Constitutional Geographies and Cartographies of Impunity

Human Rights and Adivasis/Tribes in Contemporary India

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The right to liberty for Adivasi communities is expressed in terms of territoriality—homelands that could be mobile or fixed, which confer a particular identity on its people, enabling distinct livelihood practices. Relations of land have been at the core of the Adivasi engagement with the law and the Constitution—both in the case of the peasant and non-peasant communities—engagements that have signalled major victories through taking struggles into courts of law. This paper explores the fields of constitutionalism and human rights with specific reference to tribes/Adivasis in India. In doing this, the attempt has been to trace some connections that emerge from collective engagements with the Constitution and law with respect to Adivasi rights in India. Popular sovereignty has given voice to practices of sustainability, environmental protection, the nurturing of ecological systems, traditional knowledge systems and the indispensable right "to stay put"—to refuse to move.

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> Can you tell me, we women being mothers, what kind of future we are giving to our children? Are we not passing on our past as their future? Have we undertaken these innumerable treks to do just that?
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> — (Santhal woman to anthropologist Narayan Banerjee 1982. Quoted in Mazumdar 2016: 179)

1 Introduction

The *Report of the High Level Committee on Socio-Economic, Health and Educational Status of Tribal Communities of India*, 2014, details the situation of Adivasi/indigenous communities in India: Scheduled Tribes (STs), de-notified tribes and particularly vulnerable tribal groups. The report sets out the terrain for a consideration of human rights of indigenous/Adivasis/tribal/aboriginal communities in India.[1] Sixty percent of the forest area in the country is in tribal area. Fifty-one of the 58 districts with forest cover greater than 67% are tribal districts. Three states—Odisha, Chhattisgarh and Jharkhand—account for 70% of India's coal reserves, 80% of its high-grade iron ore, 60% of its bauxite and almost 100% of its chromite reserves. Forty percent of those displaced by dams are tribal peoples. A look at violent conflict, whether in schedule V states or in schedule VI states, shows that "the state is involved in all of these conflicts in some way or another." Not surprisingly, the areas where these wars are being waged (with the state as party) are tribal areas with rich mineral reserves. The Armed Forces (Special Powers) Act (AFSPA) guarantees impunity to state perpetrators of extrajudicial murder and assault, and there are a large number of peaceful mass movements against the appropriation of tribal homelands by the state and by corporations (Xaxa Report 2014).

Around 91% of the STs live in rural areas; while around 9% of all Hindus are ST, close to 87% of STs declare themselves as Hindu, 33% of all Christians are ST and close to 79% of "other religions" are ST, the last an indication of the strong presence of autochthonous religions among tribes/Adviasis (Deshpande 2015: 5). The STs report "owning" larger amounts of land when compared to Scheduled Castes (SCs), which might be suggestive of an Adivasi understanding of access to forests as ownership; however, this coexists with sharp disparities in monthly per capita expenditure (MPCE), with MPCE for STs being the lowest among all social groups (₹813). In general, Deshpande finds that indicators of standard of living of the STs shows that they are the most marginalised among social groups with clear and persistent disparities.

Against this background, this paper attempts to present a framework for approaching the field of human rights with reference to Adivasi communities in India.

2 Constitutionalism, Human Rights and Sovereignty

The definition of what is a tribe, and who is recognised as belonging to a "Scheduled Tribe," far from being a matter of academic and historical interest alone, is critical to the application of human rights standards and specific constitutional protection—rights to equality, non-discrimination, life and liberty and the guarantee of autonomy in governance under schedules v and vi of the Indian Constitution, for instance.[2] We begin therefore with the Constitution.

The Constitution, in a key fundamental rights protection, Article 15 on the right against discrimination, in Clause 15(1) makes an analogous reference to tribe—race and place of birth—recognising that discrimination against tribes takes the form of racial discrimination and territorial distinctiveness (Kannabiran 2012).

Article 19 of the Constitution is commonly understood, through text and case law, as a provision that protects freedom of speech, expression, assembly, association, movement, residence and calling.[3] The first clause of Article 19 reads as follows: 19(1) All citizens shall have the right (a) To freedom of speech and expression; (b) To assemble peaceably and without arms; (c) To form associations or unions; (d) To move freely throughout the territory of India; (e) To reside and settle in any part of the territory of India; (f) Omitted; and (g) To practise any profession, or to carry on any occupation, trade or business. Clauses 19 (2) to (4) set out the reasonable restrictions to speech, assembly and association in the interests of public morality, decency and integrity and sovereignty of the state—these aspects and their restrictions are what figure most often in animated fashion in debates around Article 19.

Clause 5 of Article 19 reads as follows:

> 19(5) *Nothing in sub clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub clauses* either in the interests of the general public or *for the protection of the interests of any scheduled tribe* (emphasis added).

In other words, an important part of Article 19 protections have to do specifically with protection of interests of STs (Clause 5) as distinct from other marginalised groups through limitations on right to freedom of movement [sub-cause 1(d)] and right to freedom of residence [sub-clause 1(d)].

