained unanswered questions about cultural conditioning of gender roles.



Figure 6

photo credit: Anisha Wilmink

Girl leading the goats and sheep to pasture

The Latada Forest bordered both Mewar and Marwad districts of Rajasthan, and the Raika had access to both sides of the border. Before Indian independence in 1947, these two districts used to be separate states, and the Raika had no permission from the colonial Forest Departments to cross those borders then. Traditionally the Raikas lived outside the village, always staying near the forests. Their houses were built as temporary structures. During the monsoon rains they built a small *Dhani* or colony, and used forest lands for pasturing. They also had access to pasture their herds in the seasonal grasslands. In the winter, the herds, using their instinctive knowledge, migrated away from the forests, and the Raika followed the herds. The Latada dam, built for irrigation purposes was where the herds were watered. The Latada Raika's day started at 7am with milking the cows at home. The cows and buffaloes streamed into the *chook*⁴²² by themselves and numbered about two hundred. The herds waited patiently at the *chook* for the Raika herdsman to arrive, and then followed him after he signalled to them with a special calling sound. Every village paid the Raika herdsman to graze their cattle for them. This was part of the Raika's livelihood.

⁴²² 'Chook' is a part of the village where the herds assemble before taken out to pasture.

4.6.4. Land Issues

Land issues for this community focus primarily on the struggle against the Forest Department for access to forest for seasonal grazing, which the pastoralists had always used freely for the grazing needs of their livestock. This changed with the transformation of forests, into a protected area called Kumbhalgarh Wildlife Sanctuary. Forty-three villages were affected by the loss of grazing rights and Kumbhalgarh Wildlife Sanctuary's negative effect on their livelihoods. The Raika found themselves in constant conflict with the Forest Department, which objects to the Raika grazing their camels in the Kumbhalgarh forests. This was contrary to a Rajasthan High Court ruling in 2002 recognising the customary rights of communities inhabiting the Kumbhalgarh peripheries. LPPS lodged a court case against the Forest Department for disallowing camels in the forests. The FRA specifies that Gram Sabhas⁴²³ have the authority to make decisions on land use in their territory. By these rules, the Forest Department is subject to Gram Sabha decisions on the use of forest lands. The Forest Department, in having to accept the new authority of the Gram Sabhas vested by the FRA, have lost their power over the forests which they have ruled since the colonial government converted the forests into sovereign property in 1871.⁴²⁴ This loss of administrative power has led to administrative injustice, and non-compliance on the part of the Forest Department who do not attend meetings that the Gram Sabhas invite them to, nor does the *Patwari*⁴²⁵

On August 2011, a year before this data was collected, about ten thousand Raika women, men and children from Sadri used their livestock to close three or four roads in order to protest the inaccessibility to the Kumbhalgarh Forests and to demand their customary rights to the forests. Another irregularity was the illegal and exorbitant 'fees' that the Forest Department charged the pastoralists to use the forest for grazing. In the past, the forest department used to charge Rs.1.00 per sheep for grazing, and Rs.5.00 per camel. Today, these fees, are Rs.25.00 per sheep and Rs.500.00 per camel or buffalo annually. The politicians wanted Rs. 20,000.00 from each village to pay for grazing rights. The Raika community was challenging the Member of the Legislative Assembly's decision to charge monies, which was a contradiction to their customary grazing

⁴²³ Gram Sabhas are village councils comprising all adult women and men in a village. They are permanent bodies and cannot be dissolved.

⁴²⁴ "The most detrimental legislation, passed by the British in 1871, was the Criminal Tribes Act and the Indian Forest Act 1927 ...which excluded traditional forest dependents and dwellers from forest lands reserved for economic timber harvesting for the Crown's treasury, and legalised the expropriation of forest lands from tribal and other forest peoples." Indrani Sigamany, 'Destroying a Way of Life: Indigenous Peoples, The Forest Rights Act of India and Land Displacement of Indigenous Peoples' in I Satiroglu and Choi N (eds), *Development-induced Displacement and Resettlement: New Perspectives on persisting problems* (Routledge 2015)

⁴²⁵ Patwari is a government official from the Forest Department who is responsible for mapping the forest for the purposes of determining land leases.

rights. The protest was successful and the Raika community received permission to access the forest for grazing again. They also reclaimed the rights to graze their herds in the forest for only Rs.5.00 for the small animals and Rs.10.00 for the larger animals as was the custom before. The Raika now demand receipts for any payments they make, which introduces an element of accountability into the practice.

Daylibai, explained to me that in her role as a community leader, she negotiated land issues with the government officials. When forty-three villages found themselves harmed by the conversion of their territory into a Wildlife Sanctuary, the civil society network rallied and organized a public hearing in 2012 with public officials and journalists which included issues of Right to Information (RTI)⁴²⁶, the National Rural Employment Guarantee Act, and the Kumbalgarh National Park. Daylibai representing the national park issue, stressed the need of usufruct rights and access for grazing for the one hundred and twenty forest villages that existed on the periphery of Kumbalgarh, and spoke to Ashok Gehlot, the then Chief Minister of the state of Rajasthan.⁴²⁷ He directed her to the Assistant Chief Secretary of the Ministry of Environment and Forests, Mr. V.S. Singh who promised to send a high-level committee to Sadri to investigate the local opposition to the national park. Three hundred Raika pastoralists and other tribal stakeholders affected by the national park gathered for a meeting with the Divisional Forest Officer (DFO). The policies applicable to national parks in India were categorized differently according to wildlife protection legislation. Some parks were ‘inviolable’ and bar human beings from ‘trespassing.’ The problem this caused derived from the fact that forest communities, whose forest-dependant livelihoods were recently threatened by ‘inviolable’ policies, historically inhabited these ‘inviolable’ zones. Daylibai’s community in Sadri had taken a decision to petition for collective forest rights.⁴²⁸ The Raika community in this area were actively using the Forest Rights Act to claim their rights, in addition to using political action.

The battles for forest access in Latada, Pali District in Rajasthan, which LPPS supported predated the Forest Rights Act. In 2002, the Kumbalgarh Forests where the camel population traditionally grazed was closed off to pastoralists and transformed into a Wildlife Sanctuary. Many camels died of starvation as a result of inaccessibility to sustenance, and the camel population declined

⁴²⁶ NREGA is the National Rural Employment Guarantee Act, 2005, later named Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA). This Act provides for the enhancement of livelihood security of the households in rural areas of the country by providing at least one hundred days of guaranteed wage employment in every financial year to every household whose adult members volunteer to do. Unskilled manual work and for matters connected therewith or incidental thereto

⁴²⁷ This interview took place in August 2012.

⁴²⁸ The FRA includes collective forest rights, which is significant since many tribal communities behave collectively and have traditions of sharing commons.

by seventy percent, while the sheep and goat populations declined by thirty-five percent. Another reason for the decline of the herd populations was that the younger generations were not necessarily committed to the nomadic lifestyle of their parents. A significant problem the Raika faced related to the lack of administrative justice, primarily through corruption. For example, the local government requires a 'commission', which can be anywhere between ten percent and forty percent of any government grant the pastoralists apply for related to camel projects, whether veterinary care or income generation.

The Latada District Raikas followed similar legal strategies as the Sadri District Raika communities. They took their claims to the Forest Department, or to the Chief Minister of Rajasthan or to the state High Court. The members of the focus group were confident that they could gather hundreds of community members within twenty-four hours for a land claim protest. They used to use runners bearing the news from one village to the next before the mobile phone era. The Gram Panchayat of every village in the district filed a claim for their customary rights while plans were being made for converting the forest to national parks.⁴²⁹ The village formed the Aadhikar Samiti (Forest Rights Committee) which is a requirement of the Forest Rights Act, as the Samiti formally requests the people to make the claim. A report was sent by the Samiti to the Sub District Commissioner. The claims included producing proof of dwelling before 2005. This proof requires either seventy-five years of dwelling or three generations of dwellers in the forests. Another requirement was a visual map called '*Najriyar Naksar*' which the Forest Department has to provide. LPPS arranged for an affidavit through the Rao, when was then sent to three government offices.⁴³⁰ The state makes a decision. The Rao, are scribes from the Charan community who traditionally record population statistics in an old language called Dingal. Their records show that the Raika community arrived in the Marwar District of Rajasthan around three hundred years ago, from about one hundred kilometres away. The Rao/Charan still used the Maharaja of Jodhpur to describe the geographical area, and had still not adopted the Government of India's State of Rajasthan. The Forest Rights Act requirement of having to prove forest residence for seventy-five years is not procedurally user friendly, especially when many forest communities are illiterate.

The semantics of the Forest Rights Act also caused problems for mobile indigenous communities because initially the Act only described 'scheduled tribes' (Adivasis) and excluded pastoralists. Pastoralists and civil society organisations all over India took up this issue, and the wording of

⁴²⁹ The Gram Sabha's book of minutes is called '*prasthav*', in which all the land claim proceedings are recorded.

⁴³⁰ The three government offices were those of the Sub District office, the District office, and the State Committee

the Act was changed to include “other traditional forest dwellers” which includes pastoralists.⁴³¹ LPPS on behalf of the nomadic communities met with the Ministry for Tribal Affairs in Rajasthan.

On July 10, 2012, a letter with twelve signatories from the Pali Jila Congress Committee was written to the Chief Minister of Madhya Pradesh, Gujarat, Punjab, and the Mewar district of Rajasthan. This letter requested that the restrictions and fines imposed upon pastoralists should be reconsidered with more compassion and understanding when they return to the forests during the grazing season. It also called for gauchar lands (grasslands) to be “notified” (officially classified) for grazing. Balaram Raika and Hiraji Kasela, two Raika representative spoke of the FD’s role in strong terms: “The Forest Department really tortures the mobile indigenous peoples when they return for grazing during monsoon season. The cattle belong to Raika, Bhil, Gujjar, Grazia, and Rawal. Of these groups, the Raika have the greater share of cattle.”⁴³² The Raika were discovering however that the conflict with the Forest Department had unexpected dimensions. When the Raika tried to help the Forest Department (FD) to capture poachers, the Forest Department did not appreciate it. The Raika were recognising that the reason they do not like it is because the poachers themselves were from the FD,⁴³³ which was a serious allegation.

The Raika community’s campaign to reclaim their deteriorating land rights used both political and legal strategies. Their battles to protect their usufruct rights began before the Forest Rights Act was enacted. Without the law to support them then, they staged protests to force the government to recognise their rights. With the Forest Rights legislation, they have an additional mechanism, proving that the recognition of substantive rights is indispensable for any action and legal redress. Civil society here, in the form of the NGO LPPS has played a vital role not only in forcing the land rights issue onto the national agenda, and raising the capacity of the pastoral community to fight for their own land rights, but also for creating visibility and giving shape to gender participation, voice and leadership within the Raika pastoral community.

4.7. Conclusion

As highlighted in the Literature Review of Chapter Two, the historical chronology of laws in India has had long reverberations that are still affecting indigenous peoples in contemporary India. The Criminal Tribes Act 1871 targeted nomadic communities specifically, followed by the

⁴³¹ Government of India, The Scheduled Tribes And Other Traditional Forest Dwellers (Recognition Of Forest Rights) Bill (adopted on 15 December 2006, No.158-C of 2005)

⁴³² Interview: Balaram Raika and Hiraji Kasela, *Raika Camel Herders, Rajasthan* (2012)

⁴³³ Interview: ibid

Scheduled Districts Act XVI, 1874, the Government of India Act 1919 and the Government of India Act, 1935 all designed to change ownership of forest lands from mobile indigenous peoples, and settled indigenous communities' customary rights to lands to sovereign governance. Nomadic tribes have faced the harshest consequences of these changes, alienated from their lands and still, in contemporary India, alienated from the benefits of economic development.⁴³⁴

For mobile indigenous peoples the onus of pursuing a legal strategy to claim land rights and to avoid land dispossession, has fallen on the people themselves. Administrative justice and protective governance mechanisms are not reliable. This is due to government complicity with land expropriation which as the above examples show, are the central threat to lands rights and subsistence of indigenous groups in India. The examples in this chapter of such complicity are many and varied: the politician who built a sugar factory on ancestral grazing lands of the Dhanger community in the Deccan Plateau; the military who expropriated Dhanger lands for their firing range; the Maldharis who lost their *gauchar* lands to other, more powerful communities, connected to the Anand milk production which was part of the national White Revolution movement in India; the Raika who have been barred by the Forest Department from feeding their camels in their ancestral grazing corridors in the Khumbhalgarh Forest. All these cases reflect the neoliberal aspect of India's capitalist system in which the needs of the economic elite supersede those of communities who have less economic power and who are left marginalised and unprotected by the state. Despite this state of disenfranchisement, the case studies reveal that within the mobile indigenous groups studied, gender equality is present within both the Maldharis and the Raika communities. The former having in-built traditions which are gender-friendly, while with the Raika, gender has been inorganically introduced by supportive NGOs who are part of the land rights struggle. These are positive examples of the importance of non-discriminatory patterns of gender, which strengthen the collective voice and ability of these peoples to unite and advocate for their rights.

It is significant that not all the communities are necessarily using land legislation such as the Forest Rights Act to assert their land rights. Some groups such as the Maldharis favour political action, and do not utilize legislation. Others such as the Raika and the Dhanger have been introduced to the Forest Rights legislation in order to access justice. The common thread running through all these advocacy efforts has been the support from civil society such as NGOs.⁴³⁵ In Gujarat, Marag was initiated by members of the Maldhari community themselves, and in

⁴³⁴ Rudolf C. Heredia, *Denotified and Nomadic Tribes: The Challenge of Free and Equal Citizenship* (Occasional Papers, University of Poona, 2007) 7

Rajasthan and Maharashtra, the NGOs were external to the nomadic communities. The choice of using political action or legal action seemed to depend on two factors, which were the awareness of the NGOs of how to take advantage of legislation; and their capacity to do so. The Forest Rights Act itself, as explained above, is not always user friendly, and was either not being used at all, or had been part of the advocacy efforts for a few years already, or was in the initial stages of being introduced to the communities. It is evident that legal capacity of mobile indigenous communities to use legislation was dependent on civil society support.

Chapter Five: “When the Camel Grows Horns” Women as Victims and Women as Actors

5.1. Introduction

In the last Chapter Four, I described three case studies specifically relating to mobile indigenous peoples and how they used legislation to claim their land rights or alternatively, how they preferred a non-legal course and use political action instead. In this chapter and the one following, I move away from mobile indigenous peoples to the settled Adivasi forest communities of southern Rajasthan’s Aravalli Hill range who have engaged in active struggles for their lands. This Chapter Five begins with a broad-brush stroke historical introduction to the Adivasi community of India following my case study of the Forest Rights Act. I use an example of the gendered change the new legislation has rendered, in the Kurka village community of Adivasis. This particular scenario from my field work is presented as evidence of different aspects of the struggle for rights to self-determination,⁴³⁶ gender equality, and access to justice. This chapter’s case study is used to deconstruct the gender inequality and the evolution of a community’s empowerment.

One of the most significant aspects of the lives of forest communities affected by dispossession of their lands was the damage to security and forest based livelihoods, which was facilitated by new laws. These laws were designed either to extract forest resources for profit by the governing bodies, or to protect wildlife within a conservation framework. The neoliberal culture which divided the security and rights of forest communities from priorities of profit for industry or the safety of wildlife, failed to recognise that forest communities had been an integral part of forests for centuries. Forest ecology was fiercely protected by tribal peoples in order to sustain indigenous livelihoods and cultures. Indigenous women played a vital role in this protection of forest ecology. In India, tribal women’s dependence on natural resources in the forest both for domestic and livelihoods needs is significant.

The self determination⁴³⁷ of tribal communities in India was quickly eroded by the normative framework enacted since the late 1800s in India, to defend the privatisation of nature norms of forest governance. The Forest Rights Act changed the legal culture that had governed forest

⁴³⁶ The concept of self-determination is used here as using it as it is used in the Forest Rights Act in the sense of recapturing of agency and of local control over lands and natural resources rather than the broader terminology used in the case of the right to self government, which occurs in a political split of a geographical area from a nation or state.

⁴³⁷ Note: I have used the terminology ‘self-determination’ less in the legal sense of the ‘right to self government’ than in the sense of the ‘recapture of agency,’ and of having control and decision making powers over their lives.

legislation by the Indian Government after Independence, and by the colonial government before Indian Independence. Since it aims to restore lost lands and customary rights, and to reverse the historical injustice of land expropriation from tribal communities in India, it has increased the rights to self-determination, which in turn has positively influenced the livelihoods of forest communities.

National and international policies fed off each other to develop regional and national legal instruments recognising women's rights. The awareness of women's rights has evolved since the development of the concept of human rights, with treaties such as the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).⁴³⁸ Discrimination against indigenous women takes multiple forms focussing on their indigeneity and cross cutting their gender.⁴³⁹ CEDAW does not mention indigenous women's rights in particular, and the United Nations Declaration on the Rights of Indigenous Peoples does not specifically refer to women's rights (UNDRIP).⁴⁴⁰ Women still hold the unenviable statistic of comprising the majority of the poor globally, feminizing the actuality of poverty.⁴⁴¹ Staudt explicates the concept of feminization of poverty as "women's increasing and disproportionate presence among those in poverty."⁴⁴² Poverty alleviation strategies have never been gender neutral. Land, especially has been the domain of men, and economic development policies have been blind to the gender division of agricultural labour and to the contribution of women to land based production. Funding and policies have been aimed at men as the 'farmers' and women have neither been recognised as farmers nor as heads of households. Reflecting this bias, legal progress in the past had not taken into consideration gender asset sharing,⁴⁴³ nor of inheritance or control of land. The Forest Rights Act's requirement of at least third of the Gram Sabha's participation being women, has contributed to changing the paradigm of gendered decision making at the local level.

Forests, where indigenous peoples live, are resource rich areas. Development induced displacement has therefore been concentrated in forest lands in India, with forty to fifty percent of communities displaced by development being tribal, though they comprise less than eight percent of the nation's population. More than forty percent of land illegally acquired for

⁴³⁸ CEDAW Rikki Holtmaat and Christa Tobler, 'Cedaw and the European Union's Policy in the Field of Combating Gender Discrimination' (2005) 4 Maastricht J Eur & Comp L 399

⁴³⁹ Tugendhat and Dictaan-Bang-oa, *Realizing Indigenous Women's Rights : A Handbook on the CEDAW* (AIWN 2013)

⁴⁴⁰ Ibid x

⁴⁴¹ Kathleen Staudt, 'The Feminization of Poverty: Global Perspectives' (1998) 5 The Brown Journal of World Affairs 215

⁴⁴² Ibid 217

⁴⁴³ Ibid 219

development and mining belongs to tribal communities in India.⁴⁴⁴ In contemporary India, tribal women have been prominent protestors, advocating against dispossession of their lands to extractive industry.

5.2. Chapter Outline

I introduce the indigenous Adivasi community in Section 1, outlining how Adivasis are situated at the national level in India, and how the land displacement caused by extractive industries is destabilizing both tribal culture and the rich biodiversity of forests in the country. Section 2 contextualises the Adivasi situation within a gender perspective, and the impact of forest degradation. Women's specific reproductive and productive relation to natural resources has dictated an increasing impoverishment, initiating a discourse on the feminization of poverty, which I have deconstructed within the Indian context. In Section 3, moving from the national stage to the state level in Rajasthan, I illustrate the gender focus with the Kurka village case study, spotlighting the lives of women in the Aravalli tribal culture, and the patriarchal realities that women face when attempting gendered strategies for claiming their land rights. In Section 4, I weave the analysis into how ethnobotanical knowledge and gender roles have been eroded by land expropriation since forest lands became sovereign property in the eighteenth century, and more recently, how some women are finding empowering roles in the struggle for land rights.

5.3. Adivasis in India

In Chapter One, I briefly refer to the Adivasis, the indigenous tribal people of India. The section below further situates Adivasis' within the Indian context, to provide a backdrop to their land dispossession. It outlines the size of the dispersed Adivasi community, their dependence on forest lands for their livelihoods and the legislation governing their indigenous land rights. The section focuses on the adverse history of forest lands legislation for Adivasis which began the dismantling of land-based livelihoods and land security of forest communities in India. This sets the frame of reference for my argument that the Forest Rights Act has fundamentally changed the concept of forest land security, especially in relation to the preceding normative framework.

The Adivasi indigenous tribal communities in India, are officially categorised as 'Scheduled Tribes', or 'STs' for short. The population of India in 2016 is 1.32 billion,⁴⁴⁵ of which Schedule

⁴⁴⁴ Indrani Sigamany, 'Destroying a Way of Life: Indigenous Peoples, The Forest Rights Act of India and Land Displacement of Indigenous Peoples' in I. Satiroglu and Choi N (eds), *Development-induced Displacement and Resettlement: New Perspectives on persisting problems* (Routledge 2015)

Tribes comprise about 8.6 percent, totalling more than one hundred and thirteen million.⁴⁴⁶ Adivasi tribes, scattered all over India are culturally and ethnically diverse.⁴⁴⁷ They are minority populations in all the states except in the Northeast,⁴⁴⁸ living mostly in the hills and in forests, and nurturing a profound identity with their lands.⁴⁴⁹ Many Adivasi communities still depend on the forests for their livelihoods, fuel and raw materials for handicrafts and honey for economic transactions, even building their houses from materials from the forests,⁴⁵⁰ and they adhere to ancient customs that serve to maintain ecological balance⁴⁵¹. A statement by mobile indigenous peoples framed for the Rio+20 Conference of 2012, claims “ The capacity of Mobile Peoples to innovate and to conserve biodiversity is a resource that can help guide the world in its transition towards a more sustainable future.”⁴⁵² This ecological harmony is gradually being destabilized by land-based ‘modernisation’ and commerce.⁴⁵³ The Adivasis themselves, who have been pushed into smaller and smaller areas of habitation by insidious and recurring government evictions, are being forced to overgraze their decreased lands, and are losing their finely tuned, ecologically sensitive practices. ⁴⁵⁴

During and after the colonial period in India, tribal communities have had an exploitative history, with their lands “eroded by the penetration of market forces, and integrated with the British and princely administrations [for tax purposes]...[They] were increasingly engulfed in debt and lost their land to outsiders, often being reduced to the position of agricultural labourers, sharecroppers and rack-rented tenants.”⁴⁵⁵ Colonial rule transformed their lives, and the immigration of farmers from the plains contributed to the start of the destruction of forests and the impoverishment of many Adivasi communities who lost their means of livelihood, their homes and their environment, when they were displaced from the forests. Missionaries, convinced of their own European cultural superiority, were “destroying [tribal] art, their dances, their weaving and their

⁴⁴⁵ <http://www.indiaonlinepages.com/population/india-current-population.html>;

⁴⁴⁶ [2011 Census Primary Census Abstract](#); 8.6% Adivasis number approximately one hundred thirteen million five hundred twenty thousand (113 520 000).

