

**EXAMINING VIOLATION OF ADIVASI LAND  
RIGHTS BY THE MINING INDUSTRY – A CASE  
FOR CROSSING THE FENCE FROM  
ANTHROPOCENTRIC TO ECOCENTRIC  
PARADIGMS**

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*Abstract*

*The adivasis of India today constitute a community marginalised by decades of historical injustice. The forests they traditionally occupy are regarded merely as natural endowments, valuable only for resource extraction. The adivasis residing in these forests - located in the mineral rich states of Jharkhand, Orissa, Chattisgarh and Madhya Pradesh have thus had to face maximum victimization at the hands of a tyrannical development agenda. This paper argues that the eventual outcome of adherence to the anthropocentric legislations enacted for the upliftment of adivasis is ecocentric in nature. While legislations such as the Scheduled Tribes And Other*

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*Traditional Forest Dwellers (Recognition Of Forest Rights) Act, 2006, Right To Fair Compensation And Transparency In Land Acquisition, Rehabilitation And Resettlement Act, 2013 and the Panchayat (Extension To Scheduled Areas) Act 1996 formalize inter alia the adivasis' right to free, prior and informed consent and usage of forest resources, this paper seeks to demonstrate the brazen disdain exhibited by the State and the mining lobby towards the aforementioned laws. Contextualising the said non-compliance with the law, Part I of this paper examines the historical injustice faced by the adivasis, and subsequently elucidates the manner in which adivasis construct their identity around their land. Part II then examines the existent legal framework on adivasi rights. It goes on to note a trend, wherein the legal regime, is largely anthropocentric in nature. Basing itself on such finding, Part III of this paper demonstrates the chasm (and not a mere gap) that exists between precept and practice, and connects this non-compliance to the erosion of the adivasi cultural identity. Part IV puts forth that while the said legislations are underscored by anthropocentric ideologies, if complied with, they translate into a realm of environmental protection, that is, a robust ecocentric paradigm.*

## I. INTRODUCTION

Debating on the Objective Resolution<sup>1</sup> on 13th December, 1946, Jaipal Singh, an adivasi, proclaimed that despite the history of the adivasi community being ‘one of continuous exploitation and dispossession by the non-aboriginals of India’, he was taking the members of the Constituent Assembly at their word that the nation would work towards a just and equitable society, bereft of marginalisation of the adivasis.<sup>2</sup> The Objective Resolution envisaged a new chapter in the advent of the nascent Indian democracy, based on ideals of equality, non-discrimination and justice. Seventy years later, the treatment meted out to the adivasis of India- the aboriginal population, is a far cry from the aforementioned spirit visualized by the framers of our Constitution. The scope of this paper is however limited to the rights of the tribes of Central India (Jharkhand, Orissa, Madhya Pradesh and Chattisgarh) That the North-Eastern tribes (tribes with greater a literacy rate and awareness of their rights) are located in a remote corner of India, has dissuaded the mining industry from establishing large-scale operations in the land occupied by them.<sup>3</sup>

Victims of a discriminatory development model<sup>4</sup>, the adivasi population has failed to both preserve their cultural identity as well as successfully integrate into the modern economy and polity. Identifying this predicament, and the centrality of forests and forest land to adivasi identity, adivasi rights centric legislations such as the Panchayat (Extension to Scheduled Areas) Act and the Forest Rights

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<sup>1</sup>A part of the Resolution stated that ‘adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes.’

<sup>2</sup>Constituent Assembly Debates, Volume 1, 143-44.

<sup>3</sup>Ramachandra Guha, Adivasis, Naxalites and Indian Democracy, 42 EPW 32, 3307 (2007).

<sup>4</sup>Id.

Act were enacted to undo the historical injustice meted out to the adivasis. The judiciary has continually reiterated the necessity of such adivasi right-centric legislations<sup>5</sup> as a mechanism towards achieving an inclusive development model, where the rights of adivasis are sought to be balanced with development requirements. The implementation of these statutes has however been dismal. Both the adivasis as well as the environment at large have emerged as victims of poor implementation.<sup>6</sup> While the benefits of land acquisition (the ‘environmental goods’) flow to the companies, the tribal population is burdened with pollution brought on by the industrial activities on such land (the ‘environmental bads’—increase in carbon dioxide, loss of biodiversity). The distribution of environmental cost and benefit is uneven and inequitable.<sup>7</sup>

This paper demonstrates the effect of the impact of land acquisition by the mining industry on the adivasis’ rights to free, prior and informed consent, usage rights, mineral-ownership rights and their right to life under Article 21 of the Constitution. With this backdrop, this paper highlights the importance of adherence to the legal framework on land acquisition vis-à-vis adivasi rights. Compliance not only ensures preservation of the adivasi cultural identity and safeguarding of their rights, but also consequently grants recognition to the environment as a distinct entity and accords it with deserved protection.<sup>8</sup> In doing so, this paper asserts that legal structures influenced by ecocentrism (an approach ascribing rights to the environment) facilitate the attaining of environmental justice, rather than an anthropocentrism (an approach centred around human rights).

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<sup>5</sup>Alakananda Hydro Power Company Ltd. v. Anuj Joshi and ors, 2013(3) EFLT 765.

<sup>6</sup>Kanchi Kohli et al., Implementing the Forest Rights Act: Lack of Political Will?, OXFAM INDIA (Nov. 15, 2015), <https://www.oxfamindia.org/sites/default/files/PB-implementing-forest-rights-act-lack-of-political-will-261115-en.pdf>.

<sup>7</sup>Michael Mayerfeld Bell, An Invitation To Environmental Sociology 24-25 (2012).

<sup>8</sup>This would necessarily require a transition into an ecocentric arena.

## PART I

### Perpetuating Historical Injustice: Tracing The Adivasi Predicament From Colonial To Contemporary Times

The development imperative of the State has brought to the fore concerns of entities that have been systematically excluded from reaping the benefits of such development. Not only are their legitimate interests disregarded, but also severely impaired. The most prominent of these entities includes the ecosystem – responsible for harbouring life, as well as the adivasis.<sup>9</sup> With relentless consumerism leading to deterioration and pollution of forests, water bodies as well the air, the welfare of the vulnerable, voiceless adivasi community has emerged as the defenceless victim.

The historical disadvantage and injustice that the adivasi community in India has been faced with is immense, and almost irreversible. The ease with which the industrial and political lobby could acquire (often, forcibly) land inhabited by the adivasis is largely attributable to the specific dynamics of the adivasi economy, and their ingenuous modes of living.<sup>10</sup>

The fact that today a majority of the adivasis reside in forests and hills is not an overnight phenomenon, but is the culmination of a protracted process of internal colonialism. The demographic character prevalent in the adivasi belt of India is marked by a combination of minority status along with high population density. Clusters of adivasi villages often find themselves encircled by swathes of non-adivasi in the adjoining areas. This ‘enclavement’ is largely a consequence of a historical conflict between the adivasis and the technologically and

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<sup>9</sup>Amulya Gopalkrishnan, *The Fear in the Forests*, 20 FRONTLINE 19 (2003).

<sup>10</sup>Shankar Chatterjee, *Land and the Adivasi*, 47 EPW 33, 4 (2012).

militarily superior mainstream community which resulted in the oppression of the former. Spanning hundreds of years, the adivasis have been gradually driven into 'refuge zones' (jungles and hills) thus providing the industrialists, backed by the State with the 'objective basis for resource emasculation of adivasi areas through a process of internal colonialism'.<sup>11</sup>

The plight of the adivasis, exacerbated by years of calculated policies of the State has been continually highlighted by a number of Government appointed committees. The Elwin Committee in 1959 concluded that the poverty that was so ubiquitous amongst the adivasis was 'the fault of us, the 'civilised' people. We have driven (the tribals) into the hills because we wanted their land and now we blame them for cultivating it in the only way we left to them'.<sup>12</sup>

Later, the Dhebar Committee in 1960-61 observed that amongst the myriad problems being faced by the adivasis of India, alienation of land, rejection of forest rights as well as development-induced displacement were the forerunners. While the policies of the Government had occasionally alleviated the suffering of the adivasis, in a majority of situations, such policies had only exacerbated their hardship. The Five Year Plans for example contributed to widespread displacement of the adivasis.<sup>13</sup> Such development had the potential to shake the very foundations of tribal life. On the question of forest rights, the Dhebar Committee identified that in India, the status of the adivasi, once the lord of the forest, had now reduced to that of a mere subject of the forest administration.<sup>14</sup> Whenever an industrial activity or even a rehabilitation project is contemplated, every forest law and

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<sup>11</sup>Mihir Shah, First You Push Them in, Then You Throw Them Out, 40 EPW 47, 4896 (2005) [hereinafter MIHIR SHAH].

