

BEING, BECOMING AND (UN)BECOMING INDIGENOUS? INDIGENEITY, HUMAN RIGHTS, AND CLIMATE CHANGE IN INDIA

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ABSTRACT

“Is conservation a choice for our community or is it our duty in exchange for rights?” asked a young Adivasi from Kodingamali, a bauxite-rich hill range in the eastern Indian state of Odisha.¹ This brief encounter with a young Adivasi in Kodingamali brings to light that the Indigeneity embodied in India’s legal regime and international law hinges on two fundamental markers: namely, their cultural attachment to land and their cultural backgrounds that make them naturally attuned to conserve. The idea of Indigeneity is transforming in India and elsewhere as forest-dwelling communities increasingly migrate to cities or engage with extractive or other economic activities.

In this paper, I argue that the notion of Indigeneity embedded in this approach is removed from the everyday reality of Adivasi and forest-dwelling communities in India. Through empirical evidence from my fieldwork in the eastern state of Odisha, this article brings to light the challenges associated with rigidly framing Indigeneity in climate change law and policy. I then proceed to offer two pathways out of this bind. First, this article suggests that expanding the right to Indigenous participation in legal deliberations can act as a basis to reconfigure Indigenous involvement in the law and its implementation. Second, this article argues that the rights of future generations should be incorporated into climate change law and policy as a way to prevent deforestation beyond reliance merely on community-based conservation efforts.

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¹ Kodiveri Field Interview (July 15, 2019).

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INTRODUCTION

I trekked for a few hours in August 2020 to be part of the Niyamgiri Parba festival—a festival to celebrate Niyamraja, or the king of law—in the dense forests of the eastern Ghats in the state of Odisha, India. Throughout the course of this journey, I passed quaint villages, camps of the paramilitary forces that were stationed there, and thickets of lush forests. This is a scene all-too-familiar across the vast stretches of India’s forests, where there is an overlap of forest-dwelling communities, rich minerals, and an armed left-wing movement called the Naxalite movement. India’s forests exist in a politically-contested context, in which a myriad of interests—including development, the rights of Adivasi or forest-dwelling communities, conservation, and extraction—overlap and conflict with one another.

Part of the journey led me to the village of Kurli, where Jitu Jakesika lived. Jitu Jakesika is a member of the Dongria Kondh community, a community legally categorized as a “particularly vulnerable tribal group.”² Much has been written about Jitu by journalists and activists in Orissa. Jitu initially led his community in a struggle against the mining giant Vedanta Resources Ltd., which sought to mine the sacred hills, before eventually joining Vedanta and supporting its entrance into the area. He later shed his association with Vedanta and returned to working with his community in opposing it.

Jitu’s shift from opposing the mining company, to joining them, and then eventually returning to opposing them captures the complex journey that Indigenous communities experience in India of being, becoming, and (un)becoming Indigenous.

When I asked him to explain this complex journey, he stated that he was exploring his options.³ While being Adivasi or a forest-dweller in India would typically suggest opposing the mining company, Jitu went beyond the conventional markers associated with his identity and wanted to explore what life in the “mainstream” economy might be. He was disillusioned by his time at Vedanta and chose to come back to his village where he felt his quality of life was much better. To many activists of Indigenous rights in India, Jitu is the inconvenient outlier to their understanding of Adivasis or forest-dwellers as being the benevolent steward.

In this paper, I ask how the changing nature of Indigeneity in India fits within the demands and obligations made on Indigenous communities in international and domestic climate change laws and policies. I argue that it is important to consider this question as Indigenous communities transform from the benevolent steward of the environment to communities interested in engaging with the market economy or responding to the changing political economy around them. This transformation is not a sudden one but has been occurring over the course of many years, shaped by the changing political economy of India’s forests.⁴

² “Particularly vulnerable tribal group” is a legal categorization for forest-dwelling communities in India. The guidelines describe them as communities with pre-agricultural level of technology, declining population, and low literacy rates. Press Release, Ministry of Tribal Affairs, Development of Particularly Vulnerable Tribal Groups (Apr. 2, 2018), <https://pib.gov.in/newsite/PrintRelease.aspx?relid=178257>.

³ Kodiveri Field Interview, *supra* note 1.

⁴ ALPA SHAH, IN THE SHADOWS OF THE STATE: INDIGENOUS POLITICS, ENVIRONMENTALISM, AND INSURGENCY IN JHARKAND, INDIA 136 (2010).

In this paper, I argue that Indigeneity is not static, but evolving. To tether rights to a particular identity category stunts and inhibits the ability to include a spectrum of possibilities of what being Indigenous may mean. The burden to conserve, as explained by younger Adivasis, is seen as a form of unfreedom, as it limits their options to create development pathways for their community in the future.⁵

I begin the paper with Part I, where I explore the understanding of Indigeneity in India and its presence in the Indian legal framework.⁶ In Part II, I lay out the legal landscape of Indigeneity, human rights, and climate change in the international and domestic legal framework. In Part III, I use empirical evidence from Odisha to demonstrate how these legally understood identity frames of Indigeneity are too rigid, leading to the exclusion and unfreedom of those who do not fit this rigid frame. In Part IV, I propose that expanding the right of participation in deliberation on these transformations can offer a pathway out of this bind, as well as how incorporating the rights of future generations in international and domestic approaches to climate change law and policy represents another potential pathway.

I. INDIGENEITY IN INDIA

Indigeneity is a socially-constructed and politically contested term used by Indigenous peoples to mobilize for rights over land and self-determination. Indigeneity describes the historical injustice experienced by the original inhabitants of different countries.⁷ Indigeneity in India is a contested idea and has been rejected by the Indian state because of the difficulty of identifying who might be Indigenous.⁸ India's history is one of migration, and associating identity with the soil or land can be a difficult proposition.⁹ The Indian government's position is that all Indians are

⁵ Kodiveri Field Interview, *supra* note 1.

⁶ An exploration of Indigeneity in international law has not been included in this paper, though it forms the background for this inquiry. For more on this, see Benedict Kingsbury, "Indigenous Peoples" in *International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L L. 414 (1998).

⁷ Bengt G. Karlsson & T.B. Subba, *Introduction to INDIGENEITY IN INDIA* 1–19 (Bengt G. Karlsson & T.B. Subba, eds., 2006).

⁸ *Id.*

⁹ *Id.*

Indigenous.¹⁰ Though India is a signatory to the United Nations Declaration of the Rights of Indigenous Peoples, the argument has been made that Indigeneity is a Western concept being imposed on post-colonial nation-states.¹¹ The argument is that India's history has been rife with invasion, but its colonial experience was different from that of Western settler-colonialism wherein an Indigenous community was pushed away by the colonizer.¹²

Some argue that the stance assumed by the Indian state that all Indians are Indigenous was taken in an effort to foster cohesion and unity within India's diverse polity.¹³ However, one could also argue that this stance was adopted due to the challenge that identifying Indigenous communities may pose to the assertion of state control over forests and natural resources because such communities can potentially harness the power of international law to assert their rights over land and resources.

The terms used in the Indian context to describe forest-dwelling tribes are "tribal" or "Adivasi." Adivasi is a term used by forest-dwelling communities that identify as the original inhabitants of India to describe themselves. Adivasi literally translates to "the original inhabitant." The term does not encompass all forest-dwellers, which is a heterogeneous group that consists of lower caste communities, pastoralists, and Dalits, among others. Legally, some Adivasi communities are categorized as Scheduled Tribes (ST) within the Indian constitution.¹⁴ STs are recognized as such based on evidence from a wide array of markers that demonstrate "backwardness."¹⁵ The National Commission of Scheduled Tribes uses criteria including economic and social backwardness, shyness, and geographical isolation to determine whether a community qualifies as an ST.¹⁶

Certain communities that have already been categorized as STs are seen by the State as being more vulnerable due to their geographical isolation and "primitive" existence and have thus been categorized as particularly vulnerable tribal groups. The use of the term "tribal" is

¹⁰ Virginius Xaxa, *Tribes as Indigenous People of India*, 34 *ECON. & POL. WKLY.* 3589, 3590–91 (1999).

¹¹ *Id.*

¹² *Id.*

¹³ Andre Beteille, *What Should We Mean by "Indigenous People"*, in *INDIGENEITY IN INDIA*, *supra* note 7, at 19.

¹⁴ CONSTITUTION OF INDIA, art. 342.

¹⁵ Xaxa, *supra* note 10, at 3589.

¹⁶ NIRAJA GOPAL JAYAL, *CITIZENSHIP AND ITS DISCONTENTS: AN INDIAN HISTORY* 240 (2013).

associated with ideas of “primitive” or “backward,” and with it comes the understanding that these communities are one with nature.¹⁷ Indigenous communities or Indigenous Peoples (IPs) that are categorized as a vulnerable group within international and domestic law are seen as deserving of special attention for the violation of their human rights caused by climate change.¹⁸

Many scholars have criticized the use of the term Indigenous in the Indian context. Andre Beteille, a professor of sociology at North-Eastern Hill University, makes an important contribution to this criticism. He explained that the categorization of communities during the colonial period was done in a manner which made it difficult for the then-colonial administrators to distinguish community members as belonging to a tribe or caste as the social structures were complex and overlapped. This confusion has made it harder to easily identify communities as STs.¹⁹

The problem with Indigeneity in India is complicated by this divide of tribe and caste. G.S Ghurye, a prominent professor of Indian sociology, argued that the colonial process of identifying communities has been shaped by the intention to divide communities.²⁰ Ghurye made the argument that tribes were part of the Hindu fold and were not culturally distinct.²¹ On the other hand, Verrier Elwin arrived in India as part of a Christian mission in 1927 and went on to become an anthropologist living with Adivasi communities in central and northeastern India. He asserted the cultural distinctiveness of Adivasi communities and called for the legal protection of their culture.²²

These two approaches continue to guide law and policy in relation to Adivasi communities. While there is an effort to mainstream these communities through development-based integration, there is also an effort to recognize their right to self-determination in the form of isolation based on their identity.²³

¹⁷ *Id.* at 234–40.