⁴⁴⁷ Bhengra, Bijoy and Luithui, *Report on The Adivasis of India* 3

⁴⁴⁸ Government of India, *Ministry of Tribal Affairs Annual Report 2012-2011*, 2010-2011) 37

⁴⁴⁹ Jeremie Gilbert, 'Nomadic Territories: A Human Rights Approach to Nomadic People's Land Rights' (2007) *Human Rights Law Review* 693

⁴⁵⁰ United Nations, *UN Subcommission on Prevention of Discrimination and Protection of Minorities, Study of the Problem of Discrimination against Indigenous Populations*, (1986) UN Sub commission on Prevention of Discrimination and Protection of Minorities, Study of the Problem of Discrimination against Indigenous Populations, U.N. Doc.E/CN.4/Sub.2/1986/7/Add 4, para.369 (1986) 137

⁴⁵¹ Bhengra, Bijoy and Luithui, *Report on The Adivasis of India* (MRG 1999)3

⁴⁵² Chatty Dawn Chatty, *Workshop report, Dana Declaration +10, 11-13 April 2012, Wadi Dana, Jordan*. ((Refugee Studies Centre, Oxford Department of International Development, University of Oxford 2012)

⁴⁵³ *ibid*

⁴⁵⁴ *ibid*

⁴⁵⁵ Bipin Chandra, Mridula Mukherjee and Aditya Mukherjee, *India since Independence* (Penguin Books 2008) 135

whole culture.”⁴⁵⁶ Verrier Elwin, who came to India during the British colonial era, and lived among Adivasi communities, recorded that under British rule Adivasi communities “suffered oppression and exploitation, for there soon came merchants and liquor-vendors, cajoling, tricking, swindling them in their ignorance and simplicity until bit by bit their broad acres dwindled, and they sank into the poverty in which many of them live today.”⁴⁵⁷ Expropriating large tracts of forest lands for the use of the state, the colonial rulers instituted new laws designed to consolidate lands for commercial use and revenue for the British Crown. Adivasi communities were evicted from their ancestral lands, to which they had no titles, restricted from shifting agricultural practices, and from usufruct rights.⁴⁵⁸

The Adivasi ownership and usufruct rights, under customary laws pre-dating those of all invaders and colonisers, including the present Indian government, renders questionable the ethics of any contemporary laws that do not recognise Adivasi customary rights⁴⁵⁹. The British enacted the Land Acquisition Act of 1894⁴⁶⁰ which began the erosion of land rights of Adivasis. The continuing destruction of the unique Adivasi lifestyles triggered numerous tribal uprisings: in 1820, 1832, 1855-57 and 1890 among other lesser revolts.⁴⁶¹ These rebellions were systematically crushed by the British rulers and more new legislation was introduced such as the Forest Act of 1927⁴⁶², which proclaimed that all forest lands belonged to the state by classifying forest lands as protected and conservation lands, calculated to treat any Adivasis continuing to live and work in the forests as ‘encroachers’ on their own lands. This effectively displaced Adivasis from land the British needed for their timber industries, creating impoverishment and the exclusion of Adivasis. Independence from British rule did not change this trajectory of economic development, and new legislation and policies such as the Forests Conservation Act of 1980, the Procedure of Reservation of Forests, the Coal Bearing Area (Acquisition and Development) Act of 1957, and the National Minerals Policy of 1993 have reinforced development-induced displacement, and led to deprivation.⁴⁶³ “A major proportion of India’s coal, forest, hydro-electric and mineral resources are located in traditional Adivasi lands, yet most Adivasis have never gained a share of the wealth generated through exploiting these assets. Eighty-five per cent of Adivasis reportedly live below the official poverty line...”⁴⁶⁴ This

⁴⁵⁶ *ibid* 136

⁴⁵⁷ *ibid* 136

⁴⁵⁸ *ibid* 136

⁴⁵⁹ See Chapter 3 for a more detailed outline of forest legislation in India.

⁴⁶⁰ R. Bhengra, C.R.Bijoy and S. Luithui, *Report on The Adivasis of India* (MRG 1999)3

⁴⁶¹ Government of India, *Report of Working Group on Empowerment of Scheduled Tribes for the 11th five year plan* (Government of India 2007)of Scheduled Tribes for the 11th Five Year Plan. (2007) 9

⁴⁶² Bhengra, Bijoy and Luithui, *Report on The Adivasis of India* (MRG 1999) 10

⁴⁶³ *ibid*

⁴⁶⁴ *ibid* 3

national land expropriation, a policy that has developed since 1874⁴⁶⁵ and which every government has adopted before and after independence, takes place all over the country especially in mineral rich forests where tribal communities live. The identity and livelihoods of women in forest tribal communities have been closely rooted in natural forest resources. In the context of gender inequality in predominantly patriarchal societies, the threat to forest based livelihoods and loss of lands is experienced more acutely by women whose productive and reproductive roles are so closely interlinked with forest lands forcing them into a vulnerable role.

Women can be perceived both as victims and when they challenge these vulnerabilities, they develop into actors. This section, which describes the land rights issues of Adivasi women in southern Rajasthan, unpacks the dichotomy of the dual roles of women as victims and of women in control of their lives. The existence of a strong gender imbalance in which women are at the bottom of the power hierarchy, pushes women into a victim role in which they have unequal land rights and poor access to claiming land ownership. The FRA which offers, in principle, increased rights to ancestral lands, has reordered the paradigm of rights to lands of Adivasi communities. This change has also transformed gender dynamics within the community as recounted below of my field visit to the village of Kurka illustrating a growing gender empowerment. Though the outcome of their struggles might not necessarily have culminated in a uniformly empowering manner through other areas of the Aravalli Hill range, these women of Kurka were proactive agents in their own struggle for land titles.

5.4. Adivasi Women and the Feminization of Poverty

Ever since the acknowledgement of the feminization of poverty, it has been established that women share a disproportionate burden of poverty. The reasons for this would be the same as the ones that would limit women's access to justice more than they would men's access to justice. In terms of forest lands, Agarwal argues that poorer women have been "victims of environmental degradation in quite gender-specific ways," demonstrating that they have also played a significant role in environmental conservation practice.⁴⁶⁶ Some of the ecofeminist⁴⁶⁷ discourse

⁴⁶⁵ Bhengra, Bijoy and Luithui, *Report on The Adivasis of India* (MRG1999); Dash and Khotari, 'Grabbing: Dangers of the Green India Mission' (Kalpavriksh and Henrich Boll Stiftung 2012) ; Madhu Gadgil and R Guha, *This Fissured Land: An Ecological History of India* (OUP 1992); Krithi Karanth and Ruth Defries, 'Conservation and management in human-dominated landscapes: case studies from India' *Biological Conservation* (2010) Elsevier

⁴⁶⁶ Bina Agarwal, 'The Gender and Environment Debate: Lessons from India' (1992) *Feminist Studies* 119

⁴⁶⁷ Ecofeminism is the position that "there are important connections-historical, experiential, symbolic, theoretical- between the domination of women and the domination of nature" (Warren 1990, 126), taken from Deanne Curtin, 'Toward an Ecological Ethic of Care' (1991) *Hypatia* 60

presumes connections between women's biology and ties to nature. I do not expand on that aspect in this thesis, and am aware of the danger of essentialising women's connection to nature. But I will emphasise the increase in workload specifically for tribal women whose division of labour includes gathering firewood, fodder, water, minor forest produce, and cultivation of food. This workload is increased with the degradation of forests and loss of forest rivers through hydroelectric dams,⁴⁶⁸ and the impact of the erosion of natural resources on which they are so dependent affects their livelihoods.⁴⁶⁹ In India, women have been historically part of the active opposition to the increasing instances of land dispossession of forest peoples, starting with the much publicized Chipko Movement of the 1970s when tribal women hugged trees in order to prevent logging and deforestation

Land ownership in many tribal communities is often collective, which changes the gender dynamic of land rights. The FRA gives individual land *pattas* in combined names of spouses. However, before the FRA, any land claimed was in the name of the male member of household. The exception being the matrilineal Hindu communities of Kerala, and Khasi communities of Meghalaya of north eastern India, in which women historically hold the rights of land ownership and men do not.⁴⁷⁰ The enactment of the FRA may have changed the perspective of women's status in the home. Land ownership, which is generally the domain of men, offers a certain social and economic power which encourages the perception that women's work is subordinate to that of men. This perception propels land rights into the gender equality debate. In any stratum of society, women's rights to property or land is often dependent on their marital status especially if the inheritance of land is patriarchal. Tenure security then becomes dependent on the marital status, and on the success of marital relations.⁴⁷¹ The husband controls family resources which in turn lowers the status of the women and leaves women with less economic power. As highlighted in a report from the former UN Special Rapporteur on Adequate Housing: "In almost all countries, whether 'developed' or 'developing', legal security of tenure for women is almost entirely dependent on the men they are associated with. Women headed households and women

"The term ecological feminism or eco-feminism refers to a sensibility, an intimation, that feminist concerns run parallel to, are bound up with, or, perhaps, are one with concern for a natural world which has been subjected to much the same abuse and ambivalent behavior as have women." Jim Cheney, 'Eco-Feminism and Deep Ecology' (1987) *Environmental Ethics* 11

⁴⁶⁸ Cecile Jackson, 'Women/nature or gender/history? A critique of ecofeminist 'development'' (1993) *The Journal of Peasant Studies*; Bina Agarwal, 'The Gender and Environment Debate: Lessons from India' (1992) *Feminist Studies* 119; E Mawdsley, 'After Chipko: From Environment to Region in Uttaranchal' (1998) *The Journal of Peasant Studies*; Vandana Shiva, *Staying alive: Women, ecology and development* (Zed Books 1988)

⁴⁶⁹ Virginius Xaxa, 'Women and Gender in the Study of Tribes in India' (2004) *Indian Journal of Gender Studies* 345, 360

⁴⁷⁰ *ibid*, 354

⁴⁷¹ Jeremie Gilbert, 'Land Rights as Human Rights: The Case for a Specific Right to Land' (2013) *10 sur international journal on human rights* 115

in general are far less secure than men. Very few women own land.⁴⁷²

When forest lands were acquired by the government, whether Indian or colonial, the practice of shifting cultivation was misunderstood and suppressed. This permanently reshaped tribal relationships with their lands, with the sedentary shift impacting their social and financial economy.⁴⁷³ The keepers of the rich ethnobotanical knowledge of biological diversity conservation and its sustainable utilization were most certainly women, which had given them authority and respect within their communities. This important source of power had begun to be lost both to the women and to the community with land displacement. The traditional tribal communities lived in forest villages in a communal order, which was dismantled when the then colonial government imposed 'revenue villages' to facilitate forest governance. This opened up the secure forest environment to non-tribal communities which introduced new patterns of exploitation by moneylenders and other traders.⁴⁷⁴

The loss of traditional livelihoods during displacement can lead women into mainstream society to look for jobs. Given the cultural differences between mainstream and tribal communities, the relocation of employment can lead to various forms of exploitation. The sudden switch from being self-reliant in their own livelihoods, and independently engaged in the forests which were their own lands, to loss of their lands, and forced to work for daily wage labour under oppressive working conditions, can be detrimental to mental health and well-being, and for their economic circumstances. The aggression of colonization, extractive industrialization, development in the name of modernization, and deforestation experienced by tribal cultures has led to more than economic impoverishment and violates the human rights of indigenous women.⁴⁷⁵ During that period between the 1850s and 1930s, the displacement from their natural resources, homes and livelihoods, and the unfair tax policies, precipitated tribal uprisings in many parts of India including Rajasthan, which took both violent and non-violent forms. In South Rajasthan, where I was located for my data collection, rural communities such as from Bijola in the Mewar region, and the Girasias launched protests. Others such as the Bhils negotiated a joint charter drafting their requirements.⁴⁷⁶ During that period of unrest, power of the governing forces was also displayed through various atrocities against tribal communities, which included gender based

⁴⁷² Naresh Singh, *Legal Rights of the Poor: Foundations of Inclusive and Sustainable Prosperity* (AuthorHouse 2014) No page.

⁴⁷³ Tribal Rights Resources Unit (TRRU), *Tribal Women's Rights On Land And Other Natural Resources: Southern Rajasthan*, 2012)2

⁴⁷⁴ Ibid 2

⁴⁷⁵ ibid 2

⁴⁷⁶ ibid 3

violence against women.⁴⁷⁷

After Independence, Central Government policies and Five year plans included financial assistance, and Tribal Commissioners for tribal development. Between 1992 and 1997, the Eighth Five Year Plan prioritised participation and local control in an effort to combat the insidious growth of exploitation of tribal communities. The contemporary development strategies have recognised the tribal belt as vulnerable. Nevertheless, the forest lands which comprise a major part of the tribal belt, though more mineral rich than any other geography of India, also happens to be conducive to the highest concentrations of poverty in the country. The gender implications of this signifies the feminization of poverty, in which the extreme aspect of poverty and exclusion is the most devastating for women.⁴⁷⁸ This dynamic maintains a systemic inequity of women's access to natural resources, which in turn erodes the control they have over economic and social aspects of their lives.

Rajasthan scores consistently low in the terms of gender inequality, especially in terms of literacy, and participation in the workforce⁴⁷⁹. The literacy levels of tribal women in the Aravalli hills of southern Rajasthan for instance, is thirty-six percent compared to fifty-one percent for males, and thirty-two percent of males have attended school compared to thirteen percent females.⁴⁸⁰ In the target community that the NGO Astha works with, statistics indicate that most girls are illiterate, with the few literate girls only having basic literacy skills, while boys have better opportunities for school education.⁴⁸¹ This gender disparity evidences gender discrimination in opportunities for formal education, and reinforces the unevenness of gender biases prevalent in Tribal societies.

5.5. Gender Empowerment in a Kurka Village

I caught a ride to Kurka village⁴⁸² in the NGO vehicle which was transporting headquarter staff from Udaipur city to a rural meeting on land rights. We abandoned the jeep when the road ended and continued our journey on foot through the thinly forested Aravalli hills of southern

⁴⁷⁷ ibid 3

⁴⁷⁸ ibid 4

⁴⁷⁹ Rajasthan (along with Bihar, Uttar Pradesh, Madhya Pradesh, and Orissa) has consistently low achievement on the both the UNDP Human Development and Gender Development Index http://www.undp.org/content/dam/india/docs/gendering_human_development_indices_summary_report.pdf

⁴⁸⁰ The state level of literacy for Rajasthan is forty-four percent which is lower than national level of forty-seven percent. Taken from: (TRRU), *Tribal Women's Rights On Land And Other Natural Resources: Southern Rajasthan* No page

⁴⁸¹ ibid No page

⁴⁸² Kurka village in Kotra Block of Udaipur District

Rajasthan. A splash of colour on a distant knoll indicated the forest community who were waiting for us. The women wore saris of bright hues visible from a distance. The Kurka village community organisation called the Gordwad Adivasi Sangathan had a woman leader, called Mirabai. Under Mirabai's leadership they had already mapped their village boundaries and petitioned for their Community Forest Rights (CFR) claims. The process of their land claims was being discussed at this meeting. Significant within this community meeting, were the women who were sitting up front, rather than either behind the men, or a little separately, which had been the convention in the other meetings I had attended in Rajasthan. Another important difference was that these women were not wearing the *gungat* over their faces.⁴⁸³ Hindu women in Rajasthan⁴⁸⁴ use the *gungat*, which is part of the practice of *purdah*, of pulling the sari over their heads and down over their eyes. *Purdah* is not historically part of the Hindu culture, and in India, the Hindu women in the states of Rajasthan and Gujarat are considered to be complicit in patriarchal traditions in which the onus is placed on women, of avoiding sexual harassment by covering up.⁴⁸⁵ In southern Rajasthan, the tribal women had adapted to the local mainstream Hindu custom of wearing the *gungat*.⁴⁸⁶ The historical gender inequality, especially in Rajasthan, makes the fact that the tribal women of Kurka were not veiled even more significant and remarkable.



Figure 7

Women in Kurka

photo credit Indrani Sigamany

⁴⁸³ The *gungat* is a veil, used by Hindu women in Rajasthan and Gujarat, used to cover the head and eyes and sometimes the whole face, using the end of the sari. It is used in the same manner as the *purdah* is used by Muslim women. In India, where the *purdah* is part of the practice of female seclusion from public observation or from the sight of men and strangers.

⁴⁸⁴ *Purdah* is not historically part of the Hindu culture, and in India, the Hindu women in the states of Rajasthan and Gujarat are considered to be complicit in patriarchal traditions in which the onus is placed on women, of avoiding sexual harassment by covering up.

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⁴⁸⁶ This process of Sanskritization⁴⁸⁶ is not tribal tradition in any other part of India. Historical evidence suggests that “tribal societies have been less discriminatory against women and girls than other societies.”⁴⁸⁶ However this is not uniform in all states, and in Rajasthan, the tribal communities have assumed the patriarchal structures of traditional mainstream Indian cultures.

The meeting began with a discussion of the struggle of Kurka to claim land rights. The unveiled Kurka village women in the meeting were eager to share a particular experience of the day before the meeting, and were very vocal in describing a crucial instance in their journey towards empowerment. It involved dealing with bank officials and the deputy Sarpanch in Udaipur. The officials had taken a passbook from fourteen women applying for Rs. 45,000 per person which was part of the Mukya Mantri (chief minister) scheme for constructing pukka houses (permanent dwellings). The women were illiterate. When they collected the money, it was handed to them by the deputy Sarpanch gave each of them their money in an envelope. Mirabai, the leader of the Kurka village organisation had taken her literate son with her and asked him to count the money before they left the bank. Every envelope was missing Rs.500, which the gram panchayat's deputy Sarpanch, in collusion with the bank manager had taken as a bribe without informing the women. Incensed, the women stormed the bank demanding their money back. They declared that they would only leave without their money "when the camel grows horns." They did not cease their protest, and got the Adivasi men involved. The Sarpanch who was from their own tribe, and from the same panchayat, was confronted by the men who threatened him physically till he returned all the money.