<sup>12</sup>Ministry Of Home Affairs, Report Of The Committee On Special Multipurpose Tribal Blocks, 20 (1960).

<sup>13</sup>Ministry Of Home Affairs, Report Of The Schedules Areas And The Scheduled Tribes, Vol. II, (1961).

<sup>14</sup>Id.

rule seems to fade into obscurity.<sup>15</sup> Acres of forest land, along with their tribal inhabitants are ruthlessly exploited, often without any apparent exigency. The observations of these Committees are what provided the cornerstone for the formulation of an ecocentric model of development where conservation of the environment circumscribes within itself protection of tribal rights.

Ironically, it is the restrictive legal system that has perpetuated the social relegation of the adivasis and their economic impoverishment. The vague legal principle of 'eminent domain', whereby the State is empowered to appropriate privately owned land for a 'public purpose' was incorporated in the Land Acquisition Act, 1894. The term 'public purpose' was defined in an expansive manner,<sup>16</sup> and this allowed for large-scale dispossession of land from the hands of the adivasis, even in the years following independence. Even in post-colonial times, the Land Acquisition Act of 1894 continued to operate in its original utilitarian paradigm, with the adivasis continuing to be evicted from their traditional lands indiscriminately. It was only in 2013 that The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 came into force.<sup>17</sup> Secondly, in the oral culture followed by the adivasis, there existed a minimal conceptualisation of land as private property. Legal documentation of ownership was also invariably absent. Thus, in the Indian Forest Act, 1927, the British, relying on the ambiguous legal doctrine of 'res nullius' (a principle which allows the State to appropriate stretches of land, if the alleged owners do not have the requisite title documents), at one go, assumed ownership of forest

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<sup>15</sup>Ramachandra Guha, Unacknowledged Victims, *OUTLOOK* (Apr. 14, 2010), [www.outlookindia.com/website/story/unacknowledged-victims/265069](http://www.outlookindia.com/website/story/unacknowledged-victims/265069).

<sup>16</sup>The scopious definition of 'public purpose' in Section 3(f) encircled a wide number of situations where the State could acquire land under the Act.

<sup>17</sup>Venkat Ananth, The evolution of the Land Acquisition Act, *LIVEMINT*, May 22, 2015.

land traditionally occupied by the adivasis, and evicted them in the process.<sup>18</sup>

Having been pushed into the aforementioned refuge zones by virtue of the practice of internal colonialism, the adivasis progressively developed a symbiotic relationship of dependence with these forests and hills. Today, they are the victims of a development model which is supposed to be inclusive. The adivasis are being relentlessly driven out of these refuge zones, located in mineral rich areas such as the forests of Jharkhand, Orissa, Chattisgarh and so on.<sup>19</sup> Consequently, survival needs compel them to search for sustenance in the towns and cities, where they generally remain steeped in poverty, largely due to their lack of education and skill. Post-Independence, following deregulation of the mining industry in accordance with neo-liberal policies and the consolidation of the open market mechanism, the exploiting of forest resources by mining companies has only aggravated.<sup>20</sup> The surge of appropriation and destruction of common property resources (the water bodies and forests) has continued without considering the staggering social cost which the helpless adivasis have to bear.<sup>21</sup> The fact that contemporary Indian society is marked by an absence of qualitative or quantitative insight into the adversity faced by the adivasis due to development projects, bears testimony to the sheer disregard our politicians, policymakers and industrialists have displayed towards the rights, perspective and experiences of the adivasi community.<sup>22</sup>

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<sup>18</sup>Rahul Banerjee, Adivasis and Unjust Laws, 42 EPW 39, 4010 (2007).

<sup>19</sup>MIHIR SHAH, *supra* note 11.

<sup>20</sup>Brinda Karat, Of mines, minerals and tribal rights, THE HINDU, May 15, 2012.

<sup>21</sup>Dr. Romesh Singh, Mining and Its Impact on Tribals in India: Socio-Economic and Environmental Risks, 3 INTERNATIONAL JOURNAL OF SOCIAL SCIENCE AND HUMANITIES RESEARCH 2, 430 (2015) [hereinafter ROMESH SINGH].

<sup>22</sup>Chitrangada Choudhury, Adivasis and the New Land Acquisition Act, EPW (Oct. 12, 2013), [www.epw.in/journal/2013/41/web-exclusives/adivasis-and-new-land-acquisition-act.html](http://www.epw.in/journal/2013/41/web-exclusives/adivasis-and-new-land-acquisition-act.html).



However, India's development philosophy today has evolved into a paradigm wherein the intrinsic link between the adivasis and the forests they occupy have been recognized. Flowing from such recognition arose legislations such as the Forest Rights Act, 2006 (hereinafter the **FRA**) and policies such as the National Wildlife Action Plan, 2002, the National Biodiversity Strategy and Action Plan and later, the National Environmental Policy, 2006.<sup>23</sup> These policies revolve around the understanding that environmental conservation is an essential prerequisite towards ensuring the welfare of the tribal people. The demands of conservation and the demands of safeguarding adivasi rights cannot be separated from one another.

*A. The Derivation Of Adivasi Identity From Traditionally Occupied Land*

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources..

- Preamble, United Nations Declaration on the Rights of Indigenous Peoples.<sup>24</sup>

The identity of the adivasis almost solely revolves around the territory/land traditionally occupied by them. Not only is economic subsistence intricately inter-woven with land, but land is also central to the social identity of adivasis.<sup>25</sup> More importantly, the rights of adivasis over their ancestral land, is generally conceptualised around

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<sup>23</sup>Ramachandra Guha et al., *Deeper Roots Of Historical Injustice: Trends And Challenges In The Forests Of India* 55 (2012) [hereinafter GUHA et. al].

<sup>24</sup>United Nations Declaration on the Rights of Indigenous Peoples, 2008, Preamble.

<sup>25</sup>Asian Development Bank, *Land And Cultural Survival: The Communal Land Rights Of Indigenous Peoples In Asia* 15-16 (2009) [hereinafter ADB].

an understanding of the spiritual bond they share with the said land. For the adivasis, the economic importance of land pales in comparison to the religious and sentimental value of their ancestral land.<sup>26</sup> If they cannot enjoy the ‘material and spiritual’ elements associated with their land, the preservation and subsequent inter-generational transmission of their cultural legacy will be a distant dream.<sup>27</sup> It is through their harmony and intimate understanding of and spiritual relationship with the environment,<sup>28</sup> that the adivasis have sustainably managed and used the forests for years.

The centrality of land to the existence of tribal people necessitated recognition on part of the State to ensure that the rights of the tribals over their ancestral land were protected. The United Nations Declaration on the Rights of Indigenous Peoples (hereinafter **UNDRIP**) and the Indigenous and Tribal Peoples Convention, 1989 or the International Labour Organisation Convention No. 169 (hereinafter **Convention 169**) locate universally applicable human rights (thus, creating a moral as well as legal obligation for States to safeguard and fulfil these rights) and situate them within the paradigm of tribal people, emphasizing upon the collective nature of tribal rights and seeking to mitigate the historical as well as prevalent disadvantages and discrimination that they are compelled to deal with.<sup>29</sup> Underlying both the UNDRIP as well as Convention 169, is the principal understanding of the cultural, religious and economic relationship between tribal people and the land they inhabit. Article 13 of Convention 169, for instance, requires States to honour and

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<sup>26</sup>Jo Pasquallaci, 27 WISCONSIN INTERNATIONAL LAW JOURNAL 51, 55-57 (2009).

<sup>27</sup>Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79.

<sup>28</sup>Plan de Sánchez Massacre v. Guatemala, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116.

