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**Land Rights and Neoliberalism: An Irreconcilable Conflict
for Indigenous Peoples in India?**

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1. INTRODUCTION

The Forest Rights Act: Scheduled Tribes and Other Forest Dwellers (Recognition of Forest Rights) Act 2006, (FRA) of India, referred to as the Forest Rights Act or FRA in this article, grants enhanced rights to forest peoples in lands that they have occupied or used, often for generations (Government of India, 2012). 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,¹ needs to be addressed (Government of India, 2012). In addition to Adivasis’ individual rights, the FRA also respects community forest rights. This 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. The expectation from new social legislation such as the FRA in India is that it should increase justice for those whom the legislation seeks to protect. This newly acquired access to justice should theoretically, according to the terms of the FRA, 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. Social justice, defined as the equitable distribution of fundamental resources, and respect for cultural diversity such that no minority groups and their political interaction are undermined (Basok, Tanya; Ilcan, Suzan; Noonan, Jeff 2006) 267. Fraser argues that social justice today needs to take into account both redistribution of resources and recognition of cultural diversity, which tend to be polarized in today’s debate (Fraser, Nancy 1998). Larson and Murtadha point out how the inequity within the redistribution of resources and respect for human rights have become intrinsic to society’s norms and theories and governance (Larson, C. L; Murtadha, K. 2002) 134. I posit the grassroots reality of the implementation of the FRA is the product of competing political interests and conflicting values, as is often the case when social injustice occurs.

¹ ‘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. Dash and Khotari, *Forest Rights and Conservation in India* (2012, 151).

Proponents of a free-market capitalist view of development, argue that it is often an economic necessity for the government to appropriate forest lands (and thereby disregard the FRA). 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. The neoliberal view also undermines the assumption that more laws equate to more rights, and that rights automatically deliver justice. This is illustrated in the case study in this article, which highlights one of many examples of continuous land dispossession within this context. The case study also emphasises the gender biases inherent in the reaction of officialdom which, while increasing the vulnerability of women to oppression, highlights the opposing roles of “women as victims and women as actors” (Agarwal, 1992)¹¹⁹. The displacement of people from their lands by the government thus raises another more complex question: what characteristics of the legal and political system enable those charged with carrying out the law to suspend administrative justice² and circumvent existing legal frameworks?

The purpose of this article is thus to examine the current land struggles of forest peoples in the context of the legal frameworks of the FRA; the colonial legal legacy of the past; and the neoliberal doctrine of the present. I argue that the impact of the FRA for indigenous access to justice is impeded by two central factors. Firstly, the legal framework of the FRA is alien to Advisasi’s legal traditions, thereby impeding the use of the FRA as a tool to access justice. Secondly, the legal response towards any demands for justice is driven by underlying political and economic ideologies of the elected

² 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”² are not accessible for citizens, consumers, individuals or groups. UK Administrative Justice. <https://ukaji.org>

government which can similarly hinder justice. In principle, newly enacted progressive legislation promises justice. I will examine whether this promise of justice is being realised through the FRA, and how the government determines access to justice of marginalised groups in India.

This article is structured as follows: section two provides an overview of the history of tribal rights and law in India, and how contemporary Indian law has been influenced by colonial priorities that alienate customary tribal traditions. Section three outlines the human rights and social justice ideologies that underpin the FRA in India, and examines whether it provides adequate substantive and procedural access to justice. In section four, I explore the role of the state and the judiciary in enabling justice for marginalised groups such as the Gaddi tribe in India, in the changing context of globalisation and neoliberal economic ideologies. Section five uses a contemporary case study in order to examine the analytical framework proposed in the first three sections. The potential displacement of the Gaddi tribal community in the northern Indian state of Himachal Pradesh illustrates the indigenous forest people's struggle to claim their legal rights under the FRA in India. In section six, I draw together an analysis arguing that in the government response to land rights, the neoliberal governance paradigm collides with rights based approaches to governance and development. Section seven concludes by taking stock of the way in which all these factors interface with the quest for justice by indigenous forest peoples. I close by proposing that the neo-colonial legal system and the neoliberal governance structures subvert the enactment of land rights legislation and undermine legal empowerment.

2. INDIGENOUS RIGHTS AND LAND LAW

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 (Gilbert and Doyle, 2011, 5). *Terra nullius* is a principle that indigenous peoples are still fighting against in an effort to reclaim lost ancestral lands. Land has historically been tied closely to indigenous identity, and characterised by a collective

relationship to resources, and to social and spiritual well being. (Tugendhat and Dictaan-Bang-oa, 2013, 2). For example, a group of Torres Strait Islanders challenging the *terra nullius* concept at the High Court of Australia in 1992, managed to get it rejected and to obtain recognition of their ancestral land tenure. Consequently the Native Title Act of 1993 was passed to protect indigenous titles (Hunter, 2014, no page).

In India, the ancient ancestral ownership and occupation rights of tribal forest peoples in India were first 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 resources (Bhengra, Bijoy and Luithui, 1999); (Dash and Khotari, 2012); (Gadgil and Guha, 1992); (Karanth and Defries, 2010). 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 jurisprudence 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 Department³ over the lives of indigenous peoples, perpetuating ecological imperialism and dispossession (Springate-Baginski et al., 2008, 9).

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” (Galanter, 1968, 67). Galanter also points out that this legal tradition is alien to Indian traditions, “Foreign in

³ This Department is an agency of the Indian national government that traditionally has had jurisdiction over forests nationwide.

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.”(Galanter, 1968, 65); (Kidder, 1977). 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 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 geographical isolation.

Indigenous 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 way of applying or changing the law”(Galanter, 1968, 71). 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”(Galanter, 1968, 70); (Cohn, 1959); (Rudolph & Rudolph, 1969). On the other hand, a positive aspect of the decline of indigenous 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 indigenous groups. The following section takes this discussion of access to justice into the realm of social justice and rights.

3. RIGHTS AND SOCIAL JUSTICE

The FRA in India reflects a global move towards the recognition of human rights and is founded on principles of social justice. Social justice norms, which guide national and international normative frameworks, are increasingly influenced by human rights norms. Human rights, which has become part of the dominant legal norm in contemporary global conceptualisation, have similarly shaped international history (Gauri and Gloppen, 2012, 485). The French Revolution, the US civil rights movement, independence from colonial imperialism and the discontinuation of the slave trade 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 became a mainstream legal norm internationally. In line with these international legal norms and human rights frameworks, the International Labour Organisation (ILO) Convention on Indigenous and Tribal Peoples of 1989, No. 169, on 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 (Gilbert and Doyle, 2011).