In a study, Astha,⁴⁸⁷ reported that most of the communities lived in a nuclear patrilineal family system, in which the land title was usually in the name of the oldest male in the household. Only in five out of ninety cases have daughters inherited land from their birth family. Women who inherit land usually do so when they are widowed. Tribal families have a high dependency on land both personal land for personal food security, and communal lands for grazing needs for livestock. They also use common forest lands for the collection of minor forest produce which they trade commercially. Since the majority of them own no more than three *bigha* of land, they fall into the poverty category. Any curtailment of access to open resources necessitates a reliance on daily wage labour which is known for its exploitative aspects and barely ensures survival levels.⁴⁸⁸ Astha reports that the FRA is connected to better access to common lands and open revenue lands on a usufruct basis.⁴⁸⁹

⁴⁸⁷ This data was gathered by Astha from random samples from ten selected village hamlets across five districts in southern. 161 participants from 10 villages across 5 districts participated in the study. Women's land and Resource Rights Among the Adivasis of South Rajasthan: an Empirical study Astha Project

⁴⁸⁸ "Income levels of 4% of households is less than 10,000. For majority of households (70%) income is between Rs.10- Rs.20,000 p.a. from all sources. Only 26 % of households have income over 20,000. This implies a very low per capita income rate if we assume an average family size of 5-6 members. Most of the population of this region covered by our study falls therefore under the official category of the poor in India. Even some of the 24% who have reported a land holding size of more than 5 *bhigas*, report an income from all sources less than 20,000 indicating a low land productivity due to the seasonal character of agriculture being rain fed. There is a heavy reliance on other sources of income across all categories, but

In southern Rajasthan, where I collected my data, land titles were written in the name of a male in a family, either a husband or father.⁴⁹⁰ The women rarely inherited land titles. If a woman held a title, it would be only in the case of the death of her husband. Only five women out of four hundred and seventy-six women interviewed by Astha hold titles in their name. A separated or divorced woman with no land and a family to care for often ends up in an urban slum, where her security of tenure is at best questionable.”⁴⁹¹ Since ancestral land is the source of livelihoods, habitat and a key to maintaining indigenous culture, it plays a vital role for indigenous women. In many indigenous communities, women are the main food producers, knowledge holders, healers and keepers of the culture. When lands are lost, women lose their self-reliance in food production. They lose their knowledge in natural resource management, biodiversity and medicinal plants, which is not only a loss to them but to their communities too, especially with transferring indigenous knowledge to the next generation.⁴⁹² The Bhil, Garasia, Damor, and Kathodia tribes of the Aravalli hill range have been identified by academia as:

“...the custodians of local indigenous knowledge. The surrounding plants form an integral part of their culture and the information about plants gets passed on from generation to generation only through oral folklore although many times kept secret... This traditional knowledge developed over years of observation, trial and error, inference and inheritance has largely remained with the indigenous people. The knowledge of tribes on the value of plants has helped them to have a sense of responsibility in judiciously utilizing the plant resources and also to conserve and pass on the wisdom on plant resource utilization to the posterity.”⁴⁹³

According to an Astha report, a “deep rooted belief” held by both men and women in the Aravalli Hill communities considered women owning land was an anomaly. Patrilineal lineage was an accepted fact by the community. Women and young girls who might expect land rights were seen as a threat to the accepted social dynamics, and would disturb the unequal social order.

more among the poorest for even survival needs. Women’s land and Resource Rights Among the Adivasis of South Rajasthan: An Empirical Study Astha Project. (Unpublished) Pg. 38

⁴⁸⁹ Women’s land and Resource Rights Among the Adivasis of South Rajasthan: An Empirical study Astha Project 29

⁴⁹⁰ TRRU, *Tribal Women’s Rights On Land And Other Natural Resources: Southern Rajasthan* (Astha 2010)

⁴⁹¹ Gilbert, 'Land Rights as Human Rights: The Case for a Specific Right to Land' [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.2003.55.En.2016](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.2003.55.En.2016)

⁴⁹² Tugendhat and Dictaan-Bang-oa, *Realizing Indigenous Women's Rights : A Handbook on the CEDAW* (AIWN 2013)

⁴⁹³ Katewa SS and others, 'Traditional uses of plant biodiversity from Aravalli hills of Rajasthan' (2002) 2 Indian Journal of Traditional Knowledge

“Men from Ramgarh reported that other men would protest on occasion when land was given to daughters as it set a wrong precedence and women would start demanding more rights if any woman was allowed to inherit or was given property by her father.”⁴⁹⁴ A woman moving away to her marital home was perceived as an obstacle to her owning ancestral land. The findings of Astha included, “the entitlement of land to women implies the possibility of women challenging the entire power structure and its impositions on women's lives, and hence men collectively and individually resist the claims of women through assertions of lineage and denial of knowledge and resources to claim these rights.”⁴⁹⁵ The one exception, was a village called Bhalai, deep in the forest, where women were aware of the FRA and were planning to take advantage of the ability to file for joint land titles for spouses.⁴⁹⁶ Either way, men often made unilateral decisions without including women in the process of claiming land rights, and women still lacked awareness and knowledge of the law, which created strong obstructions to accessing justice and claiming land rights.⁴⁹⁷

5.6. Analysis: Empowerment and Vulnerabilities

The power and political acumen generated by their determination, resulting in a successful conclusion, was not lost on the women of Kurka. They explained at the meeting that they felt empowered and they felt strong. Some of them felt they needed to eschew the gungat which was now perceived by them as keeping them in the background, and had, they felt, kept them sheltered from community decision making. The Community Forest Rights claims that this community had made, had been with the participation of these politically mobilised women who affirmed that they were ready to fight for their lands. They stated that though they had previously never been out of their village, they were now ready to travel to Udaipur – perceived as the ‘big city’ to fight for their land rights and try to access justice. The men at the meeting confirmed that they were now aware of the new-found strength of the women, which has changed their attitude towards the women in their community, and has produced a realisation of the formerly hidden potential of women. Since the norm is that men have a monopoly on political and economic power, whether in the domestic front, national politics or in the international arena, they have more opportunities for participating in their own legal emancipation. They have more confidence in approaching the legal system. The legal system itself is staffed with more men than with women. This immediately limits access for women, and may hold an unintentional gender bias

⁴⁹⁴ Ramin J, *For Forest Land and A Way of Life: The Story of the Adivasis' Struggle in Southern Rajasthan* (Astha Sansthan 2007)

⁴⁹⁵ Ibid 42

⁴⁹⁶ Ibid 42

⁴⁹⁷ Ibid 47

within legal decision making. Though the Kurka experience was a glimpse that norms can change, access to justice for women remain more difficult than it does for men.

The Kurka narrative of changing gender attitudes might be an isolated occurrence. But it did not obscure the fact that the gender dynamic of land rights presented an uneven picture in India for indigenous peoples. It is difficult to make generalised statements about tribal women in India, since tribal peoples lived in many states in India, and differed widely from each other.⁴⁹⁸ Women in different tribes enjoyed different levels of equality. Some tribes were traditionally matriarchal and some were matrilineal. Some, such as the southern Rajasthani women had been Sankritised and some were converted to Christianity, and had assumed certain patriarchal traditions of other religions that were formally alien.⁴⁹⁹ Customary rights to land inheritance differed within tribes in different parts of India. In some areas, such as the North-Eastern states and Kerala, customary matrilineal inheritance laws prevailed. The forests had provided a certain amount of geographical distance from mainstream societies which had in some instances, maintained a degree of isolation from patriarchal elements of Hinduism and Islam, and therefore less widespread gender discrimination. The general endemic gender power imbalance however cannot be denied, and was seen to be “shaped not only by gender discrimination within Indigenous and non-Indigenous arenas, but by a context of ongoing colonization and militarism; racism and social exclusion; and poverty-inducing economic and ‘development’ policies.”⁵⁰⁰ On a macro scale, the gender imbalance also related to a global feminization of poverty, in which “women comprise the majority of the poor.”⁵⁰¹ The global reality of women being excluded from the mainstream was compounded for tribal women who faced a double discrimination of being excluded as part of tribal communities and also, in parts of India such as Rajasthan, as being separated as women within the patriarchal tribal culture.

Customary tribal land traditions respected land as communal. Within the communal context, the concept of private property and ownership created a conflictual reality. The communal system had never required documentation of private land rights.⁵⁰² Customary tribal traditions were based on the community’s shared relationship with natural resources, within which the role of

⁴⁹⁸ Xaxa’s article on tribal women in different groups all over India makes clear the potential inaccuracy of generalised conclusions given the major differences in behaviours and different status of women within these groups. Xaxa, 'Women and Gender in the Study of Tribes in India'

⁴⁹⁹ Ibid, 350

⁵⁰⁰ International Indigenous Women’s Forum FIMI, *Mairin iwanka raya : Indigenous Women Stand Against Violence* (FIMI 2006)

⁵⁰¹ “First coined two decades ago, the phrase "the feminization of poverty" focused on women's increasing and disproportionate presence among those in poverty. Two phenomena contributed to this trend: first, the overrepresentation of women among minimum-waged and unpaid workers; second, the rising percentage of women who headed households with dependent children.” Staudt, 'The Feminization of Poverty: Global Perspectives'²

⁵⁰² Astha, *Astha Women's Land Rights Report*); Interview from Mangilal

women was vital to the sustainability of the use of natural resources as a body of knowledge used for health and nutrition. Women's contribution to this system formed part of their livelihoods. When ownership and power dynamics changed with both colonial and Indian governments assuming control of forest lands, property ownership concepts crept in that were alien to customary land traditions and which disconnected women from their historical relationship with natural resources based on shared lands. The FRA, promising empowerment and equity through a progressive articulation of substantive rights also introduces a dichotomy of expectations raised by the ability to claim private land titles which contradicts the historical collective use of lands. Within this conceptual inconsistency the legal provisions of Community Forest Rights (CFR) assumes a gravity and significance that has not been developed as fully as it could and should be.

NGOs, who worked with forest land rights in southern Rajasthan, were staffed mainly by people belonging to mainstream communities. Reflecting their own private property traditions of ownership, they were slow at realising the importance of claiming community forest rights in their work of raising awareness and supporting claiming of forest rights. They focussed considerably more on private claims to hereditary forest lands. The government authorities who granted CFR were prejudiced by the threat to the status quo of loss of their power of jurisdiction over forest lands. Claiming for community forest rights therefore faced more constraints than it deserved. This affected the domain of women's livelihoods, identity and collective work with natural resources. It would also affect women's reproductive tasks of caring for the community, which is dependent on interpersonal, communal interactions and communal properties, and which is intrinsic to the maintenance of tribal culture and identity, and to control over local resources and land. Claims for land titles were part of a process that was heavily biased against women and the contemporary gender paradigm was deeply embedded in a patriarchal structure in Southern Rajasthan, which mirrored the global gender stereotype of land ownership. This gender aspect, combined with the dichotomy of private land title claims within a historical context of communal and shared land traditions renders even more elusive, potential land rights for women.

The Astha survey reported that the Forest Rights Act, had facilitated the ownership of land for women. Conventionally, the land titles had been written in the name of a male family member, and women had rarely inherited land titles, unless a husband died. Out of the four hundred and seventy-six women interviewed, only five women held titles in their own names. The FRA however, provided for the registration of land titles in joint names of both spouses. Since women cared for livestock, they claimed the goats and poultry as their property, and they also claimed the income from the sale of their livestock. This income was used for family consumption. When a family owned larger herds, the income was usually not controlled by the women and the larger

herds were not considered a woman's assets. If the sale of a larger number of animals took place in the market, the men controlled the income from those assets. The sale of milk, minor forest produce, generated income for women. However, if the sale took place in the markets and were of a higher value, the men would control the transaction and the women would not be able to claim that transaction as their own assets. The Astha study calculated that the Work Rate Participation Rate (WPR)⁵⁰³ was higher among the women than men in more than half of the villages covered in the study, inferring that "the land holding size does not impact WPR among women and that women's work contribution as household or wage labour, in foraging and cultivation is significant in all households." Women in the Adivasi communities in southern Rajasthan therefore, though their productive and reproductive contribution in general within the gender division of labour, was higher than that of the men, still had limited financial access and exercised limited control to assets such as land. By controlling the assets, men also controlled the women, which dangerously limited the economic and social freedom of women within these tribal communities. Below, I expand the gender experiences of the Adivasi community of the Aravalli Hills, in the context of gender analysis and empowerment, and its effect on land rights.

The Forest Rights Act advocates equal land rights for women and men, and requires a stated percentage of women's participation in community decision making bodies such as the Gram Panchayat. The procedural rights which bestow women systemic power, still have to be negotiated within the inherent patriarchal power structures within the Aravalli Hill tribal communities, to which women had not been traditionally invited. The Kurka example provided an instance in which the women had uncovered their strength in order to challenge the dominant cultural patriarchy. It was not a smooth transformation in the Kurka experience. To use the Kurka women's own analogy, "camels do not grow horns", which necessitated violence at some level. This, as a gender transformation for change cannot necessarily be cannot be relied upon as a methodology for structural equality within Adivasi communities on the one hand. On the other hand, however, the existence of the FRA is a welcome tool in order to access justice and begin the change to the existing gender paradigm of inequality.

5.7. Conclusion

In dealing with the issue of women's empowerment, I use the Kurka example which epitomises the struggles of women to achieve control over their lives. The patriarchal culture of the southern

⁵⁰³ The definition of **Work Participation Rate (WPR)**, as used in the Census of India is the percentage of total workers to the total population. [Indian Census in Perspective : Census Terms - Census of India](http://censusindia.gov.in/Data_Products/Library/Post_Enumeration_link/eci6_page3.html)
censusindia.gov.in/Data_Products/Library/Post_Enumeration_link/eci6_page3.html

Rajasthani Adivasis ensures the ownership of land remains primarily a male domain. Women's traditional control over natural forest resources has to contend with this patriarchal culture of land ownership in addition to the offer of individual land titles permissible under the FRA, which goes against the grain of collective land resource use, and for women's vital control of these resources. It is well evidenced that the women's ownership of property and land, which increases her economic strength, also impacts favourably on better nutrition and health for the family; on child mortality, and education.⁵⁰⁴

International aid and local NGOs have often directed both funding and program inputs at men, reflecting a patriarchal bias which reinforces the inability of women to own property and to engage in community decision making. Women's labour load is often as heavy or heavier in local agricultural production, however, they have historically not been regarded at the 'farmers'. Rather, as in the Western culture, they were regarded by development NGOs as the 'farmer's wives'. Funding, agricultural extension and new technology have been historically aimed at men. This has been a bias introduced by development civil society organisations, which has greatly impeded women's access to assets and economic control.⁵⁰⁵

Displacement from land, of the sort that southern Rajasthani forest communities are trying to use the Forest Rights Act to counter, has proven more detrimental to women with their loss of access to natural resources. This impacts not only their livelihoods but also their domestic food production and control. India's land rights legislation reflects the commitment to social justice, but it is dependent on the state and the judicial machinery for equitable enforcement. In the case of the Adivasi communities, the state, in its failure to meet legal standards of protecting citizens and ensuring access to justice, is circumventing existing legal frameworks. Given that the patriarchal status quo dictates an inequality which leads to a systemic feminized poverty, the state has an added obligation to respond to the needs of women who could be perceived as a vulnerable sub section of any community. Yet rights based legislation that should promote social justice and inclusion still has an arbitrary implementation which is dependent on gender blind practice. Returning to the Kurka women's experience however, in which the women controlled the power, there is hope that an organic, endogenous empowerment is not as impossible as a camel growing horns.

⁵⁰⁴ Xaxa V, 'Women and Gender in the Study of Tribes in India' (2004) 11 Indian Journal of Gender Studies 345

⁵⁰⁵ *ibid*

Chapter Six: Livelihoods and Forest Rights - The Struggle for Self-Determination

6.1. Introduction

In this chapter I continue the empirical theme begun in the last two Chapters Four and Five, using two examples of the Tendu *Patta* struggle for control of land based livelihoods and of the Amba village and their struggles against imminent displacement from their lands. I use these two examples to review the broader context of the global trend of land dispossession of indigenous peoples, and how legislation is used in order to access justice. The purpose of this chapter, which is the continuation of the field data from Chapters Four and Five, is to substantiate the analytical framework from Chapter Two with the data derived from the field in regard to access to justice for land rights of forest peoples. Both the Amba Adivasi forest community's land rights campaign and the Tendu *patta* livelihoods operation described in this chapter occurred in Rajasthan's Aravalli Hill Range. In this chapter I discuss my findings as I narrow the analysis to how the Adivasi tribal communities in the forests of the Aravalli Hill range have been engaged in forest rights and access to justice.

In the next section 1, I build a profile of the communities in the Aravalli hills of southern Rajasthan, as a background for the discussion of land right claims and the threat of land dispossession that the men face in the Amba case study and the Tendu Patta campaign for land based labour rights discussed in this Chapter Six. The first case study, in Section 2, outlines the campaign for self-determination through the struggle for the Tendu Patta⁵⁰⁶ livelihoods of the Adivasis of the Aravalli Hill Range. I describe the Tendu Patta trade and detail the labour intensive minor forest produce (MFP) which is undertaken in the Kotda Block of Udaipur District. The lucrative aspect of this MFP, motivated the state to enact new laws in order to protect the profits for itself. Using a legal chronology, I trace how India's conservation and commercial quests have shaken the delicate ecological harmony which Adivasis have created over the centuries in order to sustain their forest based livelihoods and cultures. The normative framework of these new laws and others preceding it, which govern Forest Rights in India and contribute to the expropriation of forest land by the government, are outlined in Section 3. Section 4 describes the evolution of the Adivasi community's transitioning from exploited labourers to business owners through a process of awareness raising and political mobilisation. In Section 5, I narrate the eventual progress to self-determination through the formation of co-operatives resulting in economic independence and a price war with which the Adivasis succeed

⁵⁰⁶ Information for the Tendu *patta* story, besides field visits, were also transcribed from two interviews at the end of 2013 and the beginning of 2014. The interviews were with Mr. Kamlendra Rathod who was head of the Samarthik, and with Dr. Ginny Shrivastava from Astha.

in hiking up wages substantially. The legal impact of the Tendu patta changes which supported the campaign for the enactment of the Forest Rights Act, with the hope of revolutionising indigenous land rights, is described in the Conclusion.

The case study in Section 6 profiles the isolated Amba forest village, and Section 7 describes the land violations they were experiencing and the strategies they were developing with the support of the civil society organisations to challenge imminent displacement from their forest homes. Section 8 details the implementation of the Forest Right Acts juxtaposing it to the governance and administrative justice claims of Amba's land rights. I conclude by drawing together the salient aspects of the discussion of this chapter: the uneven administrative justice of the law; and the dichotomous role of civil society actors with differing agendas.

6.2. Aravalli Hill Range of Southern Rajasthan

In the Aravalli hills of southern Rajasthan, an Astha survey⁵⁰⁷ concluded that the level of income for the households surveyed was low, precipitated by low productivity caused by poor land quality and predominantly rain-fed agriculture.⁵⁰⁸ The majority of the families had a low land holding, which is less than three *bigha*,⁵⁰⁹ and were dependent on supplementing their income with external labour and migration outside the community. They had poor food security for some parts of the year. Even three to five *bighas* of land did not provide enough agriculture, forcing a dependency on external labour and on the collection of minor forest produce. The forests provide “a variety of nutritious foods as edible tubers, roots, rhizome, leaves, shoots, flowers, fruits, nuts, [and] seeds.”⁵¹⁰ Wild edible plants are an important source of daily nutrition for tribal peoples of southern Rajasthan, making vital their access to minor forest produce from common property

⁵⁰⁷ Astha, *Astha Women's Land Rights Report*; Sansthan, *Astha: A Field Based Resource Organization. Annual Report 2007-2008*; Ramin, *For Forest Land and A Way of Life: The Story of the Adivasis' Struggle in Southern Rajasthan* (Astha 2007); ASTHA, *Forest Rights Story* (Unpublished, 2008); TRRU, *Tribal Women's Rights On Land And Other Natural Resources: Southern Rajasthan* (TRRU 2012). The Astha survey was conducted across ten villages in five districts of tribal communities, in the Aravalli hills of Southern Rajasthan. Age group of male and female participants in the study = 30-50 years; Average number of children = 3.7; Average Household size = 5.65; Average Land Holding = 3-5 *bigha*. Astha Sansthan, Tribal Rights Resources Unit (TRRU). Tribal Women's Rights on Land and Other Natural Resources: Southern Rajasthan. www.astha.org 2012

⁵⁰⁸ Four percent households earned less than 10,000 per annum, seventy percent households earned more than Rs.10,000 but less than Rs.20,000 and only twenty-six percent of households had an income of more than Rs.20000 per annum from all sources. The twenty-four percent households who had land of more than 5 *bigha* reported an average income from all sources of less than 20,000. Ibid

⁵⁰⁹ One *bigha* is the equivalent of 1,618.7sq.metre.

<http://dolr.nic.in/dolr/mp/mastercodes/areaunitcodes.pdf>; <https://sizes.com/units/bigha.htm>

⁵¹⁰ Katewa SS and others, 'Traditional uses of plant biodiversity from Aravalli hills of Rajasthan' (2002) 2 Indian Journal of Traditional Knowledge

resource areas. Land rights therefore not only sustain land based, traditional, tribal livelihoods, but also food sources.⁵¹¹ This section traces a labour campaign of the Tendu patta forest based trade in the Aravalli Hills and the community's evolution from exploited labourers to empowered owners who became collectively in charge of their own trade.⁵¹²

6.3. Tendu *Patta* Livelihood in the Aravalli Hill Range

For about three weeks in May, in the forested Aravalli Hill range, the women and children of the Adivasi communities rise at 4am, and walk deep into the forests to climb Tendu trees in order to gather Tendu *patta* (Tendu leaves). The most highly charged minor forest produce (MFP) in India, politically, legally, and economically are Tendu patta. Tendu patta are leaves used for rolling *bidis*, the Indian hand rolled cigarettes.⁵¹³ The women pull their long *gaghra*⁵¹⁴ between their legs and tie them up behind to facilitate climbing the trees with the children in order to reach the good leaves. As they are picked, the leaves are stored in a cloth they tie around their waists. By mid-morning, after about six hours of plucking, they return home with the collected leaves, which they drop inside the house in the middle of the floor. While the men and children begin the bundling of the leaves the women then start their morning chores of fetching water and cooking. After everyone eats, the women join the bundling teams. With fifty leaves per bundle, and about five thousand leaves per morning, it is an extremely labour intensive month of May. The bundled leaves are carried by the men to the collection depot called *fud* and the *fud munshi*⁵¹⁵ counts the bundles and pays the gatherers at a rate of per hundred bundles, called piece rate. The women rarely accompany the men to the *fud*. The interface with the *munshi* is usually men in Rajasthan, meaning they thereby also control the profits earned, which has a negative connotation in terms of gender equality. In the early 1990s in one season a family could make Rs. 3,000 at the rate of Rs.7.50 per bundle. That used to be considered a lot despite the exploitation and low daily wage.

Tendu trees grow in the forests of central India, most of this land is in Adivasi territory. The stakeholders in the lucrative Tendu competition are the Tendu patta gatherers, who are

⁵¹¹ Ibid

⁵¹² Information for the Tendu patta campaign, besides field visits, were also transcribed from two at the end of 2013 and the beginning of 2014. The interviews were with Mr. Kamendra Rathod who was head of the Samarthik Cooperative for Minor Forest Produce.

⁵¹³ There are 12 different minor forest produce (MFP), identified by the Ministry of Tribal Affairs (MoTA) which include: (i) Tendu, (ii) Bamboo, (iii) Mahuwa Seed, (iv) Sal Leaf, (v) Sal Seed, (vi) Lac, (vii) Chironjee, (viii) Wild Honey, (ix) Myrobalan, (x) Tamarind, (xi) Gums (Gum Karaya) and (xii) Karanj. Taken from

Press Information Bureau, *Identification of 15 Minor Forest Produce for Minimum Support Price* (Government of India Ministry of Tribal Affairs 2015)

⁵¹⁴ *Gaghra*: long, brightly coloured, ankle length skirts

⁵¹⁵ *Munshi* a Hindi word used to describe an actuary, accountant, clerk or secretary.

impecunious Adivasis; the buyers of Tendu patta, referred to as traders, buyers, or contractors, the state, and corporate *bidi* (locally made cigarettes) industries. Corruption existed at the level of the buyers or contractors who bid for the right to buy the collected Tendu patta, but who underpaid the primary gatherers and under-reported the collections. Since forest lands and the Tendu trees belonged to the state, the state encountered revenue losses caused by the under-reporting amounting to millions of rupees. This compelled the enactment of new laws drafted to protect the state from revenue losses in the late 1950s.⁵¹⁶

6.4. The Normative Framework Governing Forest Rights in India

Laws in India include both federal and state laws. Laws that are enacted by individual states are separate from national legislation such as the Forest Rights Act. Laws enacted by individual states therefore are not necessarily replicated in every state. In the section below, I have described a few laws that specifically govern Rajasthani Forests. These laws were particular to the state of Rajasthan and were not national laws. The original laws governing the forests, were formally designed to recognise the expropriation of forest lands by the State during colonial rule. These laws were continued and new laws were created by the Indian Government after Independence, which treated the Adivasis as ‘encroachers’ and prohibited the collection of Tendu patta, one of the few lucrative trades that the Adivasis could engage in.