<sup>29</sup>Birgitte Feiring, Indigenous peoples' rights to lands, territories, and resources, INTERNATIONAL LAND COALITION (2013), [www.landcoalition.org/sites/default/files/documents/resources/IndigenousPeoplesRightsLandTerritoriesResources.pdf](http://www.landcoalition.org/sites/default/files/documents/resources/IndigenousPeoplesRightsLandTerritoriesResources.pdf).

protect the plethora of values tribal people accord to the land they occupy.

While there exists little discussion on tribes qualifying as 'indigenous', ILO Convention 169 regards indigenous people as those who are the descendants of the inhabitants of a particular land, 'at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.'<sup>30</sup> The Convention further deems self-identification as indigenous as sufficient to attract the protections of the Convention.<sup>31</sup> To this extent, the Supreme Court of India in *Kailas v. State of Maharashtra*<sup>32</sup> recognised that the adivasis were indigenous people, since they were the descendants of the pre-Dravidian aborigines. Finally, the tribes of India identify themselves as 'adivasi', which translates into 'original inhabitants' i.e. indigenous, a term associated with pride and esteem, thus affording them the protection of the Convention. The Oraons of Jharkhand, for instance, established settlement in what is today, India, prior to even the Aryans.<sup>33</sup>

The Inter-American Court of Human Rights, in *Saramaka People v. Suriname*,<sup>34</sup> concluded that the cornerstone of tribal identity is the land traditionally occupied by them. Tribal people thus have a right to maintain their 'spiritual relationship with the territory they have traditionally used and occupied'. Similarly, in India, the Supreme Court in *Orissa Mining Corporation Limited v. Ministry of*

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<sup>30</sup>Indigenous and Tribal Peoples Convention, 1989 (No.169), Article 1(1).

<sup>31</sup>Id. at art. 1(2).

<sup>32</sup>*Kailas v. State of Maharashtra*, (2011) 1 SCC 793.

<sup>33</sup>Virginius Xaxa, *Tribes as Indigenous People of India*, 34 EPW 3589, 3593-3595 (1999).

<sup>34</sup>*Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172.

Environment and Forest<sup>35</sup> (hereinafter Orissa Mining Corporation), recognising the spiritual and religious relationship the Dongria Kondh tribe shared with the land traditionally occupied by them in the Niyamgiri hills, prevented Vedanta Resources from establishing a bauxite mine in the area. Earlier, the Court in *Samatha v. State of Andhra Pradesh*<sup>36</sup>, a case concerning acquisition of tribal land for mining, also upheld the right of adivasis to their land and forests. Impliedly acknowledging that land lies at the heart of tribal identity, it went on to hold that if land were indiscriminately acquired by non-adivasis, it would ‘wipe out the very identity of the tribals’.

Despite the widespread statutory, as well as judicial recognition granted to the importance of land to the tribal community, at the grass-root level, this recognition has barely translated into reality. The right to property today being a constitutional right under Article 300A of the Constitution empowers the State to acquire adivasi lands by legislative action and leaves the adivasis without a subsequent adequate remedy. The Xaxa Committee noted the additional disadvantages faced by the adivasis due to the right to property not being a fundamental right.<sup>37</sup> Further, the failure of the Joint Forest Management programme to efficiently consolidate the long-term interests and traditional rights to the land occupied by the adivasis was also severely detrimental to their identity.<sup>38</sup> The acquisition of tribal land by development houses, destroys the adivasis’ sense of self and identity which is intimately associated with the land, as happened

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<sup>35</sup>*Orissa Mining Corporation Limited v. Ministry of Environment and Forest*, (2013) 6 SCC 476.

<sup>36</sup>*Samatha v. State of Andhra Pradesh*, 1997 8 SCC 191.

<sup>37</sup>Ministry Of Tribal Affairs, Report Of The High Level Committee On Socioeconomic, Health And Educational Status Of Tribal Communities Of India 253 (2014).

<sup>38</sup>TV Ramchandra & AV Nagarathna, *Joint Forest Management: Issues and Experiences*, ENERGY & WETLANDS RESEARCH GROUP (2008), [www.ces.iisc.ernet.in/energy/water/paper/Joint\\_Forest\\_Management/index.htm](http://www.ces.iisc.ernet.in/energy/water/paper/Joint_Forest_Management/index.htm).

in Kandhamal, Orissa.<sup>39</sup> With the spiritual and economic practices of the adivasis often revolving around the land, indiscriminate land acquisition impedes their very identity. Further, when sacred land is no longer possessed by the adivasis, they cannot pass on their cultural legacies to the next generation, pushing their traditional identities to extinction. The following parts of this paper will go on to examine the extent of non-compliance with existent legal obligations and the need/importance to abide by the statutes, in order to not only ensure preservation of the adivasi identity, but of the environment at large.

## PART II

### II. A PERUSAL OF THE DOMESTIC AND INTERNATIONAL RIGHTS-BASED LEGAL REGIME ON ADIVASI LANDS & FORESTS

The process of land acquisition in India was chronicled by regressive colonial laws that empowered the State to grab '*terra nullius*'<sup>40</sup> land from the possession of the Adivasi community, regarded as intruders in the forests. This was often done under the guise of the 'public purpose' and 'eminent domain' doctrine without providing for any semblance of a consent-based mechanism<sup>41</sup>, which resulted in the systemic displacement of numerous tribes, like the *Oraon in Jharkand* and the *Dongria Kondh*, in Orissa. However, the Indian legal regime has transformed positively to accommodate indigenous claims over

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<sup>39</sup>Brannon Parker, Orissa In The Crossfire: Kandhamal Burning 55 (2011).

<sup>40</sup>Terra nullius, or the 'land of no one', in this context refers to the land traditionally occupied by the adivasis, over which they do not have any documentation to prove ownership.

<sup>41</sup>The prevalence of these doctrines was seen in the Land Acquisition Act, 1894. This was the central legislation used by the State to forcibly acquire land.

land. This process has largely been aided by the Supreme Court, as the history of coercion and oppression was recognized by the Court on numerous occasions.<sup>42</sup> Indigenous Rights have been cemented in Indian jurisprudence, relying on international instruments such as ILO Convention 169 and the UNDRIP. This transformation engineered by the Supreme Court, has in turn given rise to various attempts by the State formalize and enforce the right(s) of the indigenous communities over their land, by providing for various safeguards and mechanisms that strengthen the said right(s). Owing to such enactments, the helpless adivasi community, a primary stakeholder in the process of land acquisition, is provided with avenues enabling them to voice their concerns and safeguard their lands.

**A. *The Constitution: Enshrined Principles And Judicial Pronouncement***

The cornerstone of the legal regime on land acquisition in India is provided by the Constitution, where the land rights of the adivasis found much-needed recognition. By categorising the adivasis as Scheduled Tribes,<sup>43</sup> the State acknowledged the historical persecution and the atrocities committed against them, with a view to reversing such injustices. Locating the claims of the adivasis in custom, the Constitution endeavours to uphold the symbiotic relationship between the adivasis and their land. The lands, over which the adivasi community has a ‘customary right’, have been termed as scheduled areas.<sup>44</sup>

The rights of indigenous communities over their ancestral land have also been articulated as a fundamental right, by judicial dicta. The

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<sup>42</sup>Ipshita Chaturvedi, A Critical Study of Free, Prior and Informed Consent in the Context of the Right to Development — Can “Consent” be Withheld?, 5 JOURNAL OF INDIAN LAW AND SOCIETY 50 (2014).

<sup>43</sup>Indian Const. art. 342.

<sup>44</sup>Indian Const. V Schedule.

Supreme Court, has broadened the scope of Article 21 (the right to life) to encompass the land rights of the adivasi community. In *Samatha*<sup>45</sup> the Supreme Court, acknowledging the historical claim of the Adivasis reversed the prior transfers of tribal land made to private mining entities.

A neoteric instance, where the land rights of indigenous communities was enunciated vis-à-vis fundamental rights by the Supreme Court, was observed in *Orissa Mining Corporation*,<sup>46</sup> where the Court derived the right of consent of the Dongria Kondh, from their fundamental right to religious freedom. Yielding a remarkable fillip to notions of an inclusive development agenda, the Court held that the Dongria Kondh would decide whether the proposed bauxite mine affected their religious and cultural rights. However, the Court did not explore the question of whether there should exist limits upon the exercise of consent by the adivasis.