This little cited fundamental rights protection to the STs in India serves as my point of departure for examining the larger question of human rights and indigenous communities/tribes in contemporary India.[4]

Human rights are fairly well understood and delineated in great complexity with reference to regions, countries, states and peoples—notably with reference to "territories."[5] Broadly, what does the human rights framework, as commonly understood today, consist of? The Universal Declaration of Human Rights serves as a useful point of departure. Inherent dignity and inalienable rights of all persons are constitutive of freedom, justice and peace; freedom of speech and belief and freedom from fear; life, liberty and security of person; recognition as a person before the law; freedom from slavery, servitude, inhuman/degrading treatment and discrimination; freedom from arbitrary arrest, detention and exile; entitlement to fair and public hearing by independent and impartial tribunal in the determination of his/her rights and obligations; right to the presumption of innocence in criminal trial; right against arbitrary interference with privacy, family, home; the right to property, importantly for the present purposes has two facets—the right to own property and the right not to be deprived of his/her property; freedom of thought, conscience, religion, opinion and expression; right to peaceful assembly and association; right to participate in government; right to social security and the entitlement to realisation of social, economic and cultural rights indispensable for his/her dignity and the free development of his personality; the right to work, which includes protection against unemployment and provision of social protection; right to a standard of living adequate for the health and well-being; the right to education; finally Article 29(2): "In the exercise of his rights and freedoms, *everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society*" (emphasis added).

It is important, even as we set out, to take note of Talal Asad's insistence on the need to recognise "the complex historical terrain on which human rights have travelled" from Christendom to the present times of neo-liberalism. Especially problematic in his view is the fact that responsibility for safeguarding human rights is vested in individual sovereign states, whose jurisdiction is circumscribed by their national economy. As a result, harm wilfully perpetrated on the economy of one country by another, nothwithstanding the irreparable damage and suffering caused as a direct result, does not constitute a violation of human rights of those affected in large numbers by such harm (Asad 2009). As with all cultural material, he observes, the "culture of law" is soaked in complex inequalities of power. And as with all law, it is necessarily dependent on violence. "Human rights culture" therefore is not simply a persuasive and reasoned language that comes down from a transcendent sphere to protect and redeem individuals. It articulates inequalities in social life everywhere and at all times' (Asad 2000). Foregrounding universal individual rights might echo the tenor of neo-liberalism or worse still pave the way for the harnessing of human rights as "swords of empire,"[6] as Harvey cautions us, creating a hierarchy of primary rights (to private property and profit) and derivative rights (to the United Nations (UN) charter).

Stepping away from this is imperative both to be able to focus on the "diversity of political-economic circumstances and cultural practices" across the world (Harvey 2005: 178) and importantly to decide on "which universals and what rights should be invoked in particular situations … [and] how

universal principles and conceptions of rights should be constructed" (Harvey 2005: 179)—here, the question before us is how do we weave together the rich and fraught history of Adivasi experience in a manner that leads us to a more nuanced construction of human rights itself. What are the possible ways of extricating "human rights as justice" from its entanglement in webs of subjugation and disentitlement, that prompts Asad to pose the question—is human rights discourse the only language to talk about justice? (Asad 2000)

While a detailed discussion of this intense debate is beyond the scope of the present exercise focused on Adivasi communities, it is possible to consider "the conditions for constitutionally domesticating the circulation of power in complex societies," through an interreading of Habermas and Ambedkar. Habermas's delineation of the relationship between communicative reason, deliberative democracy, constitutional patriotism and popular sovereignty that emerge from communicative reason and deliberative democracy (Habermas 1996) and Ambedkar's insistence on constitutional morality offer for us a possibility of examining and understanding afresh the question of human rights that confront the lifeworlds of Adivasis/tribes in contemporary India. Baxi (2008) points us to another possibility—constitutional insurgency—through an interreading of Ambedkar (who posits a contradiction between politics and socio-economic life marked by discrimination) with Antonio Negri (who speaks of the dialectic between the constituted and the constituent power of the multitude incessantly struggling to create new worlds).

The concepts that circulate in this inter-reading—self-determination, autonomy, sovereignty, moral orders, justice, constitutional insurgencies and human rights—and the form and content of their articulation, help us move away from the focus on the sovereign state that Asad warns us of, to explore the fields of popular sovereignty and moral self-determination at the level of a constitutional collective—the STs, or an international community of belonging, for instance, "indigenous peoples." This exploration may hold possibilities for a more sustained interrogation of power and arbitrary/capricious rule, especially under neo-liberal regimes. If we agree that "[a] constitution is a political document which gives legal content to a set of pre-existing rights, secured politically by peoples' struggles" (Kannabiran 2003: 41) the significance of popular sovereignty is immediately established. Upendra Baxi observes that notwithstanding its roots in Christendom, human rights under the multireligious Indian Constitution is distinctive in several ways—for one, the "religious freedoms" of the majority Hindu religion are significantly restricted (notably through the constitutional ban on untouchability), but also (and importantly for our present purposes) there is a full recognition of the *collective rights* of religious minorities and social groups that are subject to systemic, structural discrimination (2008: 19).