Under the Indian government after Independence, Forest lands were divided into Reserve Forests, Village Forests and Protected Forests, in an attempt to further consolidate the forests under Government management. The **Rajasthan Forest Settlement Rules 1958** described policy for the demarcation of forest boundaries, which was to be carried out by the Forest Department. The enactment of the Rajasthan Forest Settlement Rules 1958 immediately restricted access of tribal communities to the forests, and obstructed their traditional livelihoods, putting the onus on the Adivasis to claim back the ancestral rights they lost to the policies of reserved forests. These ancestral rights, under the **Rajasthan Forest Settlement Rules 1958** were required to be sanctioned by the local Government (Part IV Section 16).

The rules acknowledge the existence of villages in the forests, and incorporates claims to be made by persons from Blocks and villages. The claims include “rights” and “concessions,” as highlighted below:

⁵¹⁶ Bhanwar Singh Chadana and others, *Status of Adivasis/Indigenous Peoples Land Series – 8 Rajasthan*, (SAIP 2014)

Page 346, Part IV “Investigation of Claims” Section 11 (b) The First step to be taken by the Forest Settlement Officer is the publication of a proclamation under section 6 of the Act as given in form “L” specifying the situation and limits of the proposed Reserve as published in the Official Gazette, explaining the consequences which will ensue on the reservation of the forest and requiring all persons claiming any right in or over such forest, to specifically within the prescribed period, either in writing or verbally, the nature of such rights and the amount and particulars of the compensation (if any) claimed in respect thereof.

The “claims” that were referred to here were land claims referred to in Section (14) (a) “*The claims on which the Forest Settlement Officer will have to adjudicate will usually be of two classes: - (i) Claims to Land.*” A very interesting aspect of the Rajasthan Forest Settlement Rules 1958 is that in Part IV Section 6, the claims can be presented either on behalf of a family or on behalf of a tribe or community. This recognizes therefore the communal rights of a forest tribal group. It also recognized usufruct rights, and access to minor forest produce. However, the access was no longer free, but had to be sanctioned by the government, which impairs rights to self-determination of tribal communities.

The ensuing laws which consolidated state monopoly over forest lands and prevented Adivasi control over their ancestral lands included the **Rajasthan Reserved Forest Act 1960** which restricted both habitation and farming the lands within Reserved Forest areas, and declared the gathering and collection of minor forest produce as a punishable offence. This reduced the Adivasi communities to the status of encroachers on their own lands and criminalized them. The restriction of access to pursue their traditional livelihoods also led to impoverishment. Many Adivasis either became wage labourers on their own lands, bonded to the government, or had to leave the forest to look for menial jobs which paid low daily wages. In 1972, the Central Government passed the **Wildlife Protection Act**. The Forest Department takes responsibility to protect the wildlife in any game sanctuary. This task however, took priority over the needs of forest communities. The Act stated that forest people and other people dependent on the forests are not allowed to sell forest resources and minor forest produce. This destroyed livelihoods, especially those of the most marginalized tribal families who are highly dependent on the sale of minor forest produce, and on limited farming on their own lands.⁵¹⁷ This Act protected wildlife, an important development. However, it was at the cost of the resident forest communities. The **1980 Rajasthan Protected Forest Act**, did not criminalize the forest communities as the very restrictive Rajasthan Reserved Forest Act of 1960 enacted twenty years before. But people still

⁵¹⁷Bhanwar Singh Chadana and others, *Status of Adivasis/Indigenous Peoples Land Series – 8 Rajasthan*, (SAIP 2014) 79

needed an official pass to take dry wood or forest produce for consumption from the forest, and it was only legal to collect one head load of minor forest produce per person per day.⁵¹⁸ With the enactment of the Forest Rights Act, the one head load restriction was changed and the community could use bicycles, bullock carts but not two wheel or four wheel vehicles because it would add to forest degradation. This vehicle law changed in 2013, and the restrictions were lifted. The Congress Government also drafted new welfare policies which provided funds for community development. Panchayat members received a stipend from the government and had access to development funds. But the funds had not been well spent on the community for improvement for livelihoods.⁵¹⁹ The Forest Rights Act 2006 was part of these new welfare policies of the Congress Government.

In Rajasthan, in order to counter the revenue losses, and to regulate the trade in the interests of the government, the state enacted the **Rajasthan Tendu Leaf Trade Regulation Act 1974**.⁵²⁰ The main aim of creating a state monopoly in the Tendu leaf trade, was to consolidate the profits under the government. The state monopoly of the Tendu leaf trade was outlined within the following provisions: Section 5 Which restricted the purchase only to the State Government or an agent chosen by them. This disempowered the community and exposed them to potential exploitation; Section 7 & 9 which fixed the price of Tendu leaves in consultation with a government committee and bound the buyers to purchase the leaves at this price; Section 10 which requires growers to register themselves with the State Government; Section 11 which requires manufacturer of *bidis* and exporters of Tendu leaves to register; *Section 22. Rajasthan Forest Act, 1953 and other laws not to apply to tendu leaves for purposes covered under this Act. -(1) Nothing contained in the Rajasthan Forest Act, 1953 (Rajasthan Act XIII of 1953) shall apply to tendu leaves in respect of matters for which provisions are contained in this Act.* This legal regulation not only ensured that the Adivasis remained impecunious, daily waged labourers, it was also disempowering for them to have the state controlling their livelihoods on what used to be their own ancestral lands. The profits were not shared with the Adivasis by the state.

Section 5. Restriction on purchase or transport of tendu leaves. Section 7. State Government to fix price [of Tendu leaves] in consultation with committee. Section 9. State Government or agent to purchase tendu leaves – (1) The State Government or their authorized officer or agent shall be bound to purchase at the price fixed section 7, tendu leaves offered for sale at the depot during

⁵¹⁸ Ibid 79

⁵¹⁹ Some of the development schemes include the Indira Gandhi/Chief Minister housing grant; and the National Rural Employment Guarantee Act (NREGA) which guarantees each rural household one hundred days a year of wage employment. This incorporates building roads, dams, bunds, protecting forest walls among other construction jobs

⁵²⁰ http://www.rajforest.nic.in/writereaddata/Revised_Rules_1974_English.pdf

the hours of business; This restricted the purchase only to the State Government or an agent chosen by them, which excluded the Adivasis from any control or decision making concerning the trade.

Box 2

Rajasthan State Forest Laws and Land Right Campaigns, and Federal Forest Laws

- **1958: Rajasthan Forest Settlement Rules** demarcated forest boundaries controlled by the Forest Department. Restricted access of tribal communities to the forests, and obstructed their traditional livelihoods, putting the onus on the Adivasis to claim back the ancestral rights they lost to the policies of reserved forests. These ancestral rights, under the Rajasthan Forest Settlement Rules 1958 were required to be sanctioned by the local Government
- **1960: Rajasthan Reserved Forest Act** restricted both habitation and farming the lands within Reserved Forest areas; gathering and collection of minor forest produce became a punishable offence. Adivasi communities perceived as encroachers on their own lands and criminalized them
- **1972: Wildlife Protection Act** (the Central Government). Forest communities' needs become subordinate to the protection of the wildlife in any game sanctuary, regulated by the Forest Department. The sale of forest resources and minor forest produce by forest peoples are restricted
- **1974 Rajasthan Tendu Leaf Trade Regulation Act.**⁵²¹ Regulation of trade to create a state monopoly in the Tendu leaf trade, and to consolidate the profits under the government
- **1980: Rajasthan Protected Forest Act.** Lessened existing restrictions which criminalized forest communities, but retained control through imposition of official passes to collect dry wood or forest produce for consumption from the forest, with only one head load of minor forest produce per person per day⁵²²
- **1993: TDF (Tribal Development Forum)** is established in the Kotra block of Udaipur for tribal self-rule rights based approach on progress. They collected poor and marginalized tribal people from four blocks and established leaders to encourage a strong community alliance of tribal people for land rights
- **1995: Jungle Jameen Jan Andolan**, a people's organization for tribal land rights is formed by affected tribal communities of Southern Rajasthan. A major effort and struggle for forest rights ensues
- **2002: CSD (Campaign for Survival and Dignity)** States become involved jointly in the struggle on national level to outline a framework for a new forest act. People's Organization helped by beginning to pressure the government about passing a Forest Act to protect villagers from displacement.
- **2006: The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006** (also known as the **Forest Rights Act**) finally passed by Federal Government

⁵²¹ http://www.rajforest.nic.in/writereaddata/Revised_Rules_1974_English.pdf

⁵²² Bhanwar Singh Chadana and others, *Status of Adivasis/Indigenous Peoples Land Series – 8 Rajasthan*, (SAIP 2014) 79.

6.5. Transitioning from Labourers to Owners

The years 1986, 1987 and 1988 were drought years in the Aravalli hills of southern Rajasthan. The rains came in 1989, breaking the cycle of drought, and by 1990 people could look beyond hunger, drought, water and food. Livelihoods became a focus and in the early 1990s, the communities in Kotda Block of Udaipur District, started taking stock and analysing how much they were being paid for labour intensive work of gathering. The Forest Department, *Panchayats*, *Zilla Parishads* (District Panchayats or councils) showed no interest in people's rights, their livelihoods, or in the formation of co-operatives for minor forest produce, and the community did not know much about it, nor did they know their rights.

With the support of Astha, the NGO focusing on land rights, the tribal communities picked the Tendu patta micro industry as a shared priority that was a Block-wide issue.⁵²³ The goal was to get a better rate for their labour and this was the start of a long-term advocacy movement which changed the dynamic of the Tendu patta as a minor forest produce and as income generation for Adivasis. Astha lent strong support to the advocacy movement and using village level staff, organised the tribal communities into a strong unity. Astha's objective was to create peoples' organisations that would eventually stand independently. They began with small, issue based meetings, in which people began analysing the Tendu patta rate. The first meetings discussed the issue of the levels of exploitation of poor communities who live in resource rich areas. The questions posed were: what strategies did the communities need to undertake in order to avoid exploitation by more powerful stakeholders and how could they make sure they could use the resources to their advantage? With Astha's help, communities in Kotda Block petitioned the Forest Department (FD) to initially raise the minimum rate to Rs.10.00. Because the FD makes the most royalties from Tendu patta, historically it suited the FD to not list Tendu as part of the minor forest produce that the forest peoples were allowed to access. At that point in 1990, there were about forty thousand Tendu patta collectors in Kotda Block. The contractors, usually rich outsiders, sometimes even from outside the state of Rajasthan, were heavily dependent on this large number of labourers. The contractors, in 1990, used to pay royalties to the Forest Department of between Rupees 1.5 lakhs to Rupees 13-14 lakhs.⁵²⁴ These royalties gave them the right to collect the forest produce from a specific unit, which was a geographical piece of land from which they could collect, buy and transport the Tendu leaves.

⁵²³ Initially, Astha had ideological reservations about supporting the Tendu patta trade because smoking was so bad for health. However, it was the only livelihood that was shared throughout the whole Block, which could be used as part of the livelihoods improvement advocacy. Astha therefore went along with this choice of trade for the advocacy. The ultimate goal was to spread any advancements made with this strategy to other minor forest products so that the communities could take control of their own resources.

⁵²⁴ One lakh = 100,000

The community strategy was a strike action to stop collecting the tendu leaves till the rate per bundle was raised from Rs.7.50 per bundle to at least Rs.15.00. Initially, three gram panchayats organised themselves. The tribal panchayats often have up to fifteen villages. Later, they organised into five clusters, with all the leaders of the Gram Sabhas forming an organisation called Sangarsh Samiti with about fifty people from all over the Block. This core group spread the word using *pad yatras* (foot pilgrimages); through songs, and more meetings. The communities began a strike action which lasted sixteen days. Initially the contractors tried to break the strike by hiring a jeep with microphones which they drove through the villages announcing that the strike was over. The *fud munshi* made some bundles of leaves to try to convince people that the strike was over. But the strike continued. The contractors still had to pay royalties to the Forest Department whether they had Tendu patta or not. They arrived at Astha's doorstep offering a "donation" to Astha, if Astha could stop the protest by making an offer. Astha declined, explaining that this was not their campaign but the people's, and that they did not have any power. Since paying royalties worth lakhs of rupees without leaves was an expensive option, on day seventeen the contractors agreed to pay Rs.15.00 minimum for leaves collected. This minimum rate was flexible, since it was only a minimum. For example, if the contractor wanted the tribal people to collect the last leaves of the season, they were prepared to pay more. The strike action had thus been a success.

6.6. Self Determination through Collaboration

The following year of 1991, the Sangarsh Samiti community organisation that had been formed before the strike action in 1990 with the help of Astha began to analyse the Tendu patta trade: what their profits from the Tendu patta were; who the buyers were; and what the rates of sale were. It was a capacity building exercise to understand the trade, and led to the tribal communities feeling as if they had a bit of a handle on the Tendu leaf business. It also led to the realisation, that they were being paid a pittance of the profits. The tribal community decided that they wanted to control the business themselves and not use middlemen, especially since the traders were so exploitative. They found a sympathetic IAS⁵²⁵ officer who was the Managing Director of the Manohar Kant Raja Sangh (Rajasthan Tribal Federation). He encouraged the formation of cooperatives and offered to finance the venture,⁵²⁶ and suggested that they, the community, become a contractor. This entailed attending the auction and bidding for a unit. A unit indicated a specific area of the forest in which the successful bidder is allowed to gather

⁵²⁵ IAS: Indian Administrative Service

⁵²⁶ The budget covered renting a *godown* (warehouse) to store the leaves, buying gunny sacks to put the leaves in, and a ten to fifteen percent sum of money to cover the Forest Department royalty fees.

Tendu leaves. Following the Rajasthan Tribal Federation advice, the Kotda community formed a co-operative called Adivasi Tendu Patta Sangrahan (collection) Sahakari Samiti, Kotda. (Tribal Tendu leaf collector's co-operative). For self-determination, this was a significant achievement and the first of its kind for the Adivasis of Kotda Block.⁵²⁷

The co-operative attended the auction and managed to win three units using the grant from the Tribal Federation. The Forest Department accepted their bid. Besides gathering the Tendu leaves, the successful bidder has the right to count the leaves; pay the gatherers; bring the leaves to the *godown* (warehouse); and sell it to the *bidi* manufacturers or *bidi* leaf traders. The manufacturing of the *bidis* is an all India trade, with different brands. The majority of the rolling is done in south India, though the Tendu leaves are grown in the central belt of India.⁵²⁸ Locally, the preparation of the Tendu leaves is complicated and takes a few days of preparing the leaves for transport from the forests in the central belt of India before they reach the destination of the *bidi* rolling factories in south India.

Taking over control of the Tendu business by the co-operative became a labour-intensive venture. The *fud munshi* and his team slept and lived in the fields in order to guard the Tendu patta, as the bundles were laid out in an empty field to dry after being counted. If the field used for the drying of the leaves had difficult access to the road, it created a problem for the people who brought their Tendu patta for drying, and it also made it difficult to transport it to the godown. The priority was the people bringing the leaves who had to have access to the field. Camels would transport the leaf-filled gunny sacks from the fields to the road where they were loaded onto the trucks waiting to depart for the *godowns*. The *godowns* kept the bags dry in case of pre-monsoon showers. Re-drying was possible if there were one or two showers. However, if early rains wet the leaves they would get discoloured, immediately lowering the purchase price.⁵²⁹ The next step in the process were the very interested buyers. They examined a sample of five *boras* - big gunny sacks, which were considered the 'standard bags.' The small gunny sacks were called *bori*. A price was struck by the cooperative's secretary or president with the buyer after the leaves had been inspected.⁵³⁰ Once the price had been settled, an agreement was drawn up in writing and

⁵²⁷ In 1995, all the Tendu patta co-operatives merged to form one organisation called Samarthak Samiti. Since Tendu patta is seasonal and only lasts for one month, the cooperatives focussed on other minor forest produce for the rest of the year, such as honey, honey wax, black plums, amla products, bel fruit, custard apple, and so on.

⁵²⁸ The Tendu leaves are grown in the central belt of India, which includes northern Andhra Pradesh, Orissa, Chhattisgarh, Rajasthan, northern Maharashtra, northern Gujarat, and Madhya Pradesh.

⁵²⁹ The Tendu patta season starts season starts may 1st. monsoon starts middle to end of June.... but pre-monsoon showers could wet the bags.

⁵³⁰ The Kotda block initially used the support of Kamleendra Rathod who managed the Samarthak Samiti or the self help group SHG, for the negotiations with the buyers.

signed in binding documents. In the first year, the Adivasi Tendu Patta Sangrahan Sahakari Samiti co-operative in Kotda⁵³¹ made a net profit of 6.5 lakhs,⁵³² which was a significant success for self-determination, much larger than a mere profit margin for the Tendu patta trade of the Adivasis.

The commercial success that the co-operative enjoyed lent a confidence and power which was used to stabilise the minimum wage. The Kotda co-operative had wanted to pay their Tendu patta gatherers Rs.30.00 per bundle. In spite of the seemingly high rate, they calculated that they would still make a profit. The government had increased the minimum collective rate to Rs.20.00 per bundle, and the other contractors were still also paying only 20 rupees per bundle. On May 2nd of 1991, the Kotda co-operative called a big meeting under a tree in the outdoors at Sulau Choraha, where three roads come together. The contractors resisted any raise and tried to keep the rate at Rs.20. The community, who were members of the co-operative persisted and the meeting dragged on for five hours, resulting in a compromise of Rs.26.00 per bundle. The main objective of the Tendu patta co-operative raising the rates was so the gatherers or leaf collectors could share in the profits, and also to force the other contractors to raise their rates, which was achieved successfully. Actions such as the Tendu campaign gave birth to tribal rights activist groups one of which was called the Jungle Jameen Jan Andolan. In 1995, the Jungle Jameen Jan Andolan took its campaign to the larger cities, in order to pressure the government to draft and pass legislation recognising tribal land rights. Rallies were held in the streets of the cities such as Jaipur and New Delhi in order to grow the movement beyond the state and onto a national level with the message of resource extraction causing the displacement of forest communities. This contributed to the 2006 enactment of the Forest Rights Act.

In the case study below the threat of imminent displacement of the isolated forest community of Amba village, and the legal strategies formulated by them with the help of civil society, emphasizes the land insecurity that remains part of forest peoples' lives.

6.7. Community Profile: Amba Village, The Phulwari Ki Nal Wildlife Sanctuary, Kotra Block, Udaipur

Phulwari Ki Nal is one of eleven Forest Blocks⁵³³ in the District of Udaipur, about 120 km away from the city of Udaipur.⁵³⁴ Phulwari Ki Nal was 'notified'⁵³⁵ in 1983 as a wildlife sanctuary.

⁵³¹ Tribal Tendu leaf collector's co-operative.

⁵³² 6.5 lakhs is Rs.600,500/-

⁵³³ The local word for 'forest' is 'van'. Forest Blocks are called 'van *khand*'

and is described as “hilly and undulating part of Southern Aravalli Hills.”⁵³⁶ It forms a part of the largest continuous forest tract in the arid Aravalli Range of hills in Rajasthan and is rich in fauna.⁵³⁷ The sanctuary, stretching to 511.41 sq. km comprises eleven *Van Khands* or forest blocks, one of which being Phulwari. 365.92 sq. km is Reserved Forest and 145.49 sq. km is Protected Forest.⁵³⁸ The sanctuary houses about one hundred and thirty-four forest villages which have existed for many generations, and form an integral part of the biodiversity of this area. Amba was the smallest village in this district with thirty-five households. The Bhil tribe who lived here, identified by the names of three sub-sections of the Bhil tribe: the Khair, Dama and Kapariya. Set deep in the forest, it was isolated by poor access and infrastructure with no running water and electricity though it was the year 2013. The nearest school was in the next village, ensuring low literacy levels.

I visited the Amba village, in the Phulwari Ki Nal Wildlife Sanctuary with NGO staff members from Astha. One striking aspect during my visit to Amba was just how inaccessible the village remained even in the year 2013. The road to Amba did not exist, which excluded any four wheeled vehicles from access to Amba. Our only options were to walk or use a motorbike. Soon after we entered the Wildlife Sanctuary borders, marked by a large yellow signboard announcing the entrance to the Phulawari Wildlife Sanctuary, the road disappeared and we continued on a dirt track in the forest. Leaving the dirt track to my surprise, Sarfraj, the driver, aimed his motorcycle right at the river and we rode bumpily along the dry winter riverbed. During the monsoons, the river would be full. For now, however, it made for the most direct means of entry into Amba village.⁵³⁹

⁵³⁴ The district is the principal subdivision within the state. There are 476 districts in India; Districts are subdivided into tehsils, areas that contain from two hundred to six hundred villages. The tehsildar who serves in much the same capacity as the collector, is the chief member of the tehsil revenue department and is the preeminent official at this level.) Government of Rajasthan, Department of Forest 2010 <http://rajforest.nic.in/?q=phulwari-ki--nal>

⁵³⁵ ‘Notified’ is terminology maintained from the Indian Forest Act 1927, enacted during the British colonial period when forest lands belonging historically to tribal communities were notified in order to extract forest resources for industry. Chapters 2, **3, 4 & 9**. (see Chapter 3 of this thesis for further details).