#### Specific Enactments With Respect To Land Acquisition: A Manifestation Of Environmental Concerns Through Consent And Consultation Mechanisms

There has been a marked change in the legal position, in favour of the indigenous communities, with a transformative revamp in the principles underlying land acquisition. By limiting the exercise of 'eminent domain' and affording statutory recognition to democratic notions such as the right to free, prior and informed consent (hereinafter FPIC), the Indian legislature has aspired to construct an inclusive development agenda.

The primary legislation on land acquisition is *The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation*

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<sup>45</sup>*Samatha v. State of Andhra Pradesh*, supra note 36.

<sup>46</sup>*Orissa Mining Corporation Limited v. Ministry of Environment and Forest*, supra note 35.

and Resettlement Act, 2013 (hereinafter **LARR**). In a paradigmatic shift from the public purpose doctrine, crystallised in the Land Acquisition Act, 1894 (which currently stands repealed), the current regime provides various safeguards to the adivasis. Mandating consent from the adivasi community, for both private-public partnerships and private acquisitions,<sup>47</sup> the LARR Act seeks to reinforce the adivasis' right of FPIC. Additionally, the prior consent of the representative bodies such as the Gram Sabha has to be obtained.<sup>48</sup> Although Gram Sabhas do not entirely represent adivasi interest due to entrenched cultural differences, the consent requirement embodies protection which was not present earlier. There is also a provision for an independent body to conduct social impact assessments.<sup>49</sup> A social impact assessment has been envisaged to be a study conducted by an autonomous body of experts, to delineate the probable social aftermath of the land operations. It is distinct from an environmental impact assessment, as it aims to examine the 'social, cultural and economic' rather than the 'environmental' outcomes of the project. The assessment, as a requirement, must be undertaken in consultation with the affected communities. The LARR Act however, exempts the Coal Bearing Act (an Act notorious for its lack of social impact assessment and consent mechanisms and hence widely used by the mining industry to acquire land) from fulfilling the former's statutory requirements.<sup>50</sup> The dreadful effects of the above exemption on adivasi land rights have been elucidated in the subsequent chapter.

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<sup>47</sup>Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, Section 2, Proviso (1).

<sup>48</sup>Id. at § 4 (1).

<sup>49</sup>Id. § 4.

<sup>50</sup>When Land is Lost Do we Eat Coal: Coal Mining and Violations of Adivasi Rights in India, AMNESTY INTERNATIONAL (July 2016), [https://www.amnesty.org.in/images/uploads/articles/COAL%20BREPORT\\_11\\_FIN\\_AL\\_on\\_27-7-2k16\\_LOWRES.pdf](https://www.amnesty.org.in/images/uploads/articles/COAL%20BREPORT_11_FIN_AL_on_27-7-2k16_LOWRES.pdf) [hereinafter AMNESTY].



An enactment on similar lines is the Panchayat (Extension to Scheduled Areas) Act (hereinafter **PESA**), 1996. Instrumental in extending the 1993 Constitutional Amendments, which conferred powers of overseeing local developments on Panchayats to Scheduled Areas, the provisions of the Act, require any corporation intending to acquire tribal land to ‘consult’ (However, the Act does not define the term consult, and what such a consultation must entail, leaving it dangerously open to interpretation. The compliance requirements, prior to the acquisition of land, were subsequently elucidated by executive orders issued by the Ministry of Rural Development, mandating Corporations to obtain letters of consent from the Gram Sabhas in the region) the Panchayat or Gram Sabha before doing so. A further round of consultation must also be held before resettling or rehabilitating the affected parties. Additionally, executive orders were issued by the Ministry of Rural Development stating that corporations can acquire land only after obtaining letters of consent from the Gram Panchayats in the region.

The Gram Panchayats, situated in close proximity to forests, have been empowered to adjudicate on the usage of forest land for non-forest purposes, by the provisions of the FRA.<sup>51</sup> The Act confers upon forest-dwellers the right to occupy and live on the forest land, the right to use the surrounding forest resources, right to FPIC, right to rehabilitation, the right to gain ‘traditional knowledge’<sup>52</sup> using the surrounding ecosystems and any other traditional rights that were previously enjoyed by the communities.<sup>53</sup>

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<sup>51</sup>Scheduled Tribes And Other Traditional Forest Dwellers (Recognition Of Forest Rights) Act, 2006, § 6(1).

<sup>52</sup>Id. § 3 (1).

<sup>53</sup>This circumscribes all the traditional rights, except the right to hunt or trap animals.

The right of being consulted and FPIC has been extended to the realm of environmental protection, by way of the provisions of the Environmental Protection Act. The Ministry of Environment and Forests has mandated Environmental Impact Assessments (**EIA**) for industrial projects.<sup>54</sup> The procedure for the EIA, explicitly undertaken to further the objective of environmental protection, confers the right to object, a sub-set to the broader right of consent upon the local communities. The right to consent has been afforded to these communities, by way of providing for public consultations that are to be mandatorily held (before the industrial project is approved) with stakeholder communities who are likely to bear the burden of the environmental externalities of the project.<sup>55</sup>

Further, the corporation intending to engage in such activity, has to submit a draft EIA report in English and the local language to the representative bodies of the region, who in turn are required to publicise the report and the proposed project, in order to invite public scrutiny.<sup>56</sup> Therefore, if the public presentation of the Environment Impact Assessment report does not receive any objections from the concerned communities, the corporation is considered to be compliant with the provisions of the EPA. Consequentially, the commencement of the corporation's activities is made contingent on receiving no objections from the concerned communities. The presence of such provisions reinforces the importance of the right of FPIC of the concerned communities. It also serves as an indicator of the rights-based approach taken by the legislature, pursuing the ultimate goal of

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<sup>54</sup>Environment Impact Assessment Notification, MINISTRY OF ENVIRONMENT AND FORESTS (Jan. 27, 1994), [envfor.nic.in/legis/eia/so-60\(e\).pdf](http://envfor.nic.in/legis/eia/so-60(e).pdf).

<sup>55</sup>In the notification, issued by the Ministry of Environment and Forests on preparation of Environmental Impact Assessment reports, public consultations have been recognized as a stage in a four stage process consisting of screening, scoping, public consultation and appraisal.

<sup>56</sup>Notification issued by the Ministry of Environment and Forests, MOEF (Sept. 14, 2006), [envfor.nic.in/legis/eia/so1533.pdf](http://envfor.nic.in/legis/eia/so1533.pdf) [hereinafter EIA NOTIFICATION].

environmental protection, albeit through a legal framework of protection of adivasi rights. The end of safeguarding the environment is attempted to be achieved by adopting a human rights approach.

At a global level, the right to FPIC has also assumed great importance. Internationally, India has endorsed various instruments that have recognised the importance of consent and consultation of indigenous communities, prior to the process of land acquisition. The right to FPIC, part of the fabric of the right to self-determination of indigenous people<sup>57</sup> is a standard recognized globally by the UN Committees on Economic, Social and Cultural Rights, UN Committee on the Elimination of Racial Discrimination, United Nations Forum on Forests et al.<sup>58</sup> The UN Declaration on the Rights of Indigenous People (Articles 10, 11, 19, 28, 29) also regards this right as the crux of the movement towards ensuring the protection of tribal people's rights. The importance of FPIC in the context of environmental protection has also been recognised by the Nagoya Protocol<sup>59</sup> and the Convention on Biological Diversity.<sup>60</sup>

Notwithstanding the environmental cost of the process of land acquisition (specifically arising from its aftermath – mining, dam construction and so on), the legal regime governing land acquisition has been schematised around the core objective of protection of the

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<sup>57</sup>Tara Ward, The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law, 10 NORTHWESTERN JOURNAL OF INTERNATIONAL HUMAN RIGHTS 2, 55 (2011).

<sup>58</sup>P. Tamang, An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices, UNITED NATIONS (Jan. 2005), [www.un.org/esa/socdev/unpfii/documents/workshop\\_FPIC\\_tamang.doc](http://www.un.org/esa/socdev/unpfii/documents/workshop_FPIC_tamang.doc).

<sup>59</sup>The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization was ratified by India on 18th February, 1994.