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 (Galligan and Sandler, 2004, 26). 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 (Galligan and Sandler, 2004, 48). Traditionally, the international bodies engaged in

setting human rights standards attempted to direct and facilitate the implementation at national levels. More recently however, we see the introduction of forms of direct implementation of international law, with discrete legal systems. 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. The essential level is generally determined by the most vulnerable group and the protection of their rights, as understood in international law.⁴

The weakness of the policy of individual states being obligated to comply with the minimum core of social economic rights is highlighted by Amartya Sen. He challenges the ‘coherence’ of the human rights approach, and “the intellectual edifice of human rights,” through three critiques (Sen, 2001, 227). Firstly, he questions the legitimacy of human rights since they are based on ‘pre legal principles’ and are not justiciable rights, which adds confusion to the legal system. The status of human rights is therefore weakened since they are entitlements sanctioned by the state, which is the ultimate legal authority. The second critique pertains to what he calls ‘coherence’. Since rights have to be provided by an authority or a state, for example “the right to food or to medicine”, Sen argues that they can be a “hollow” concept, especially if the agency in charge does not provide the food or medicine, or in the case of this essay, land rights. Thirdly, he questions the universality of the social ethics of human rights, and whether they are held in the equal regard by all cultures (Sen, 2001, 228).

In India, in response to this expectation of a minimum core of social economic rights, the Forest Rights Act 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, is perceived as “contemporary India’s largest land regime change” (Sambhav et al., 2013, no page). 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

⁴ 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* (Varun Gauri and Daniel M. Brinks eds, Cambridge University Press 2008)

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” (Government of India, 2012, 1).

An estimated two hundred million people in India who are dependent on the forests for livelihoods and habitat may benefit from the FRA (Sarin and Springate-Baginski, 2010, 6). When Twenty three percent of India’s forest lands were designated as state forests, for the use of extractive industries, the due legal process of recognising pre-existing customary rights was not respected. “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 FRA” (Sarin and Springate-Baginski, 2010, 6).

Two groups of people are granted substantive rights under the FRA. First, “Forest Dwelling Scheduled Tribes,” 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 livelihood needs and includes the Scheduled Tribe pastoralist communities. The second group of people granted rights under the FRA are “Other Traditional Forest Dwellers,” 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.

The important substantive rights which are granted to those covered by the FRA, include: (1) the right to “hold and live in the forest land under the individual or common occupation for habitation or for self-cultivation for livelihood”; (2) “community rights such as nistar, by whatever name called” (“nistar” refers to the necessities of carrying on the business of living, including, in the communal

context, timber, pasture, fodder, burial/cremation ground, schools, parks, playgrounds, drains etc.); (3) the right “of ownership, access to collect, use, and dispose of minor forest produce which has been traditionally collected within or outside village boundaries.”⁵ (4) “other community rights of uses or entitlements such as fish and other products of water bodies, grazing ... and traditional seasonal resource access of nomadic or pastoralist communities”; (5) the “rights in or over disputed lands under any nomenclature in any State where claims are disputed.”⁶ (6) “rights for conversion of Pattas [titles] or leases or grants issued by any local authority or any State Government on forest lands to titles.” (7) right to protect, regenerate or conserve or manage any community forest resource⁷ which [forest dwellers] have been traditionally protecting and conserving for sustainable use. “This is amongst the most powerful and significant rights for re-commoning the enclosures and restoring community controlled democratic forest governance within customary village boundaries” (Sarin and Springate-Baginski, 2010, 12). None of the rights to land granted under the Act can be either sold or otherwise transferred.

A further right granted to those covered by the FRA, is one which explicitly recognizes that forest dwellers have been the victims of illegal acts depriving them of their rights in the past, and considers rehabilitation to alternative sites. As one can see from reviewing this list, a number of significant substantive rights are granted by the terms of the FRA. If implemented as written, the FRA 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.

⁵ “minor forest produce” is defined to include “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” Government of India (2012). The Forest Rights Act. In NOTIFICATION, M. O. T. (ed.) 6th of September, 2012 ed. New Delhi: Government of India Controller of Publications

⁶ This right is “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.” Sarin, M. and Springate-Baginski, O. (2010). India Forest Rights Act - The anatomy of a necessary but not sufficient institutional reform. In PAPERS, I. D. (ed.) *Research Programme Consortium for Improving Institutions for Pro-Poor Growth*. Manchester, UK: IDPM School of Environment and Development University of Manchester 10

⁷ Community forest resource’ means “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” *ibid.*¹²

The procedure for claiming rights under the FRA begins at the village level. The Gram Sabha, a village assembly, which under the FRA 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. The government ministry responsible for implementing the FRA is the Ministry of Tribal Affairs (MoTA), rather than the Ministry of Environment and Forest (MoEF). Given that the MoEF may be required to surrender significant power, revenue and land under the FRA, 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.

The enactment of this progressive social law has not however, translated into the just and equitable implementation of law in India. For example, given that the majority of the tribal communities have poor access to education, it might be unmanageable to make claims and to collect evidence for the claim within three months from the day a claim arises. Two types of proof are required, and documentary evidence might be problematic for forest people to produce, such as proving that they have occupied the forest land before December 13, 2005 (Section 4.3). There are several issues, but this is just one illustration that the legislation is not user friendly. Another is that the claimants must prove seventy-five years of residence, which is unreasonable especially as it may exclude a great number of people from protection. It fails to take into consideration that this kind of proof is many times not available. Moreover, restricting eligibility to 'scheduled' tribes also excludes many tribal groups, who for some historical administrative reason had not been 'listed' by the colonial government in the 'schedule' and fall through the tribal benefits net. (Sarin and Springate-Baginski, 2010, 18).

The rules 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 which are harmful to pastoral and transhumant communities and communities called Primitive Tribal

Groups (PTGs). The unfortunate articulation of how the FRA relates to other existing laws has caused ambiguities, especially with contradictions between rights of tribal communities, and conservation and wildlife laws. Forest people 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 FRA does not provide adequate clarification on these contradictions, nor therefore adequate 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”(Government of India, 2012). Under the FRA, 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. 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 (Sarin and Springate-Baginski, 2010, 18).

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, gives 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. To sum up, the inconsistencies within the FRA are many, which creates an inadequacy for the law to be perceived as successful land reform. The inherent legal inconsistencies of the FRA are further exposed when

pitted against the hegemonic ideology of Neoliberalism. It is this ideology which is the focus of the next section.

4. NEOLIBERALISM AND SOCIAL JUSTICE

Many states in developing countries exhibit features of neoliberal statecraft, so we may ask whether their present ideologies have impacted on their understanding of rights, law and justice. In order to examine the failure to recognise legal rights of indigenous peoples, which is described in detail in the case study below, it is helpful to consider the role of the government, state exploitation of forest lands, and the conditions that foster the legal exclusion of indigenous peoples fighting for their land rights. Under neoliberal capitalism, the government, the judiciary, the market forces, civil society and political society are competing for resources. 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” (Harvey, 2005, 2).