⁵³⁶ Government of Rajasthan, Department of Forest 2010 <http://rajforest.nic.in/?q=phulwari-ki--nal>

⁵³⁷ The fauna recorded are leopard, hyena, chinkara (Indian gazelle), wild boar, Four-horned Antelope, Flying squirrel, Pangolin and 120 species of Birds. The Four Horned Antelope, Pangolin, Flying Squirrel, and Deer species are of ‘conservation interest.’

⁵³⁸ Government of Rajasthan, Department of Forest 2010 <http://rajforest.nic.in/?q=phulwari-ki--nal>

⁵³⁹ Mountain riverbeds however are not sandy, and for me, the pillion rider, it became painfully bone jarring as Sarfraj skilfully navigated the bluish, large, smooth river-bed stones, which were sometimes covered by large water puddles. As an outsider from urban India, I was astonished by the fact that in the year 2013, in India, known at that point as one of the fastest growing economies in the world, there were still isolated villages and hamlets with no modern infrastructure such as roads and running water or electricity.

Set amongst the trees, the Amba houses were predominantly built from thatch, twigs, branches and other forest material. One house, half built was being constructed with stones and cement, the owner being a recipient of a government housing benefit scheme.⁵⁴⁰ Any natural clearings in the jungle had been converted to fields. Most of the community could be said to be living below the poverty line, dependent on minor forest produce for their livelihood, supplemented by seasonal migratory work. No individual or the community had filed a claim for their land rights with the Gram Sabha. Their awareness of the Forest Rights Act was low, and the state government, who by provisions of the Act were obliged to acquaint the communities with their rights, had not only neglected to do so, they were in this instance, exploiting the lack of community awareness in order to refuse these rights.



*Figure 8 Traditional 'kachcha' homes in Amba, built from forest materials and mud
The commencement of the building of a 'pukka' home in Amba, under a social welfare scheme.*

6.8. Land Violations and Strategies

The sense of urgency in the Phulwari Ki Nal Wildlife Sanctuary was obvious. Four of the smallest villages⁵⁴¹ had been served a notice from the District Collector⁵⁴² via the *Sarpanch*,⁵⁴³ summoning them to a meeting at which the *Sarpanch* was to inform the community that a survey team was being formed by the Forest Department in order to hold a survey of the villages. The community was to complete a survey questionnaire recording the value of the assets of the community on January 9th, 2014. This was allegedly the first stage that the government used in the process of displacing communities from the wildlife sanctuary. The survey form, which was detailed could then be used to prove that the community could be re-housed or rehabilitated elsewhere. This information could potentially be used in order to change the status of the

⁵⁴⁰ A government social welfare program started by Rajiv Gandhi in 1985 which offers subsidies and cash-assistance to people living below the poverty line (BPL) for constructing houses.

⁵⁴¹ The villages served the notice were: Bhimatalai, Vaviran and Shisvair under Medi Panchayat and Amba in Mahad Panchayat.

⁵⁴² The district collector is the highest official in a district, and is a member of the Indian Administrative Service.

⁵⁴³ A *sarpanch* is an elected head of the gram panchayat, which is the governing body at the village level in India.

sanctuary to a 'critical' wildlife sanctuary which would then become 'inviolable.' A critical wildlife sanctuary, which was inviolable, would prohibit forest people from inhabiting the area.

At first glance, the presentation of the survey form was in a benign format, including the name of the village, the size of the population, the measurements of the land area, individual landholdings, and whether the houses were 'kachcha' or 'pukka'.⁵⁴⁴ If one looked carefully however, the end of the survey form, the space for a signature or thumb print necessitated voluntary agreement to vacate the lands. The requirement of a signature to voluntarily abandon their own lands, seemed to exploit the fact that the community was predominantly illiterate and would sign the form without the knowledge that they were being complicit in dispossessing themselves from their own properties. The Astha field worker noticing this, immediately contacted the NGO lawyer,⁵⁴⁵ who issued a notice to the Forest Department pointing out that the plans to displace the community were illegal according to the FRA under the present circumstances in which forest rights had not been vested in this community as yet.

The manner in which the plans to convert the status of the Phulawari Wildlife Sanctuary to a critical wildlife sanctuary was very strange. Kamendra Singh, an Astha staff member from the local community managed a marketing outlet called Samarthak Samiti, which sold minor forest produce for the community such as honey, woollen blankets, wax, resin, wood oil and medicinal plants among other non-timber products. Coincidentally he shared the same name as someone else who was part of a District Level team who were devising the plan of the conversion to a critical wildlife status which would displace certain communities. The team comprised the Collector, the District Forest Officer, the Conservation Forest Officer, and other members. Kamendra, on December 29th, 2013, received a letter of invitation on to the meetings by accident a week before the survey was issued to the community. He attended the meeting and alerted Astha when he realised what was being planned.

The threat that the community felt was palpable. Upon arrival, an old man came up to me in greeting, and the first thing he said was, "*Where there are Adivasis, there are forests. We are the caretakers of the forests. I am now over seventy years old, and have never lived anywhere else. If they displace us, where do we go?*" This question captured the essence of the Gram Sabha meeting I attended at Amba that day of January 11th, 2014. The NGO had planned the agenda around a discussion of what strategy to use in order to avoid being displaced by the forest

⁵⁴⁴ 'Kachcha' means 'rough' or 'flimsy' and refers to homes made of mud and thatch; while 'pukka' homes are 'solid', 'firm', 'strong' and refers to homes made of concrete or stones, or brick.

⁵⁴⁵ Mr. Ramesh Nandvana the lawyer attached to Astha and working with the tribal communities donated his services to the organisation free of charge.

department who were trying to change the status of the wildlife sanctuary to a “critical wildlife habitat,” which would make the area inviolate. The Astha staff explained at the meeting that the Amba community was under no obligation to sign any paper. The community should interrogate any outsiders as to what their purpose was in entering the village. The community could initiate a discussion with the Collector and ask questions about the plans being launched for the Phulwari Ki Nal Wildlife Sanctuary; the lack of transparency of the process; and whether the process complied with the Forest Rights Act. The community were cautioned about giving anyone, even if from the Forest Department, permission to hold a survey. The advice given included: “*Do not act obsequious to any government official, and always question their encroachment on the village.*” The meetings began with traditional communal singing, spelling out a commitment to self-determination: “*We planted the mango trees; this land is ours; we won’t lose our land; In Jaipur, in Delhi, the government is in charge...on our land, we are in charge, we are the government.*” With a quickening activist pace, the Gram Sabha meeting was followed up the next day by another strategy meeting at the Astha Training Centre at Kotra village in Kotra Block in order to consolidate the strategies against displacement, and the next week a meeting for all the villages from Kotra Block, was facilitated by Ramesh Nandvana, the legal counsel for Astha, in order to build the legal capacity of the community. The strategies were based on FRA and the procedural rights that the community could access. These are analysed in the next section below on Administrative Justice in the context of how to respond to the government action calculated to change the status of the Phulawari Wildlife Sanctuary to a critical wildlife sanctuary, which in turn would displace the Amba community from their ancestral forest home. ‘Inviolate’ was a term used in the FRA in which a critical wildlife habitat requires areas “*to be kept as **inviolate** for the purposes of wildlife conservation.*”⁵⁴⁶

⁵⁴⁶ Chapter One, Section 2 (b) “critical wildlife habitat” means such areas of National Parks and Sanctuaries where it has been specifically and clearly established, case by case, on the basis of scientific and objective criteria, that such areas are required to be kept as **inviolate** for the purposes of wildlife conservation as may be determined and notified by the Central Government in the Ministry of Environment and Forests after open process of consultation by an Expert Committee, which includes experts from the locality appointed by that Government wherein a representative of the Ministry of Tribal Affairs shall also be included, in determining such areas according to the procedural requirements arising from sub-sections (1) and (2) of section 4;



Figure 9 Gram Sabha meeting at Amba village January 2014

6.9. Analysis: Administrative Justice and the FRA

The Tendu *patta* story, of a rights-based campaign to transform forest livelihoods from an exploitative trade to one in which the Adivasis controlled their own livelihoods, occurred a decade and a half before the Forest Rights Act was in place. The southern Rajasthan Adivasis' struggle for self-determination and access to justice had contributed an important part to the campaign which culminated in the Forest Rights Act. The Forest Rights Act affirms many of the rights that were hard fought for in the case study above. For example, the FRA has defined the term "minor forest produce" to include all non-timber forest produce of plant origin, including bamboo, brushwood, stumps, cane, tussar, cocoons, honey, wax, lac, tendu or kendu leaves, medicinal plants and herbs, roots, tubers and the like.⁵⁴⁷ The fact that Tendu is part of the list is significant as it was consciously removed from the list historically on account of its lucrative attributes. It now 'belongs' to the people again, to have access to collect, to use as they had done traditionally, within or outside the village borders.⁵⁴⁸

The FRA opened up land access, and more than thirty percent of households reported access to common lands and open revenue lands.⁵⁴⁹ The families who managed successful land rights claims under the FRA, tended to have larger land holdings, and more access to land in revenue villages. Household incomes were supplemented by ownership of livestock. Poultry and goats were reared for consumption and could provide an important asset for supplementing the income of small landholders. Small households might have kept between one or a few cows, and larger

⁵⁴⁷ FRA Chapter One, Section 2, (i)

⁵⁴⁸ FRA Chapter Two, Section 3, (c)

⁵⁴⁹ TRRU, *Tribal Women's Rights On Land And Other Natural Resources: Southern Rajasthan* (2012)

landholders tended to keep buffaloes. Every household, regardless of their wealth, aspired to owning a pair of bullocks.⁵⁵⁰ Marginal households were dependent on the collection of minor forest produce for both income and for consumption needs, while medium landholders resorted more to trade from products from land, forest and cattle as income supplement.

As defined earlier in this study, administrative injustice is when the government fails to protect citizens and on the contrary behaves in a manner that is unjust, unreasonable or dishonourable, or does not allow citizens access to justice.⁵⁵¹ The threat to the Phulwari Ki Nal communities was not only from the administrative injustice of the Forest Department's efforts as dispossessing the community from their ancestral lands. Another threat to land security lay in the unreliable access to justice embodied in the terminology of the FRA as noted below. The wording of the Act, specifically leaves the decision of establishing any areas as critical wildlife habitat: "*as may be determined and notified by the Central Government in the Ministry of Environment and Forests after open process of consultation by an Expert Committee, which includes experts from the locality appointed by that Government wherein a representative of the Ministry of Tribal Affairs shall also be included, in determining such areas according to the procedural requirements arising from sub-sections (1) and (2) of section 4.*"⁵⁵² The decision therefore to convert a wildlife sanctuary to a 'critical wildlife' status, is determined by the government in this case. The government at the forest level is represented by the Forest Department, who have not been known to conscientiously follow the Free and Prior Informed Consent (FPIC)⁵⁵³ required both by the national FRA and by international laws such as UNDRIP, nor have they been proven to be sympathetic to or supportive of forest rights, creating a conflict of interest biased against tribal communities.⁵⁵⁴

The violations of the FRA legislation by the Government via the Forest Department was on several counts: For instance, in Amba, the concerned Gram Sabhas had not given permission before any change could take place or could be planned. *Chapter III.4. (2) (e) The free informed consent of the Gram Sabhas in the area concerned to the proposed resettlement and to the package provided has been obtained in writing.* If the Gram Sabha agrees or give permission for

⁵⁵⁰ Ibid

⁵⁵¹United Kingdom Administrative Justice Institute, *What is administrative justice? AA discussion paper* (Nuffield Foundation Series 2015)

⁵⁵² FRA Chapter One, Section 2 (b)

⁵⁵³ FPIC - Free and Prior Informed Consent

⁵⁵⁴United Nations Declaration on the Rights of Indigenous Peoples (adopted on 13 December 2007, UNGA Res. 61/295 A (UNDRIP Add 1): "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the **free, prior and informed consent** of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return (Article 10);"

any change then all plans for change or rehabilitation need to be open and transparent, with compensation packages to have written agreements. The FRA defines strict prerequisites for protecting forest rights before being able to either create inviolate areas for wildlife conservation, or before being able to either resettle or have any other forest rights affected. In Amba, the six criteria, recorded in the FRA that had to be met before any change of status had not been fulfilled:

Chapter IV.6. (7) The process of recognition and vesting of rights as specified in section 6 is complete in all areas under consideration. All individual and community forest rights have to be completed and recognized. This refers to the rights of individuals and communities to make a claim to their land, which the Gram Sabha is authorized to verify and consolidate and map the area before it passes the claim to the Sub-Divisional Level Committee (SDLC) for consideration. The SDLC is created by the State Government, as is the District Level Committees (DLC) to whom the claim goes to after the SDLC has considered it. The decision of the DLC is “final and binding.” The Amba community had not started the process of claiming community of individual rights.

Chapter III.4.(2)(b) It has been established by the concerned agencies of the State Government, in exercise of their powers under the Wild Life (Protection) Act, 1972, that the activities of impact of the presence of holders of rights upon wild animals is sufficient to cause irreversible damage and threaten the existence of said species and their habitat; The first step is that the State Government has to prepare a report that proves there is conflict between the forest people and wildlife, and they have to mention any threats that people may be causing to endangered species. Secondly the government has to share the report with the concerned Gram Sabhas and the public, neither report had been prepared by the government for the Amba village. As the old gentleman said when I arrived at Amba, “We are the caretakers of the forests.”

Chapter III.4. (2). (c) The State Government has concluded that other reasonable options, such as, co-existence are not available; The argument provided by the Amba community in relation to the above two clauses is that they have lived in harmony with the wild life for centuries. In addition to this, the State Government making a decision on whether the tribal communities were endangering the existence of wild life was both unilateral and could be perceived as arbitrary. The threats that the community faced also included the uncertainty of not knowing what validation the community had that the decision made by the State Government was not biased; and how transparent this decision-making process would be to the community.

Chapter III.4. (2). (d) A resettlement or alternatives package has been prepared and

communicated that provides a secure livelihood for the affected individuals and communities and fulfills the requirements of such affected individuals and communities given in the relevant laws and the policy of the Central Government;

Chapter III.4. (2). (e) The free informed consent of the Gram Sabhas in the area concerned to the proposed resettlement and to the package provided has been obtained in writing;

Chapter III.4. (2). (f) No resettlement shall take place until facilities and land allocation at the resettlement location are complete as per the promised package: Provided that the critical wildlife habitats from which rights holders are thus relocated for purposes of wildlife conservation shall not be subsequently diverted by the State Government or the Central Government or any other entity for other uses.⁵⁵⁵

None of these procedures had been honoured by the government. The Committee that was set up had sent a letter to the *Sarpanch* to inform the community of the survey and plans for impending displacement, instead of getting Gram Sabha permission. The attempts at displacement of people from their lands by the government raises another more complex question: what characteristics of the legal and political system enable those charged with carrying out the law to suspend administrative justice⁵⁵⁶ and circumvent existing legal frameworks?

In Kotra village, at a meeting I attended, where the community had gathered to meet with Astha regarding the FRA, alleged government violations of forest rights emerged during the discussion. These alleged government violations comprised a long list which I have described below, and which confirm the lack of Administrative Justice, referred to above, in which the government had failed to protect the forest peoples discussed above.

“The Forest Department (FD) is continuing to build walls and fences in forest lands.”

Before the Forest Rights Act, the FD, which is part of the Ministry of Environment and Forests (MoEF) had complete control of the forests. The walls and fences were often used to keep forest communities out of the forest, as forest lands constituted very rich resources that the government profited from. Any government activity since the FRA has to first go through the Gram Sabha for permission. The continuation of building walls and fences without Gram Sabha authorization

⁵⁵⁵ FRA: Chapter Three, Section 4 (2)

⁵⁵⁶ Administrative justice is defined as “when the government, or those working on its behalf, act in ways that appear wrong, unfair or unjust, [and do not ensure] that public bodies and those who exercise public functions make the right decisions...[and that] mechanisms for providing redress when things go wrong”⁵⁵⁶ are not accessible for citizens, consumers, individuals or groups. United Kingdom Administrative Justice Institute, *What is administrative justice? A discussion paper* (Nuffield Foundation Series 2015)

conveys a clear message that the government respects neither the law, nor the forest people. It also signals that the government is unable to relinquish authority to the community. Self-determination of forest people is not respected nor understood.

“The Forest Department persists with felling trees for timber.”

The reasons for this are similar as in the discussion above. In addition to this, the FD’s actions in felling trees confirms the perception both within the forest communities and among scientists that traditional conservation methods of indigenous peoples are more committed to the ecological preservation than many governments who become complicit with corporate sectors when they harness mineral rich forest lands for extractive industries and for conservation, which continues to displace indigenous peoples from ancestral lands.

“Communities are displaced in order to make way for critical wildlife habitats, without the FD complying with the law of eliciting Gram Sabha permission first.”

This action on the part of the government does not respect the customary conservation practices of the Adivasis which is spelled out in the FRA: *CHAPTER II 3. (i) right to protect, regenerate, or conserve or manage any community forest resource, which they have been traditionally protecting and conserving for sustainable use; Critical wildlife habitats taking priority over the needs of people, elicits the paradigmatic shift within the conservation debate, the more recent perspective on conservation challenging the classic conservation policies of exclusion of people. The FD seems to be unable to let go of the former conservation policy of excluding people, which is what was at play in the conversion of the Phulawari Wildlife Sanctuary to a critical wildlife sanctuary. The new conservation paradigm advocates integrating the need to protect flora and fauna with the need to protect peoples’ livelihoods and culture, especially when their culture is dependent on ‘protected areas’⁵⁵⁷. The new paradigm drives the inclusion of humans into the equation. Conservation with ‘a human face’, acknowledges that human beings are part of nature and that protecting human needs are as important as preserving beautiful wilderness areas. It includes a debate on whether indigenous peoples (forest people) contribute to the destruction or to the protection of the forests. The protectionists don’t take into consideration the economic hardship and irreversible cultural impacts of restrictions on indigenous communities. The sacrifice of livelihoods of humans does not equate with the efforts of protecting the ‘common*

⁵⁵⁷ In India, for example, protected areas comprise many categories such as: Reserve Forests; Protected Forest; Protected Areas which include National Parks; Sanctuaries; Tiger Reserves; Critical Wildlife Habitats; Conservation Reserves; Community Reserves; Other lands (e.g. unclassified lands); Revenue Areas.

good'.⁵⁵⁸ The people versus biodiversity has moved into the human rights arena, and when human rights are situated opposite the rights of nature then you get win-lose situations which are self-defeating, and which do not promote dialogue. ⁵⁵⁹

“The government sells forest lands to extractive industries. And the government expropriates forest lands in the name of ‘development.’”

Chapter Three of this dissertation, on international normative frameworks, expounds upon this aspect with numerous illustrations from different countries including India. I situate my discussion on the neoliberal analysis discussed in Chapter three which points out the disjunction of economic development schemes which harm human rights, and impoverish certain marginalised sections of society. The argument is that the rights of all individuals and communities should be of equal priority and economic development schemes should not be pursued for the benefit of some at the expense of others. This would deny access to justice for certain sections of society.

“The Forest Department preys on forest people.”

The experience of the forest communities had been that of the FD extracting money and misusing their authority, from people collecting bamboo and other building materials from forests for their houses. This goes against the Forest Rights of the communities in the FRA *CHAPTER II Section 3. For the purposes of this Act, the following rights which are secure individual or community tenure or both, shall be the forest rights of forest dwelling Scheduled Tribes and other traditional forest dwellers on all forest lands, namely: -*

right to hold and live in the forest land under the individual or common occupation for habitation or for self-cultivation for livelihood by a member or members of a forest dwelling Scheduled Tribe or other traditional forest dwellers;

right of ownership, access to collect, use, and dispose of minor forest produce which has been traditionally collected within or outside village boundaries;

The example discussed during the meeting in Kotra in January 2014, was of one young woman who had collected dry wood, which the FD confiscated, demanding Rs.500 for it to be returned.

⁵⁵⁸ Peter R Wilshusen and others, 'Reinventing a Square Wheel Critique of a Resurgent "Protection Paradigm" in International Biodiversity Conservation' (2011) 15 International Biodiversity Conservation, Society & Natural Resources: An International Journal

“Many people living in and near protected areas perceive their interest is tangible and immediate and the common interest is unclear and intangible.”⁵⁵⁸

⁵⁵⁹ “Biodiversity conservation programs do not necessarily have to hinder the attainment of human rights for all people living in or near protected areas. The moral argument in favour of nature protection is perfectly defensible as far as it goes. But if nature protection occurs at the expense of humans without accountability based on a separation between humans and nature, then it becomes less defensible.” Ibid 17

The clear message from the FD was that the forest lands belong to the FD and not to the tribal communities. Another example was of a man who was weaving baskets and was apprehended by the FD and interrogated about why he had not requested permission to use minor forest produce to weave his basket. The grasses he had collected for his weaving were confiscated by the FD who wanted him to pay a bribe to retrieve them. The basket weaver reported this incident to the Astha staff who confronted the FD about non-compliance of the FRA law and the grasses were returned to the man with an acknowledgement that a mistake had been made. For the tribal communities, however, this erratic behaviour, dictating principles of eminent domain, remains a constant threat.