¹⁸ STEPHEN HUMPHREYS, *Introduction to HUMAN RIGHTS AND CLIMATE CHANGE* 1–2, n. 1 (Stephen Humphreys ed., 2006).

¹⁹ Beteille, *supra* note 13.

²⁰ JAYAL, *supra* note 16, at 246.

²¹ *Id.*

²² NAMITA WAHI & ANKIT BHATIA, CENTRE FOR POLICY RESEARCH., *THE LEGAL REGIME AND POLITICAL ECONOMY OF LAND RIGHTS OF SCHEDULED TRIBES IN THE SCHEDULED AREAS OF INDIA* 14 (2018).

²³ *Id.* at 21.

Amita Baviskar, a professor of environmental studies at Ashoka University, argues that Indigeneity is a social fact and a strategy deployed by forest-dwelling communities in search of a better life.²⁴ It is a way for forest-dwelling communities to make claims in their struggle for gaining rights over forest land. “Who is the original inhabitant?” is a tenuous question with varied responses in the Indian context.²⁵ Adivasis and forest-dwellers in India have been marginalized by colonial forest laws, which have denied them access to forest land and produce. Thus, being Adivasi, as anthropologist Ajay Skaria states, means a shared experience of loss of forests, alienation of land, displacements by development projects, and much more.²⁶

This shared experience of injustice has informed the mobilization of a movement to recognize and support legal claims that stem from being Adivasi or a forest-dweller in India. Forest-dwelling communities that have been identified as STs are protected by protective land rights and have access to reservations for government jobs based on their identification legally as a vulnerable group.²⁷ The Forest Rights Act of 2006 (FRA), a recent piece of legislation that aims to recognize the rights of forest-dwellers to forest land and resources, uses this existing legal category as the basis for establishing eligibility to land rights in forest areas.²⁸ In recognition of the particular form of historical injustice STs have suffered, the FRA categorizes an ST in a manner that automatically gives communities access to land rights, while other forest-dwellers are required to provide evidence of having lived and depended on forest areas for three generations or seventy-five years.²⁹

Baviskar states that Indigeneity in India benefits from a dominant stream of environmentalism, where the simultaneous pursuit of social justice and ecological concerns makes forest-dwellers, and Adivasis in particular, the perfect embodiment of a group struggling against social

²⁴ Amita Baviskar, *The Politics of Being Indigenous*, in INDIGENEITY IN INDIA, *supra* note 7, at 33.

²⁵ *Id.*

²⁶ AJAY SKARIA, *HYBRID HISTORIES: FORESTS, FRONTIERS, AND WILDNESS IN WESTERN INDIA* 122 (1999).

²⁷ ARPITHA KODIVERI, *HINDU CENTER FOR POLITICS AND PUBLIC POLICY, NARRATIVE OF DALIT INCLUSION AND EXCLUSION IN FORMULATING AND IMPLEMENTING THE FOREST RIGHTS ACT* 12 (2006).

²⁸ The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, No. 2, Acts of Parliament, 2007 (India) [hereinafter Forest Rights Act].

²⁹ Baviskar, *supra* note 24, at 33.

deprivation while leading ecologically-wise livelihood.³⁰ It is this coming together of social justice claims with ecological concerns that have created a rigid framing of Indigenous identity in India and elsewhere.³¹

Interviews with young Adivasi community members in Odisha reveal a textured reality of their everyday. In the hills of Kodingamali in the eastern state of Odisha, a unique protest is brewing. The forest-dwelling community in Kodingmali, which consists mostly of Adivasis, want to allow bauxite mining on their traditional lands, on the condition that the Adivasi are given jobs in the aluminum refinery.³² This is unlike most protests of forest-dwelling communities across Odisha, which oppose the mining projects. The protest in Kodingamali cuts against the assumption that Adivasi communities always engage in ecologically-wise occupations. A young Adivasi, when asked why he wants the mine to start operations, said

We want to engage with mining. I would like to have a guaranteed monthly income. Right now everything is uncertain. The forest department does not let us access forest produce. I don't see why Adivasis are the only ones responsible for saving the forests in deplorable living conditions while others can sell their lands without this burden.³³

These transformations on what being Indigenous means from the benevolent steward to trying hard to make a living by engaging with the extractive economy are shaped by the hostility produced by the political economy that prioritizes extraction and exclusionary conservation.³⁴ Alpa Shah, an associate professor in anthropology at the London School of Economics, speaks to this phenomenon and the trap that such eco-incarceration creates for forest-dwelling community members.³⁵ Her argument is that the relationship Adivasi communities have with the land is transforming as Adivasis migrate to nearby villages and towns as

³⁰ *Id.*

³¹ *Id.*

³² Sumedha Pal, *Stop Vedanta: Anti-Bauxite Mining Protests in Kodingamali Set Example of Resistance to Corporates*, NEWSCLICK (July 29, 2019), <https://www.newsclick.in/stop-vedanta-anti-bauxite-mining-protests-kodingamali-example-resistance-corporates> [https://perma.cc/LF6W-823X].

³³ Kodiveri Field Interview, *supra* note 1.

³⁴ SHAH, *supra* note 4, at 136.

³⁵ *Id.*

agricultural laborers.³⁶ This, she states, is not merely a contemporary occurrence, but is historical among the Munda community she studied.³⁷

The changing relationship of forest-dwelling communities with their lands and forests are visible in Odisha too.³⁸ As an Adivasi family who had decided to sell their land to an integrated steel plant in Jagatsingpur said,

I am attached to my land, but I am also looking for what might be the best way for me to provide for my family and secure my children's future. I did not join the group that was opposing this project as I was unsure about what would happen to my family and my ability to provide for them. My relationship with the land changed from it being a source of livelihood to an asset I could trade for an alternative life in the city.³⁹

The challenge with the romanticized understanding of forest-dwelling communities as sharing a special cultural, economic, environmental, and social bond with the land is that this romanticized understanding is changing rapidly both due to the state's modernization efforts as well as historical patterns of migration. This notion is grounded in the political mobilization advanced by Adivasis that they are the original inhabitants and share deep cultural roots with the land. Alpa Shah articulates this challenge as follows:

Adivasis who migrate seasonally are inconvenient for the activists, not only because their physical absence threatens the idea of Jharkhand as a state full of Adivasis, but also because continued migration undermines the imagery of Adivasis as rooted in their land. In this rhetoric, migration results in the real Adivasis, the true sons of the soil, being wrenched from their land by stealing, rapacious outsiders, or dikus, who transport them to faraway places. Alienation from their land is represented as leading to the slow death of the Adivasis.⁴⁰

The stream of environmentalism that combines the tenets of social justice with the ecologically-wise livelihood of forest-dwelling communities is founded on the Adivasis' attachment to land. This understanding guided the drafting of the FRA. The FRA is based on the assumption that forest-dwelling communities are best suited to conserve

³⁶ *Id.*

³⁷ *Id.* at 138.

³⁸ *Id.*

³⁹ Kodiveri Field Interview (Aug 22., 2019).

⁴⁰ SHAH, *supra* note 4, at 139.

the forests, given their innate desire to conserve and the traditional knowledge with which they are culturally endowed to make these decisions.⁴¹ It recognizes their rights to forest land on the basis of this cultural endowment.

The Indigenous, ST, or forest-dwelling identity is a complex one that is constantly transforming. Being Indigenous in the Indian context has taken on a performative form with displays of cultural traditions of their association with the land in their struggle for rights. Yet, being Indigenous does not do away with other identity criteria like gender, caste, religion, class, geographic origin, and others.⁴²

Amartya Sen, a professor of economics and philosophy at Harvard University, argues that the choice to be loyal to certain groups and prioritize certain identities is a peculiarly important liberty which needs to be recognized.⁴³ Conversations with forest-dwelling communities across the forested hills of Odisha show that many identity claims exist. Some people identify as forest-dwelling while others identify strongly as forest workers or laborers. These identity constructs co-exist, compete, and change. The romanticized image of the noble savage or the benevolent steward constrains the authentic expression of the transforming identity claims of forest-dwelling communities.

The challenge of tying a protective rights framework to a rigid understanding of identity is that it risks excluding community members that do not fit into this frame. As Amartya Sen notes, recognition of identity as a part of law or citizenship brings with it the adversity of exclusion which goes hand in hand with the gift of inclusion.⁴⁴ Adversity of exclusion is present in India's forested stretches as many forest-dwelling communities that have not been categorized as STs cannot access rights over land and other protective laws that come with this categorization.⁴⁵ This exclusion creates a sense of hierarchy within the law when it comes to claiming rights. While ST communities are seen in the eyes of the state as being worthy of forest rights, non-ST communities do not fall within the frame of the identified stream of environmentalism.⁴⁶

⁴¹ Radhika Krishnan & Rama Naga, *'Ecological Warriors' Versus 'Indigenous Performers': Understanding State Responses to Resistance Movements in Jagatsinghpur and Niyamgiri in Odisha*, 40 S. ASIA J.S. ASIAN STUD. 878, 888 (2017).