Though the term Neoliberalism is widely used, a critical discourse on the concept of Neoliberalism is still nascent. Emerging as a political economic theory, rooted in Adam Smith’s classical liberalism theories (Thorsen, 2010, 8), (Harvey, 2005); the present discourse is eclectic, representing broad and often contradictory political perspectives. An economic doctrine that stresses individual freedoms in the context of private property, free trade and free market capitalism, Neoliberalism prescribes the role of the state as supporting these aspects through guaranteeing the integrity of money and efficient functioning of the markets. State support of public facilities such as legal structures and defence is justified purely in order to prioritise the success of markets as the necessary pre-condition to the welfare for its citizens. State responsibility remains limited, with the emphasis on freedom and self regulation of markets (Harvey, 2005, 3); (Thorsen, 2010). Dag Einar Thorsen writes that publications on Neoliberalism are often critical, and his interpretation is that Neoliberalism is a loose set of

political beliefs with proposes that the state is legitimately responsible for safeguarding individual liberty which is perceived in terms of commercial liberty for individuals and corporations, with the state's role as being minimal (Thorsen, 2010, 15).⁸

Hayek and Friedman, foundational figures in neoliberal ideology, are of the school that advocates an individual's freedom to choose as being spontaneous and 'natural', and that a state which manages welfare would suppress economic advancement (Thorsen, 2010, 14). These free-market social and economic policies, popularly known as the Washington Consensus, (Jessop, 2002, 454) became the dominant economic policy during Reagan and Thatcher governments in the US and the UK in the 1980s, and now pervade national and international financial institutions including those such as the IMF, The World Bank and the World Trade Organisation (WTO). In 1975, the 'Chicago boys,' so named because they came from the University of Chicago, worked with the IMF at Pinochet's invitation to reshape the Chilean economy along Neoliberal lines (Harvey, 2005, 8). China in 1978, India in the 1980s and Sweden in the 1990s all turned decisively towards neoliberalised economies (Harvey, 2005)⁹. Harvey posits that the 1930s capitalist slump and the Second World War shaped the neoliberal appeal, as both capitalism and communism were seen to have failed, which activated the Bretton Woods agreements and generating global financing and management through the IMF and World Bank and the United Nations (Harvey, 2005, 10). After Independence in 1947, a badly impoverished India chose strongly supported state economic policies. Concentrating on building an industrial base, these policies did not comprehensively address the deep poverty of the majority of Indians. The 1980s economic liberalization was the architect of the New Economic Policy of 1991, which continued to alienate the impecunious groups such as tribal populations. (Gidwani, 2006, 11);

Michel Foucault, the French philosopher, who has given us post modern and post structural understandings of the past in the present through his analysis of psychology, social theory, and history of ideas, (Kelly, no date) observes that in the neoliberal tradition, state policies are, even in the social

⁸ Also see Mises 1962; Nozick 1974; Hayek 1979.

sphere, strongly influenced by market forces. In support of this, Lemke refers to the allocation of inadequate resources, the inequitable aspect of which suffers from competing goals. (Lemke, 2010, 197). Foucault argues that the neoliberal statecraft attempts to redefine the social sphere as an economic domain, which means that the onus is on the government of a nation state to regulate competition and the market for individuals, and groups and for institutions (Lemke, 2010, 197).

Humphreys makes a case for neoliberal policies influencing forest laws and environmental mechanisms such as the Kyoto Protocol, and the European Union's Emissions Trading Schemes. He argues that in order for neoliberalism to flourish, the government has to be strong and has to introduce "market-based disciplines to new areas and create political space that can be occupied by private sector businesses" (Humphreys, 2009,319). Humphreys shows, through detailed evidence, that neoliberal policies have been influential since the 1992 UNCED forest principles and the latest 2007 Non-Legally Binding Instrument on all Types of Forests. Specifically, forests continue to be prioritized as a corporate resource base for markets and extraction, rather than protected for non-exploitable sustainability. Other ecological sustainable and social justice forest policies of conservation, wildlife protection are competing with neoliberal power, such as when the Convention on Biological Diversity which included public-private partnerships as a mechanism for the promotion of private investments (Humphreys, 2009,322).

Oishik Sircar takes an unrelenting stand on the erosion of human rights in the context of neoliberalism in India. He deems the undermining of rights an illusion of 'legal emancipation'. Legal emancipation being the faith citizens put in their government and in the judicial system in order to be 'emancipated' from poverty and granted access to justice. The assumption is that laws have the power to grant rights, which will guarantee justice. This "linear progression" is what Sircar calls an illusion, or 'spectacles' through which one incorrectly views the culture of rights as having the potential for emancipation and access to justice. Justice, however, is often elusive, by reason of the gap between the expectation of justice and the reality of what the law delivers. Sircar argues that neoliberalism is being used by the state to justify the "liberal statecraft and market craft, both of which operate through a seamless

intersection of managerial and militarised agendas.” This neoliberal statecraft has led to the “privatisation of state accountability” and to the “the militarisation of the state (Sircar, 2012, 527),” both of which contradict the rights based culture that has been developing. It also compounds the betrayal of vulnerable populations who understandably expect that their access to justice should increase with the enactment of social justice legislation. Within vulnerable populations, women are even more marginalised than men. A neoliberal setting that subordinates the State to the market, compromises the protective and ‘just’ role of the courts and that of the constitutional framework. The courts, where they are merely instruments of the neoliberal state, are thus used to legitimise what Sircar deems state violence. This analytical framework is useful to understand the case below of the Gaddi women being arrested in Himachal Pradesh for peacefully protesting for their land rights. It bears witness to the ‘illusion’ that more laws equal more rights, which in turn equal more justice.

When the ‘allocation of scant resources for competing goals’ is taken on by the state, from “the majoritarian perspective of social betterment”(Sen, 2001, 251), minority rights can be in danger of being disregarded to an extreme, as exposed by the pattern of steady dispossession of tribal lands. Majority improvement is part of a neoliberal ideology. A hypothetical example of majority improvement is illustrated by Sen. He divides a cake between three people called B, C and D, “with the assumption that each person votes to maximize only her own share of the cake” (Sen, 2001, 251) After voting, a share of person B’s cake is taken away and given to C and D, in the name of “majority improvement”. Even if person B is the poorest of the three, this division could continue till B would have no cake left. Despite a government’s mandates to protect the most marginalised communities, under the concept of majority improvement, this would be justified, creating a contradiction in governance.