The illustrations above raise the question of what precisely is the role of the Forest Department in administering the Forest Rights Act, and where does the concept of justice fit in? Firstly, the administration of legislation, which requires initial awareness raising within the department of what rights the legislation is granting and to whom, seems to be lacking in Rajasthan; secondly, if the government introduces new legislation, the onus is upon the government to commit to the new law and to undertake every strategy that this commitment requires. This is not apparent in aspects such as educating the staff not only on how the new law is to be implemented, but also what the rationale and background of the legislation is, and why it was enacted. The goals and purpose of this law needs to be thoroughly comprehended by the staff responsible for implementing it, which the evidence above does not support. The enactment of the FRA has changed the role and expectations of the FD. Is this change in their role understood by them, and to whom are they accountable for carrying out their duties according to the expected goals? The irony of government employees perceived by citizens to be oppressing them as in the examples alleged above, is that the salaries of these civil servants are ultimately derived from the income tax collected from the citizens whose rights are not necessarily being protected. For the FD to be engaged in demonstrating their power by extorting bribes from Adivasis, reveals the FD to be pitting itself against the rights of tribal peoples who are using the forest according to customary rights deemed legal by the FRA.

Mangilal ji from Astha, in charge of the Forest Rights Act matters in the NGO, queries what might be the reasons for the seemingly random aspects of the rejections of claims and awards, and asserts that the implementation process is not going perfectly. He points a finger at the Forest Department who are not fulfilling their duties in helping the community with verification work, and neither is the Revenue department. The verification refers to the obligations to verify aspects such as land records, and maps which chart the territorial boundaries. In many areas people did not claim their rights because they did not get the proforma from sub-divisional committee to claim their rights in time. Many claim files are still under process. Some files are delayed in the

panchayat,⁵⁶⁰ some are in FD office, and some files are with the *Patwari*. *Patwaris* are responsible for demarcating lands and for drawing the maps. Mangilalji feels that *Patwaris* are not cooperating nor helping the community in the FRA process of claiming land rights

6.10. Conclusion

The Tendu *pattas*⁵⁶¹ campaign to claim land rights for control of their livelihoods preceded the enactment of the Forest Rights Act and illustrated a concerted effort to claim rights through political strategies and not necessarily legal ones. The success of the Tendu *patta* struggle forced the discussion of how political advocacy is necessitated either in order to support legal claims or to force the issue of eventual enactment of rights based legislation for marginalised communities. The case study of the threat of imminent displacement from their forest lands faced by the Amba community represented how the Forest Rights Act had been used to access justice for land rights.

Previously in Chapter Three, I argued that national legislation and policies do not necessarily improve access to justice for communities and individuals on the national stage. I posit that this is mainly because of three reasons, which include the uneven implementation of the FRA; the marginalisation of tribal groups and societal barriers such as gender inequality which prevents many using the FRA; and the lack of administrative justice at both the frontline and at the national level to empower Adivasis to access justice. In this chapter, I extend that argument to posit the fact that the FRA exists confirms that substantive rights are recognised which is a considerable improvement over having no rights at all. The implementation of the FRA in India is uneven and dependent on how progressive the state administration is. Rajasthan is perceived to be one of the more backward states in the administration of the FRA, with the least community forest rights claims awarded compared to the rest of India.⁵⁶² This differentiation has to be borne in mind to avoid national generalisations. The nation state in the alleged violations illustrated above, creates a threat to the human rights of the tribal communities. This causes a dysfunction, some of which is determined by administrative justice which in turn is dependent on the mind-set

⁵⁶⁰ Panchayat is the local governing body at the village level. Village is called 'Gram'. The Panchayat is usually referred to as the Gram Panchayat, to be differentiated from the Gram Sabha, which is the village committee, formed by every adult member of a village. If a village has less than 1500 members, then it is grouped with other villages in order to form the Gram Sabha. The Gram Sabha elects the 'panchas' for the Gram Panchayat, holds them accountable, and conducts village meetings. The Gram Panchayat is in charge of organizing the development of the villages which includes all welfare, social justice, and economic activities for the community.

<http://www.importantindia.com/12463/gram-sabha-and-gram-panchayat-in-india/>

⁵⁶¹ Tendu *patta* (*Diospyros melanoxylon*) leaves are used for making bidis, which are hand-rolled cigarettes in India. <http://www.downtoearth.org.in/coverage/the-tendu-leaf-12528>

⁵⁶² Interview with Madhu Sarin. November 2013.

of the Forest Department, recalling the colonial attitudes of forest ownership being with the state.

The unevenness of the implementation is demonstrated by other indicators that there are also positive reports that Adivasis are being given legal rights to their lands. In Rajasthan, thirteen thousand Adivasis had received land deed papers at the time this data was collected in 2013 which is what the FRA is about.⁵⁶³ Evidence that the Forest Department is working hard to implement the FRA in its geographical area, is also apparent by the help that some tribal communities are getting from the FD in claiming legal rights under the Act. The provisions in the FRA outlined in detail above have facilitated the submission of land claims for tribal communities. Some forest officials, from top officials to forest guards, are publicizing the rights of the FRA in their area of work, and some of them show interest in the rules and procedures, which are of help to the Adivasis. There are very few issues of harassment or corruption in dealing with the tribal people who submit their claims. The point being made here being that in spite of the land violations experienced by some tribal people instigated by the Forest Department, there are other positive aspects which present a contradictory picture.

The extent of awareness raising and training of Forest Department staff dictates the level of success of new legislation. What aspects of governmentality is necessary to avoid setting up new laws to fail? What policies need to be in place in order to remove the apparent animosity demonstrated in the examples experienced by the forest communities in the Aravalli Hills? How can these attitudes be replaced with an understanding of their responsibility to implement the law that has been enacted by a democratically elected government in 2006? That the FD are part of this elected government mandates requires a show of political morality towards the people they are governing. In addition to this, both the government staff and the community themselves need to be catching up with progressive provisions within the law such as equality in land ownership for women and men. The law states women and men are equal. The law states “land to the tiller,” particularly for Schedule Tribes and other traditional forest dwellers. Strategies for legal empowerment need to be ‘gendered’, which means that both women and men have equal opportunities for claiming their rights. The law needs to “transform the way that mainstream policies benefit and burden diverse women and men.”⁵⁶⁴ The law needs to take into account the multiple discrimination faced by indigenous peoples who are both tribal and female, when they are in the process of claiming their rights to self-determination and to their communal lands. The new gender equation spelt out by the law requires a change of awareness and acceptance within

⁵⁶³ Interview with Mangilal ji, Jan 2014

⁵⁶⁴ K Staudt, 'The Feminization of Poverty: Global Perspectives' (1998) 5 *The Brown Journal of World Affairs* 215

both the community and government servants. Patriarchal realities within the Rajasthani tribal culture of land ownership traditions are being challenged by the Forest Rights Act.

The onus of making communities aware of their rights is on the government. This responsibility however is not always conscientiously assumed by civil servants in charge. The forest Adivasi communities themselves are generally illiterate and would be unaware of their legal rights if it were not for civil society organisations assuming responsibility for the community's ability to access justice in regard to the FRA. The strong support roles of civil society are welcome to the land rights movement, and maybe indispensable. However, it also means that civil society support allows the government to evade their responsibility of protecting rights of citizens. Since illiteracy is an issue, online forms and FRA materials are inaccessible to the forest peoples. The Indian Government is often results driven, and understand concrete goals such as the number of students in education facilities or the number of trees that have been planted. What they find more difficult to comprehend is the importance of communities to be organised so they can access information and trainings in order to be able to access justice. This has resulted in the protection of rights of forest communities being undertaken by civil society organisations, and instead in this instance for the Aravalli Hill forest communities, the protection of their rights has not necessarily come from their government who are vested with duties and obligations to protect the community's rights and needs.

The Forest Department in India, after the enactment of the FRA, were faced with a change of dynamics in power over the forest lands. Prior to the FRA, the government had control and decision making powers of forest lands. The FRA reversed these powers and gave them back to the forest peoples in line with customary tribal land rights. Rather than committing to the 'spirit of the law' which adheres to human rights, the Forest Department at times seem to be unable to let go of the powers that eminent domain gave them. As Robert Reich states, "Without political will and political power - and a movement behind that political will and power - no policy is going to be put into effect."⁵⁶⁵ A query that keeps cropping up is what exactly did the government do after enacting the law in regard to building the capacity of the Ministry of Environment and Forests (MoEF) to administer the law, to understand the new law, and to commit to the law. The lack of commitment by the administration has caused harm to the forest communities and to the concept of land rights, and has complicated the use of legal mechanisms for forest rights. In regard to the FRA, the political will was not necessarily consistent nor

⁵⁶⁵ Robert Reich at an interview, May 5, 2016. Robert Reich is an American Professor of Public Policy, an economist, a political commentator, an author, and served in the administrations of Presidents Gerald Ford, Jimmy Carter and Bill Clinton. <http://www.vox.com/2016/5/5/11581940/robert-reich-ezra-klein>

sustained, and the access to justice of tribal communities continued to be hindered by the industrialisation, administrative injustice and poor education and legal awareness of Forest Department employees. Compounding these barriers are well meaning but are poorly conceived policies of conservation.

Conclusion: The Unevenness of Access to Justice

7.1. Introduction

In the quest to empirically examine whether the enactment of the Forest Rights Act has changed the accessibility of justice for indigenous peoples who are claiming rights to ancestral lands, I have advanced a new and holistic conceptual framework. I specifically examined whether legal mechanisms governing land rights in India make it more difficult for indigenous people to get the resources they need to improve their lives. This study challenged whether the Forest Rights Act (2006) of India and its implementation, provided a powerful tool for indigenous peoples to manage their own forests, and to advocate for their rights, or whether it in reality increases their vulnerability. When pulling together the various conclusive threads that have emerged from this research, the most significant finding was the conclusion that access to justice cannot occur in a vacuum with the introduction of new legislation, however progressive. Rather, it is dependent on crucial nuanced variables, which I have detailed in this dissertation and is part of my new conceptual framework. The conceptual framework triangulates scholarly and empirical evidence on the major aspects of access of justice, forest governmentality, economic policies, gender equality and legal literacy and legal history. The new framework identifies a nuanced understanding of the political, social and economic contextual landscape as vital for a critical analysis of access to justice

The case study chapters provided a perspective of local experiences of the immediate effects of the Forest Rights Act in India, exploring at the micro level, the effects of forest rights legislation on the lives of forest peoples in the discrete geographical areas that this study focuses on. This final chapter draws together these variables alongside empirical data to produce an analytical conclusion of the effects of the FRA on indigenous forest peoples' access to justice in India. In interpreting the theoretical framework that unfolded through the literature review, I portray a broader analysis of how access to justice is experienced by indigenous peoples in India, mostly Adivasi tribes and mobile indigenous peoples living in or using the forests on a usufruct basis.

The underpinning causal factors that have emerged from my data acknowledge that access to justice is influenced by the historically and legally biased evolution of land rights, and the political and economic choices of governments. As Rawls theorised, a key tenant of access to justice depends on whether the government policies benefit all citizens, or respond only to an elite few at the expense of marginalising communities whose cultures do not mirror the

mainstream norms.⁵⁶⁶ Similarly, whether embedded social discriminatory attitudes towards gender or nomadism are recognised and taken strongly into account also influences access to justice.

My findings indicate that legislation on land rights has divergent and uneven success in improving access to justice for indigenous peoples. This unevenness is dependent on several political, institutional and socio-economic factors, which are embedded within multiple levels of the implementation of the FRA and how indigenous communities realise their land rights through it. These factors can be understood in three over-arching concepts of the law: how progressively the substantive rights within a law are framed and the historical genesis of this framing; whether the procedural rights are well defined and appropriate; and how conscientiously and justly the procedural rights are enacted and realised by citizens. Within these concepts the following interdependent factors shape the extent of access to justice for indigenous communities: the impact of historical legislation on contemporary policies; gender bias in governance; the role of civil society in advocating for rights of marginalised communities, and the legal literacy of the community.

7.2. Chapter Outline

This concluding chapter outlines five central factors that contribute to how access to justice is experienced by indigenous peoples. Each section offers conclusive evidence on different aspect of the research questions. Section 3 on the History of Laws and Legal Literacy summarises how land laws originating from the colonial expropriation of local lands creates a hegemonic understanding of land as purely an economic resource. Section 4 on Administrative Justice pulls together the major findings of how governance affects access to justice. Section 5 on Civil Society Support concludes the role of civil society in supporting access to justice for marginalised communities Customary gendered traditions shape how land is inherited and how substantive legal rights empower women and the community are discussed in Section 6 on Gender and Land Inheritance. In Section 7 entitled Capitalism and Extractive Industry, I highlight conclusive evidence of the relationship of neoliberal policies on extractive industries and development and how they relate to forest rights are summarised. I cross reference the above concepts of administrative justice and neoliberal policies with the importance of substantive and procedural legal rights and whether these rights have empowered forest communities to formulate legal strategies of forest communities in order to access justice.

⁵⁶⁶ John Rawls, *A Theory of Justice* (Oxford University Press 1999) 9

7.3. The History of Laws and Legal Literacy

India is a very diverse country, with different forest issues in different states, complicated by Federal and state divisions. This results in big variations between states in implementing the FRA. Based on the evidence from my data collection, the FRA in general appears to have had an uneven success in improving access to justice for indigenous peoples in the parts of India that I have studied. The evidence from the field work in chapters Four, Five and Six points to the major impediment to access to justice as being administrative injustice. The administrative injustice is evident in local forest governance, unjust national policies, and legal systems, which condone this injustice by not providing appropriate redress. This administrative injustice has its roots in the issues emerging from the theoretical framework developed in this research. The analytical framework I advance in this study refers to the history of land laws that I posit were drafted in order for the smooth expropriation of land by colonizers. The ensuing judicial imperialism during the colonial occupation of foreign lands denied people their rights. The dysfunction lies in the concept that justice and ethics underpin the concept and structure of law; yet, the legacy of colonial land laws continues to enable contemporary governments to expropriate valuable, resource rich lands such as forest lands, in a manner that mirrors an internal colonization.

I conclude that the historical laws allowing land expropriation has contributed to the evolution of a culture that normalises economic expropriation of forest and other resource rich lands. The concept of eminent domain was legally extended to forests from the seventeenth century in India. The Indian national government readily adopted this concept after Independence with a seeming lack of analysis to potential consequences of retracting rights of vulnerable communities. This lack of analysis has informed the attitudes of government bodies such as the Ministry of Environment and Forests, and departments under this Ministry such as the Forest Department. For example, in Gujarat, the government had sold to private individuals and industries *gauchar* lands that the Maldharis used for grazing their herds, and in 2011, the community was protesting the sanctioning by the BJP government of fertile farmlands with reservoirs, thereby destroying their livelihoods because the reservoirs would destroy the rich ecosystem where they grazed their cattle. In Maharashtra, two government officials encroached illegally onto the grazing land of the Dhangar and have built a sugar factory. Pastoralists were forbidden to use the Kumbalgarh Forests where they have traditionally grazed their camels, sheep and goats when the government demarcated it as a Wildlife Sanctuary. A high number of the herds died, and the Raika suffered serious losses to their livelihoods. The ensuing attitudes can be perceived as exploitative and disrespectful of rights of tribal communities. They also strongly influence the administrative justice with which the Forest Rights Act is implemented. The connection between the histories of

the Indian Forest Laws, present forest governance, and attitudes, remain inextricable and dominant, and present a barrier to access to justice.

The legal framework that gives people rights is provided by a historical trajectory from which a law emerges, the actors which draft it, and the bodies which enact it. Conversely, I argue that these same processes, actors and institutions can also collude to deny people their rights. The dominant legal system in India, was imposed by a colonial government in the late 1800s, and is the historical trajectory which is rooted in continued land imposition in my cases studies It has eliminated local legal pluralism, which has eroded local legal literacy, self-determination and access to justice. Today the traditions of how indigenous communities apportion justice, necessitates a legal validation of customary laws, and an awareness of national legal frameworks that support their rights. The imposition of a foreign system on a colonised nation injects an element of legal unfamiliarity that is immediately intimidating and excludes sections of the population. This was the case with the Adivasis and the mobile indigenous communities that I interviewed in areas such Amba, Kurka, the Dhangers in Maharashtra, and the Raika in Rajasthan. Many of them are illiterate, and do not share the English language that the legal system requires. These issues have resulted in the FRA being juxtaposed with an embedded judicial imperialism, which can result in the laws not necessarily enabling access to justice. This is compounded by socio-economic inequalities and language barriers within India, which have impaired the legal literacy and capacities of indigenous communities to use legal institutions on a more equal basis. I conclude that in addition to how a law is framed, the implementation of the law is significant, and can create the most difficult barriers to access justice. These barriers to justice have rested upon uncommitted governance and poor compliance mechanisms for implementation of legislation, which do not support the spirit of the law or human rights.

Adding to the complexity of legal accountability for human rights, is that international regulatory bodies have little power for enforcement, and correlates directly with the weak accountability at the national level for implementing human rights. The continuous land expropriation by governments and corporate industries which displace indigenous peoples highlights the inconsistencies between a growing international human rights body of law and the experience of indigenous peoples on the ground at the national level. Nation states remain unaccountable to international laws. Even if treaties have been signed by countries, they are not necessarily honoured, and indigenous communities do not have the capacity to take the fight internationally. Some declarations and conventions have no teeth and cannot hold countries accountable. Some countries such as the USA have not signed up to several human rights treaties. The question therefore remains open as to how the law can support indigenous communities being displaced when there is a gap between international human rights norms and national laws or national

enforcement of existing laws. The research question of whether international legal norms are inherently biased against excluded groups in any country has evoked a multi-dimensional response. This response highlights the historical benefit to western nations to which imperialism gave weight. The resultant global economic order has reinforced the north-south economic power imbalance, while overtly attracting the transnational capitalist class global south to capitalist values. This has created two opposing dynamics which simultaneously have led to increasing displacement of indigenous peoples from mineral-rich lands for extractive industries while at the same time, generating myriad international treaties and declarations, and national laws morally oriented towards protecting the human rights of marginalised groups.

7.4. FRA Implementation and Administrative Justice

The increase in decision-making and voice of forest peoples that the *Gram Sabha* village councils offer, is a welcome aspect of the FRA. This empowering aspect however is diminished in the light of the fact that many government and local authorities are neither well educated in the objective of the Forest Rights Act, nor how it should be implemented. Governmental bodies and their frontline workers therefore do not always take responsibility in responding to the rights of tribal communities. My case study analysis repeatedly led back to how the issue of poor governance leads to uneven administrative justice. This poor governance, is counterbalanced by a few optimistic examples which evidence how legislation is being implemented in the ‘spirit of the law.’ In Rajasthan, some Forest Department officials are conscientiously helping some tribal communities in claiming their land titles.⁵⁶⁷ A few staff from the Forest Department in Rajasthan have been spreading the word about land rights under the FRA, and a few have shown interest in procedural aspects of the FRA. Importantly, claims which have been submitted are dealt with sincerely for the most part. The implementation therefore remains sporadic with some positive implementation experiences, which offset to a small degree the other aspects of land violations experienced by some communities.

My dissertation defines governmental attitudes, which become hostile to equitable justice when they do not respond to the needs of forest communities, as administrative injustice. The major cause identified by the respondents interviewed for injustice was that the Forest Department and Ministry of Environment and Forests (MoEF) either did not understand the law very well; did not subscribe to the ‘spirit of the law;’ or were unable to relinquish the power of eminent domain. When this is the case, a pattern is set of disempowering the community with the government in control. The FRA was enacted without thorough preparation by the government, who neither disseminating information to the community about their rights, nor trained government officials

⁵⁶⁷ By 2013, during my data collection, thirteen thousand Adivasis had received land deed papers at the in Rajasthan.

in the provisions of the Act. Consequently, the main goal of the Act which was to foster empowerment for the community was lost.⁵⁶⁸ This specifically sabotages the provisions of the Act which offer community control of forest lands and forest resources, and begins to reinforce socially discriminatory practices by the government towards marginalised minorities. Indian forest governance therefore, combines to reinforce the disempowerment of forest peoples. This emphasises that the frontline implementation of policies such as the FRA is not a mechanical process but just as political as the policy process which formulates them. Access to justice is therefore highly dependent on how legal rights are recognised or enacted by judiciaries or governments,

The disempowerment created by the politicised implementation of the FRA, is further exacerbated by the existing reality of widespread illiteracy and isolation of forest dependent communities in India, such as the Amba community, and other tribal communities in the Aravalli Hills where I worked, which renders many unable to hold forest officials accountable. This correlated with poor legal literacy, highlights the impact of socio-economic circumstances on access to justice. Within this context, the role of civil society to support forestry communities becomes crucial. It is this factor which I turn to next.

7.5. Civil Society Support

Civil society in India, as evidenced in this study has been active in challenging the legal illiteracy and lack of rights, and has played a crucial role in supporting the creation of new rights based forest legislation. This has had two consequences for the implementation of forest legislation, one being the variable nature of support from developmental NGOs. A relatively unexplored disjunction is caused by the fact that civil society priorities might differ from those of the communities they are working with, especially when NGO practitioners often belong to a different socio-economic class from the communities they support. This was discernible in the weighting that was awarded to land claims for individual titles compared to titles for communal property that the FRA recognises. Individual property is a mainstream norm, not a tribal collective one. NGOs are themselves targets of, at times, misled or out-dated policies and could be perceived as part of the problem. Some NGOs subscribe to supporting the community through welfare programs that could be either be perceived as filling a gap left by the government, or as creating further dependence among the communities. Other NGOs concentrate on empowerment

⁵⁶⁸ Interview data from Madhu Sarin, Founder of Campaign for Survival and Dignity, an informal but powerful all India grass roots organisation network of civil society organisations involved with forest rights.

and creating legal literacy. Depending on which community works with which type of NGO, could influence a community's access to justice, and their ability to 'work' the legal system. Some NGOs choose not to work with new legislation, but prefer to advocate for land rights through purely political action and strategies, as the case of the Maldhari community in Gujarat.