<sup>60</sup>The Convention on Biological Diversity is a multi-lateral treaty and was premised on anthropocentric principles such as sustainable development and fair, equitable sharing of benefits of natural resources.

rights of the adivasis over their land. This rights-based framework has continually been espoused by judicial doctrine, legislations as well as the Constitution. The same phenomenon is apparent in the realm of environmental protection. The Statement of Object and Reasons, of the Environment Protection Act, for example, refer to the Act as a general legislation directed towards attaining environmental protection. The protection and improvement of the environment is the axis around which the Act revolves.<sup>61</sup> However, notifications issued by the Ministry of Environment, Forests and Climate (responsible for the implementation of the Act) under the Environmental Protection Act, have strived to fortify the land rights of the adivasis, by providing for public consultations and the right to object to corporate usage of the said land.<sup>62</sup> An unequivocal human rights centric approach has thus been taken by the legal regime concerning land acquisition.*(emphasis added)* The following part of this paper goes on to examine the levels of compliance with this approach taken by the legislature and judiciary to safeguard adivasi rights.

### PART III

#### III. NON-COMPLIANCE WITH THE RIGHTS-BASED LEGAL FRAMEWORK: A RECURRENT PHENOMENON

The gap and inconsistencies prevalent between ‘law on the books’ and the ‘law in action’ is a phenomenon apparent in all realms of law. However, while dealing with environmental law, this gap is often a chasm, and is spread over every level of the enviro-legal system.<sup>63</sup>The

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<sup>61</sup>Environmental Protection Act, 1986, The Preamble.

<sup>62</sup>EIA NOTIFICATION, *supra* note 56.

<sup>63</sup>Daniel Farber, Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law, 23 HARV. ENVTL. L. REV. 297, 297-301 (1999) [hereinafter FARBER].

coercive model (or deterrence model) to compliance with law is premised on the understanding that the bodies whose activity the law seeks to regulate are rational economic actors, complying with the law only at the stage where the benefits of non-compliance are exceeded by the costs of the same.<sup>64</sup> Per contra, as Gary Becker argues, potential deviants react *inter alia* to the probability of detection and subsequent punishment and ensure compliance at a point wherein it would be economically imprudent for them to violate the law.<sup>65</sup> However, if the offenders are not brought to book - if sanctions are not imposed upon them, the deterrence model fails and non-compliance with the law becomes recurrent. This is all the more applicable while discussing discords with environmental legislations, where the reasons for nonconformity are not restricted to mere anti-social conduct,<sup>66</sup> but are far more intricate, encompassing systematic non-compliance and development concerns.

In India, when it comes to law dealing with adivasi land rights and its interface with the mining industry, compliance is a rare sight. With the State indulging in violent repressive measures to curb adivasi protests against mining, as in Gadchiroli<sup>67</sup> in its attempt at pushing forward an aggressive development policy, the benefits of the industry's non-compliance with statutes such as the Forest Rights Act and the PESA Act far outweigh the costs. That the penalty imposed upon State authorities for violating provisions of the Forest Rights

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<sup>64</sup>Robert Glicksman & Dietrich Earnhart, *Coercive vs. Cooperative Enforcement: Effect of Enforcement Approach On Environmental Management*, 42 INT'L REV. OF LAW & ECON, 135-138 (2015).

<sup>65</sup>Gary Becker, *Crime and Punishment: An Economic Approach*, 76 JOURNAL OF POLITICAL ECONOMY 2, 169-217 (1968).

<sup>66</sup>FARBER, *supra* note 63.

<sup>67</sup>Javed Iqbal, *The Mining of Another Adivasi God*, THE WIRE (2016), <https://thewire.in/62281/in-gadchiroli-the-mining-of-another-ativasi-god/>.

Act is pegged at a paltry thousand rupees,<sup>68</sup> bears dangerous testimony to the corporate- State nexus disrespecting adivasi rights.

**A. *Violation Of The Right To Free, Prior And Informed  
Consent***

The requirement for obtaining consent and holding prior consultations, especially considering the intrusive character of large-scale development projects, is the pre-cursor to meaningful effectuation of the adivasis' right to health<sup>69</sup>, a wholesome environment, religion and so on. For the adivasi community, the mechanism of FPIC is one of paramount importance. Not only does it empower the adivasis to exert control over their ancestral land, but it also enables them to pursue their right to development as a distinct segment of the populace, and thereby preserve their rapidly-disintegrating unique cultural identity.<sup>70</sup> The *Supreme Court, in Orissa Mining Corporation Limited v. Ministry of Environment and Forest* recognising the gravity of prior consent of the adivasis (whose traditional rights were being impeded) annulled the agreement between the mining corporation and the Government, since it excluded their consent.

However, there exists a massive disparity between precept and practice. A report published by Amnesty International points out that the consent of adivasis was completely ignored while the expansion of the Kasmunda mine was underway. Similarly, while acquiring adivasi land for the Basundhara West mine, the consent of the

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<sup>68</sup>Scheduled Tribes And Other Traditional Forest Dwellers (Recognition Of Forest Rights) Act, supra note 43, § 7.

<sup>69</sup>Indigenous and Tribal Peoples' Rights over Natural Resources, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, [cidh.org/countryrep/Indigenous-Lands09/Chap.VIII.htm](http://cidh.org/countryrep/Indigenous-Lands09/Chap.VIII.htm).

<sup>70</sup>Free Prior and Informed Consent: an indigenous peoples' right and a good practice for local communities, FAO, <http://www.fao.org/3/a-i6190e.pdf>.

adivasis was once again sidestepped.<sup>71</sup> It seems to be common practice not only in India, but also worldwide that even in the rare cases when consent is obtained, in reality it is engineered<sup>72</sup> often through the use of pressure tactics on villagers or by forging gram sabha resolutions, as was done in Orissa to facilitate iron ore mining.<sup>73</sup> In Singrauli, notwithstanding vehement opposition from the Forest Advisory Committee and the MoEF, licenses for mining were granted to two companies, with the apparent consent of the affected adivasis. Later, it was brought to light that the consent given by the adivasis, was in fact fraudulent, since it was never really given, and was constructed by the mining company, thus standing vitiated.<sup>74</sup>

Such violations of the right to FPIC cast grave aspersions on the existence of the protective enactments with the adivasis being dependent on land for economic and cultural sustenance. A crucial reason for such violations is embodied in the Coal Bearing Act itself, which excludes social impact assessment systems and prior consultation and consent of adivasis likely to be affected by the said process. The clash between the consent requirements mandated by the Forest Rights Act and a lack thereof in the Coal Bearing Act creates a dangerous situation of confusion and uncertainty, facilitating deliberate misreading of the labyrinthine laws. The fact that in cases of land acquisition under the Coal Bearing Act, the Act ousts the

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<sup>71</sup>AMNESTY, *supra* note 50.

<sup>72</sup>Marcus Colchester & Fergus MacKay, In Search of Middle Ground: Indigenous Peoples, Collective Representation And The Right To Free, Prior And Informed Consent, 10TH CONFERENCE OF THE INTERNATIONAL ASSOCIATION FOR THE STUDY OF COMMON PROPERTY (May 7, 2004), [http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/974/Colchester\\_Search\\_040508\\_Paper107d.pdf?sequence=1](http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/974/Colchester_Search_040508_Paper107d.pdf?sequence=1).

<sup>73</sup>Chitragada Choudhury, Making a hollow in the Forest Rights Act, THE HINDU, Apr. 8, 2016.

<sup>74</sup>Usha Ramanathan, Where do Adivasis stand in Indian law?, INTERNATIONAL ENVIRONMENTAL LAW RESEARCH CENTRE (Feb. 27, 2015), [www.ielrc.org/content/n1504.pdf](http://www.ielrc.org/content/n1504.pdf).

application of the PESA Act only exacerbates the plight of the adivasis, whose rights to FPIC are disdainfully violated.<sup>75</sup>

Despite the Supreme Court's recognition<sup>76</sup> of the importance of the right to FPIC, albeit in the context of the PESA Act only, unless the Government and the mining industry view the requirement to obtain 'consent' as a genuine humanitarian concern as and not as a mere barrier to overcome, true progress in this regard cannot be made. It is only through channels of treaties, international human rights statutes, national legislations, judicial pronouncements and 'inherent sovereignty'<sup>77</sup> that adivasis assert their right to FPIC in their endeavour to secure their indigenous value system, identity and practices. Unless this right is effectively protected, not only will the extinction of the adivasis be perpetuated, but community forest management programmes and ecocentric policies will be insurmountable tasks to implement.