This uncomplicated cake example has been played out in real life in the displacement of the Gaddi tribal communities in the Chamba District described below. These elements of neoliberal statecraft and their clash with the social justice and rights based Forest Rights Act, also plays out in the case study on land displacement protests,, with negative consequences of land dispossession for the Gaddi

Tribe. It reveals the tension between laws framed for social justice and governmental violation of these laws. This is particularly difficult to reconcile when the government is obligated to act as the ultimate legal authority to ensure access to justice.

5. THE CHAMBA DISTRICT LAND DISPLACEMENT CASE STUDY

During a peaceful protest against plans for a hydroelectricity project,⁹ which would dispossess them of their lands, thirty-five Gaddi tribal¹⁰ women were arrested in March 2014, in the northern Indian state of Himachal Pradesh. The women, from Holi village of Chamba District had been protesting against the proposed hydroelectricity plans for two years. The plans would decimate the dense forests they inhabit and result in the loss of their homes. A 15 kilometre long tunnel would be built for the project, requiring blasting. This in turn would dry up the Ravi River on which they depend for water resources, and eventually displace the community.

The arrests of the Gaddi women are inconsistent with fundamental rights of citizens of India such as the right to equality, the right “to freedom of speech and expression”, and the right to “assemble peaceably and without arms” (India, 2007 , Part III No.14). The arrests also violate forest rights of indigenous peoples under the Forest Rights Act of 2006, which indicates that it does not seem to have influenced the behavioural norms of either the government or of the judiciary towards land rights of the tribal women, at least in Chamba District. In the face of this clear violation of the FRA and the seeming disregard for social justice by the government, two fundamental questions arise: do the protesting tribal women in Chamba District have legal rights over their land, and has the FRA delivered on its promise of greater power and enhanced rights for indigenous peoples in India? The

⁹ 180 MW Bajoli Holi Hydroelectricity Project plans promoted since 2012 by a private company called GMR. The project involves the diversion of seventy-five hectares of rich Himalayan forests and the felling of almost five thousand trees. HimDhara, 'Action Alert! Tribal Women in Chamba arrested!' (<http://www.himdhara.org/2014/03/26/action-alert-tribal-women-in-chamba-arrested/>, 2014) accessed 12 June 2014

¹⁰ The word 'tribal' or Adivasi is a generic term used to describe indigenous peoples in India. 'Gaddi' is the name of the specific tribe of the women from Holi.

adverse effects of development-induced displacement remain unquestioned by those in power and are reinforced both by the government and by the corporate sector.

Besides the arrest of the tribal women, as well as the intimidation of the women by local contractors and police, to force them to withdraw their protest, the Chamba case revealed several governance shortcomings (HimDhara, 2014, no page). The gender based violence implications of police and local contractors intimidation of the women does not comply with international standards concerned with violence against women.¹¹ Furthermore it compounds the fundamental failure to recognise land rights under the Forest Rights Act. The Forest Rights Act grants land rights to both women and men equally. The Ministry of Environment and Forests (MoEF) granted approval for the forest clearance to the corporation funding the project. This action was taken without referring the matter to the Gram Sabha (the meetings of local village councils)¹² as required by the provisions of the Forest Rights Act. The approval was made on the basis of a false certificate issued by the Chamba Deputy Commissioner, which stated: “there were no claims for forest rights to be settled on the seventy five hectare forest land to be diverted for the project” (HimDhara, 2014, no page). In addition to this, the initial plans for the hydroelectricity project had called for construction on the bank of the river Ravi where there were no forest villages. The MoEF however, gave consent to GMR to shift the project to the opposite river bank where several tribal forest villages were situated. The MoEF consent apparently was given within one day of the GMR application, while the inhabitants were only informed of the decision two years later. This consent was given despite an evaluation report by the Himachal Pradesh State

¹¹ CEDAW Committee General Recommendation 19 definition of violence against women (VAW) as “Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.” Tugendhat and Dictaan-Bang-oa 5

¹² “The Gram Sabha shall be the authority to initiate the process for determining the nature and extent of individual or community forest rights or both that may be given to the forest dwelling Scheduled Tribes and other traditional forest dwellers within the local limits of its jurisdiction under this Act by receiving claims, consolidating and verifying them and preparing a map delineating the area of each recommended claim...” The Forest Rights Act Chapter IV 6(1)

Electricity Board which examined technical, social, environmental and economic issues in making a recommendation against the shift from one river bank to another.¹³

A third action harmful to the claims of the tribal women was the ruling of the Himachal Pradesh High court, which denied claims filed in support of the tribal women.¹⁴ The High Court's ruling seems questionable in light of Section 4(5), in which the FRA prohibits the eviction of forest dwellers from forest land under their occupation till completion of the process of recognition of rights.¹⁵ The Ministry of Tribal Affairs (MoTA) had issued directions in 2012 emphasizing that the protective clause against eviction from forest lands is absolute, but this guidance was disregarded both by the MoEF and by the High Court, which also reinforces the endemic power imbalance which is "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" (FIMI, 2006, 6).

As with any law, the cooperation of various governmental agencies was required for the rights of the tribal women under the FRA to be recognised and realized. Among the various stakeholders who failed in their legal duty were the MoEF, the state High Court judges, the Chamba Deputy Commissioner, and the Police. The Forest Department under the MoEF are obliged to support the community and the new legislation. "Forest Departments, however, have shown considerable resistance to permitting recognition of the community forest resource (CFR) right as it challenges their exclusive territorial jurisdiction and control over forests"(Sarin and Springate-Baginski, 2010, 24). The case of the Gaddi Tribal community is a sad reminder that however commendable the law's

¹³ The Himachal Pradesh State Electricity Board also pointed out that the GMR had "misrepresented some technical issues" in order to justify the geographical shift. (HimDhara 2014)

¹⁴ An option that was pursued by the tribal women with the support of civil society advocates, was to get an injunction on the basis that the Gram Sabha consent for forest land diversion had not been received and the FRA had therefore not been implemented. (CFR) Another option considered was filing a petition at the state level monitoring committee by the women or other members of the gram sabha on their behalf, under section 7 and 8 of FRA challenging the violation of FRA. Copying in the Ministry of Tribal Affairs (MoTA)

¹⁵ Section 4(5) of FRA: "Save as otherwise provided, no member of a forest dwelling Scheduled Tribe or other traditional forest dweller shall be evicted or removed from forest land under his occupation till the recognition and verification procedure is completed." The Forest Rights Act

intent and however precise its language, legislation will remain just words on paper without the cooperation of the government agencies and courts charged with making the law a reality in the lives of marginalised people. The case study demonstrates that the implementation of legislation and policy is just as political as the process through which a policy is enacted and passed by government. It is driven by the ideological orientation of the state and its actors, which as in this case, is inconsistent with the human rights and social justice foundation of the FRA. In the case of the Chamba district, it has resulted in tribal rights being subverted and undermined at the expense of the more powerful neoliberal agenda of the state and private sector interest groups.