⁴² *Id.* at 883–84.

⁴³ AMARTYA SEN, *IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY* 3 (2006).

⁴⁴ *Id.* at 28.

⁴⁵ *Id.*

⁴⁶ Ariptha Kodiveri, *Wildlife First, People Later?* 9 J. INDIAN L. & SOC'Y 39 (2018).

This section outlines the contested nature of Indigeneity in India and the challenge that results from Adivasi communities, whose Indigeneity does not fit within the rigid frame present within the law. Communities that are not considered Indigenous are subject to a similar form of injustice in terms of dispossession and denial of forest rights.

I argue that a difference exists in the identity and the everyday reality of those who are considered Indigenous in India and the rigidity of the framework of Indigeneity that is solidified within the law. This will provide a background for discussion in the next section on the understanding of Indigeneity within international and domestic law and how it is being harnessed within the emerging legal space of climate change and human rights.

II. CLIMATE CHANGE, LAND RIGHTS AND INDIGENOUS PEOPLES—A GLIMPSE INTO THE LEGAL MECHANISMS IN INTERNATIONAL AND DOMESTIC LAW

The discourse on climate change and human rights pays specific attention to the plight of Indigenous communities. Indigenous communities are considered among the groups that are most vulnerable to the impact of climate change because they live and depend on forests.⁴⁷ While Indigenous communities are viewed as vulnerable, they are also seen as being an important part of the solution to climate change by paving the way for adaptive strategies stemming from their traditional knowledge.⁴⁸

Indigenous communities are particularly vulnerable because they inhabit geographical areas like forests, which are substantially impacted by climate change.⁴⁹ Further, the political and legal challenge caused by the lack of recognition of forest rights, coupled with poverty and reliance on natural-resource based livelihoods, makes the matrix of vulnerability complex.⁵⁰ In northeastern parts of India, extreme weather patterns characterized by a lack of rainfall followed by floods have had a

⁴⁷ Human Rights Council, Rep. of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009).

⁴⁸ Human Rights Council, Rep. of the Special Rapporteur on the Rights of Indigenous Peoples, U.N. Doc. A/HRC/36/46 (Nov. 1, 2017).

⁴⁹ *Id.*

⁵⁰ *Id.*

devastating impact on the agriculture-dependent tribal communities living in the area's hilly forests.⁵¹ This is just one example of climate change's impact on Indigenous communities.

The movement toward seeing climate change and human rights as intersecting concepts, it can be argued, came about due to activism by Indigenous communities who called for better representation of their interests in climate change discussions internationally.⁵² Stephen Humphreys, an associate professor of international law at the London School of Economics, argues that the absence of the human rights language in climate change discussions and in the drafting of international law can be attributed to the valorization of the physical sciences as a discipline that can assist in making sense of the problem and finding the solution.⁵³ While this has contributed to the absence of human rights language, activism by Indigenous communities propelled the infusion of the language of human rights into climate change law and policy.⁵⁴

A petition by the Inuit community in the Inter-American Court of Human Rights in 2005 claimed that global warming was adversely affecting all their rights, ranging from their rights to a distinct culture, self-determination, livelihood, and health.⁵⁵ This petition provided a framework through its arguments to explain how global warming impacts the rights of Indigenous communities. This, it can be argued, was the start of exploring the intersection between climate change, human rights, and the rights of Indigenous communities within international law.⁵⁶ As the petition clearly articulated, the impact global warming has on the rights of Indigenous communities is an integral part of the human rights regime.

A paper written by the International Union for Conservation and Nature and a report derived from the paper in 2008 elaborated on the connections between the rights of Indigenous communities and climate

⁵¹ See generally Akshit Sangomala, *Extreme Weather in Northeast: Floods in Some Districts, Others Stay Dry*, DOWN TO EARTH (June 25, 2020), <https://www.downtoearth.org.in/news/climate-change/extreme-weather-in-north-east-floods-in-some-districts-others-stay-dry-71950> [<https://perma.cc/GUQ2-HX8A>].

⁵² Tahnee Lisa Prior & Leena Heinämäka, *The Rights and Role of Indigenous Women in the Climate Change Regime* 8 ARCTIC REV. L. & POL 193, 193 (2017).

⁵³ STEPHEN HUMPHREYS, HUMAN RIGHTS AND CLIMATE CHANGE (Stephen Humphreys ed., 2010).

⁵⁴ See, e.g., Forest Rights Act, *supra* note 28.

⁵⁵ Pet. to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, Dec. 7, 2005.

⁵⁶ See HUMPHREYS, *supra* note 53, at 4.

change.⁵⁷ It explicitly identified the duality of the vulnerability of Indigenous communities and their position as potential bearers of the solution to climate change.⁵⁸ This issue paper was written to fill a knowledge gap identified between climate change concerns and the rights of IPs. As the report states,

[W]hile there is a growing knowledge about the impacts of climate change on species and ecosystems, the understanding about the potential impacts of climate change on livelihoods and cultures of indigenous and traditional communities is fragmented. Furthermore, there is a lack of recognition of the importance which traditional people may play in their own future adaptation to climate change.⁵⁹

This research laid the foundation for thinking about vulnerability, adaptation, and mitigation alongside the rights of Indigenous communities. The overlapping concerns of climate change, strategies to address it, and the rights of Indigenous communities have reinforced the rigid understanding of Indigeneity in law.

The Permanent Forum on Indigenous Issues held its seventh session on “Climate change, bio-cultural diversity and livelihoods: the stewardship role of indigenous peoples and new challenges.” A report prepared by the members of the forum for this session on the impact of climate change mitigation on Indigenous communities reaffirms the risk posed by climate change towards Indigenous communities and insists on the need for a human rights-based approach towards mitigation and adaptation measures.⁶⁰ An important observation that the report makes is that Indigenous peoples, who have the smallest ecological footprints, should not be asked to carry the heavier burden of adjusting to climate change.⁶¹ This report was followed by another significant report by the Special Rapporteur in 2017, which examined the human rights impacted by climate change and reiterated again the duality of Indigenous communities as being vulnerable and an important part of the solution.⁶²

Indigenous peoples are among those who have least contributed to the problem of climate change yet are the ones suffering from its worst

⁵⁷ MIRJAM MACCHI, INTERNATIONAL UNION FOR CONSERVATION OF NATURE, INDIGENOUS AND TRADITIONAL PEOPLES AND CLIMATE CHANGE (2008).

⁵⁸ *Id.* at 7.

⁵⁹ *Id.*

⁶⁰ U.N. Economic and Social Council, *Impact of Climate Change Mitigation Measures on Indigenous Peoples and Their Land and Territories*, U.N. Doc. E/C.19/2008/ (Mar. 19, 2008).

⁶¹ *Id.*

⁶² Rep. of the Special Rapporteur on the Rights of Indigenous Peoples, *supra* note 48.

impacts. They are disproportionately vulnerable to climate change because many of them depend on ecosystems that are particularly prone to the effects of climate change and extreme weather events such as floods, droughts, heatwaves, wildfires, and cyclones.⁶³

Indigenous communities embody the duality of being viewed as vulnerable while being part of the solution. They navigate this duality as a pathway to securing rights while remaining aware of the uneven burden to conserve that they are forced to bear. The duality is a convenient coming together of rights and duties, but the difficulty is that the duty to conserve is unevenly borne by Indigenous communities in comparison to others. Having minimally contributed to climate change, why then are Indigenous communities bearing the excess burden of mitigation?

A young woman and a Dalit forest-dweller in Talabira, Odisha, where a coal mine is situated, described the burden to conserve:

I have studied outside and I am qualified to be an accountant, I came back to the village to see if the coal mine might offer me a job. That has not happened instead I find that our village community is opposing the mine. I do not understand why we are the only community required to conserve the forests? Shouldn't this be the responsibility of the state?⁶⁴

Determining how to equitably distribute the burden to conserve is a difficult problem to solve, but what this interview reveals is the changing nature of Indigeneity and the desire of the younger members of the community to break away from the demands of conserving the forest areas.

In this Part, I have problematized the convenient coming together of climate change, land rights, and the rights of IPs. My critique is focused on the changing nature of Indigeneity, particularly the aspect of being naturally attuned and wanting to conserve forests. Securing land rights of IPs is seen as a way to combat climate change, but such rights are offered on the condition that communities conserve this land. As I continue to demonstrate with insights below, this is a challenge that needs to be acknowledged as this area of law evolves over time.

⁶³ *Id.*

⁶⁴ Kodiveri Field Interview, *supra* note 39.