### ***B. Violation Of Usage Rights***

For the adivasis who live in and around forests, the usage of forest produce such as medicinal plants and timber are imperative for not only their economic subsistence,<sup>78</sup> but also for a variety of socio-cultural purposes. In view of this dependency relationship between the adivasis and the forests,<sup>79</sup> Section 3(1) of the FRA, democratising governance of forests and establishing community ownership, empowered the adivasis to control and use the forest and its resources ('minor produce'). Further, the PESA Act also grants legal

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<sup>75</sup>AMNESTY, supra note 50.

<sup>76</sup>Orissa Mining Corporation Ltd. v. Ministry of Environment and Forests, supra note 30.

<sup>77</sup>COLCHESTER, supra note 72.

<sup>78</sup>Numbers Of Forest 'Dependent' Peoples And Types Of People Forest Relationships, FAO, <http://www.fao.org/docrep/w7732e/w7732e04.htm>.

<sup>79</sup>The National Forest Policy, 1988 recognizes the 'symbiotic relationship between the tribal people and forests'.



recognition to adivasi usage rights. Thus, today, adivasis are legally entitled to the rights of usage of the forest land. However, violent social conflicts in the forests of India continue to occur and often revolve around the discord between commercial interests of the industries and the adivasis right to livelihood from the forest.<sup>80</sup>

The mining industry, ably supported by the State provides strong opposition to relinquishing the State monopoly, originally conceptualized by the British, over the forest and its resources. The Joint Forest Management was only a meagre ‘incremental improvement in user rights of communities dwelling in and around forests.’<sup>81</sup> Later, a report jointly published by the Ministry of Environment and Forests and the Ministry of Tribal Affairs noted that the status of the implementation of the Community Forest Rights<sup>82</sup> (of which ‘usage rights’ is a subset) under the FRA was dismal and needed thorough improvement.<sup>83</sup> Notwithstanding the statutory recognition of adivasi usage rights, the violation of the same is attributable to state advocacy of the urgency of development needs.

For instance, the illegal acquisition of land for the purposes of mining by the South Eastern Coal Fields in Korba<sup>84</sup> and in the case of the Jurudi manganese mines<sup>85</sup> without providing adequate compensation

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<sup>80</sup>GUHA et. al, supra note 18, at 23.

<sup>81</sup>ADB, supra note 25.

<sup>82</sup>Community Forest Rights refer to ‘the customary common forest land within the traditional or customary boundaries of the village or seasonal use of landscape in the case of pastoral communities, to which the community had traditional access’.

<sup>83</sup>NC Saxena et al., Joint MoEF- MoTA Committee, Manthan – Report of National Committee on Forest Rights Act, GOVERNMENT OF INDIA (2010), <http://rajbhavan-maharashtra.gov.in/rajbhavan/pdf/tribalcell/FRA%20COMMITTEE%20REPORT%20N%20C%20SAXENA.pdf>.

<sup>84</sup>Saumya Ranjan Nath, Illegal and unfair acquisition of mining land in Korba, DOWNTOEARTH (June 29, 2016), <http://www.downtoearth.org.in/news/illegal-and-unfair-acquisition-of-mining-land-in-korba-54627>.

<sup>85</sup>Justice MB Shah Commission of Enquiry for Illegal mining of Iron Ore & Manganese, Second Report on Illegal Mining of Iron and Manganese Ores in the

and the benefit accruing from such acquisition to the adivasis have resulted in gross violations of usage rights enumerated under Section 3(1) of the FRA. For the adivasis living around the Tetariakhar mine, the gair mazrua land (common land) was their principal source of livelihood and sustenance for years, by virtue of its rich forest produce inter alia. The use of the draconian Coal Bearing Act, to acquire the gair mazrua land by Central Coalfields Limited left the Oraon community without their primary avenue of survival.<sup>86</sup> With the adivasis' right to the usage of the forest produce on these lands, their chances at mere sustenance are drastically reduced.

It is the adivasis who are burdened with the livelihood and social cost of mining, which has thus become a 'resource curse' for them.<sup>87</sup> Deep-rooted administrative intransigence towards the FRA and PESA provisions on usage rights is counterproductive in removing historical injustices faced by the adivasis. The alarming trend of illegal revocation of such community forest rights, (as evidenced by the recent scandal surrounding land acquisition by Adani Mining in Chattisgarh<sup>88</sup>) is a process that, if allowed to continue significantly undermines the adivasis' rights to food and livelihood, and jeopardizes their chances of survival.

a) *Violation Of The Ownership (And Benefits Therefrom) Rights Over The Minerals Of The Adivasis*

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State of Odisha, (Oct., 2013), <http://mines.nic.in/writereaddata/UploadFile/Second%20Report%20on%20Odisha%20Vol%20-%20II.pdf>.

<sup>86</sup>AMNESTY, supra note 50.

<sup>87</sup>Chitragada Choudhury, Mining at Any Cost: The Odisha Government's Continued Dismissal of Adivasi Rights, THE WIRE (May 16, 2016), <http://thewire.in/35711/mining-at-any-cost-the-odisha-governments-continued-dismissal-of-adivasi-rights/>.

<sup>88</sup>Kanchi Kohli, Mining is in the Way of Adivasi Forest Rights, Not the Other Way Round, THE WIRE (June 7, 2016), <http://thewire.in/40405/mining-is-in-the-way-of-adivasi-forest-rights-and-not-the-other-way-round/>.

Article 26 of The UN Declaration on the Rights of Indigenous Peoples, signed by India stipulates that indigenous people have rights over land and resources ‘traditionally owned, occupied or used’ by them.<sup>89</sup> Further, the State should accord ‘legal recognition and protection’<sup>90</sup> to them. Article 15(2) of ILO Convention 169 on tribal people goes further, and mandates the State to include indigenous people in exploration of natural resources conducted on their land, and to provide them with a share of possible benefits.

The Supreme Court of India in *Threesiamma Jacob v. Department of Mining*<sup>91</sup> deconstructed the State’s dominant narrative that ownership of sub-surface minerals vests in the State. It further held that such ownership would ‘follow the ownership of the land, unless the owner of the land is deprived of the same by some valid process.’ In India however, the rights of the adivasis to ownership over and benefits from the land and the minerals contained therein are routinely violated. The political contention that the ownership rights over the minerals vest in the State, owing to land settlement systems, such as the Ryotwari System have been argued against vehemently by the judiciary.

However, reminiscent of the Regalian Doctrine, which vested ownership of minerals in the State<sup>92</sup> (depriving the traditional occupants), the innumerable forcible acquisitions of land, as seen in Jharkand, Orissa and Chattisgarh,<sup>93</sup> are a departure from the statutory requirements and judicial pronouncements. To salvage the existent

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<sup>89</sup>United Nations Declaration on the Rights of Indigenous Peoples, 2008, art. 26(1).

<sup>90</sup>Id. art. 26(3).

<sup>91</sup>*Threesiamma Jacob v. Geologist, Dptt. of Mining and Geology and Ors*, AIR 2013 SC 3251.

<sup>92</sup>John Rogers & Geoffrey Feiss, *People And The Earth: Basic Issues In The Sustainability Of Resources And Environment* 240 (1998).