The significance of this women-only protest also relates to a global feminization of poverty, in which “women comprise the majority of the poor” (Staudt, 1998, 217).¹⁶ Agarwal argues that poorer women have been “victims of environmental degradation in quite gender-specific ways,” demonstrating that they also have also played a significant role in environmental conservation practice (Agarwal, 1992, 119). Some of the ecofeminist¹⁷ discourse presumes connections between women’s biology and ties to nature. I do not expand on that aspect in this article, 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. In India, women have also been historically part of the active opposition to the increasing instances of land dispossession of forest peoples, starting with the much

¹⁶ “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, K. (1998). The Feminization of Poverty: Global Perspectives. *The Brown Journal of World Affairs*, 5(2).2

¹⁷ 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 Curtin, D. (1991). Toward an Ecological Ethic of Care *Hypatia*, 6(1). 60
“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.” Cheney, J. (1987). Eco-Feminism and Deep Ecology. *Environmental Ethics*, 9(2). 115

publicized Chipko Movement of the 1970s when women hugged trees in order to prevent logging and deforestation. (Jackson, 1993); (Agarwal, 1992); (Mawdsley, 1998); (Shiva, 1988)

The global reality of women being excluded from the mainstream is compounded for tribal women who are excluded as being part of tribal communities and also as being women within their tribes. Women in different tribes enjoy different levels of equality. Some tribes are traditionally matriarchal and some are matrilineal. Some have been Sankritised and some were converted to Christianity, and have assumed certain patriarchal traditions of other religions that were formally alien (Xaxa, 2004, 350). Land ownership in many tribal communities is communal, which changes the gender dynamic of land rights. In the Khasi communities of Meghalaya of north eastern India, women historically hold the rights of land ownership and men do not (Xaxa, 2004, 354). It is difficult to make generalised statements about tribal women in India, since tribal peoples live in many states in India, and differ widely from each other.¹⁸ Some experiences however, are shared, such as the impact of the erosion of natural resources on which they are so dependent for their livelihoods (Xaxa, 2004, 360). The loss of livelihoods and dispossession of their lands for all the Gaddi community would gravely impoverish all of them. For the women specifically however, gathering food, and the collection water and firewood for fuel within their communal gender division of labour would expose them to dangers, when being pushed further into the forests in search of their natural resources, such as the threat of wildlife. These dangers are important enough for the Gaddi women to protest for two years in spite of intimidation by local police and government officials aimed at forcing the protest to end. The Gaddi women's demonstration to claim their rights to their communal lands and to self-determination uniquely highlights the multiple discrimination faced by indigenous peoples who are both tribal and female. It also displays their leadership and underlines the gender issues inherent in the struggle to retain land ownership.

¹⁸ 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.

Forest lands are a valuable economic resource, exploited by the state in India since the 1800s, when the colonial government converted them into sovereign property. The customary ancestral ownership and occupation rights of tribal forest peoples in India were first disregarded under colonial rule in 1874, when the colonial administration facilitated control of Adivasi lands, which were abundant in natural and mineral resources, with the enactment of new laws. The Scheduled Districts Act XVI, 1874, and the Government of India Act 1919 and the Government of India Act, 1935 (Bhengra, Bijoy and Luithui, 1999); (Dash and Khotari, 2012); (Gadgil and Guha, 1992); (Karanth and Defries, 2010).

Neoliberalism influences social justice. Social justice in this case, is the recognition and respect for the land rights of indigenous forest peoples such as the Gaddi community, who are threatened with the loss of their land by plans for a hydroelectric project. It could be argued that economic policies followed by the government that allows this scenario of displacement from lands are questionable. These policies, which seem to favour the individual and corporate profit over indigenous land rights, reflect the neoliberal doctrine. Harvey points out that “accumulation by dispossession entails a very different set of practices from accumulation through the expansion of wage labour in industry and agriculture...Dispossession entails the loss of rights...Neoliberal concern for the individual trumps any social democratic concern for equality, democracy and social solidarities” (Harvey, 2005, 178) .

The neoliberal endorsement of privatization in the Gaddi case sits uncomfortably not only with the concept of land rights but also with the international agreed principles of forest conservation and protection of habitats. The Gaddi protest is a reflection of how the state, under neoliberal ideologies, is redistributing resources from marginalized groups such as women and indigenous peoples, to the economic elite. This proves Harvey’s theory of ‘creative destruction’ of neoliberalisation redistributing rather than generating assets and wealth, withdrawing rights to commons, and as in the Gaddi case, obstructing indigenous socio-economic patterns, and livelihoods (Harvey, 2005, 159). One of the principle tenets of neoliberalism is that the government should not “interfere” in the functioning of the market – that there should be a “separation” of government from market. In that sense, the failure of the Indian government to intervene in the Gaddi case is consistent with neoliberal

policy, but its abandonment of it' protect the rights of indigenous people under the FRA has resulted in serious harm to the livelihoods and lives of the Gaddi. Gowan describes it in terms of Foucauldian governmentality, in which the state is complicit in a "steady abandonment of the majority to precariousness" (Gowan, 2013, 2-6); (Gidwani, 2006). It is evidence of a heavy-handed state intervention against the interests of the subaltern, and reminiscent of the lack of 'coherence' that Sen refers to in regard to the state's role in providing access to justice.

6. THE COLONIAL LEGACY OF THE PAST AND THE NEOLIBERAL DOCTRINE OF THE PRESENT

In India, globalisation has created a dichotomy.¹⁹ On the one hand, the 'creative'²⁰ and activist traditions that influenced the Constitution, enable it to become "the vehicle of empowerment of the untouchables and indigenous peoples (defined respectively as the "scheduled castes" and "scheduled tribes") (Baxi, 2000);(Gauri and Gloppen, 2012). On the other hand, two centuries of colonial rule has left a legacy of laws designed with a view to extracting resources from the colony, and to controlling local populations who might be harmed in the process. Much of the political and legal culture in India was initially adopted unchanged by the independent Indian government, which reinforced and maintained the exploitation of the subaltern populations in many ways, creating an 'internal colonisation' situation in the county, divided along lines of class and caste. "Postcolonial legality thus stands sited in the dialectics of repression and insurgency" (Baxi, 2005, 544). It continues colonial laws' repressive legacies and even innovates these through the regimes of security legislations (Gauri and Gloppen, 2012). The Forest Rights Act is an attempt to correct historical injustices of land tenure, but it is impeded by the two barriers of the colonial legacy of the past, and the neoliberal doctrine of the present. The law has been complicit in the oppression of the poor and marginalised groups.