The second consequence of civil society's involvement in land rights has been that civil society is filling a vacuum created by poor governance, which has led to a lack of protection for marginalised communities. Civil society organizations, such as development NGOs, are a critical part of the community's ability of asserting legal rights, as they have staff who actively engage in educating the community on how to access their legal rights, as observed with Astha in Udaipur in Chapter Six. This complication highlights the inability of the government to fulfil its role of protecting its citizens. It also directly contradicts the very existence of legislation recognising land rights of forest peoples. Legislation is formulated by government bodies, which are entrusted to execute the law in collaboration with local authorities such as the *Gram Sabha*, but do so ineffectively in general. In some cases, referred to in chapters five and six in this study, failing to execute the law becomes an active discriminatory effort, which Sircar deems 'state violence.'⁵⁶⁹ Sircar points out that new laws, or more laws do not necessarily manifest in more rights or more justice, especially in the context of the evidence of laws being circumvented by the state, and state violence against marginalised minorities in the struggle for land and resource extraction. Perfect laws do not necessarily result in justice. They require that those the law seeks to protect be made aware of the law and they require mechanisms for asserting the rights granted by the legislation. The success of the FRA depends on the agencies of government implementing the law as written, which, as I have proven in the case study chapters is arbitrary. More reliable is the support of civil society in India, but civil society organisations are not ubiquitous, and they are dependent on funding that is limited in size and scale. This adds to the sporadic aspect of legal support for empowerment, which creates further uneven access to justice since NGOs are often small islands of success,⁵⁷⁰ and many indigenous communities are not afforded this support. Despite this however, there is a lot of room for hope as civil society organisations⁵⁷¹ are taking

⁵⁶⁹ Sircar, 'Spectacles of Emancipation: Reading Rights Differently in India's Legal Discourse.'

⁵⁷⁰ The NGOs I collected data from, all of which were extremely successful in their work with land rights, included Astha, Seva Mandir, SPWD (Society for Promotion of Wasteland Development), Marag, LPPS (Lokhit Pashu-Palak Sansthan), and Anthra. All in the states of Rajasthan, Gujarat and Maharashtra.

⁵⁷¹ The civil society organisations in India are strong and vibrant and have been a powerful force aligning with tribal rights in the country. I met and interviewed organisations such as Campaign for Survival and Dignity, and Kalpavriksh whose work for tribal land rights has been dynamic and influential in pushing through the Forest Rights Act. Another highly participatory forum is the CFR-LA (Community Forest Rights Learning and Advocacy Process), which is an online environmental portal, subscribed to by civil society organisations and community organisations who are also part of the forest rights movement in India.

the law further than in an instrumental capacity, and using it comprehensively through national activist platforms, in collaboration with forest peoples.⁵⁷²

7.6. Gender and Land Inheritance

One of the most marginalised minorities struggling for their land rights are indigenous women. They face a double discrimination both as a part of indigenous communities and many also within these communities. This is illustrated in the southern Rajasthani case study, where the women of the Kurka community faced patriarchal domination and were traditionally excluded from land ownership rights within the family. Women's customary responsibility of using land resources collectively however, might be eroded by the ability to claim individual land titles under the Forest Rights Act. This individual land ownership in the forests reduces customary collective land arrangements and excludes the control women have enjoyed over natural resources. Control over natural resources in the past, have been a significant contribution to women's economic independence, which in turn has had positive fallout on family stability especially for children's nutrition and health. Given the established gender division of labour in which it is usually women who collect water and firewood for cooking, the individual claims which have decreased collective forest lands, have pushed women further into the forests to look for firewood and water. This has increased their work load. The community forest rights under the Forest Rights Act addresses the gender issues on collective control of natural resources by allowing land titles in the names of both spouses or in the name of single women.

The Forest Rights Act's improvement of access to land ownership has had dichotomous consequences for women who have been empowered by the freedom gained of potential for land ownership. The insistence by civil society advocates of the axiomatic aspect of gender discrimination, rendering women more marginalised and vulnerable than men, ensured mechanisms of empowerment within the procedural aspects of the FRA, including the promise of increased and legalised representation on decision making bodies such as the *Gram Sabha* and *Gram Panchayat*, and the legal recognition and access to the collection of minor forest produce which forms a significant part of women's livelihoods. Yet on the other hand, women stand to lose control over natural resources and over activities, both domestic and economic that are customarily connected to communal property. The gender dynamics of indigenous communities, therefore are another factor that leads to inconsistent access to justice through the FRA for indigenous people. The lack of analysis of these consequences renders the administration of the

⁵⁷² In 2012, as part of the first phase of my data collection, I participated in the National Level Consultation on Forest Rights Act and Protected Areas in New Delhi; and in 2013, I had the opportunity to attend a Public Hearing on Community Forest Rights.

Act gender-blind, in which the differential impact on women and men is neglected and unacknowledged.

Moving away from the section on gender issues, the section below addresses the consequences for indigenous communities of government economic policies which prioritise profit from extractive industries over tenure security.

7.7. Capitalism and Extractive Industry

Socio-economic inequalities have dogged tribal land security since forest lands were expropriated by the state in the 1800s. The single most predatory impact on land displacement for indigenous peoples has been in the name of economic development. Free-market capitalist philosophy, as reflected in the experiences of the threat of imminent displacement by some of the tribal communities I interviewed, is an impediment to government implementation of the FRA.

The communal norms and the forest based livelihoods of indigenous peoples contrast acutely with the Indian government's choice of a capitalism which, as evidenced in this study, puts profits above the rights of indigenous peoples. The need for resource rich forest lands serves corporate goals with which the Indian government is complicit. Conservationists similarly have an agenda which conflicts with indigenous peoples' land claims. In my study, examples of state neglect, which Sircar calls "state violence,"⁵⁷³ are visible in the sugar factory that has encroached upon the grazing corridors of the Dhanger community in Maharashtra, and the struggles of the Maldharis from Gujarat who are faced with the loss of their dairy based livelihoods, since the White Revolution and the corporatization of dairy produce at Anand. No account was taken by the government of these small mobile indigenous community living on the periphery of mainstream society with differing norms oriented towards a communal system of sharing resources. These norms that have evolved over time, contradicts the individual profit and state free-market capitalism to which the sugar factory and the corporate dairy industry subscribe. The reinforcement of citizens' welfare as a lower priority than the market, compromises constitutional values and the role of courts in upholding justice.⁵⁷⁴

In Amba, the threatening stance taken by the Forest Department in its attempts to dispossess the Adivasi community from their interior forest villages, is an aggression that is allowed to be maintained by the lack of legal literacy. It is the 'lawlessness' that Anderson suggests contributes to poverty, and which is bred through state corruption, and the "unchecked abuses of political

⁵⁷³ Sircar O, 'Spectacles of Emancipation: Reading Rights Differently in India's Legal Discourse.' (2012) 49.3 Osgoode Hall Law Journal 527

⁵⁷⁴ Ibid

power”⁵⁷⁵ involved in the threat of eviction from one’s ancestral lands and source of livelihood.⁵⁷⁶ The Indian government’s commitment to the private sector’s profit intentions becomes contrary to the government’s role to protect the welfare of its most marginalised communities. This comprises neglect and abuse of the socio-economic rights of these communities.⁵⁷⁷

All these differing goals compete with the rights of forest peoples to control their own land. Since the government, corporate industry and conservationists have the power to contribute to a momentum resulting in displacing forest communities, it tilts the power balance away from indigenous peoples, leading to further marginalisation and economic and social impoverishment. The most important aspect of the Forest Rights Act is that the promise of substantive rights to claim land, changes this power imbalance in principle. The challenge lies in translating the principle of legislated rights

Since forests are resource rich, they are a prime target for extractive industry, governments and multinational corporations. These powerful actors are increasingly forming partnerships⁵⁷⁸ that covet indigenous lands, contributing to ecological imbalance, a violation of indigenous land rights, and damage to their health.⁵⁷⁹ For indigenous peoples, being able to access justice through legislation such as the FRA in order to challenge displacement from their lands is therefore vital. The government’s trading of resource rich forest lands for extractive industry, has been one of the main reasons for tribal peoples being displaced. The extraction of forest resources challenges the priorities of neoliberal development policies benefitting some at the cost of others, which undermines the human rights of the communities facing dispossession of their lands in this case. The equality of rights which are not reflected in economic development programs contradict justice for the dispossessed sections, and deny indigenous communities control of their lives. In the hierarchy of government priorities, within which economic concerns trump those of communities, the economic contribution by these communities to society is often poorly recognized. The example of the invisible contribution of pastoralists in preserving and managing the ecological balance of grazing lands, which they have done so for centuries, emphasises the point. This type of economic contribution happens over a long time period, is less visible, less recognized and not ecologically destructive. Mining, or hydroelectric plants on the other hand

⁵⁷⁵ Anderson, 'Access to justice and legal process: making legal institutions responsive to poor people in LDCs' 3

⁵⁷⁶ Ibid iii

⁵⁷⁷ Oishik Sircar, 'Spectacles of Emancipation: Reading Rights Differently in India's Legal Discourse.' (2012) 49.3 Osgoode Hall Law Journal 527 9

⁵⁷⁸ Dean B Suagee, 'Self-Determination for Indigenous Peoples at the Dawn of the Solar Age' (1991) 25 U MichJLReform 673

⁵⁷⁹ Jeremie Gilbert, 'Corporate Accountability and Indigenous Peoples: Prospects and Limitations of the US Alien Tort Claims Act' (2012) 26

may yield greater short term benefits but destroy the land and rivers and cause pollution. A lot of the financial gain goes to the economic elites and is not widely shared with the communities who inhabit these lands and who are dependent on these rivers. While this continues to happen, it undermines the spirit of the law such as the Forest Rights Act.

The scholarship engaged in this study, from which a new theoretical framework to analyse access to justice emerged, comprise four major aspects. The first aspect of judicial imperialism has been discussed above, of how the drafting and enactment of land laws had both denied and concurrently provided a framework for land rights. The second aspect has highlighted the lack of legal literacy necessary to access justice, which has been maintained by the social, economic and gender disparities.

The third aspect engages with the concept of justice based on a social contract. This development has produced norms of human rights which in turn have helped institutionalise the beliefs that people have rights that can be legally protected. The dichotomy lies in the fact that the existence of the international human rights frameworks does not necessarily protect marginalised communities who do not always have the capacities and legal literacy to access justice, and which has not caught up with the human rights which exist. This creates a potential hollowness of the human rights norms. The duty bearers of rights are governments and judiciaries. Governments and judiciaries are staffed by individuals whose moral compass controls the enforcement of human rights law. The disjunction of the dependency of human rights enforcement on potentially flawed morality which creates vulnerabilities for marginalised communities is discussed by thinkers such as Rawls, Sen and Cappelletti.⁵⁸⁰ The tenability of just laws and access to justice are directed by egalitarian and inclusive governance.

The ability of indigenous communities to access justice is reflected in the enforcement of the Forest Rights Act in India, which has many cases of injustice peppered amongst other cases of due process and justice. Lack of legal literacy is still a formidable barrier, as is the frequent administrative injustice with the fact that government officialdom is not necessarily user friendly and is at times downright abusive. The necessity for the law to be upheld clashes unhappily with the inappropriately applied policies for economic development which have repeatedly displaced indigenous peoples from their lands and continue to do so. The case studies in this research sharply illustrate this point and highlight the systemic legal and political deviations which allow the existing legal frameworks to be circumvented. The case studies also make obvious the

⁵⁸⁰ John Rawls, *A Theory of Justice* (Oxford University Press 1999); Amartya Sen, *The Idea of Justice* (Penguin 2010); Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' [1977] BLR183 203

inherent incompatibility between the human rights values of the Forest Rights Act and the free-market economic government policies. The duty of the government to enforce justice is violated by economic policies by the same government, creating a dysfunction for accessing justice, especially for communities made vulnerable by dispossessed of their lands.

7.8. Significance of Findings

My thesis is a significant multi-site research critically examining forest rights legislation, indigenous access to justice, and forest land expropriation. It builds a theoretical framework to examine the impact of the FRA on access to justice through a dual national and local-level analysis. It is one of the few studies on the Forest Rights Act from the perspective of the continuing bias in the legal history of India since colonialism, which, for example, is evident in the works of Galanter and of Cappelletti.⁵⁸¹ Galanter cites examples from the USA and Cappelletti uses many examples from European countries. My thesis adds evidence from India to substantiate the analysis of historical bias continuing to exist in the framing of contemporary laws.

My national level analysis underscores that the legal response towards any demands for justice is driven by underlying political and economic ideologies of the elected government. The local-level data from all the three states of Gujarat, Rajasthan and Maharashtra, and all the case studies in those states cited by me, clearly demonstrates these underlying ideologies are expressed at the local level through the institutions of the state. Neoliberal governmentality conflicts with the activist spirit of the Forest Rights Act. The dichotomy between the authoritarian governmentality of forests departments often obstructs the progressive rights that the forest peoples are potentially promised through the Forest Rights Act. India's neoliberal governmental policies protect and reflect the priorities of the market, abandoning the true purpose of the justice underpinning laws and the role of courts and the constitutional framework, which Sircar refers to as the "expansion of the global neoliberal economy [which] is creating a paradigm shift away from the recognition of universal human rights standards."⁵⁸² With growing populations necessitating the exploitation of natural and mineral resources, there is a global move to appropriate resource-rich land. The international imperialistic characteristics of resource expropriation is reflected in the historical framing of laws and at the national level, in the behaviours that many national governments such as India mimic, in the interface between marginalized populations and national corporate

⁵⁸¹ Marc Galanter, 'Access to Justice in A World of Expanding Social Capability' (2010) FULJ 115; Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' [1977] BLR183 197

⁵⁸² Oishik Sircar, 'Spectacles of Emancipation: Reading Rights Differently in India's Legal Discourse.' (2012) 49.3 Osgoode Hall Law Journal 527 13 & 14

interests. The economic and social conditions created by international institutions on a global scale, mirror those necessary on a micro scale within countries such as India, where there is negative evidence of benefits of any actual development trickling down to the Adivasis from Rajasthan or the mobile indigenous peoples such as the Maldharis, the Raika and the Dhanger, who are losing control over the natural resources on which they depend for their livelihoods, such as community forests. My research adds valuable evidence and detail to how the confluence of these forces are resulting in an obstruction of the justice that the FRA promises. It highlights that exploitative economic policies are continuing to impoverish forest communities in spite of land rights legislation such as the Forest Rights Act.

Important to the scholarship is the value added by this research of a specific gender analysis. The case studies illustrate the empowering effects of legislation as seen in the Kurka case, where the women began to challenge patriarchal traditions which have subverted women's rights to property ownership; the woman community leader in the nomadic Raika community in Rajasthan, championing the land rights cause; and the Maldhari women in Gujarat who traditionally enjoy a more equal role in controlling finances and the sale of their dairy products. The gendered interpretation of the data adds a crucial element to any perspective on land struggles of indigenous peoples. The three case studies on mobile indigenous peoples adds consequential data to indigenous scholarship which, in general tends to peripheralise nomadic groups, who are also overlooked by governments because people on the move are harder to govern.

The main thread running through these chapters is the extent to which indigenous peoples access justice. The main indicator I use in this thesis is how successful the Forest Rights Act has been in determining access to justice. The definition of Access to justice in Chapter Two of the Literature Review, incorporated the 'just' and 'equitable' aspects of legal and judicial outcomes.⁵⁸³ I point out in this thesis, that the law and justice are not synonymous though justice creates a foundation for the law. It is assumed that forest rights are conceded with the enforcement of the Forest Rights Act. I have demonstrated, however, that in the case of tribal India, the effectiveness of the government, the roles that the courts and lawyers are not always functional in protecting the rights of citizens and does not necessarily lead to equitable outcomes. This proves that justice is not always accessible. Rawls associates justice with an ability to trust that the procedures will work within a morality and that justice will deliver 'fairness'.⁵⁸⁴ I conclude that for tribal communities in India, who are already socially and economically marginalised, inequality

⁵⁸³ UNDP, *Access to Justice Practice Note* (2004) UN

⁵⁸⁴ John Rawls, *A Theory of Justice* (Oxford University Press 1999) 3

strongly influences their ability to work the judicial system to their advantage, especially when competing with financially comfortable corporate interests. In spite of the progressively articulated Forest Rights Act, being able to claim land rights remains a difficult process for indigenous peoples.

The Forest Rights Act in India is shaped by constructive and beneficial substantive rights. The substantive rights within the Act are clear and progressive and have been game changing for indigenous peoples in India. These rights have revolutionized the potential to claim land rights, whether customary or ancestral, which is a great achievement for the tribal and forest communities, and for civil society organisations that advocated fiercely for these rights in collaboration with forest peoples. Whether the procedural rights are similarly sound can be refuted. Separate to the framing of the procedural rights is the execution of the provisions. This is where the biggest impediments emerge. These impediments framed in this study within the concept of administrative justice and the role of the state. I find that the five factors dictate the extent that administrative justice is delivered and access to justice realised by indigenous communities. These are: the historical context of forestry laws and legal literacy of indigenous people; FRA implementation and administrative justice; civil society support; gender and land inheritance; and the effect of neoliberalism and extractive industry.

To conclude, in order for these rights to materialise, these five factors must be understood and examined. As evidenced in this study, we still have a long way to go before that can be achieved, especially because many of these factors are the results of entrenched inequalities and the results of free-market capitalist economic and political forces which sit uneasily with human rights but remain unchallenged. The picture that emerges therefore is often unequal and unbalanced.

Any new legislation, in this case, the Forest Rights Act goes through several steps before it can be employed to access justice: A protracted advocacy campaign, which, for the FRA, was launched by both the forest communities and civil society; an acceptance by the government of the concept of these particular legal entitlements and the ensuing process of drafting, followed by the enactment; and then the administering of the law. The missing element in the instance of the Forest Rights Act was the preparation by the government of its staff who were entrusted with administering the legislation. Despite this it is important to acknowledge that the existence of progressive substantive rights is a huge step forward as a channel for the community to secure legal redress for land violations, and has to be protected by honing and strengthening these factors, in particular administrative justice which is so vital for the success of the Forest Rights Legislation. The framework I have advanced in this research provides a holistic and nuanced understanding of how diverse groups of marginalised indigenous communities around India, are

able to utilize the progressive legislation such as the Forest Rights Act in their fight to claim land rights. As I have pointed out earlier in this research, access to justice is a means to an end. The end in this debate is indigenous empowerment, right to ancestral forest lands, and the control of forest governance.

Appendices

Appendix 1 Framework for Primary Data for Field Work⁵⁸⁵

Legal knowledge/legal literacy:

- a. Does the community know of the existence of the law?
- b. Do they understand the provisions?
- c. Do they understand their rights?
- d. Do they know how to go about claiming their land rights, and how to use the courts to make a claim?
- e. Do they know how to protect their land from continuing expropriation?
- f. Literacy rate? (Gender connotation here as women are generally less educated than men and girls are pulled out of formal education earlier than boys.
- g. Language discrepancy between law and local spoken languages (NGOs have to translate the law into Hindi - Astha)
- h. Government. (Forest Department) does not fulfil responsibility to make communities aware of their rights, nor its FPIC⁵⁸⁶ obligation.⁵⁸⁷ why is this? The FD officials themselves are not well informed. They don't know their remit.
- i. Traditional discrimination against tribal communities leads to an apathy, disinterest. When forests were converted to 'sovereign territory' by the British Crown for use as revenue lands, British colonial laws labelled many forest tribal communities as 'notified tribes'. They were regarded and treated as criminals who had to check into police stations to register periodically. This created a stigma that continues to be attached to these communities by the Indian government, who at times openly resent that the indigenous peoples through the *Gram Sabhas*⁵⁸⁸ have decision making rights over the lands.

2. Advice and representation:

- Free legal advice and representation?
- What mechanisms exist?
- Trained paralegal?
- Does the government assume responsibility to provide legal services to communities who cannot afford it?
- Availability of government funded legal aid and grants, loans?
- Availability of pro-bono assistance?
- Availability of CSOs who supply legal literacy/services?
- Availability of Law school clinics make law students available for free legal advice or services and representation?
- Availability of Mobile legal clinics?

⁵⁸⁵ Rule of Law Initiative American Bar Association, *Access to Justice Assessment Tool* (American Bar Association, Rule of Law Initiative, 2012) 16

⁵⁸⁶ FPIC – free and prior informed consent.

⁵⁸⁷ Government of India, *The Forest Rights Act* (6th of September, 2012 edn, Government of India Controller of Publications 2012) Chapter III 4.2 (1) (e)

⁵⁸⁸ 'Gram Sabha' means a village assembly, which shall consist of all adult members of a village and in case of States having no *Panchayats, Padas, Tolas* and other traditional village institutions and elected village committees, with full and unrestricted participation of women;" Ch. 1, Article 2 (g) *ibid*

- Affordability?
 - Problems
 - Can these legal services reach remote communities?
 - Free legal aid is often not available
 - Do lawyers facilitate the building of trust of communities?

3. Access to a Justice Institution:

- Can people travel to justice institution/court – is there public transport?
- Can they afford the travel?
- Can they afford legal fees?
- Can they afford the time off from work to attend hearings?
- “The more difficult it is for a citizen to travel to a justice institution, the less likely it is that the citizen will think it is worth using the justice institution to resolve their justice problems.”⁵⁸⁹
- Does the supply of legal services and courts and representation match the demand? Capacity.
- Is the region politically stable? If not, it would affect the accessibility of people to justice
- If they were treated in a discriminatory manner, it would inhibit their use of legal facilities.
- If women don’t feel safe using the legal facilities, it would inhibit their use of legal facilities. In India, police brutality is a problem, and police are known to molest women who try to lodge a complaint of sexual violence. Can the state provide protection when these instances arise?
- Mobile courts?
- Civic education so people know their rights. Legal literacy education.