A. AN OVERVIEW OF THE INTERNATIONAL APPROACH TO CLIMATE CHANGE, HUMAN RIGHTS, AND INDIGENOUS PEOPLES

The intersection between Indigenous communities' land rights and international climate change law can be understood in clusters. While these clusters are used for analytical convenience, they are by no means watertight categories. I have identified three categories in which the intersection between climate change, land rights, and Indigenous rights is pronounced. Below is a schematic overview of these three categories of vulnerability, mitigation, and adaptation.

i. Vulnerability

The growing area of international law on climate change and human rights emphasizes the human rights-based approach to addressing the threats posed by climate change and ways to mitigate and adapt to these threats. Indigenous communities have been identified as a group that is vulnerable to the impact of climate change.⁶⁵ In order to address this vulnerability, the resolutions on human rights and climate change elucidate the need to protect their rights, especially the right to self-determination.⁶⁶

The detailed report by the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights highlights the vulnerability and the impact climate change will have on the human rights of Indigenous communities.⁶⁷ The report demands the implementation of existing human rights law as a way of identifying the impact and ensuring the protection of the rights of Indigenous peoples.⁶⁸ It states:

The United Nations Declaration on the Rights of Indigenous Peoples sets out several rights and principles of relevance to threats posed by climate change. Core international human rights treaties also provide for the protection of indigenous peoples, in particular with regard to the right to self-determination and rights related to culture. The rights

⁶⁵ Johnson N. Nkem et al., *Profiling Climate Change Vulnerability of Forest Indigenous Communities in the Congo Basin* 18 MITIGATION & ADAPTATION STRATEGIES FOR GLOB. CHANGE 513, 514 (2013).

⁶⁶ *Id.* at 528–29.

⁶⁷ Rep. of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights, *supra* note 47.

⁶⁸ *Id.*

of indigenous peoples are enshrined in ILO Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries.⁶⁹

Similarly, a report prepared by the Special Rapporteurs of the Permanent Forum on Indigenous Issues on the rights of Indigenous communities in the context of climate change mitigation measures identifies the rights of Indigenous communities which will be adversely impacted.⁷⁰ They include the right to self-determination; the right to land; the right to free, prior, and informed consent (FPIC); the right to health, water, food; an adequate standard of living; and the right to culture and traditional knowledge.⁷¹ The range of rights at issue demonstrates the nature of Indigenous communities' vulnerability through a human rights lens, and implicates the state's obligation to respect, protect, fulfill, and redress such rights.

The Paris Agreement is a landmark agreement aimed at combatting climate change. It was signed in Paris in December 2015 by all of the members of the United Nations Framework Convention on Climate Change.⁷² The Paris Agreement explicitly introduces the language of human rights law into the climate change agreement.⁷³ The report submitted by the Special Rapporteurs of the UN Permanent Forum on Indigenous Issues⁷⁴ observes how the voices of Indigenous communities were not adequately included in the making of the Paris Agreement:

Despite these important developments, indigenous peoples were disappointed over the insufficient inclusion of indigenous peoples' rights in the Paris Agreement. A key objective was to include references to the rights of indigenous peoples in all the relevant provisions on mitigation and adaptation. Mexico, Peru, Nicaragua, Guatemala, the Philippines, and Canada, as well as several Pacific island states, supported the inclusion of references to indigenous peoples in the negotiations.⁷⁵

⁶⁹ *Id.*

⁷⁰ *Impact of Climate Change Mitigation Measures on Indigenous Peoples and on Their Territories and Lands*, *supra* note 60.

⁷¹ *See id.*

⁷² Paris Agreement to the United Nations Framework Convention on Climate Change, art. 5.2, Dec. 12, 2015, T.I.A.S. No. 16-1104.

⁷³ *Id.*

⁷⁴ *Impact of Climate Change Mitigation Measures on Indigenous Peoples and on Their Territories and Lands*, *supra* note 60.

⁷⁵ *Id.*

The understanding of vulnerability of Indigenous communities and the impact on their rights is drawn from the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). In the report submitted by the Special Rapporteurs of the UN Permanent Forum on Indigenous Issues, the struggle of Indigenous peoples is recorded as being grounded in the UNDRIP: “[Indigenous communities] continue to advocate for the development of a human rights-based approach to climate change, in accordance with the principles of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).”⁷⁶

The Paris Agreement acknowledges the rights of Indigenous communities in its preamble, where it calls for a participative and inclusive approach by taking into consideration the concerns of vulnerable groups including Indigenous communities. The right to participation and FPIC forms an essential procedural safeguard that is derived from the right to self-determination. Before any development project or other intervention takes place on Indigenous land, it is imperative that the community’s consent be obtained. The vulnerability of Indigenous peoples to climate change forms the foundation for the interconnection between climate change, human rights, and Indigenous peoples.

The importance of laying out this schematic overview is to be able to draw from it how Indigeneity is understood within this emerging area of law. The report submitted by the Special Rapporteur articulates this understanding of vulnerability succinctly: “Climate change impacts negatively on a broad range of human rights and indigenous peoples are particularly vulnerable due to the exposure of their traditional lands and territories.”⁷⁷

The understanding of vulnerability is tied to the dependence of Indigenous communities on their traditional lands and forests. This remains true for many communities that self-identify as Indigenous or forest-dependent, yet the changing nature of Indigeneity demands a broader discussion about how the impact on their human rights is to be understood.

⁷⁶ *Id.*

⁷⁷ Rep. of the Special Rapporteur on the Rights of Indigenous People, *supra* note 48, ¶ 32.

ii. Mitigation

Mitigation in the context of climate change broadly refers to a state's obligation to reduce greenhouse gas emissions.⁷⁸ The politics of the Global North and Global South in relation to this question is widely discussed by researchers, scholars, and policymakers. In general, the Global North is considered to be largely responsible for global emissions while the Global South demands a right to emit in order to develop.⁷⁹ In this paper, I will focus on programs that involve Indigenous peoples and the demands the programs place on Indigenous peoples to conserve. The programs that often target Indigenous peoples are very often geographically located in forests. This becomes important as the governance of forests in many richly forested countries is based on a colonial legal framework in which the state has control over decision-making, marginalizing the interests of Indigenous and forest-dwelling communities.⁸⁰

Forests are uniquely placed ecologically to act as carbon sinks as well as a carbon source as it absorbs carbon but at times releases more carbon than it absorbs.⁸¹ The understanding of forests as carbon sinks, and thus needing to be preserved, is not unchallenged as the political economy demands the extraction of its resources.⁸² As articulated in an Earth Bulletin update of the sixth Conference of Parties, “[t]he role of forests as a climate change strategy has, however, long been controversial and is believed to be one of the ‘crunch issues’ that led to the failure to reach an agreement at the earlier meeting (COP6) at The Hague.”⁸³

Forest-centric mitigation efforts initially focused on afforestation, reforestation, and deforestation avoidance, as mentioned in the Intergovernmental Panel on Climate Change in its report on Land Use, Land-

⁷⁸ *Impact of Climate Change Mitigation Measures on Indigenous Peoples and on Their Territories and Lands*, *supra* note 60, ¶ 12.

⁷⁹ Andrew Hurrell & Sandeep Sengupta, *Emerging Powers, North-South Relations and Global Climate Politics*, 88 INT'L AFFS. 463, 465 (2012).

⁸⁰ RAMACHANDRA GUHA ET AL., *DEEPER ROOTS OF HISTORICAL INJUSTICE: TRENDS AND CHALLENGES IN THE FORESTS OF INDIA* 6, 8, 10 (2012).

⁸¹ Joytee Smith, *Afforestation and Reforestation in the Clean Development Mechanism of Kyoto Protocol: Implications for Forests and Forest People*, 2 INT'L J. GLOB. ENV'T ISSUES 322, 325 (2002).

⁸² Shanker Gopalakrishnan, *The Conflict in India's Forests: Will State-Driven Expropriation Continue?*, *ECON. & POL. WKLY.*, (June 8, 2019).

⁸³ *See Summary of the Sixth Conference of the Parties to the Framework Convention on Climate Change: 13-25 November 2000*, INT'L INST. FOR SUSTAINABLE DEV. 18–19 (Nov. 27, 2000).

Use Change, and Forests in 2000.⁸⁴ The decision made under the Kyoto Protocol, which was then the key international legal instrument to address climate change, was to conduct this mitigation effort as a clean development mechanism.⁸⁵ The rules that govern the afforestation and reforestation efforts require that local stakeholders are consulted, but studies have shown that the rules do not safeguard the land rights of IPs and forest-dwelling communities.⁸⁶

The most significant social risk is that industrial plantations supported by Clean Development Mechanism funds could exacerbate existing disparities in land distribution and deprive communities of customary land rights and livelihood needs. There are well-documented cases in the literature where governments in Asia and Latin America have given plantation concessions on land traditionally held by local people.⁸⁷ The efforts of afforestation and reforestation were viewed by Indigenous communities as alienating them from the forest areas and transferring forest land to industries for developing these plantations.⁸⁸

With the emergence of the United Nations Program for Reducing Emissions from Deforestation and Forest Degradation (UN-REDD+) program, the approach to integrating forests into international climate policy moved from focusing solely on afforestation and reforestation to also preventing deforestation and degradation. The UN-REDD+ program has three essential goals: to reduce emissions from deforestation and forest degradation, to foster conservation and sustainable management of forests, and to enhance forest carbon stocks.⁸⁹ UN-REDD+ functions on a mechanism for providing funding to governments to undertake these activities.

⁸⁴ ROBERT T. WATSON ET AL., *IPCC 2000: SUMMARY FOR POLICYMAKERS LAND USE, LAND-USE CHANGE, AND FORESTRY* (Robert T. Watson et al. eds 2000).

⁸⁵ Kyoto Protocol to the United Nations Framework Convention on Climate Change, art. 12, ¶ 2, Dec. 11, 1997, 2303 U.N.T.S. 162.

⁸⁶ Smith, *supra* note 81, at 323.

⁸⁷ *Id.* at 328.

⁸⁸ Christopher Reyer et al., *Climate Change Mitigation Via Afforestation, Reforestation and Deforestation Avoidance: And What About Adaptation to Environmental Change?*, 38 *NEW FORESTS* 15 (2009).