¹⁹ Globalisation is a process of international trade and investment that has occurred throughout history. The debate on the effects of globalisation includes a critique of profits taking priority over rights of people and communities. <http://www.globalization101.org/what-is-globalization/>

²⁰ 'Creative' is the expression used by Sircar to describe the interventions by the Indian Supreme Court such as Public Interest Litigation, and Social Action Litigation to protect human rights of marginalised communities.

Though it promises access to justice, security and protection, it has not served this purpose in India. (Galanter, 1983, 6). This conflict has created a legal dysfunction.

The displacement of the Gaddi community exemplifies the tension between neoliberal statecraft and rights-based legislation such as the FRA. The legislative framework of the FRA was undermined and subverted by the agenda of economic growth driven by a collusion of neoliberal governance and the private sector. I have discussed above how access to justice and commitment to rights and social justice in the form of progressive legislation has been thwarted by certain inherently incompatible expanding neoliberal economic ideologies of the government. The marginalisation of the Gaddi community is compounded by juridical alienation, caused by lack of knowledge of customary and formal legal traditions, as outlined in the second section of this article. This alienation exacerbates the lack of access to justice for Adivasis in India.

Amartya Sen's scrutiny of "the intellectual edifice of human rights" outlined in section three, may help us understand the attitudes of Indian officialdom in the case of the arrested tribal women in the Chamba case study. The Chamba women's rights to justice are not realised, since this entitlement, according to Sen's critique is not 'sanctioned' by the representatives of the state, who would be the 'ultimate legal authority' to legitimise the rights. The representatives of the state, whether it be the Himachal Pradesh High Court, the police, the Chamba Deputy Commissioner, the MOEF, acting in concert with GMR the private company, do not 'value' these rights of the tribal forest people, whether they be women or men. Since these actors have both the political-economic power and legal knowledge the tribal communities do not possess, indigenous rights are overridden. Dash and Khotari estimate that in postcolonial India, roughly 100,000 to 300,000 forest people have been evicted from their lands, and "several million more deprived fully or partially of their sources of livelihood and survival" (Dash and Khotari, 2013, 152). The statistics from the National Commission for Scheduled Castes and Scheduled Tribes highlights the impoverishment of Adivasis: 83 percent of the country's bonded labourers are from Scheduled Tribal peoples, and 85 percent of them live below the official 'poverty line' (Bhengra et al., 1999)⁷. The poverty of the forest tribes is particularly unjust given that

“90 percent of India’s coal mines, 72 percent of the forest and other natural resources, and 80 percent of India’s minerals, are in Adivasi lands. Over 3,000 hydroelectric dams are also located in these areas” (Bhengra et al., 1999, 7). The profits from this natural wealth have never been shared with the Adivasis who inhabit these lands. These statistics directly correlate with Sen’s hypothetical cake example: a community or tribe, already impecunious, outvoted and outmanoeuvred, protesting against further injustice of potential loss of homes, livelihoods, and culture but up against the dominant ideology of neoliberal majority improvement. If dispossessed of their lands, the community would be left with nothing or ‘no cake.’ Since there has been no precedent set for the GMR company or the government officials to share any future profits of the hydroelectricity project with the tribal forest peoples, the tribal community would be forced to give up their land without any compensation, and surrender their share of the ‘cake’, in the name of majority improvement for economic development.

The modern state’s inclination towards a compact with the private sector has created conditions in which the state’s role to protect and care for the welfare of its citizens is no longer a priority. In biopolitical discourse,²¹ the process of displacing marginalised communities from their lands would be an example of ‘abandonment’, or neglect towards their social and economic rights. The role of modern government is thus questionable, especially if it espouses pastoral care and individual and community wellbeing. This is in stark contrast to present global neoliberal governance which has fostered the reality of extreme marginalisation of millions of people (Selmecezi, 2009, 520).

Lemke’s discussion of neoliberal norms provides a theoretical framework for the actions of officialdom and of the market sector in the Chamba district, which links up with the ‘hollow’ aspect of human rights norms with which Sen takes issue. If the Gaddi communities’ rights are not valued, sanctioned, and implemented by governments nor respected by the corporate sector, the emancipatory

²¹ Biopolitics describes the interface between the political and biological existence of human beings. Selmecezi, A. (2009). “...we are being left to burn because we do not count” : Biopolitics, Abandonment, and Resistance. *Global Society*, 24(4). describes “the most quoted “definition” of biopolitics”: “For millennia, man remained what he was for Aristotle: a living animal with the additional capacity for a political existence; modern man is an animal whose politics places his existence as a living being into question” (Foucault, *The History of Sexuality*, op.cit., p. 143). Anna Selmecezi, “...we are being left to burn because we do not count” : Biopolitics, Abandonment, and Resistance’ (2009) 24 *Global Society* 522

intent of rights-based legislation is left unrealised. While stressing that capitalism depends on a structured system of values and ethics such as trust, Sen does acknowledge that one of its limitations is that it is unable to counteract a tendency to economic inequality. Sen points out that the market system is dependent on either the law or on “mutual trust and an implicit sense of obligation”(Sen, 2001, 265). Though the role of the government in the neoliberal world is relatively diminished and market oriented, the market remains subject to the policies that the government formulates. In order to enforce any of these policies and regulate the market, the government relies on the law, as does the market. Based on this logic, human rights based approaches can hold governments accountable with respect to human rights treaties that they have legally ratified. In addition right-based legislation provides support for citizens when they make representations in court, or when they step forward in the role of rights holders.

Fights for social and economic rights are 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”(Galligan and Sandler, 2004, 48). 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” (Gauri and Brinks, 2008, vii). Yet positive examples of courts making affirmative rulings on social and economic rights do exist, for example Argentina’s 1998 Vicente case where the state was required to provide medical services and essential medicines to the marginalized communities. Similarly in another example in India in 1981, the Supreme Court astutely created judicially enforceable rights concerning housing, education and bonded labour from what were formerly constitutional guiding principles, demonstrating their willingness to act upon a moral obligation.²² In contrast, the ruling in

²² Gauri quotes Justice Richard Goldstone: “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

the Gaddi case illustrates the inconsistency of enforcing social justice norms by governments with neoliberal principles.

As demonstrated in the Gaddi instance such inconsistencies increase the perceived 'abandonment' of community rights by duty bearers. This abandonment may also increase impoverishment of certain sections of the population. Wilkinson and Pickett in 'The Spirit Level' provide rigorous cross-country evidence that increased impoverishment of a few leads to inequality and a reduced standard of living for the majority of the population.²³ This finding is incompatible with the 'self-care' strategy of neoliberalism, in which the individual becomes responsible for social ills such as poverty, unemployment, illness, and the onus is shifted away from the greater society and governance (Lemke, 2010, 201). Problematic strategies like these as well as the rising inequality around the world and accompanied discontent, products of the neoliberal doctrine, could mean that a pendulum swing away from neoliberal ideologies towards a right-based and social justice based idea of the welfare state is a hopeful possibility.