Closely related to this is Xaxa's pertinent observation that Christianity and missionary work in India had brought tribes within the ambit of congregational life spilling over the boundaries of individual tribes to a wider identity—intially religious but soon spreading to an associational life based on a recognition of common histories of exploitation and oppression—stirring a self-conscious assertion of an Adivasi identity (2016: 44). We return here therefore to associational freedoms under Article 19 of the Constitution which enable the expression of popular sovereignty, constitutional patriotism, constitutional morality and importantly, constitutional insurgencies. It is this dense nesting of human rights principles that constitute transformative constitutionalism.

I will attempt from this point onwards to address these questions with reference to "concrete particulars" (which will help us understand events and issues in practical terms) in relation to Adivasi communities (Delany 2003). The constitutional framework in India reaffirms these inalienable rights, providing specific justiciable, fundamental rights protections to the STs as a territorially defined, internally diverse, constitutional collectivity. To return to the opening observation on Article 19 protections under the Constitution for the STs, there are, I suggest, strong reasons for mapping human rights of Adivasi communities on a distinctive terrain, even while keeping sight of the core principles around which such rights may be articulated or indeed affirmed. The questions of autonomy, popular sovereignty and transformative constitutionalism (encompassing constitutional patriotism, constitutional morality and constitutional insurgency) are the wayfinders in this terrain. The importance of meaning can scarcely be understated in this context.

Is there an alternative way of conceptualising human rights through the "creation or recreation of substantive and open democratic governance structures"? (Harvey 2005: 176)

In opening out the field of human rights and its application to Adivasi/tribe/indigenous communities, however, the major limitation is a definitional one, where enumeration in the list is necessary for application of specific protections—that is, special constitutional safeguards and special legislation. Within the broader expanse of human rights, however, it is possible to argue for the "commonality of conflicted lives" (to borrow from Sundar (2016: 7)) to articulate rights for communities similarly placed but governmentally distributed across categories—as for instance with de-notified tribes not classified as STs, and "indigenous peoples" (Xaxa 2016).

3 Territory and Geographies of Adivasi Experience

> [T]erritoriality [is] a social (and political, economic, cultural) *process* that unfolds not only in place but through time. It thereby allows us to more easily see territories as *social products*. And learning to see through territory is valuable in learning to understand the world: the world as a whole and the worlds within which our lives are lived. (Delaney 2005, Introduction)

Tribal pasts in India are extremely complex and multilayered, as Guha demonstrates through his close examination of medieval South Asia that rigorously asserts the need to "banish social and ecological stasis from the woodlands of the world"; he maps for us the "diverse sociopolitical trajectories by which various communities had arrived at their modern situations" (Guha 1999: 201). This is a valuable caveat especially at a time

when flattening and homogenising narratives of "indigeneity" might undermine the complexity of the fields of human rights for diverse tribal communities each with its own past that lingers on, shaping collective memory and the geography of experience: "But we Santhals are fools, aren't we? All of us Adivasis are fools. Down the years, down generations, the Diku have taken advantage of our foolishness. Tell me if I am wrong. I only said, 'We Adivasis will not dance anymore.' What is wrong with that?" (Shekhar 2015).

The figure of the *diku* crystallises the danger of dispossession in Adivasi homelands in schedule v areas and yet, in the context of schedule vi areas, Baruah cautions us to the dissonances embedded in "the indigenous-outsider binary" (Baruah 2008: 16). Questions of human rights are embedded in this complex multilayered porosity of inter tribe/inter group relations.

The criminalisation of approximately 200 nomadic, peripatetic and foraging and petty trading communities under the Criminal Tribes Acts of the British government, asserted colonial territorial power through surveillance, the use of police force and state custody, and importantly brought into play notions of proprietorial control by the state of commodities, trading, access to lands and forests, the freedom of movement and autonomy of livelihoods (Radhakrishna 2008). The continuing repercussions of this move of the colonial government are visible in the case of the custodial torture and murder of Budhan Sabar in West Bengal in the late 1990s.[7] Sundar draws our attention to reports of jails in Jharkhand, Odisha and Chhattisgarh, that were packed beyond capacity with Adivasi prisoners—Chhattisgarh for instance with a occupancy rate of 252% of capacity—with Adivasis jailed for minor forest offences unable to pay bail or preventively detained for being "Maoists" in areas of counter insurgency operations by the police and paramilitary forces that specifically targetted Adivasis (Sundar 2016: 15).

Adivasi women: The immiserisation of Adivasi communities and their precarity in exploitative labour arrangements and intermittent migration (which has its beginnings in colonial policy and rule) has specific impacts on women. The lack of traditional restrictions on women's labour and mobility perhaps accounts for the preponderance of Adivasi women in the migrant labour force historically. However, Mazumdar (2016) observes that the circular, short-term pattern of Adivasi women's migration severely constricts their freedom by drawing them into regimes of accumulation with the harshest conditions of labour mortgage and recruitment for the harshest forms of manual labour. Kishwar's discussion of Ho women of Singhbhum is particularly illuminating. Their vulnerability to sexual abuse at these insecure worksites, and their vulnerability to abuse by dikus in their homelands increasingly under occupation by forest guards, police and settlers, aggravates their vulnerability within their own communities—witnessed in "the loss of usufructory rights of tribal women due to rape by dikus" (Kishwar 1982). This continues to be a major preoccupation across Adivasi communities in relation to property, usufruct/ownership rights over land, access to education and public employment and political representation today.