⁸⁹ *See UN-REDD PROGRAMME, GUIDELINES ON FREE, PRIOR, AND INFORMED CONSENT* (Jan. 2013) (available for download at <https://www.unredd.net/documents/un-redd-partner-countries-181/templates-forms-and-guidance-89/un-redd-fpic-guidelines-2648/8717-un-redd-fpic-guidelines-working-final-8717.html?path=un-redd-partner-countries-181/templates-forms-and-guidance-89/un-redd-fpic-guidelines-2648> [<https://perma.cc/2WLD-2RDY>]).

The procedural guidelines for the implementation of UN-REDD+ recognize the right to FPIC as part of the conditions upon which funding for activities under UN-REDD+ depends. The guidelines require clarity of the land tenure of Indigenous peoples and forest-dwelling communities.⁹⁰ The program further requires states to show adherence to key relevant international instruments in order to obtain funding.⁹¹ While these safeguards are welcomed, Kirsty Gover, a professor at Melbourne Law working on domestic and international law affecting Indigenous people in Canada, New Zealand, Australia, and the United States, argues that the distinction made between Indigenous peoples and forest-dependent communities has limited the access that forest-dependent communities have to these progressive safeguards. She explains that the

UN-REDD Programme operational guidance documents specify different standards for indigenous peoples and forest-dependent communities, respectively. While indigenous peoples enjoy the full scope of FPIC, including the right to withhold consent (discussed further below), the 2013 UN-REDD Programme FPIC Guidelines “provide that ‘a blanket application of FPIC is not required for all forest-dependent communities’ although ‘at a minimum States are required to consult forest-dependent communities in good faith regarding matters that affect them with a view to agreement.’⁹²

UN-REDD+ is a preventive measure that combines the consideration of livelihood and reduction of poverty by compensating Indigenous communities for conserving forest areas. The stewardship of forests by forest-dwelling communities is sought to be harnessed by the UN-REDD+ program in an effort to prevent deforestation and make the process more inclusive. As explained in Decision 4/CP.15, which was drafted by the ad-hoc working group on long term cooperative action under the UNFCCC, the ad-hoc working group recognizes “the need for full and effective engagement of indigenous peoples and local communities in, and the potential contribution of their knowledge to, monitoring and reporting.”⁹³

⁹⁰ *Id.*

⁹¹ *See id.*

⁹² MAUREEN TEHAN, THE IMPACT OF CLIMATE CHANGE MITIGATION ON INDIGENOUS AND FOREST COMMUNITIES: INTERNATIONAL, NATIONAL AND LOCAL LAW PERSPECTIVES ON REDD+ 104 (2017).

⁹³ Rep. of the Conference of the Parties on its 15th Session, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, U.N. Doc. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010), <http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf> [https://perma.cc/3XF2-B8H4].

The Paris Agreement recognized the importance of UN-REDD+ in addressing climate change. Article 5 of the Paris Agreement encourages states to implement programs for reducing deforestation and forest degradation.⁹⁴ The UN-REDD+ program is an area where climate change mitigation, human rights, and IP rights interact. This brief overview of the program illustrates that the inclusion of IPs is based on the assumption that IPs will be willing to conserve and act as stewards of the forests. The notion of the willingness to conserve is visible in the duties embedded in this program where forests are to be preserved to function as carbon sinks. The question then, is what happens to such efforts if the Indigenous people do not comply with this assumption?

A contested area within the implementation of UN-REDD+ is forest land tenure. UN-REDD+ is a joint effort between three agencies including the Food and Agricultural Organization.⁹⁵ The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests provide a framework for countries to establish tenure conditions for the implementation of UN-REDD+. These guidelines seek to clarify land tenure and recognize the rights of IPs and forest-dwelling communities to customary and community land tenure.⁹⁶ While clarity of forest land tenure is important, another notable aspect of these guidelines is the assumption that IPs share a particular connection with the land. The Voluntary Guidelines provide that “State and non-state actors should acknowledge that land, fisheries, and forests have social, cultural, spiritual, economic, environmental and political value to indigenous peoples and other communities with customary tenure systems.”⁹⁷

The connection between mitigation efforts and the recognition of community land tenure is gaining traction in approaches to climate change, human rights, and Indigenous peoples. A report by the World Resources Institute titled *Securing Rights and Combating Climate Change* advocates for securing community tenure rights of IPs and forest-dwelling

⁹⁴ Paris Agreement to the United Nations Framework Convention on Climate Change, art. 5.2, Dec. 12, 2015, T.I.A.S. No. 16-1104.

⁹⁵ UN-REDD Programme Strategic Framework 2016-2020, ¶ 2.4 (2015) (available for download at <http://www.fao.org/sustainable-forest-management/toolbox/tools/tool-detail/en/c/1047524/> [<https://perma.cc/M8UK-H6GR>]).

⁹⁶ See FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, VOLUNTARY GUIDELINES ON RESPONSIBLE GOVERNANCE OF TENURE OF LAND, FISHERIES, AND FOREST iv, v, (2012).

⁹⁷ *Id.*

communities as a cost-effective and proven way to mitigate climate change.⁹⁸ The study states that

Indigenous people and other rural communities inhabit more than 50 percent of the world's land, across all continents except Antarctica. Their stewardship of Earth's natural resources supports as many as 2.5 billion people with food, water, fuelwood, and other life essentials. Less well-known, but also vitally important, is the role of community land in global efforts to avoid runaway climate change and achieve sustainable development.⁹⁹

The report categorizes this as an undervalued approach to climate change mitigation. Forest land tenure, or tenurial security, in most countries (if recognized) is contingent on the duty to conserve and the inalienability of forest land.¹⁰⁰ These two limitations to the recognition of tenurial security have been interrogated by Adivasi communities in Sundergarh, Odisha who are fighting against the expansion of a coal mine. Ranjith (name changed), a representative of the Communist Party of India, (Marxist) made this pertinent observation when asked about land rights:

We do not really have land rights, it's more like a lease from the state. They say we can use it, stay on it but we cannot sell it because it is either a coal-bearing area or a carbon sink. The state will be the arbiter on how forest land if alienated is used?¹⁰¹

Tenurial rights of IPs and forest-dwelling communities are bound by the prerogative to conserve forest areas, while the decision of alienation is left to the state and parastatal agencies in the Indian context. The approach towards the recognition of community land tenure and climate change mitigation received a boost as a special report by the Intergovernmental Panel on Climate Change (IPCC) on climate change and land emphasized the need for community land tenure for the

⁹⁸ See CALEB STEVENS ET AL., *SECURING RIGHTS, COMBATING CLIMATE CHANGE: HOW STRENGTHENING COMMUNITY FOREST RIGHTS MITIGATES CLIMATE CHANGE* (2014). I do not contest that IPs share a connection with forest land, but I argue that this relationship is changing and there is a need for international climate change policy and law to acknowledge this change. I will address this aspect specifically in Part IV of this paper.

⁹⁹ See *id.*

¹⁰⁰ *Id.* Matt Sommerville, *Land Tenure and REDD+*, LANDLINKS (Apr. 17, 2013), <https://www.landlinks.org/issue-brief/land-tenure-and-redd-risks-to-property-rights-and-opportunities-for-economic-growth/> [<https://perma.cc/6VDW-ZHLG>].

¹⁰¹ Kodiveri Field Interview, *supra* note 1.

mitigation of climate change.¹⁰² The report states the following on the aspect of community land tenure:

Securing and recognizing tenure for indigenous communities (such as through revisions to legal or policy frameworks) has been shown to be highly cost-effective in reducing deforestation and improving land management in certain contexts, and is therefore also apt to help improve indigenous communities' ability to adapt to climate changes.¹⁰³

The remaining challenge with this approach is the issue of eco-incarceration as IPs and forest-dwelling communities are seen as being culturally and spiritually tied to the land and naturally attuned to conserve. It is this myopic understanding of IPs and forest-dwelling communities within the law that needs to be interrogated.

The intersection of community land tenure and mitigation is seen as an effective way to prevent the acquisition of forest land for industrial activities. The right to FPIC is understood to be a legal mechanism through which such acquisition can be prevented in countries where the right has been adopted. The IPCC report clearly identifies land grabs where land has been compulsorily acquired without acknowledging landowners' rights. Such compulsory acquisition is a threat to climate change. Activists in India are reframing FPIC not merely as a shield against land grabs but a way to prevent deforestation.¹⁰⁴

In Talabira, Odisha, the forest-dwelling communities are protesting the axing of approximately forty thousand trees intended to make way for coal mine expansion.¹⁰⁵ In an interview with an Adivasi woman, I asked how she views her struggle as one that protects the climate. She articulated: "Our consent was not taken, the resolution of the village assembly was falsified. Coal mining is a climate change issue. If we protect our lands, we are also protecting the climate from changing."¹⁰⁶

This interpretation of FPIC, which conforms to the archetype that Indigeneity desires conservation, becomes problematic in its opposition to

¹⁰² MARGOT HURLBERT ET AL., IPCC 2019 SPECIAL REPORT ON CLIMATE CHANGE AND LAND: RISK MANAGEMENT AND DECISION MAKING IN RELATION TO SUSTAINABLE DEVELOPMENT (Rodrigues & Turner II eds., 2019), <https://www.ipcc.ch/srccl/chapter/chapter-7/> [<https://perma.cc/F7WS-TCBH>].