4. Fair Procedure:

- Does the justice system process cases in a timely manner?
- Do communities/individuals have an opportunity to present their case?⁵⁹⁰
- Language issues? Are the justice proceedings taking place in the local language?
- Does the government provide protection for people who bring their grievances to courts? Protection against reprisals?
- Impartial resolutions? Courts are staffed by educated and political elite. They might have a conflict of interest and a partnership with the corporate world.
- Corruption?
- Can the laws guarantee independence? “The law requires the executive, legislature, public authorities, and private interests to respect and abide by a justice institution’s decisions, even if they do not agree with them.”⁵⁹¹
- “Adjudicators/mediators are appointed (and re-appointed) on merit, according to publicised, objective and clear criteria, and through as non-politicised a process as possible.”⁵⁹²

⁵⁸⁹ Rule of Law Initiative American Bar Association, *Access to Justice Assessment Tool* (American Bar Association, Rule of Law Initiative, 2012) 22 d

⁵⁹⁰ Ibid 30

⁵⁹¹ Ibid 32

⁵⁹² Ibid 32

- Is there an independent and strong oversight government or civil society mechanism, such as human rights commissions or ombudsmen⁵⁹³
- Impartial?
- If one party in a court case has more resources than another, this will create an imbalance and be conducive to negative pressure on the other party.
- If there is a mediator, they should check for the possible use of coercion and intervene.

5. Enforceable Solution:

- Are sanctions available for non-compliance, either coercive force or social sanctions?⁵⁹⁴
- Corruption within law enforcement agencies who might be vulnerable to bribes. In this case the oversight mechanism needs to kick in.
- “Power dynamics within society can affect enforcement through social sanction. Parties with standing and influence are likely to be able to resist community pressure to comply with the justice institution’s ruling. Citizens from marginalised groups are unlikely to be able to exert pressure to comply with judgements in their favour.”⁵⁹⁵

⁵⁹³ Ibid 33

⁵⁹⁴ Ibid 38

⁵⁹⁵ Ibid 39

Appendix 2

Secondary Research Questions Used for Field Work

1. What experiences and events either increased or impeded social justice?
2. What forms did forest governance and ‘governmentality’ (implementation and governance) take?
3. What was the community’s concept of eminent domain: ‘to whom does this land belong?’
4. How did they perceive their historical transition from ancestral owners of forest lands, to ‘encroachers’ in the eyes of the government, to land-owning rights bestowed in principle by the Forest Rights Act?
5. How did the transition from colonial economy to independent and sustainable economies unfold?
6. What aspects of community life indicates increasing gender empowerment (women’s struggle against petty administrators)?
7. How does civil society prioritise this?
8. How sustainable are present livelihoods? (tendu patta co-ops; minor forest produce; pukka homes;)
9. What forces contribute to legally empowering communities, and what form does this take?
10. Social and economic consequences of displacement? Building legal capacity for Adivasis?
11. The role of civil society in social legislation (tensions between civil society strengthening and mainstream and middle-class society (CSOs) biases which drive change?
12. Drivers of change vs barriers

Glossary

Aadhikar Samiti: (Forest Rights Committee - FRC) which is a requirement of the Forest Rights Act, as the *Samiti* formally requests the people to make the claim. Forest Rights Committees are formed by the *Gram Sabha* to assist it in processing forest right claims, as instructed in the Forest Rights Act.

Ana – Jiana: The custom in the Maldhari community for women after marriage, to go back and forth from her own family to the marital home on visits. This is called “*Ana.*” The final return to the marital home, which is called “*Jiana*”, occurs six months after the birth of the first baby. During the *Jiana*, the woman brings back livestock given formally to her by her relatives, which are her own assets.

Banti: Ancient edible grains

BDO: Block Development office

Bidis: Indian hand rolled cigarettes

Bigha: A *bigha* is a local unit of land measurement in square meters in India, which varies considerably, but in Rajasthan it is roughly 2,500 square meters.

Bij: Usage in the Maldhari community to denote the free distribution of milk to community members. The cultural traditions called ‘*bij*’ required the free distribution of milk to neighbours at least two days in a month. This milk is not allowed to be sold for money by convention.

Chinkara: Indian gazelle

Chook: Is a part of the village where the domestic herds assemble before taken out to pasture.

Dhani: Colony

Districts: Districts are subdivided into tehsils, areas that contain from two hundred to six hundred villages

DLC: District Level Committee

Dupatta: A veil worn around the shoulders by women, or thrown over their heads, and in some parts of western India such as Rajasthan and Gujarat, states where women respond to a more patriarchal convention than their sisters in many other Indian states, use to veil their faces.

Forest coupes: A compact area in which trees are marked for sale by auction or tender to be removed within a specified period.

Fud: Collection depot

Gaghra: Long, brightly coloured, ankle length skirts

Gairann: Local name for fields such as *gauchar* land

Gauchar: Communal pasture lands used for grazing domestic animal herds. Every village had an open green for this purpose.

Ghar patti: House tax

Godown: Warehouse

Gram Sabha: Local village decision making councils comprising all adult women and men in a village. They are permanent bodies and cannot be dissolved.

Gram: Village

Gungat: A veil used by Hindu women in Rajasthan and Gujarat, used to cover the head and eyes and sometimes the whole face, using the end of the sari. It is used in the same manner as the purdah is used by Muslim women. In India, the purdah is part of the practice of female seclusion from public observation or from the sight of men and strangers.

JFM: Joint Forest Management

Kachcha house: A 'rough', unrefined house usually built of a mixture of mud and wood and thatch. The opposite of this is the usage of 'pukka'

Kodra: Ancient edible grains

Kulak: Land record

MFP: Minor forest produce

MoEF: Ministry of Environment and Forests

MoTA: Ministry of Tribal Affairs

Munshi: Hindi word used to describe an actuary, accountant, clerk or secretary

Najari Naksha: Formal survey of village boundaries

Najriyar Naksar: Visual map which the Forest Department has to provide for the process of claiming land

Nistar: 'Nistar' is the name for the concession that forest peoples are granted for the removal of forest produce from forest coupes for domestic use. They are not allowed to barter or sell this produce. The forest department fixes the rates for the distribution of forest produce which they call *Nistar* rates, which are not supposed to exceed 50% of market rates. Forest produce distributed at *Nistar* rates for example include bamboo, certain types of timber, timber poles, and firewood

Operation Flood/ White Revolution: Refers to the highly successful dairy cooperation movement in Anand, Gujarat begun in 1970, which created a National Milk Grid connecting milk producers and consumers throughout the county, "reducing seasonal and regional price variations while ensuring that the producer gets fair market prices in a transparent manner on a regular basis." Begun as a rural development initiative to create jobs and income for rural communities, it considered a major economic success for India's rural milk producers, and for facilitating easy access for the purchase of dairy products for the consumer, with more than 70,000 dairy cooperatives in the country by the late 1980s.

Pad yatras: Foot pilgrimages

Panchayat Samiti: The *Panchayat Samiti* is the *tehsil* or *taluka* or block level of a rural local self-government system in India. They form the middle level of the *Panchayati Raj* Institutions in India. It acts as a link between Village Panchayats (*Gram Panchayats*) and *Zila Parishad* (District council).

Panchayat: Council

Panchnama: Claimants in the Forest Rights Act

Pattas: A title deed to a property

Patwari: The village accountant in Rajasthan, (the village accountant is known by other names such as *Talati*, *Patel*, *Karnam*, *Adhikari*, *Kulkarni*, *Shanbogaru*, depending on the state in India).

Prepatra: Forms used in the Forest Rights Act to process a land claim

PTG: Primitive Tribal Group

Pukka house: A sturdy house built of concrete and brick.

Rao: Scribes

Revenue land: Government terminology for economically beneficial land in rural India, as opposed to “Wasteland” which was unproductive.

Sarpanch: An elected head of the gram panchayat, which is the governing body at the village level in India.

SDLC: Sub-divisional level committee

ST: Schedule Tribe

TDF: Tribal Development Forum

Tendu patta: Leaf picked from *Tendu* trees and used to roll bidis for smoking tobacco

Terra nullius: Vacant or empty lands

Van Khands: Forest blocks

Van: Forest

Wasteland: A term used by the government to denote barren and unused land.

Zila Parishad: District council

Zilla Parishads: District Panchayats or councils

References

- Abrell E and others, *Bio-Cultural Community Protocols. A Community Approach to Ensuring the Integrity of Environmental Law and Policy* (United Nations Environment Programme (UNEP) and Natural Justice, 2009)
- Alcorn J, 'Indigenous Peoples and Conservation' (1993) 7 *Conservation Biology*
- American Bar Association RoLI, *Access to Justice Assessment Tool* (American Bar Association, Rule of Law Initiative, 2012)
- Anaya JS, *Indigenous Peoples in International Law* (OUP 2004)
- Anderson M, R, 'Access to justice and legal process: making legal institutions responsive to poor people in LDCs' (2003) 178 *IDS Working Paper* 178
- Astha, *Astha Women's Land Rights Report*)
- ASTHA, *Forest Rights Story* (Unpublished, 2008)
- Baxi U, 'Taking Suffering Seriously: social Action Litigation in the Supreme Court of India' (1985) *Third World Legal Studies* 107
- Baxi U, 'Postcolonial Legality' in Ray HSaS (ed) *A Companion to postcolonial Studies*, vol 2 (A Companion to postcolonial Studies, Blackwell Publishing 2000)
- Bhengra R, Bijoy CR and Luithui S, *Report on The Adivasis of India*, 1999)
- Bhullar L, 'The Indian Forest Rights Act 2006: A Critical Appraisal' (2008) 4 *Law, Environment and Development Journal (LEAD)*
- Bose P, Arts B and van Dijk H, 'Forest governmentality': A genealogy of subject-making of forest-dependent 'scheduled tribes' in India' (2012) 1 *Land Use Policy* 664
- Bureau PI, *Identification of 15 Minor Forest Produce for Minimum Support Price* (Government of India Ministry of Tribal Affairs 2015)
- Campaign for Survival and Dignity, *What is the Forest Rights Act about?* (<http://www.foresightsact.com/index.php>, 2013) Campaign for Dignity and Survival, State of Implementation of the Forest Rights Act - Summary Report (2013)
- Chadana BS and others, *Status of Adivasis/Indigenous Peoples Land Series – 8 Rajasthan*, 2014)
- Chandra B, Mukherjee M and Mukherjee A, *India since Independence* (Penguin Books 2008)
- Chatterjee P, *The Politics of the Governed: Reflections on Popular Politics in Most of the World* (Columbia University Press 2004)
- Chatty D, 'Mobile peoples and conservation.' (2002) Vol 18 *Anthropology Today*
- Chatty D, *Workshop report, Dana Declaration +10, 11-13 April 2012, Wadi Dana, Jordan.* (Refugee Studies Centre, Oxford Department of International Development, University of Oxford 2012)
- Chimni BS, 'International Institutions Today: An Imperial Global State in the Making' (2004) 30 *EJIL*

- Committee DS, *Dana Declaration on Mobile Peoples and Conservation* (2002)
- Dash T, 'Redefining Biodiversity Conservation in India' Policy Matters
- Dash T and Khotari A, 'Grabbing: Dangers of the Green India Mission' in Kohli K and Menon M (eds), *Banking on Forests: Assets for a Climate Cure?* (Banking on Forests: Assets for a Climate Cure?, Kalpavriksh and Henrich Boll Stiftung 2012)
- Dash T and Khotari A, 'Forest Rights and Conservation in India' in Harry Jonas, Suneetha M. Subramanian (ed) *Right to Responsibility: Resisting and Engaging Development, Conservation, and the Law in Asia* (Right to Responsibility: Resisting and Engaging Development, Conservation, and the Law in Asia, Natural Justice and UNU-IAS Institute of Advanced Studies 2013)
- Desai M, *Subaltern Movements in India; Gendered Geographies of Struggle Against Neoliberal Development* (Routledge 2015)
- Dworkin R, *Justice for Hedgehogs* (Belknap Press for Harvard University Press 2011)
- Gadgil M, "Conserving Biodiversity as If People Matter: A Case Study from India" 'Ambio - Economics of Biodiversity Loss
- Gadgil M and Guha R, *This Fissured Land: An Ecological History of India* (Oxford University Press 1992)
- Galanter M, 'The Displacement of Traditional Law in Modern India' (1968) 14 Journal of Social Issues
- Galanter M, 'Making law work for the oppressed' (1983) III The Other Side 7
- Galanter M, ' Access To Justice In A World Of Expanding Social Capability (2010) Fordham Urban Law Journal'
- Galligan D and Sandler D, 'Implementing Human Rights' in Halliday S and Schmidt P (eds), *Human Rights Brought Home Socio-Legal Perspectives on human rights in the National Context* vol 3 (Human Rights Brought Home Socio-Legal Perspectives on human rights in the National Context Hart Publishing 2004)
- Gauri V and Brinks DM, *Courting Social Justice* (Cambridge University Press 2008)
- Gauri V and Gloppen S, 'Human Rights-Based Approaches to Development: Concepts, Evidence and Policy' (2012) 44 Polity
- Gilbert J, *Indigenous peoples' land rights under international law : from victims to actors* (Transnational Publishers 2006)
- Gilbert J, 'Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples' (2007) 14 International Journal on Minority and Group Rights 207
- Gilbert J, 'Nomadic Territories: A Human Rights Approach to Nomadic People's Land Rights' (2007) Human Rights Law Review 681
- Gilbert J, 'Land Rights and Nomadic Peoples: Using International Law at the Local Level' (2012) 16 Nomadic Peoples 78

Gilbert J, 'Land Rights as Human Rights: The Case for a Specific Right to Land' (2013) 10 *sur international journal on human rights* 115

Gilbert J and Doyle C, 'A New Dawn over the land: Shedding Light on collective Ownership and Consent' in Allen S and Xanthaki A (eds), *Reflections on the UN Declaration on the rights of indigenous peoples*, vol 12 (Reflections on the UN Declaration on the rights of indigenous peoples, Hart Publishing 2011)

Government of India, *Report of Working Group on Empowerment of Scheduled Tribes for the 11th five year plan* (Government of India 2007)

Government of India, *Ministry of Tribal Affairs Annual Report 2012-2011, 2010-2011*)

Gujarat D, 'Gauchar land not to be allotted to industries: ' *Desh Gujarat* (Ahmedabad <<http://deshgujarat.com/2012/04/22/no-gauchar-land-allotment-for-industry-commercial-activity-gujarat-govt-coming-up-with-a-new-policy-on-pasture-land/> - print> accessed 24/3/16

Holtmaat R and Tobler C, 'Cedaw and the European Union's Policy in the Field of Combating Gender Discrimination' (2005) 4 *Maastricht J Eur & Comp L* 399

<http://www.indiantribalheritage.org/>, 'The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 ' (*Tribal Cultural Heritage in India Foundation*, 2013) accessed 26.2.2013

ILO, *ILO Convention on Indigenous and Tribal Peoples 1989 (No. 169) A Manual* (Project to Promote ILO Policy on Indigenous and Tribal Peoples, 2003)

Impe A-M, *A Convention to Fight Discrimination* (Union view, 2011)

India Go, *The Forest Rights Act* (Government of India Controller of Publications 2012)

India Go, 'Ministry of Tribal Affairs' (*NIC/NICSI*, 2012) <<http://tribal.nic.in/>> accessed 2 Feb

Indian Tribal Heritage, 'The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 Reports & Articles ' (2013) 2013

Jonas H and others, *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas conserved by Indigenous Peoples and Local Communities* (Natural Justice in Bangalore and Kalpavriksh in Pune and Delhi, 2012)

Karant KK and Defries R, 'Conservation and management in human-dominated landscapes: case studies from India' *Biological Conservation*

Katewa SS and others, 'Traditional uses of plant biodiversity from Aravalli hills of Rajasthan' (2002) 2 *Indian Journal of Traditional Knowledge*

Kohler Rollefson I and Rathore SH, 'Participatory Approaches to Using the Camel in Combating Desertification' in Faye and Esenov (eds), *Desertification Combat And Food Safety: The Added Value Of Camel Producers* (Desertification Combat And Food Safety: The Added Value Of Camel Producers, IOS Press 2005)

Myers M, 'Qualitative research in information systems ' (1997) 21 *Management Information Systems Quarterly*

- Nations U, *UN Subcommission on Prevention of Discrimination and Protection of Minorities, Study of the Problem of Discrimination against Indigenous Populations*, (1986)
- Nations U, *Convention on the Rights of the Child* (UNICEF 1990)
- Nations U, *United Nations Declaration on the Rights of Indigenous Peoples* (United Nations 2007) United Nations Declaration on the Rights of Indigenous Peoples
- OHCHR, *International Convention on the Elimination of All Forms of Racial Discrimination 1965* (UNOHCHR 1965)
- Oxford Dictionaries, *OxfordDictionaries.com* (Oxford University Press 2013)
- Pathak N, *Community Conserved Areas in India: A Directory* (Kalpavriksh 2009)
- Perry R, 'Balancing Rights or Building Rights - Reconciling the Right to Use Customary Systems of Law with Competing Human Rights in Pursuit of Indigenous Sovereignty' (2011) 24 *Harvard Human Rights* 71
- Raika B and Kasela H, *Raika Camel Herders, Rajasthan* (2012)
- Ramin J, *For Forest Land and A Way of Life: The Story of the Adivasis' Struggle in Southern Rajasthan* (Astha Sansthan 2007)
- Ramnath M, 'Surviving the Forest Rights Act: Between Scylla and Charybdis' (2008) 43 *Economic and Political Weekly* 37
- Rathod HS, *Raika Camel Herders of Sadri, Rajasthan* (2012)
- Rawls J, *A Theory of Justice* (Oxford University Press 1999)
- Sambhav KS, *Centre set to dilute tribal rights over forestland* (Down to Earth Magazine 2012)
- Sansthan A, *Astha: A Field Based Resource Organization. Annual Report 2007-2008*, 2007-2008)
- Saravanan V, 'Political Economy of the Recognition of Forest Rights Act 2006: Conflict between the Environment and Tribal Development' (2009) 29 *South Asia Research* 199
- Sarin M, 'Lessons for Govt of India from Australia on respecting the relationship of adivasis to their territories: 'GDP growth' at any socio-economic and cultural costs is a short sighted policy' *The Hindu* (India Opinion/Editorial <<http://www.thehindu.com/opinion/editorial/land-lessons-from-australia/article4488891.ece>>
- Sarin M and Springate-Baginski O, 'India Forest Rights Act - The anatomy of a necessary but not sufficient institutional reform' in Papers ID (ed) *Research Programme Consortium for Improving Institutions for Pro-Poor Growth* (Research Programme Consortium for Improving Institutions for Pro-Poor Growth, IDPM School of Environment and Development University of Manchester 2010)
- Sigamany I, 'Destroying a Way of Life: Indigenous Peoples, The Forest Rights Act of India and Land Displacement of Indigenous Peoples' in Satiroglu I and N C (eds), *Development-induced Displacement and Resettlement: New Perspectives on persisting problems* (Development-induced Displacement and Resettlement: New Perspectives on persisting problems, Routledge 2015)

- Sigamany I, 'Land Rights and Neoliberalism: an Irreconcilable Conflict for Indigenous Peoples in India?' (2016) International Journal of Law in Context, Cambridge University Press
- Simmons B, *Mobilizing for Human Rights: International Law in Domestic Policy* (Cambridge University Press 2009)
- Singh N, *Legal Rights of the Poor: Foundations of Inclusive and Sustainable Prosperity* (AuthorHouse 2014)
- Sircar O, 'Spectacles of Emancipation: Reading Rights Differently in India's Legal Discourse.' (2012) 49.3 Osgoode Hall Law Journal 527
- Springate-Baginski O and others, 'The Indian Forest Rights Act 2006: Commoning Enclosures' Overseas Development Group, University of East Anglia
<http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/1269/Springate-Baginski_233001.pdf?sequence=1>
- Srivastava A, *History of India (1000 A.D.- 1007 A.D.)* (1971) Shiva Lal Agarwala
- Stanley OD, '“Wetland Ecosystems And Coastal Habitat Diversity In Gujarat, India”. ' (2004) VII Journal of Coastal Development, 49
- Staudt K, 'The Feminization of Poverty: Global Perspectives' (1998) 5 The Brown Journal of World Affairs 215
- Suagee DB, 'Self-Determination for Indigenous Peoples at the Dawn of the Solar Age' (1991) 25 U MichJLReform
- TRRU, *Tribal Women's Rights On Land And Other Natural Resources: Southern Rajasthan*, 2012)
- Tugendhat H and Dictaan-Bang-oa E, *Realizing Indigenous Women's Rights : A Handbook on the CEDAW* (Tebtebba Foundation, Forest Peoples Programme, Asia Indigenous Women's Network (AIWN), 2013)
- United Kingdom Administrative Justice Institute, *What is administrative justice? AA discussion paper* (Nuffield Foundation Series 2015)
- Ulfstein, Geir *Indigenous Peoples' Right to Land*, in Armin von Bogdandy, Rüdiger Wolfrum (eds.) (2004) Max Planck UNYB Vol 8 (2004)2 Kluwer Academic Publishers
- UN, *The International Bill of Human Rights* (UN 1996)
- UNDP, *Access to Justice Practice Note* 2004)
- United Nations, *Universal Declaration of Human Rights* (UNGA 1948)
- Wani M, *Nought Without Cause* (Global Forest Coalition Kalpavriksh Vasundhara 2008)
- Wilkinson R and Pickett K, *The Spirit Level: Why Greater Equality Makes Societies Stronger* (Bloomsbury Press 2011)
- Wilshusen PR and others, 'Reinventing a Square Wheel Critique of a Resurgent "Protection Paradigm" in International Biodiversity Conservation' (2011) 15 International Biodiversity Conservation, Society & Natural Resources: An International Journal

Xanthaki A, 'Indigenous Rights in International Law over the Last 10 Years and Future Developments' (2009) 10 Melbourne Journal of International Law 27

Xaxa V, 'Women and Gender in the Study of Tribes in India' (2004) 11 Indian Journal of Gender Studies 345