Apart from the multifarious ways in which Adivasi women are trapped routinely in webs of dispossession—from land, labour, ancestral rights, sexual and reproductive autonomy, for instance—their vulnerability to collective sexual assault especially as part of state counter-insurgency offensives in situations of conflict needs close examination (Human Rights Forum 2013). The beginnings of impunity and custodial sexual assault—with no reprieve from courts were visible with Mathura in Maharashtra in the late 1970s.[8] We see this repeated in later years, especially in Chhattisgarh and Manipur—Thangjam Manorama and Soni Sori embodying human suffering and the feminist resistance against the realities of state impunity (Kannabiran and Menon 2007). The armed might of the state silences and stigmatises both. It silences, literally by eliminating those that speak; it silences by disallowing voice through repression; and it silences by stigmatising and criminalising survivours, as we witnessed in the case of Soni Sori. However, in attempting to understand impunity in relation to Adivasi communities, while being mindful of the particular, it is important to draw in an understanding of the material contexts of sexual assault. The experience of harm and suffering is closely tied to larger (hope-filled) questions of accountability and justice in the face of chronic, aggravated and cumulative dispossession.

The question of land: The single most recurrent theme in accounts of Adivasi struggles, rights, assertions and counter assertions is "land"—simultaneously, forest, grazing lands, homelands, villages (habitations/hamlets/settlements), commons, homes and territory (with demarcated boundaries and explicit jurisdictional and juridical characteristics). The land is also mobile with the pastoral and other nomadic, the peripatetic and the foraging communities moving back and forth redrawing their territories and intermittently settling into sedentary rhythms for varying lengths of time. In inhabiting land, there are specific relationships that are constructed between territory, identity and experience—lifeworlds that are the subject of collective memory, recalled in specific forms of ritual, kinship practices and forms of worship.

There are two aspects of territoriality that merit specific mention at this point: residence and mobility. What does the term "village" signify? In arid areas "a few adobe homesteads near a source of water," in mountain terrain, "a clutch of wooden homes clinging to the slopes," the pastoral Bakkarwal, and other peripatetic communities might spend the whole year in tents (Rao and Casimir 2003: 14). An oft forgotten reality is that villages are places that are regularly served by peripatetic entrepreneurs and nomadic specialists who have a keen sense of every aspect of village life in the villages they traverse seasonally. And yet, Berland (2003: 108) observes, there is no village study that either systematically records the visits of peripatetic artisans and entertainers, or calculates the impact, if any, of their transactions on the village economy or social organisation.

An important part of the relations to land has been the *inherent right* of mobile, nomadic communities to move without restraint—mobile territoriality. The description of the Koravas offered by Meena Radhakrishna is striking. An itinerant trading community, the Koravas traded in grain, salt, cattle and bamboo between interior districts and the coastal areas in the mid-19th century, reaching stocks to far-flung areas on bullocks and donkeys (Radhakrishna 2008: 7–8). Several forest tribes were linked to the outside world through barter relations with peripatetic communities, and through other contact with rural and urban agglomerations (Rao and Casimir 2003: 13–15)—the Chenchus of Nallamalla for instance who were traditional guides, palanquin bearers and wayfinders for Hindu pilgrims passing through the Nallamalla forest dotted as it is by pilgrimage sites. So the forest itself had boundaries that were porous, the people dwelling in the forest carrying the boundaries with them in their incessant travels. This helps us see the forest as constitutive of the constitutional guarantee of right to life for the largest section of Adivasi communities.

A cursory look at the geographies of Adivasi experience points us towards possibly framing the territorial imperative quite differently from Adivasi perspectives. Devy draws our attention to the fact that Adivasi art constructs space and imagery in specific ways, where verbal and pictorial space is demarcated by an extremely flexible framing—the lines between art and non-art are blurred and porous and "Adivasi paintings merge with their own living space as if the two are no different at all" (2006: 71). More importantly, as Delaney observes, "cultures create and "produce" territories … through the process of reproducing and re-creating themselves." In other words, "[T]erritories are not simple artifacts by any means. Rather, they are fundamentally *constitutive* of the social orders whose features they express…" (Delaney 2005, "The Social Life of Territory").

The relationship between a scheduled area and STs residing in villages in the scheduled area is an intimate one. The constitutional geography is critical to the definition and identity of the tribes therein, and becomes the basis for their assertion of rights at every level. Although it is true that excessive power is vested in governors and the neo-liberal state has folded government into land acquisition and resource extraction under armed guard, making the exception a permanent condition of rule in scheduled areas; and although it is also true that new juridical categories like "encroachers" are invented to empty forests of resistance to dispossession, the constitutional geography set out in schedules V and VI is sealed by the non-negotiable fundamental right protection in Article 19, quoted in the beginning of this paper.