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Manish Kumar, *Dark Times Await Odisha's Talabira as Forests Razed for Mining*, MONGABAY (Dec. 28, 2019), <https://india.mongabay.com/2019/12/dark-times-await-odishas-talabira-as-forests-razed-for-mining/> [<https://perma.cc/BSS5-ZRTT>].

¹⁰⁶ Kodiveri Field Interview (Feb.12, 2020).

coal mine expansion and engagement with the extractive economy. While International reports, resolutions, and research on climate change, land rights, and IP do not explicitly draw this link, it can still be derived from data illustrating that community forest land is better protected when managed by IPs or forest-dwelling communities. As seen in the report by the World Resources Institute,

Researchers have documented compelling evidence from many countries that tenure-secure community land yields positive environmental outcomes. For example, researchers from [the World Resources Institute] and the InterAmerican Development Bank found that the average annual deforestation rates in tenure-secure indigenous forestlands in Bolivia, Brazil, and Colombia from 2000-2012 were two to three times lower than in similar land not managed by indigenous people. Other research produced similar results for Panama, Brazil and across Latin America.¹⁰⁷

The litany of mitigation efforts ranging from afforestation, reforestation, UN-REDD+, and community land tenure demonstrates that IPs and forest-dwelling communities can be viewed as part of the solution. Two elements of their identity are amplified, their connection with the land and their desire to be stewards, as mitigation efforts require Indigenous communities to steward their lands to be able to harness the ability of forests to act as carbon sinks. This flows into the involvement of IPs and forest-dwelling communities adaptation efforts too, with emphasis on traditional knowledge as being a way to mitigate climate change.

In the section below, I argue that this limited construct of Indigeneity and forest-dwelling communities can marginalize those who fall outside of this rigid framing. Inclusion of IPs and forest-dwelling communities in international climate change law and policy should not be conditional on this rigid framing. Instead, the inclusion of IPs and forest-dwelling communities should extend their aspirations beyond forest conservation.

¹⁰⁷ Peter Veit, *Land Matters: How Securing Community Land Rights Can Slow Climate Change and Accelerate the Sustainable Development Goals*, WORLD RESOURCES INSTITUTE, <https://www.wri.org/news/land-matters-how-securing-community-land-rights-can-slow-climate-change-and-accelerate> [https://perma.cc/2KQL-V868] (last visited Mar. 4, 2021).

iii. Adaptation

Adaptation efforts involve Indigenous peoples and forest-dwelling communities with an interest in harnessing their Traditional Knowledge (TK) as a repository of ways to adapt to climate change. TK refers to knowledge culturally rooted and learned over generations by Indigenous communities and informed by their connection to the land.¹⁰⁸ The report by the Special Rapporteur on Indigenous Rights in Climate Change and Indigenous Peoples identifies the importance of TK in climate change adaptation: “Indigenous peoples can assist in providing solutions to mitigate and adapt to the effects of climate change. The International Indigenous Peoples Forum on Climate Change and UNEP have noted that indigenous peoples can contribute to numerous potential adaptation activities by drawing on their traditional knowledge.”¹⁰⁹

In Decision V of the Paris Agreement, non-party stakeholders identify the importance of TK. The agreement aims to create a platform where TK can be shared.

The need to strengthen knowledge, technologies, practices, and efforts of local communities and indigenous peoples related to addressing and responding to climate change establishes a platform for the exchange of experiences and sharing of best practices on mitigation and adaptation in a holistic and integrated manner.¹¹⁰

Understanding TK as a resource in adapting to climate change is necessary. Evidence from interviewing forest-dwelling communities in India shows transformations in TK as forest-dwelling communities have moved away from their traditional livelihoods to working in the extractive industry or other industries. The inclusion of IP and forest-dwelling communities in adaptation and mitigation efforts requires them to steward their lands. TK is understood to be derived from a sense of stewardship and inherited from the elders.

As the relationship that IPs share with the land is transforming with the changing political economy, there is a need to examine how the dynamic concept of TK is transforming.

¹⁰⁸ *Traditional Knowledge*, WORLD INTEL. PROP. ORG., <https://www.wipo.int/tk/en/tk/> [<https://perma.cc/6VQD-Q5WG>] (last visited Mar. 4, 2020).

¹⁰⁹ Rep. of the Special Rapporteur on the Rights of Indigenous People, *supra* note 48, ¶ 59.

¹¹⁰ Rep. of the Conference of the Parties on its 21st Session, *supra* note 93.

B. DOMESTIC LEGAL APPROACHES TO CLIMATE CHANGE, HUMAN RIGHTS, AND INDIGENOUS PEOPLES

India's approach to climate change law and policy has targeted different sectors in pursuing sustainable development and renewable energy. At the intersection of climate change, land rights, and IPs, the policies in the forestry sector become important. Climate change policy in India consists of the National Action Plan on Climate Change (NAPCC) and each sub-national units' own climate change action plan. Using the three criteria above, I identify the intersection on aspects of vulnerability, mitigation, and adaptation.

i. Vulnerability

India does not identify forest-dwelling communities as being particularly impacted by climate change. The NAPCC developed by India identifies a broader category of people who are sensitive to climate change, specifically poor and vulnerable individuals. The NAPCC aims to protect these communities through inclusive and sustainable development.¹¹¹ This broader categorization on socio-economic grounds was preferred as a more inclusive understanding of the vulnerability to climate change. Given this broader category, there is no requirement to prove membership in an ST or other forest-dwelling community. While this inclusivity is beneficial, activists argue that specific human rights violations like the loss of land to extractive industries experienced by forest-dwelling communities will remain unaddressed.¹¹²

ii. Mitigation

The intersection of climate change, human rights, and forest-dwelling communities is very visible in the mitigation efforts undertaken by India. India's mitigation efforts have been focused on afforestation and the recognition of community forest rights for community-based conservation under the Forest Rights Act. The National Green India Mission aims to increase the forest and tree cover to 33 percent of India's

¹¹¹ PRODIPTO GHOSH, MINISTRY OF ENVIRONMENT, FORESTS AND CLIMATE CHANGE, NATIONAL ACTION PLAN ON CLIMATE CHANGE, 17 (Oct. 2009) (India).

¹¹² Jitendra Vir Sharma et al., *Forest Right Act and Climate Change Vulnerability: Impact on Forest and Forest Dwelling Communities in Maharashtra*, INDIAN FORESTER, 1231, 1231 (Dec. 2015).

land mass.¹¹³ This mission has already begun, and the involvement of forest-dwelling communities is currently undertaken through the joint forest management committees.¹¹⁴

India also has legislation for compensatory afforestation called the Compensatory Afforestation Fund Act.¹¹⁵ The Act states that if forest land is acquired for development activities like mining, the same amount of land will have to be forested elsewhere.¹¹⁶ This has been controversial as forest-dwelling communities have been displaced in creating these plantations.¹¹⁷ For example, in Pidadamaha village, located in the Kandhamal district, Odisha forest-dwellers have been displaced as the forest department clears twelve acres of forest land to make way for plantations as part of the compensatory afforestation.¹¹⁸

The role of forest-dwelling communities in the conservation of forests in India has been contested as the forest department continues to hold the power in making key decisions.¹¹⁹ The rights of forest-dwelling communities were explicitly recognized in the Forest Rights Act, which recognizes the role of forest-dwelling communities in the protection of forests.¹²⁰ These community forest rights are yet to be properly enforced. Where such enforcement has occurred, it has been difficult for forest-dwelling communities to assert these rights as the state forest department has not operationalized the community forest management plans that were formulated.¹²¹ The rights of forest-dwelling communities in India are negated by laws that recognize the tenets of exclusionary conservation.¹²²

¹¹³ Ghosh, *supra* note 111, at 25.

¹¹⁴ *Id.*

¹¹⁵ Compensatory Afforestation Fund Act, 2016, No. 38, Acts of Parliament, 2016 (India).

¹¹⁶ *Id.*

¹¹⁷ Ishan Kukreti, *Uprooted for the Sake of Compensatory Afforestation*, DOWN TO EARTH (Apr. 2019), <https://www.downtoearth.org.in/news/forests/uprooted-for-the-sake-of-compensatory-afforestation-64268> [<https://perma.cc/9YQX-88QA>].

¹¹⁸ Abhijit Mohanty, *Odisha's Tribal Communities Are Reeling Under a Land Grab Project Masquerading as 'Afforestation'*, THE WIRE (July 2020), <https://thewire.in/rights/odisha-kandhamal-forest-rights-tribals> [<https://perma.cc/C6Q7-KREK>].

¹¹⁹ SHARACHCHANDRA MADHUKAR LELE & AJIT MENON, *DEMOCRATIZING FOREST GOVERNANCE IN INDIA* (2014).

¹²⁰ Forest Rights Act, *supra* note 28.

¹²¹ COMMUNITY FOREST RIGHTS-LEARNING AND ADVOCACY, *PROMISE AND PERFORMANCE: TEN YEARS OF THE FOREST RIGHTS ACT IN INDIA* (2016) (finding that 85.6 million acres of forest area can be recognized as CFR areas, however only three percent of this potential area has been recognized), https://rightsandresources.org/en/publication/promise-performance-10-years-forest-rights-act-india/#.XWd7_nuxU2w [<https://perma.cc/DMA7-TK3C>].

¹²² Ashis Kothari et al., *Conservation in India: A New Direction*, 30, No. 43 *ECON. & POL. WKLY.* 2755 (Oct. 1995), <https://rightsandresources.org/en/publication/promise-performance-10-years-forest-rights-act-india/#.XWd7nuxU2w> [<https://perma.cc/ZM39-P66R>].