7. CONCLUSION

Can new national legislation that is administered by a market oriented government and interpreted by a traditional judiciary, successfully respond to the contrasting norms and needs of indigenous peoples? In this article I have argued that the legal response towards any demands for justice is driven by the historical evolution of formal law in a country, which has displaced indigenous legal plurality, and by both the political and economic ideologies of the government. With the Gaddi case study of an all-women protest for land rights, I have exposed the irreconcilable conflict between neo-liberal policies and social justice legislation for India's indigenous peoples, with the added dimension of

economic rights with civil and political rights." (viii) For example, Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 2 SCR516

²³ Wilkinson and Pickett's study of the National Health Services of the United Kingdom also affirmed that societal sharing of responsibility for vulnerable sections of the population benefits all. Richard Wilkinson and Kate Pickett, *The Spirit Level: Why Greater Equality Makes Societies Stronger* (Bloomsbury Press 2011)

gender justice within land dispossession. I have revealed the government's response to land rights in India, and how the neoliberal governance paradigm collides with the country's rights based approaches to governance and development. This article has explored the way in which all these factors interface with the quest for justice by indigenous forest peoples, making a case that the neoliberal approach, and the alien legal traditions subvert the enactment of land rights legislation and undermine legal empowerment

Justice is contingent upon a complex number of factors, which include rights, a commitment to social justice by the state, an efficient and activist judiciary,²⁴ and a market economy that accommodates community rights. This is evidenced by the implementation of India's Forest Rights Act, in which all these procedural factors continue to obstruct access to justice for the Adivasis. As I have illustrated in this article, these include: insufficient guarantees to allow claimants to pursue their claim and access justice; the hindrance caused by poor conceptualisations of the Gram Sabha's²⁵ role; the obstructive framing of the "in addition and not in derogation to other laws" which has caused uncertainties in enforcing the FRA legislation, and omissions in the rules. On a broader level, the expansion of the global neoliberal economy has resulted in a paradigm shift that is denying universal human rights standards.

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, when committing itself to neoliberal economic policies, does the government violate laws that they enacted themselves? Does this dichotomy

²⁴ The concept of an 'activist Judiciary' in India is reflected in the literature, and indicated above in footnote 23. In a similar vein, Sircar writes, "The "dynamics of disenchantment" are partially allayed by the trust that the rightsless have placed in the Constitution because of the creative activist interventions by the SC over the last several years in the form of Public Interest Litigation (PIL) or Social Action Litigation (SAL) to protect and uphold the human rights of a range of disadvantaged communities and individuals..." 551, and he asks "What role has an activist judiciary played in representing the Samvidhan to the common people to make them "love it" and "prize it"? 555

²⁵ Gram Sabha is a village council.

demonstrate the ‘hollowness’ of human rights with suspect political commitment, alluded to by Sen’s critique of human rights? If rights based legislation is not supported by practice, and by approaches that are conducive to legal empowerment, and if the duty bearers do not recognise the needs of marginalised groups, FRA will be rendered ‘hollow’ and rights to land will not be recognised. 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. Judging from the Gaddi tribal protest, this does not necessarily happen, and the power of the corporate sector to appropriate land seems greater than that of tribal communities to assert their rights effectively to lay claim to their ancestral lands, rights explicitly granted to them under the FRA, to lay claim to their ancestral lands. If the executive branch of the government of India does not abide by the provisions of this Act, it is not conforming to the UNCESCR “minimum core” of social economic rights. By not responding to the needs of the most vulnerable groups, the government is failing to comply with the obligation of meeting the ‘minimum essential level’ that must be satisfied by state parties. The indigenous groups are entitled to the protection of rights to land tenure, housing, and livelihood.

Democratic elections bring change, through new governments. The policies followed by each government support not only the economic and social culture of governance but also the human rights values it adopts. After India’s May 2014 elections, a change in elected government also resulted in a marked political shift in values relating to social justice. The departing Congress government sponsored a plethora of social justice legislation. The governing BJP (Bharatiya Janata Party) is sharply neoliberal in its beliefs, which may affect the social and economic rights of vulnerable and marginalised populations. Rights based legislation promotes social justice and inclusion yet always remains dependent for implementation on the commitment of the government of the day. The dispossession of people’s lands by the government also raises another more complex question: what characteristics of the legal and political system enable those charged with carrying out the law to circumvent existing legal frameworks? And I leave the reader with the question: Can new national legislation, that is administered by a market oriented government and interpreted by a traditional judiciary, successfully respond to the contrasting norms and needs of indigenous peoples?

For Review Only

References

- Agarwal, B. (1992). The Gender and Environment Debate: Lessons from India. *Feminist Studies*, 18(1).
- Agarwal, R. (2011). Five Years of Forest Rights Law. *Civil Society Online*.
- Basok, Tanya; Ilcan, Suzan; Noonan, Jeff. (2006). Citizenship, Human Rights, and Social Justice. *Citizenship Studies*.
- Baxi, U. (2000). Postcolonial Legality. In RAY, H. S. A. S. (ed.) *A Companion to postcolonial Studies*. Blackwell Publishing.
- Baxi, U. (2005). Postcolonial Legality. In SCHWARZ, H. & RAY, S. (eds.) *A Companion to Post Colonial Studies*. Blackwell Publishing.
- Bhengra, R., Bijoy, C. R. and Luithui, S. (1999). Report on The Adivasis of India. London: Minority Rights Group.
- Bryden, J. and Geislerb, C. (2007). Community-based land reform: Lessons from Scotland. *Land Use Policy* 24.
- Cheney, J. (1987). Eco-Feminism and Deep Ecology. *Environmental Ethics*, 9(2).
- Curtin, D. (1991). Toward an Ecological Ethic of Care *Hypatia*, 6(1).
- Dash, T. and Khotari, A. (2012). Grabbing: Dangers of the Green India Mission. In KOHLI, K. & MENON, M. (eds.) *Banking on Forests: Assets for a Climate Cure?* Delhi/Pune: Kalpavriksh and Henrich Boll Stiftung.
- Dash, T. and Khotari, A. (2013). Forest Rights and Conservation in India. In HOLLY JONAS, H. J., 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.
- Fimi, I. I. W. S. F. (2006). Mairin iwanka raya : Indigenous Women Stand Against Violence. *A Companion Report to the United Nations Secretary-General's Study on Violence Against Women*.
- Fraser, Nancy. (1998). Social Justice in the Age of Identity Politics: Redistribution, Recognition, Participation.
- Gadgil, M. and Guha, R. (1992). *This Fissured Land: An Ecological History of India*, India: Oxford University Press.
- Galanter, M. (1968). The Displacement of Traditional Law in Modern India. *Journal of Social Issues*, 14(4).
- Galanter, M. (1983). Making law work for the oppressed. *The Other Side*, III(2).
- Galligan, D. and Sandler, D. (2004). Implementing Human Rights. In HALLIDAY, S. & SCHMIDT, P. (eds.) *Human Rights Brought Home Socio-Legal Perspectives on human rights in the National Context North America (US and Canada)* Hart Publishing.
- Gauri, V. and Brinks, D. M. (2008). *Courting Social Justice*, Cambridge: Cambridge University Press.
- Gauri, V. and Gloppen, S. (2012). Human Rights-Based Approaches to Development: Concepts, Evidence and Policy. *Polity*, 44(4).
- Gidwani, V. K. (2006). Subaltern Cosmopolitanism as Politics. *Antipode*, 38(1).
- Gilbert, J. and Doyle, C. (2011). A New Dawn over the land: Shedding Light on collective Ownership and Consent. In ALLEN, S. & XANTHAKI, A. (eds.) *Reflections on the UN Declaration on the rights of indigenous peoples*. Oxford, UK: Hart Publishing.