The right to personal liberty in this context takes on a distinct collective meaning for the STs, setting these protections a class apart from the general delineation of the individual right to personal liberty under a liberal interpretation. The conditions of interference that are impermissible are set out alongside the delineation of territory: tribe and territoriality are inextricably linked, such that "[w]e should refuse the idea that claiming the 'right to stay put' is about 'traditional stasis'" (Butler and Athanasiou 2013: 24).

4 Dispossession

We enter the discussion of "dispossession" in the context of human rights of Adivasi communities through the SC and the ST (Prevention of Atrocities) Act, 1989, Section 3(1) of which states:

> Whoever, not being a member of … a scheduled tribe …
> (iv) wrongfully *occupies* or cultivates any land owned by, or allotted to … a member of … a scheduled tribe or gets the land allotted to him transferred; …
> (v) wrongfully *dispossesses* a member of … a scheduled tribe from his land …
> (xv) forces or causes a member of … a scheduled tribe to leave his house, village or other place of residence, …
> Shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine.

The significance of this statutory provision lies in the fact that it captures the everyday, disaggregated accretion of Adivasi dispossession—through the wrongful occupation/usurpation/"transfer"/usufructory rights of lands in scheduled areas to individual non-tribal occupants.[9]

Although the meaning of dispossession and through it of possession is often flattened out to construct possession as ownership of private property under capitalism, the distinction between ownership and possession is at the heart of contestations around Adivasi territoriality and the regimes of dispossession that bind Adivasi communities down. Rao and Casimir set out a distinction between ownership and access, by pointing out that in precolonial times what was important was access to land when one needed it, suggesting that ownership of land was less directly linked to power and status (2003: 16–17).

While the neo-liberal turn, to use Harvey's expression, does mark the inaugural moment in the accumulation of dispossession (2005), regimes of dispossession in tribal homelands in India are marked by histories of occupation under different state regimes and by dominant social groups on the subcontinent. As Levien (2015: 147) observes, "the concept of regimes of dispossession encourages us to see dispossession as a form of coercive redistribution that states use to facilitate different forms of accumulation and class interests in different periods." Further, importantly for our elaboration of human rights, he suggests that because it is a political process mediated by states, it can be stopped through non-compliance. While Levien applies this concept to land under capitalism, I suggest that it is useful to understand the Adivasi experience through the concept of regimes of dispossession, where territoriality (as distinct from land) is at the core and *geographies of experience* become intelligible through the prism of territory (Delaney 2005). For Adivasis more than any other group, the life experience of entire communities is intimately connected to their spatial organisation—whether these are homelands or the mobile territory of peripatetic communities (several of whom are STs)—and hence the significance of mapping geographies of experience (Delaney 2005).

Dispossession itself has been complex and layered, homogenising livelihoods and lifeworlds while delegitimising them. The most common description of foragers and hunter–gatherers, for instance, has been that they have lived in isolation. Yet, there is ample evidence that for centuries, foraging communities have lived in contact with rural and urban agglomerations (Rao and Casimir 2003: 13); studies have shown that very few nomadic communities subsist solely on foraging—a significantly larger number sustain themselves in a mixed economy of foraging and trading in wild produce (Rao and Casimir 2003: 23–24). Importantly for our purposes, there is evidence of shifts that communities have made from cultivation to foraging and peripatetic livelihoods consequent on displacement, thus challenging the linear narratives of tribal development and progress from nomadism to sedentarism (Rao and Casimir 2003: 22–25).

The relationship between dispossession and extraction of forest produce and mineral resources is closely interlinked. The earlier category through which this was understood was exploitation—exploitation of land and underground resources and exploitation of tribals who lived on the ground that was being emptied out around and beneath them (Guha 2012: 45; Xaxa 2012).

An important aspect of research on the question of land and dispossession in relation to tribal communities is the argument that while the state and the market view land as a commodity, in the tribal lifeworld, land has a complex material–symbolic–spiritual–historical significance that militates against commodification (Ekka 2012; Fenelon and Hall 2008: 1876) and the forest is "the leitmotiv of their material and spiritual existence" (Munshi 2012: 4). Further, for peoples who live in a symbiotic relationship with land, water, forests, habitats and habitations, the death of water is a living, continous dispossession—the conversion of "living water" to stagnant, "dead water" that becomes a death trap for life forms that depend on it (Padel and Das 2016: 226). And yet it is this very intractability that governments have sought to defeat—a necessary condition for the dispossession that follows.

The "grammar of territory" to borrow from Delaney (2005), is irredeemably and profoundly altered through processes of "simplification" and "standardisation" (Scott 1998). In Kumar's (2012) view this was effectualised through three changes: commercial over subsistence use (accumulation of dispossession to echo Harvey (2005)); delegitimisation of communities (cultures of dispossession to echo Bhandar and Bhandar (2016)); and unrestrained resource exploitation (regimes of dispossession to echo Levien (2015)). This new grammar is introduced through bureaucratic writing. The ascendancy of written records over orality, speech and practices of sociality functions to shrink access and negate entire modes of thought and relationality between peoples, communities and environments/habitats that did not depend on the particular forms of the written word that constitute modernity. Akhil Gupta's (2012) examination of *structural violence* is particularly pertinent to our understanding of the predicament of Adivasi/indigenous communities: What are the specific ways in which writing functions as a key modality for the perpetration of structural violence by the state?