Additionally, some conservationists argue that the recognition of forest rights contributes to deforestation. Forest rights are seen as contributing to carbon emissions because the exercise of these rights can reduce the capacity of forests to act as carbon sinks. Despite this risk, the IPCC report on climate change emphasizes the need to recognize community forest rights.

The conflict between exclusionary conservation and community-based conservation paints the broader political context for the intersection between climate change, human rights, and forest-dwelling communities in India. The challenge of the rigid framing of Indigeneity is visible in the FRA with demands placed on these communities to steward in the form of community forest rights. This is best captured in my encounter with Jitu Jakesika in Khunti village. I asked him what he thinks about these laws and his perception of being Adivasi in India. He responded,

Being Adivasi means that I need to conserve these forests, I cannot disrupt its natural existence yet I need to eke out a livelihood. The difficulty of being Adivasi in India is that our rights are attached to a particular conception of identity and our role as being conservers of the environment. I do not think is fair, conserving the environment is a burden that we bear not out of choice but as a way to access rights. While some desire to conserve I think we need to have other options too.¹²³

This challenge of Indigeneity and forest-dwelling communities has been identified by many as the burden to conserve, which is seen as an obligation in exchange for forest rights while communities do not have a choice in moving beyond the demands of conservation and stewardship.¹²⁴ In the section below, I argue for a mechanism where an element of choice is introduced in taking on this burden.

iii. Adaptation

India has recognized the role of TK in the management of forests within the FRA and the Biodiversity Act. The Biodiversity Act provides for the creation of a people's biodiversity register for documenting TK that can inform the management of these areas.¹²⁵ The linkage of TK with climate change adaptation is present in the National Mission for Sustaining

¹²³ Kodiveri Field Interview, *supra* note 1.

¹²⁴ Kodiveri, *Wildlife First, People Later?*, *supra* note 46.

¹²⁵ Biological Diversity Act, 2002, No. 18 Acts of Parliament, 2003 (India).

the Himalayan Ecosystem. This mission acknowledges the role of TK in enabling the sustainable management of the Himalayan ecosystem.¹²⁶ TK in India, similar to international law, is treated as static as opposed to evolving with the changing political economy of the forests.

III. THE CHANGING NATURE OF INDIGENEITY AND APPROACHES TO CLIMATE CHANGE LAW AND POLICY: EVIDENCE FROM BELOW

In Part I, I provided a schematic overview of international and domestic law and policy that sits within the intersection of climate change, human rights, and the rights of Indigenous peoples and forest-dwelling communities. While there is not an agreed definition of “Indigenous Peoples” in international law, certain identity criteria have come to be associated with Indigenous peoples, such as their cultural distinctiveness, desire to conserve, and attachment to the land. The notion of Indigeneity embedded within these approaches has amplified two markers. Specifically, these are the idea of Indigenous and forest-dwelling communities as benevolent stewards of the forests and their cultural, spiritual, social, and economic attachment to the land.

These markers belie the everyday reality of Adivasi and forest-dwelling communities in India. Through two vignettes of forest-dwelling community members in the eastern state of Odisha, I unpack the complexity of their everyday experiences and juxtapose it to the rigid framing of Indigeneity embedded in international and domestic approaches to climate change law and policy.

A. VIGNETTE 1: AMRENDRA AND HIS QUEST FOR JUSTICE BY SELLING FOREST LAND

Sundergarh is a coal-rich district in the eastern state of Odisha. It has also been categorized as a scheduled area. The area has been mined for coal since India’s independence in 1947 by private companies and then the Mahanadi Coal Fields (MCL), which is a state-owned company. In Tumulia village, I met with Amrendra (name changed). He brought with him a file containing an archive of his struggle against the MCL. As I perused the file, I saw a wide range of documents, including petitions filed with the High Court against the manager of the MCL requesting compensation for acquired land. I asked Amrendra how he reconciles the

¹²⁶ Ghosh, *supra* note 111, at 24.

conflict between his opposition to the acquisition of forest land and his desire for compensation. Amrendra, in a matter-of-fact manner, stated

I am doing whatever I can to gain some form of justice in this context. I do not have a set of values guiding my struggle at the moment. I am willing to surrender my land if I get the right amount of compensation so that I can build a new life. I am asking for my land back since the compensation that I am demanding cannot be met.¹²⁷

Justice in coal-bearing areas is a difficult prospect and his struggle for justice where they tried all approaches mirrored the narratives of others in Sundergarh.

I asked Amrendra how he had decided to sell his land. In response, Amrendra described the changing relationship with forest land in coal-bearing areas from conservation and livelihood to asset tradability. Amrendra said the struggle to protect his land began in 1987; it has been thirty-two years that he has continued his struggle. In the beginning, Amrendra was keen on rescuing the forests and maintaining a certain way of life. That goal motivated him to file several petitions before the government opposing the project on environmental grounds. As coal mining began, the forests became uninhabitable with polluted air and water and a loss of trees. Specifically, he recalls that the coal dust caused several public health hazards and respiratory infections.

This made Amrendra rethink his relationship with the forest land on which he still lives. "I woke up one morning to my daughter coughing, and that is when I decided I need to sell this piece of land for the best price possible and move to the city."¹²⁸ The desire to conserve now transformed into the aspiration to move away for a better standard of living.

A few environmental activists and organizations remain active in the area and oppose the coal mine as it will contribute to climate change. I asked Amrendra how he feels about this. He quickly retorted "How can we stay here and fight for the environment? I agree that the mine is contributing to climate change, but I am not interested in this fight. My energy is invested in trying to get my family out of this situation."¹²⁹

The story of Amrendra is one among many other narratives that co-exist in Sundergarh. His vignette demonstrates the changing relationship with land and stewardship due to the political economy of extraction. While this transformation has occurred due to the entrance of

¹²⁷ Kodiveri Field Interview, *supra* note 39.

¹²⁸ *Id.*

¹²⁹ *Id.*

coal mining, the question I would like to pose through his vignette is: does his desire to sell land and move to the city mark the beginning of a (un)becoming of Indigeneity?

B. VIGNETTE 2: JITU AND HIS ASPIRATION BEYOND STEWARDSHIP

Jitu's story appears in the introduction to this paper. His journey represents the transformations taking place deep within India's forests. In this vignette, I recount a conversation with him on the burden to conserve the forests. I asked him a question that I had asked many Adivasi and forest-dwelling communities in Odisha: who owns the forests?

Jitu responded that it was an incomplete question. He reframed it as: who owns the forest and who guards it? He further explained

As much as we attempt to challenge this in law and activism, the forests are owned by the Indian state at least in how the laws are implemented at the moment as the state takes the decision on alienation. The guarding of the forest is supposedly done by the forest department, but it is also required of us. Guarding of the forests is a shared responsibility between the Adivasi and the state but alienation is the right of the state. This is a contradiction if you ask me.¹³⁰

I asked him to elaborate on this contradiction that he sees. He responded "Not all Adivasis are interested in conserving the forests, some of them would like to engage with the market economy through livelihoods which may not be viewed as sustainable. Where does such an Adivasi fit within the law and what kinds of rights can he or she access?"¹³¹ I have come to term this as the burden to conserve.

Jitu's description of an Adivasi not interested in conserving the forests shakes the international and national foundation upon which Indigenous rights rest. The lived reality of Adivasi communities is complex and younger Adivasis I encountered in Odisha described their desire to move away from the forests and pursue aspirations beyond the confines of being a steward. The question I ask through this vignette is: is Jitu's desire to engage in the market economy and pursue ambitions beyond being a steward of the forests accommodated within the rigid framing of Indigeneity in international and national law?

¹³⁰ Kodiveri Field Interview, *supra* note 1.

¹³¹ *Id.*

C. THE CHANGING NATURE OF INDIGENEITY

Through these two vignettes, I have demonstrated the changing nature of Indigeneity in India. Most identity constructs are fluid, negotiated and renegotiated based on their interactions with the state, law, economy, and resistance. The approaches to climate change law and policy at the intersection of land rights and the rights of IPs rest on a solidified understanding of being Indigenous or a part of a forest-dwelling community—which is a source of unfreedom for those who fall outside its contours.

This is a known problem in the literature on identity-based politics or the politics of recognition where the fear of rigid framing of identities is a source of exclusion.¹³² The rooting of Indigeneity in a particular set of rights makes this all the more problematic. In India, this problem is evident in the exclusion of Dalit and other forest-dwelling communities from accessing rights when the state does not view them as Indigenous.¹³³

The question then becomes: does the approach to climate change law and policy accommodate a fluid understanding of Indigeneity and the identity of forest-dwelling communities? I argue that it can by introducing an element of choice in the process. Indigenous communities, like other communities, are a confluence of a multiplicity of interests and identities. The heterogeneity of these interests cannot be ignored in the making of law and policy. A sample of this heterogeneity is visible in the division within the Adivasi community in Tumulia on the question of selling forest land. There are members of the community that want to conserve the forests and remain in these areas and others that desire to leave the area. This is a simplified binary of a multifaceted conflict, yet this is a binary that does exist.

It becomes important, then, that the law accommodates the articulation of these differing choices. In Part IV, I argue that the right of Indigenous and forest-dwelling communities to participate in conservation efforts should be expanded to account for their desire to act as stewards. Another pathway out of this bind, I suggest, might be found in the use of other emerging legal frameworks like the rights of future generations or the rights of nature.