- Government of India (2012). The Forest Rights Act. In NOTIFICATION, M. O. T. (ed.) 6th of September, 2012 ed. New Delhi: Government of India Controller of Publications
- Gowan, T. (2013). Thinking Neoliberalism, Gender, Justice. *S&F ONLINE Barnard Center for Research on Women*, 11.1-11.2(Fall 2012/Spring 2013). Cambridge UK:
- Gutting, Gary, ed. (2005) *The Cambridge Companion to Foucault*. 2d ed. Cambridge Companions to Philosophy. Cambridge UK: Cambridge University Press.
- Harvey, D. (2005). *A Brief History of Neoliberalism*: Oxford University Press.
- Himdhara. (2014). *Action Alert! Tribal Women in Chamba arrested!* [Online]. <http://www.himdhara.org/2014/03/26/action-alert-tribal-women-in-chamba-arrested/>. [Accessed 12 June 2014].
- Humphreys, D. (2009). Discourse as ideology: Neoliberalism and the limits of international forest policy. *Forest Policy and Economics* 11.
- Hunter, J. (2014). Rights-based land reform in Scotland: Making the case in the light of international experience. *A discussion paper for Community Land Scotland*.
- India, G. O. (2007). The Constitution of India.
- Jackson, C. (1993). Women/nature or gender/history? A critique of ecofeminist 'development'. *The Journal of Peasant Studies*, 20(3).
- Jessop, B. (2002). Liberalism, Neoliberalism, and Urban Governance. *Antipode*, 452.
- Karant, K. K. and Defries, R. (2010). Conservation and management in human-dominated landscapes: case studies from India. *Biological Conservation*, 143[Online].
- Kenrick, J. (2011). Scottish land reform and indigenous peoples' rights: self-determination and historical reversibility. *Social Anthropology/Anthropologie Sociale* 19(2).
- Kidder, R. L. (1977). Western law in India. *Sociological Inquiry* 47(3-4).
- Larson, C. L; Murtadha, K. (2002) Leadership for Social Justice. *Yearbook of the National Society for the Study of Education*.
- Lemke, T. (2010). 'The birth of bio-politics': Michel Foucault's lecture at the College de France on neo-liberal governmentality. *Economy and Society*, 30(2).
- Mawdsley, E. (1998). 'After Chipko: From Environment to Region in Uttaranchal', . *The Journal of Peasant Studies*, 25(4).
- Ocan, C. E. and Ocan, C. (1994). Pastoral resources and conflicts in North-Eastern Uganda: the Karimojong case. *Nomadic Peoples*, 34/35.
- Sambhav, K. S., et al. (2013). *Rights without Benefits* [Online]. DownToEarth. Available at: <http://www.downtoearth.org.in/content/rights-without-benefits> [Accessed 17 March 2015].
- Sarin, M. and Springate-Baginski, O. (2010). India Forest Rights Act - The anatomy of a necessary but not sufficient institutional reform. In PAPERS, I. D. (ed.) *Research Programme Consortium for Improving Institutions for Pro-Poor Growth*. Manchester, UK: IDPM School of Environment and Development University of Manchester
- Selmeczi, A. (2009). "...we are being left to burn because we do not count" : Biopolitics, Abandonment, and Resistance. *Global Society*, 24(4).
- Sen, A. (2001). *Development as Freedom*, second edn: Oxford University Press.
- Shiva, V. (1988). *Staying alive: Women, ecology and development*: Zed Books.
- Sircar, O. (2012). Spectacles of Emancipation: Reading Rights Differently in India's Legal Discourse. *Osgoode Hall Law Journal*, 49.3.

- Springate-Baginski, O., et al. (2008). The Indian Forest Rights Act 2006: Commoning Enclosures. *Overseas Development Group, University of East Anglia*.
- Staudt, K. (1998). The Feminization of Poverty: Global Perspectives. *The Brown Journal of World Affairs*, 5(2).
- Thorsen, D. E. (2010). The Neoliberal Challenge - What Is Neoliberalism? *Contemporary Readings in Law and Social Justice*, 2(2).
- Tugendhat, H. and Dictaan-Bang-Oa, E. (2013). Realizing Indigenous Women's Rights : A Handbook on the CEDAW. *Tebtebba Foundation, Forest Peoples Programme, Asia Indigenous Women's Network (AIWN)*.
- Xaxa, V. (2004). Women and Gender in the Study of Tribes in India. *Indian Journal of Gender Studies*, 11.
- Young, L. A. and Sing'oei, K. (2011). Land, livelihoods and identities: Inter-community conflicts in East Africa. *Minority Rights Group International (MRG)*.

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ABSTRACT

Does legislation that grants land rights necessarily ensure justice? The Forest Rights Act of 2006 (FRA) in India, a landmark social justice law, aims to enhance land security for forest peoples. Increasingly displaced by development and extractive industries which intensifies impoverishment, indigenous peoples in India should with the FRA, be able to protect their land, their livelihoods and their culture. Continued government violations of forest land rights in the name of development, highlight that economically vulnerable populations lack the power to take advantage of legislation. I examine the tension of current indigenous land struggles in the context of the legal frameworks of the FRA, and the neoliberal culture of India.

Keywords: Indigenous land rights, Forest Rights Act 2006, gender equality, access to justice, human rights, land dispossession, neoliberalism

Land Rights and
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