There is a large body of work that speaks of tribal "access to land," "land transfer regulation" and its unenforceability, "land alienation," "displacement" and "eminent domain"—all of these terms have their origin in statist discourse where the "enabling legislation" coexists with its opposite, giving rise to what Nitya Rao terms a "*legal anomaly*" (Rao 2012, emphasis added). Speaking of the Santhal Paraganas as late as 2003–04, Rao points to the interpretation of *jhum* or shifting cultivation as "illegal" by forest officers—whose resolution of illegality is to force bribes in return for permission to cultivate. The legal anomaly in this instance is caused by the coexistence of Rule 10(i) of the Santhal Parganas Protected Forest Rules that confer legal rights on Paharias to jhum; and the revised guidelines of the Forest (Conservation) Act, 1980, that obstructs such cultivation.

Freedom of Religion

The trope of "legal anomaly," which is the direct result of the juridification of the geographies of Adivasi experience in India takes several forms—conflicting legal provisions where the provision enabling access is inevitably defeated; non-implementation of legislation by executive; reductionist interpretations of legislation through administrative law, where the formulation of rules at the level of states defeats the core purpose/statement of objects and reasons of a legislation (as in the case of the Panchayats (Extension to the Scheduled Areas) Act of 1996–PESA); and the overriding powers of eminent domain in a constitutional era where a colonial principle overrides constitutional geographies. Together these and multifarious other manifestations of such anomaly, legitimised through the marking of a legal regime, imbricate Adivasis in webs of cultural trauma, human rights wrongs and constitutional violations that make their everyday lives in a constitutional terrain a place where the past lingers in far-reaching ways.

The current debates on dispossession and accumulation have foregrounded different intersecting axes of dispossession—particularly relevant to an understanding of the Adivasi predicament is the triangular intersection of the accumulation of dispossession (Harvey), regimes of dispossession (Levien 2015) and cultures of dispossession (Bhandar and Bhandar 2016). With respect to the last, the question of the right to the freedom of religion—the freedom to practise and propagate religion as well as the right to manage religious affairs of the community autonomously is critical. Deshpande's observation that 79% of those who report their religious affiliation as "other" are STs—that is, not Hinduism, Christianity, Islam, Jainism, Buddhism or Zoroastrianism—is suggestive of the strong continuing presence of autochthonous religions in tribes is extremely important (Deshpande 2015).

The practice of religion is closely tied to spaces of worship and communal living, and rituals surrounding work (that already has a territoriality), residence and collective memory. What are the specific ways in which the accumulation of dispossession and its regimes trigger and sustain cultures of

dispossession, marking them on the lost homeland, lost cultures—the metaphysical and the physical fused in the regimes of dispossession. Mining projects in the Niyamgiri hills in Odisha, for instance, deprived Adivasis the right to worship Niyam Raja who resided in the forests, and dispossessed them of places of worship and opportunities to propagate their religious beliefs.[10] In a similar manner, the submergence of Adivasi villages (all affected villages, but given the specific territorial grammar that scheduled villages invoke, we may focus attention on scheduled areas alone for the present purposes) deprives entire village communities of their spaces for local government, schools, community living and meeting, thus shrinking the boundaries of these areas without presidential sanction, which is a constitutional requirement.

The archaic, colonial rule of eminent domain, rules in direct contradiction to the justiciable protection of scheduled areas under Article 19, set out at the beginning of this paper:

> [T]he property of subject is under the eminent domain of the state, so that the state or he who acts for it may use and even alienate and destroy such property, not only in cases of extreme necessity … but for ends of public utility, to which ends those who found civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done the state is bound to make good the loss to those who lose their property.

This is the final and most critical signpost of dispossession with far-reaching consequences to the right to life and liberty of Adivasi and traditional forest dwelling communities across the country.[11] A report of the Official Working Group on Development and Welfare of Scheduled Tribes during the Eighth Five-Year Plan (1990–95) on the rehabilitation of tribal people concluded almost 50% of the 1.694 million people displaced by these projects (8,14,000) were tribal people. This observation was based on a comprehensive study of 110 projects (Government of India 1993 cited in Greenpeace India 2011: 12). The impact of ecological and economic insecurity presents other manifestations in Attappady block in Kerala consisting of three gram panchayats that are habitations of extremely vulnerable tribal communities—Irula, Kudumba and Muduga. In 2013, Attappady witnessed the deaths of at least 36 infants either soon after birth or they were still born.[12] That Attappady is an illustration of the situation of the STs nationally is borne out by the fact that the daily per capita expenditure of STs is about half that of the general category; multidimensional poverty is at 81% compared to 66% among SCs; child mortality rates are highest among STs; and 46.6% of Adivasi women suffer from chronic malnutrition—as evident from extremely low body mass index (Sundar 2016: 9). As Akhil Gupta (2012: 6) argues "extreme poverty [is] a direct and culpable form of killing made possible by state policies and practices."