¹³² NANCY FRASER, *REDISTRIBUTION OR RECOGNITION?: A POLITICAL-PHILOSOPHICAL EXCHANGE* (2004).

¹³³ ARPITHA KODIVERI, *POLICY REPORT NO. 17: NARRATIVES OF DALIT INCLUSION AND EXCLUSION IN FORMULATING AND IMPLEMENTING THE FOREST RIGHTS ACT, THE HINDU CTR. FOR POLITICS AND PUBLIC POLICY 58* (2006).

IV. PATHWAYS OUT OF THE BIND

Indigeneity, as has been seen in this paper thus far, is transforming. As Megan Moodie, an associate professor of anthropology at the University of California at Santa Cruz, argues, these transformations are in response to the aspirations of these communities shaped by a changing political economy around them.¹³⁴ The changing nature of Indigeneity is due to a myriad of factors, but this paper is a sample of the contexts in which such transformations are taking place. Acknowledging the changing nature of Indigeneity, this Part provides two potential pathways out of the rigid framing of Indigeneity in law and the lived reality of these communities.

The first pathway is an expanded understanding of the right to participation where the desire to conserve can be negotiated and the terms of being Indigenous reconfigured. The second pathway is the use of emerging legal frameworks like the rights of future generations as a pathway outside of this bind.

A. THE IMPORTANCE OF CHOICE: AN EXPANDED UNDERSTANDING OF THE RIGHT TO PARTICIPATION

The right to participation—particularly the right to FPIC—forms an integral part of the approach to climate change law and policy. FPIC is a derivative of the right to self-determination. The UN Permanent Forum on Indigenous People understood FPIC in 2003 to include “[t]he collective right to give or withhold consent applies to all projects, activities, legislative and administrative measures and policies (and their associated processes and phases) that directly impact lands, territories, resources, and livelihoods of indigenous peoples and other local communities.”¹³⁵

There is not a universally agreed definition of FPIC in international law although it is found in many international legal instruments. In India, the right to FPIC was not recognized until 2013. The legal framework prior to 2013 imposed the legal standard of consultation of Adivasi communities through the environmental clearance process. Adivasi communities never had agency within the law to withhold their

¹³⁴ MEGAN MOODIE, *WE WERE ADIVASIS* (2015).

¹³⁵ JASMINE CAMPBELL, *ENGAGING WITH FREE, PRIOR, AND INFORMED CONSENT 9* (BSR, 2012).

consent to a development project that would have a devastating impact on their lands and culture.¹³⁶

The challenge with the implementation of this right in the context of mitigation and adaptation, keeping in mind the changing nature of Indigeneity, is whether forest-dwelling communities are given room to negotiate their aspirations beyond the demands of stewarding the forests.

Consent in the guidelines for FPIC for the UN-REDD+ program interprets consent as:

- a. A freely given decision that may be a “yes” or a “no,” including the option to reconsider if the proposed activities change or if new information relevant to the proposed activities emerges;
- b. A collective decision determined by the affected peoples (e.g. consensus, majority, etc.) in accordance with their own customs and traditions;
- c. The expression of rights (to self-determination, lands, resources and territories, culture); and
- d. Given or withheld in phases, over specific periods of time for distinct stages or phases of REDD+. It is not a one-off process.¹³⁷

This is an expansive understanding of consent. However, in the implementation of this provision in India, in particular, it is limited to a decision that may be a “yes” or a “no.” The potential for this legal avenue to enable deliberation on the transformations taking place within the community is seldom harnessed.¹³⁸

Including deliberation on the changing nature of Indigeneity would go a long way towards changing the terms of recognition within the law. The porosity of the law in absorbing these changed terms of recognition will be developed on the basis of these deliberated outcomes. A sort of jurisprudence or understanding derived from these deliberated outcomes can slowly push the boundaries of the law.

FPIC within the climate change discourse in India is viewed as a shield in reducing deforestation. This marginalizes the aspirations of forest-dwelling community members who seek to negotiate with

¹³⁶ *Odisha Mining Corp. v. Ministry of Env't & Forests & Others*, Writ of Petition (Civil) No. 180 of 2011 (2013) (India).

¹³⁷ GUIDELINES ON FREE, PRIOR, AND INFORMED CONSENT, *supra* note 89.

¹³⁸ JURGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION VOL. 1: REASON AND THE RATIONALIZATION OF SOCIETY* (Beacon Press Books, 1984).

companies or the state acquiring the land. An expanded right to participation based on the tenets of deliberative democracy can act as a pathway out of this bind by laying the foundation for changing the terms of recognition within the law of what being Indigenous or a forest-dweller means.

I propose that FPIC be expanded beyond decisions of afforestation, community-based conservation, and the notion of stewardship. The right to participation, through FPIC or other consultations, should encourage a dialogue within the community and with the state, as well as with other actors, on how these programs and initiatives interact with their aspirations and changing relationship to forest land.

Amartya Sen articulates that the choice to adhere to or move away from certain identity constructs is an important freedom that has to be recognized.¹³⁹ The right to participation needs to be viewed as deliberative space where the shifting sands of Indigeneity can be negotiated and renegotiated within and outside communities. Deliberation here refers to discussions before the village assembly or *Gram Sabha*, an already existing deliberative forum at the village level, where matters of importance are deliberated and negotiated.¹⁴⁰ These deliberated decisions made by the village assembly, once formed, can provide a firmer footing on which climate change initiatives can be implemented without compromising the aspirations of these communities.

Another element of this expanded idea of the right to participation is to include community members who are affected by these decisions as opposed to restricting it to those who are legally recognized as Indigenous. This is a limitation in most FPIC and right to participation provisions as seen in the UN-REDD+ program.¹⁴¹ Bounded deliberation with communities immediately impacted by the climate change initiatives is pertinent to understand the lived realities in which these laws and policies operate.

¹³⁹ SEN, *supra* note 43.

¹⁴⁰ Radu Ban & Vijayendra Rao, *Is Deliberation Equitable? Evidence from Transcripts of Village Meetings in South India*, in POLICY RESEARCH WORKING PAPER (Working Paper No. 4928) (World Bank Development Research Group, Poverty and Inequality Team, May, 2009).

¹⁴¹ Tehan, *supra* note 92, at 85–86.

B. THE RIGHTS OF FUTURE GENERATIONS

Emerging legal frameworks, like the rights of future generations to a sustainable environment, that are not rooted in a particular understanding of identity can be drawn into the approaches taken towards climate change mitigation to avoid deforestation. The rights of future generations have not yet formed an explicit part of international climate change or human rights law.

The question of how the state should protect the human rights of those not yet in existence remains. In an article on the rights of future generations in the context of climate change, Bridget Lewis argues that “if we acknowledge that states have the capacity to affect future generations through their actions on climate change now, then a corresponding obligation could be said to be owed to those generations.”¹⁴²

There are different theoretical challenges in adopting an approach that incorporates the rights of future generations, however, the framework, if adopted, can liberate Indigenous communities from their bind. The right to participation can allow for changing the terms of recognition within the law while the rights of future generations can provide an additional legal approach for the prevention of deforestation.

The rights of future generations then restrict deforestation in instances where forest-dwelling communities are not interested in conserving these areas. This, of course, is a tricky proposition as the rights of future generations may dangerously move the needle back to exclusionary conservation. The rights of future generations can limit the exercise of the rights of Indigenous communities if they are prevented from using forest produce in an effort to prevent deforestation.

These pathways that I have discussed in a limited capacity are potential ways to navigate this conundrum of the rigid framing of Indigeneity. As climate change law and policy in the context of Indigenous rights are being constructed, it becomes imperative to engage with the changing nature of Indigeneity and its impact on the development of this area of law.

¹⁴² Bridget Lewis, *The Rights of Future Generations Within the Post-Paris Climate Regime*, 7 *TRANSNAT'L ENVTL. L.* 69 (2018).

V. CONCLUSION

In this paper, I have argued that there exists a certain rigid understanding of Indigeneity on which rights and approaches to climate change mitigation and adaptation are based. I trace the approaches to climate change policy internationally and domestically to provide a glimpse into the contours of Indigeneity subtly tucked into the law.

This understanding is removed from the everyday reality of Indigenous and forest-dwelling communities in India. Through vignettes, I offer a lens into the challenges that surround Indigenous communities in being Indigenous—the primary challenge being the transformation taking place in their relationship to forest land and their desire to conserve.

Rajendra Nayak, a young Adivasi living beside the coal mines in Sundergarh, Odisha, when asked what he thinks the future of his community will be, states

Our future is one of trying to make sense of the rapid changes happening around us while we try hard to hold onto to what our identity meant to us historically and what it means to us now as we encounter change that is omnipresent.¹⁴³

Thus, he believes that the future lies somewhere between the historical underpinnings of what it means to be Indigenous and its transformations in the present. Adivasi communities are seen negotiating the extractive economy, the Indian state, and their collective aspirations of the future may be.

I conclude that an expanded right of participation where the changing nature of Indigeneity can be deliberated upon and outcomes decided can assist in pushing the boundaries of the law to change the terms of recognition. Second, I suggest that rights of future generations, if incorporated into climate change law and policy, can act as an additional legal framework in preventing deforestation beyond the recognition of community land tenure. These avenues can open up spaces within the law for Adivasis like Rajendra to articulate the transformations underway in what it means to be Adivasi or Indigenous.

¹⁴³ Kodiveri Field Interview, July 18, 2018.