<sup>93</sup>Girija Shivakumar, *Jairam: forcible land acquisition by PSUs led to Naxal problem*, THE HINDU, Sept. 8, 2013.

clash between development and consent, perhaps the adivasis themselves could be engaged in mining in an attempt to also help them attain economic upliftment.<sup>94</sup> By engaging themselves in largely unskilled forms of employment in the mining industry, the tribals of Orissa have reaped the benefits of economic upliftment.<sup>95</sup>

### *C. Violation Of The Adivasis' Right To Life*

Mining itself endangers the 'right to life guaranteed by Article 21' which 'includes the right of enjoyment of pollution-free water and air for full enjoyment of life.'<sup>96</sup> The Supreme Court, in *MC Mehta v. Union of India* further held 'life, public health and ecology have priority over unemployment and loss of revenue.'<sup>97</sup>

It is the adivasis, living nearby mines who have to bear the brunt of mining waste, which pollutes adjoining water bodies, rendering them incapable for use. Vast expanses of land are also left infertile and barren, due to the need for topsoil removal and the indiscriminate dumping of waste. The air pollution caused by the mineral dust from mining, further leads to several health ailments (respiratory complications, skin diseases, water-borne infections and so on) to adivasis. The tribal population of Juruguda in fact, were the victims of radioactivity due to mining of uranium, and its processing in the forest adjoining their village.<sup>98</sup> It is thus imperative that mining be prohibited on 'ecologically and culturally sensitive areas'<sup>99</sup> to not only protect the right of adivasis to a wholesome environment, but the environment at large.

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<sup>94</sup>Samatha v. State of A.P, supra note 36.

<sup>95</sup>Skillshare International India, Status Of The Adivasis In Odisha 2014: A Human Development Analysis 23.

<sup>96</sup>Subhash Kumar v. State of Bihar, (1991) 1 SCC 598.

<sup>97</sup>M.C Mehta (Kanpur Territories) v. Union of India, 1992 Supp (2) SCC 637.

<sup>98</sup>ROMESH SINGH, supra note 21.

<sup>99</sup>Ashish Kothari & Anuprita Patel, Environment and Human Rights, NHRC (2006), <http://www.bhrc.bih.nic.in/Docs/Environment-and-Human-Rights.pdf>.

## PART IV

### A. *Anthropocentrism And Ecocentrism: An Introduction*

The points of diversion between the anthropocentric and ecocentric approaches are located in the differing rationales and priorities of each approach. The ‘ecological integrity’ of the environment is exalted by ecocentrism while human development lies at the heart of anthropocentrism.<sup>100</sup> The primary assertion of the ecocentric approach is the intrinsic value of the environment. It does not lend primacy to the existence of the human race, but views humans to be a constitutive element of the environment.<sup>101</sup> Owing to such divergence, legal structures underscored by ecocentric values, which ascribe rights to the environment<sup>102</sup> seem to manifest a comprehensive regime for environmental protection.<sup>103</sup> The interests of human beings (including the tribal people, and the non-tribals in their quest towards development) and the needs of the environment are not mutually exclusive realms, but can be, and are harmonized by ecocentric legislations.

### B. *The Indian Scenario: Trends And Aspirations*

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<sup>100</sup>YK Choy, 28 Years into “Our Common Future”: Sustainable Development in the Post-Brundtland World, 168 WIT TRANSACTIONS ON THE BUILT ENVIRONMENT 2, 1206 (2015).

<sup>101</sup>Dinah Shelton, Human Rights, Environmental Rights, and the Right to Environment, 28 STANFORD INTERNATIONAL LAW JOURNAL 1,104 (1991).

<sup>102</sup>Susan Emmenegger & Axel Tschentscher, Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law, 6 THE GEORGETOWN INT'L ENVTL. LAW REVIEW 3, 553 (1994).

<sup>103</sup>Id. at 573.

After adopting an overwhelmingly anthropocentric approach in *MC Mehta v. Union of India*<sup>104</sup> and *Indian Council for Enviro-Legal Action v. Union of India*,<sup>105</sup> the Court has repeatedly voiced its aspirations to shift to an ecocentric approach. In *Centre for Environmental Law, World Wide Fund v. Union of India*,<sup>106</sup> the Court stressed on the importance of an effective species protection regime, while ruling that principles of sustainable development indicated an ‘anthropocentric bias’. Further, it held that the interest of mankind cannot take precedence over other species. Human beings have inherent obligations towards non-human entities as well. The Supreme Court also used the ‘species best-interest standard’ (a standard developed to place the interests of threatened species like the Asiatic lion) to articulate the right of Endangered Species to survive.<sup>107</sup> Thus, by attributing rights to non-humans and by acknowledging the right to live of endangered species, this judgment marked the beginning of the shift from an anthropocentric approach to an ecocentric approach.

Later, in the case of *T.N. Godavarman Thirumulpad v. Union of India*,<sup>108</sup> the Court stressed on the importance of an ecocentric approach to the law. The Court, while examining the phenomenon of human-wildlife conflicts, held that the route to attaining the absolutely imperative goal of environmental justice lay in engineering a shift from the anthropocentric approach to an ecocentric approach. This shift was considered necessary in order to establish a holistic framework for protection of the environment.

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<sup>104</sup>M.C Mehta (Kanpur Territories) v. Union of India, supra note 97.

<sup>105</sup>Indian Council for Enviro-Legal Action v. Union of India, AIR 1996 SC 1446.

<sup>106</sup>Centre for Environmental Law, World Wide Fund v. Union of India, (2013) 8 SCC 234.

<sup>107</sup>Id.

<sup>108</sup>T.N. Godavarman Thirumulpad v. Union of India, (2012) 3 SCC 277.

Notwithstanding the theoretical differences between the two approaches explained above, regarding them to be water-tight compartments is a misleading understanding. A manifestation of the fluidity of each approach, and the interplay between their respective realms is perceptible in the authors' subsequent attempt to the contentious issue of (the violation of) Adivasi rights.

Further, the fluidity between these approaches is discussed, by examining the legal response to illegal land acquisition - a process with heavy environmental costs. Despite being vigorously anthropocentric, the strengthening and creation of similar legal structures could translate into ecocentric results, in the form of creation of superior structures for environmental protection and the recognition of the intrinsic value of the environment.

***C. The Strengthening Of Human Rights As A Response To A  
Process With Environmental Costs: From Anthropocentric To  
Ecocentric Outcomes***

The externalities of land acquisition are multi-faceted, ranging from the cultural to the environmental. The social and cultural dimensions of the process are the loss of livelihoods, the erosion of various rights (when done without consent) and devaluation of religious practices. Another dimension is the environmental dimension. Unchecked land acquisition has left in its wake widespread environmental costs.<sup>109</sup> The land that was once rich in mineral has now been left barren. Mining operations undertaken on these lands have also generated a large quantum of dust, leaving the air severely contaminated.<sup>110</sup>

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<sup>109</sup>Mining Overview, CENTRE FOR SCIENCE AND ENVIRONMENT, [www.cseindia.org/node/384](http://www.cseindia.org/node/384).

<sup>110</sup>AMNESTY, *supra* note 50.

The law in its response to the adverse environmental impact of land acquisition, has protected human rights, rather than setting quantifiable limits, while approval/vetting of industrial projects for land acquisition. The clear environmental concerns posed by the process of land acquisition has been engaged with, by setting up consultation mechanisms (Gram Sabhas) to increase public participation in environmental decision making and strengthening the right to grant/ withhold consent, by mandating consent from the affected communities before project approval. No recognition has been attributed to the intrinsic value of the environment vis-à-vis adivasi rights and there has been no formulation of the rights of the environment as an entity. Therefore, the law, on paper has been anthropocentric.

Despite being anthropocentric in nature, the legal regime on land acquisition could translate into effective environmental protection, if seamlessly implemented. Strengthening Adivasi control over land, ties the end of environmental conservation with cultural identity and traditional practices of the local communities. The realms of environmental protection and cultural identity are interconnected by the deification of land.<sup>111</sup> As discussed earlier, land is central to the existence of the adivasi, as it does not merely represent a means of production, but is perceived to have ‘a deep cultural and religious meaning.’<sup>112</sup> Although the traditions and beliefs of every community differ, the symbiotic relationship with the land is a common

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<sup>111</sup>Samia Slimane, Indigenous peoples and pollution - a human rights framework, UNITED NATIONS EXPERT GROUP MEETING ON INDIGENOUS PEOPLES AND PROTECTION OF THE ENVIRONMENT (Aug. 2007), [www.un.org/esa/socdev/unpfii/documents/workshop\\_IPPE\\_slimane.doc](http://www.un.org/esa/socdev/unpfii/documents/workshop_IPPE_slimane.doc).