Displacement then needs to be understood as a process that consists of several layers of interlocking, simultaneous, sequential and intergenerational dispossessions—a process fraught with violence on multiple, intersecting axes. Felix Padel (2011: 5) invokes the image of sacrifice, juxtaposing the practice of human sacrifice among the Konds of Orissa in the colonial period, at one end with the sacrifice of Kond lives in the name of "peace" by the British far in excess of those sacrificed in Kond ritual over several years; at the other end human sacrifice in its modern form, in the idea that a nation's development depends on the "national sacrifice" of its tribal minority (Padel 2011: 310)—a genocidal sacrifice.

We now have before us the core themes for a consideration of human rights of Adivasi/tribal communities: land, faith, spirituality and religion, culture, assembly, displacement, the "outsider" diku—zamindars, moneylenders, shopkeepers—occupation/dispossession, reclamation from other species of forest-folk, colonisation (the land adrift!) … And through this run the criss crossing highways of impunity.

5 Towards an Adivasi Human Rights Imaginary

We return to the innumerable treks of the Santhal woman through desolate landscapes of dispossession connecting a dispossessed past with an anticipation of dispossession as the only future for her children. The critical question is, what is the move through which dispossession may be countered?[13] Butler and Athanasiou observe that it is important

> to think about dispossession as a condition that is not simply countered by appropriation, a term that re-establishes possession and property as the primary prerogatives of self authoring personhood … We must elaborate on how to think about dispossession outside of the logic of possession … that is, not only avoiding but also calling into question the exclusionary calculus of proprietariness in late liberal forms of power … (2013: 6–7).[14]

I will attempt in this concluding section to trace some connections that emerge from collective engagements with the constitution and law with respect to Adivasi rights in India. Popular sovereignty has given voice to practices of sustainability, environmental protection, the nurturing of ecological systems, traditional knowledge systems and the indispensable right "to stay put"—to refuse to move.[15]

It is possible to extend Sarbani Sen's (2010) periodisation of popular sovereignty to the specific phases of Adivasi resistance: the colonial period that provided the pre-history for the constitutional articulation of specific collective and territorial rights for the STs, which we have referred to briefly; the foundational moment of Constitution making, where the ideas and philosophies of tribal autonomy, mobility and lifeworlds were written into the Constitution through a representative process (can we afford to forget the figure of Jaipal Singh Munda in the constituent assembly?); and the post-foundational phase where we have the small, yet determined, struggles across the Indian subcontinent to find survival, voice and visibility—the resistance to POSCO, Vedanta, Narmada, Polavaram; and the resistance in Chhattisgarh and Manipur, among others. This third phase has witnessed several intersecting strategies: lawmaking;[16] challenging state violence on Adivasi communities and thereby challenging impunity through collective mobilisation and strategic litigation;[17] non-violent protest against the AFSPA;[18] and forcing the implementation of the Forest Rights Act through the filing and monitoring of claims by Adivasi citizen groups across the country.[19]

Particularly important in triggering a cascading resistance against impunity and jurisprudential dissociation—setting a new method in human rights advocacy was the 1979 Open Letter to the Supreme Court protesting against the trial court judgment in the Mathura case.[20]

If we use the frameworks of popular sovereignty as our point of departure, it can scarcely be contested that *pluralism* and *diversity* (of all life forms) should lie at its core. A close look at the struggles for survival and dignity by constitutional collectivities like the STs underscores the indispensability of imagining lifeworlds of freedom and dignity even while reckoning with practical unattainability of justice as its core problem in the troubled present.

The right to liberty for Adivasi communities is expressed in terms of territoriality—homelands that could be mobile or fixed which confer a particular identity on its people, enabling distinct livelihood practices. Relations of land have been at the core of the Adivasi engagement with the law and the Constitution—both in the case of the peasant and non-peasant communities—, engagements that have signalled major victories through taking struggles into courts of law.

Since a majority of Adivasi communities are forest dwellers, the homeland issue is not limited to land, but extends to their presence in the entire forestscape. A central concern that arises from their location in the forestscape is that of governance, autonomy and self-determination, all issues that have been the focus of struggles in recent times around the issue of forest rights as well. However, it is just this focus that poses a threat to the interpretation of sovereignty in relation to settlement by the state under neo-liberalism. And yet, it is that very autonomy—the sovereignty of the people intertwined with their right to autonomy in their homelands that is embodied in the Adivasi slogan "*maava naate maava raaj*" (our land, our rule). Article 19(5) along with schedules V and VI of the Constitution specifically protect Adivasi homelands and provide us with the language, tools and strategies to counter callous, hegemonic and violent national government that persists in trying to limit the reach of the Constitution.

The PESA and the STs and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act of 2006 (FRA) are designed to regulate governance and political autonomy. The intense struggles and deliberations around these legislations and the fight to ensure state compliance to their core principles were and continue to be expressions of popular sovereignty and constitutional insurgency by Adivasi networks across the country.

To return to Asad's concerns discussed at the beginning of this paper, although the field of justice may be opened up in many different ways, it is productive to use constitutionalism to promote the close connection between justice and popular sovereignty. What aspects of constitutionalism are indispensable for this idea of justice? If we agree that pluralism and diversity without prejudice are ideally the pulse of a vibrant and just society, and therefore central to the idea of constitutional patriotism, how does the constitution speak to this imperative?

Transformative constitutionalism then is an approach to mapping an Adivasi human rights imaginary framing development as a bounded endeavour in which justice and freedom are spatially and socially hedged in and held together by the state—vested through popular sovereignty with the responsibility for protection of citizens against harm—with a specific set of constitutional obligations towards Adivasis/STs.[21] These are not responsibilities easily or willingly borne by any government, but they are undeniably the constitutive responsibility of the democratic state that can discipline governments, especially when subject to pressures from movements for civil liberties, human rights and Adivasi rights.

NOTES

1 There are different terms used to describe indigenous communities in India and the rest of the world. Xaxa (2016) and Radhakrishna (2016) provide a comprehensive account historicising the deployment of descriptors for indigenous peoples. This paper takes note of this discussion in addressing the question of human rights across these descriptions—with a focus on treatment and discrimination based on identity/category.

2 We are speaking of 8.6% of the country's population with 705 different communities enumerated in the category of Scheduled Tribe under Article 342 of the Constitution of India. Of this the Scheduled Tribes of the northeast constitute 8.7% of the total ST population, while those in the schedule V areas of central, eastern, southern India and the islands comprise over 90%—this latter cluster includes the 75 tribes classified as "particularly vulnerable tribal groups" and some de-notified tribes (DNTs) (Sundar 2016). While most of these protections are available to groups named in The Constitution (Schedule Tribes) Order 1950, there are tribal communities that fall within the categories of Scheduled Castes, other backward classes and some that do not fall into any of these categories (Munshi 2012; Radhakrishna 2016; Sundar 2016).

3 My arguments on Article 19 of the Indian Constitution were first presented in "Constitutional Conversations on Adivasi Rights" (Kannabiran 2015).

4 Xaxa in fact observes that the category of "indigenous peoples" has been challenged in India "precisely because it is loaded with rights claim over land and territory with which they are intricately linked" (Xaxa 2016: 51).

5 I borrow here David Delaney's definition of territory as distinct from any other spatial formation (Delaney 2005).

6 A characterisation by Bartholomew and Brickspear, quoted in Harvey 2005. Or as Asad warns us, "As soft and hard law it is inextricably entangled with imperialist strategies and the capitalist drive for profit" (Asad 2009).

7 *Paschim Banga Kheria Sabar Kalyan Samity v State of West Bengal & Ors,* W P No 3715 of 1998.

8 *Tukaram v State of Maharashtra*, 1979 SCR (1) 810. Mathura, an Adivasi girl was raped in police custody. The case triggered a national campaign for reform of rape law.

9 A preliminary review of cases under the AP Land Transfer Regulation Act in the Bhadrachalam ITDA alone conducted by the Council for Social Development, Hyderabad has revealed the preponderance of litigation that either asserts non-tribal control or places adivasi possession in suspension pending judicial decision (anticipatory dispossession).

10 Supreme Court in *Orissa Mining Corporation Ltd v Ministry of Environment and Forest*, (2013) 6 SCC 476.

11 See Levien (2015) for a detailed analysis of land acquisition under neo-liberalism and Ramanathan (2010) for a discussion on eminent domain and sovereignty.

12 See D'Rozario (2013).

13 In thinking through the possibilities of a distinct human rights imaginary situated in the historical experience of Adivasis, I have drawn immeasurably from the work of Carolyn Finney (2014).

14 See Butler and Athanasiou (2013).

15 This is an aspect of the right to liberty under Article 21 of the Constitution of India that was forcefully argued by K G Kannabiran in 2008–09 in the context of the Polavaram Dam case.

16 Land transfer regulation legislations; SC/ST Prevention of Atrocities Act, Panchayats (Extension to Scheduled Areas) Act; The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, for instance (see Radhakrishna 2016).

17 Budhan Sabar's case (see note 5 above) and *Nandini Sundar and Ors v State of Chhattisgarh* (also known as the *Salwa Judum* case); and the numerous cases challenging forced displacement across the country, for instance. Especially important is the Samata case which was a precursor and torchbearer for the articulation of popular

sovereignty and transformative constitutionalism: *Samata v State of Andhra Pradesh*, AIR 1997 SC 3297.

18 Irom Sharmila's protest and the protest of the women of Manipur is immediately relevant although it must be stressed that the violence of this law has been disproportionate in Kashmir.

19 See Ramdas (2014).

20 An Open Letter to the Chief Justice of India (1979) 4 SCC 17–22. Letter written by Professors Upendra Baxi, Vasudha Dhagamwar, Raghunath Kelkar, and Lotika Sarkar.

21 For a detailed elaboration of the possibilities and trajectories of transformative constitutionalism, see Kannabiran (2012).

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