<sup>112</sup>Ganz B., Indigenous Peoples and Land Tenure: An Issue of Human Rights and Environmental Protection, 9 GEORGETOWN INTERNATIONAL ENVIRONMENTAL LAW REVIEW 1, 173-194 (1996).



feature.<sup>113</sup> They view themselves as inseparable from the land that they inhabit.<sup>114</sup> Consequentially, any threat to ownership would be a ‘threat to cultural preservation’.<sup>115</sup>

Strengthening the right of a stakeholder, for whom the (sacred) land is synonymous with the existence of the community itself, could translate into creating a superior mechanism for environmental protection, as the use of the land would be underscored by its perception as a spiritual entity. Consequentially, the protection of the inhabited land would be prioritised over the servicing of ecologically incompatible human needs. Environmentally detrimental activities that could be damaging to the inhabited land would never be allowed to be undertaken, as any strain on the land would be perceived to be endangering either the community or more importantly possible objects of worship.

In synergy with fortifying the rights of the adivasi communities, an active attempt must be made to diminish the involvement of large-scale corporations in acquiring the land. Rendering attempts to illegally acquire the land futile, will ensure the continued use of the land as a spiritual entity, rather than an instrument to enable production for servicing economic interests. An imperative cog in the wheel of ensuring environmental conservation through the existing legal regime, is the continued use of the land in a revered manner and not as an instrument.

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<sup>113</sup>The Relationship Between Indigenous People And Forests, UNEP, <http://www.unep.org/vitalforest/Report/VFG-03-The-relationship-between-indigenous-people-and-forests.pdf>.

<sup>114</sup>John S. Dryzek et al., *The Oxford Handbook Of Climate Change And Society* 233 (2011).

<sup>115</sup>Curtis G Berkely, *Maya Land Rights In Belize And The History Of Indian Reservations* 34 (1994).

The protests of a Native American tribe, the Standing Rock in North Dakota, is an exemplification of a situation wherein protection of traditional rights over land (in that case, religious/spiritual rights), serves the end of environmental preservation goals. The dispute concerned the construction of the Dakota Access Pipeline, a project which was being undertaken for the transportation of crude oil.<sup>116</sup> While climate change activists raised their concerns regarding the potential contamination of the Missouri river (also an important source of water for the tribe) owing to the pipeline, the tribe themselves were greater aggrieved by the destruction of their objects and locations of worship. After widespread protests by members of all segments of society, the State sanction for the project has been withdrawn.<sup>117</sup> The protests have served as a powerful indicator of the efficacy of the rights-based approach, wherein the land and cultural rights of the indigenous communities, when upheld, has invariably protected the environment.

Apart from the tangible end of environmental conservation, an ancillary benefit of strict compliance and an additional creation of rights is legal discourse on the environment. There could possibly be a fillip to the prioritisation of conservation of the environment in law and policy-making, and even possibly the judiciary, by ensuring representation of Adivasi community members in local governance bodies that ought to be consulted before undertaking acquisition.<sup>118</sup> A powerful voice should be lent to communities who would push for the

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<sup>116</sup>Sam Levin, Dakota Access pipeline: The who, what and why of the Standing Rock protests, *THE GUARDIAN* (Nov. 3, 2016), <https://www.theguardian.com/us-news/2016/nov/03/north-dakota-access-oil-pipeline-protests-explainer>.

<sup>117</sup>The Standing Rock pipeline protesters and their pyrrhic victory, *THE ECONOMIST* (Dec. 10, 2016), <http://www.economist.com/news/united-states/21711340-decision-halt-construction-dakota-access-pipeline-likely-be>.

<sup>118</sup>Prakash Keshwan, Studying Local Representation: A Critical Review, *RESPONSIVE FOREST GOVERNANCE INITIATIVE* (2012), [sdep.earth.illinois.edu/files/RFGI\\_Working\\_Papers/4Kashwan,%20Studying%20Local%20Representation.pdf](sdep.earth.illinois.edu/files/RFGI_Working_Papers/4Kashwan,%20Studying%20Local%20Representation.pdf).

interests of the environment (as the land they inhabit bears spiritual and religious importance to these communities), when there is a conflict with goals of development. Such communities, victims of marginalisation do not possess political or legal currency, and thus are in need of countervailing power. Ensuring the representation of such a stakeholder, would additionally help in creating the social impetus for compliance with environmental laws, by enabling representation of environmental interests.<sup>119</sup>

In this paradigm, even if there is no direct attribution of rights to the environment, awarding the right over the land to communities whose belief systems acknowledge the intrinsic value of the environment lends more power to such claims, thereby resounding with ecocentric logic, although the law is textually anthropocentric in nature.

This interaction between human rights and environmental protection has been conceptualised by Dinah Shelton as ‘environmental rights’.<sup>120</sup> Environmental rights entail the expansive interpretation of ‘existing human rights in the context of environmental protection’.<sup>121</sup> Vital to this concept is the provision of procedural rights and guarantees such as the right to FPIC and other rights that enable the political participation of those affected.<sup>122</sup>

However, there is a possible limitation to the efficacy of this approach. If the values and norms of the affected communities alter significantly, to support economic development over environmental well-being, the protection of their rights become detrimental to the

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<sup>119</sup>UNDP Regional Centre In Bangkok, Towards Inclusive Governance 33- 115 (2007).

<sup>120</sup>DINAH SHELTON, *supra* note 96, at 103-138.

<sup>121</sup>*Id.* at 117.

<sup>122</sup>Lorenza Fontana & Jean Grugel, The Politics Of Indigenous Participation Through ‘Free Prior And Informed Consent’: Reflections From The Bolivian Case, *WORLD DEVELOPMENT* (2016), [www.consultaprevia.org/files/biblioteca/fi\\_name\\_archivo.646.pdf](http://www.consultaprevia.org/files/biblioteca/fi_name_archivo.646.pdf).

protection of the environment. Therefore, an anthropocentric approach would no longer have an ecocentric outcome, if it is not informed by ecocentric logic. The critique, commonly offered against anthropocentric environmental law, that it does not create comprehensive legal protection, would stand, unless it upholds rights of those, whose belief systems are premised by values that reflect ecocentric logic.

#### IV. CONCLUSION

Schedule V of the Constitution, legislations such as the Forest Rights Act and the PESA Act and international instruments like the UNDRIP, developed around the core objective of protecting adivasi rights (and the environment, to an extent) are imperatives in ensuring equitable prosperity of every stakeholder in the age of development today. The State must thus engage in a balancing exercise involving complex policy formulation keeping in mind its constitutional obligation envisaged under Schedule V, that majority needs cannot always trump minority interest, and sometimes, concessions need to be made.

On paper, the legal instruments outlined in this paper have endeavoured to address the desideratum of undoing years of persecution of the adivasi community. However, the enforcement of the instruments has been far from satisfactory. The devaluation of adivasi rights by the State and the mining industry has become a common phenomenon, especially in the central Indian mineral rich states. The need for compliance with the law cannot be emphasized upon enough. Securing the rights of the adivasi is however not an end in itself. The end must be to strengthen and make dominant values and beliefs that resonate with ecocentric logic. As the degree of compliance with the anthropocentric laws is increased, the distinction between anthropocentrism and ecocentrism gradually dissipates.

Ultimately, it is the ecocentric realm, consisting of both the adivasi community as well as the environment – the forests, land, water and the air which emerge as the beneficiary of adequate compliance.

It is argued that the first step towards improving compliance with the existing rights-based legal framework, is to remedy what remains a significant lacunae in the law- the lack of effective sanction. For example, Section 7 of the Forest Rights Act imposes a meagre penalty of 1000 rupees for non-compliance with the Act. Firstly, the quantum of liability has to be significantly increased, as the non-compliant parties are usually agencies of the State or powerful non-state actors. The authorities responsible for the enforcement of the Act, must be empowered to impose penalties in proportion with the turnover of the entity involved. Secondly, apart from quantum, the sanctions can be made multi-dimensional. Some of the legislations mentioned in the paper, still do not prescribe criminal liability for contravention. Lastly, legal reform cannot be restricted to the environmental framework alone. There has to be longstanding changes made to other laws that feed into environment protection, like the Special Economic Zones Act, 2005. In practice, there must be an active attempt to ensure the State does not turn a blind eye to such non-compliance, but engages in vigorous prosecution of the concerned individuals and corporations. Only then can the adivasi community and the environment they inhabit receive the long overdue respect and protection they truly warrant.