INDIGENOUS PEOPLES' RIGHTS OVER FOREST RESOURCE GOVERNANCE IN INDIA AND CANADA: DEBATING THE ROLE OF DECENTRALIZATION

A Thesis Submitted to the College of
Graduate and Postdoctoral Studies
In Partial Fulfillment of the Requirements
For the Degree of Master of Laws
In the College of Law
University of Saskatchewan
Saskatoon

By

Sheethal Padathu Veettil

PERMISSION TO USE

In presenting this thesis in partial fulfillment of the requirements for a Postgraduate degree from the University of Saskatchewan, I agree that the Libraries of this University may make it freely available for inspection. I further agree that permission for copying of this thesis in any manner, in whole or in part, for scholarly purposes may be granted by the professor or professors who supervised my thesis work or, in their absence, by the Head of the Department or the Dean of the College in which my thesis work was done. It is understood that any copying or publication or use of this thesis or parts thereof for financial gain shall not be allowed without my written permission. It is also understood that due recognition shall be given to me and to the University of Saskatchewan in any scholarly use which may be made of any material in my thesis.

Requests for permission to copy or to make other uses of materials in this thesis in whole or part should be addressed to:

Dean
College of Law
University of Saskatchewan
Saskatoon, Saskatchewan S7N 5A6
Canada

OR

Dean
College of Graduate and Postdoctoral Studies
University of Saskatchewan
116 Thorvaldson Building, 110 Science Place
Saskatoon, Saskatchewan S7N 5C9
Canada

ABSTRACT

India and Canada have a common colonial past which deeply disturbed the close ecological relationship between Indigenous peoples and forests, with the colonial authorities restricting Indigenous peoples' legitimate use of forest resources. Even during the post-colonial period, the forest policies in both these countries continued centralized conservation mechanisms that excluded Indigenous peoples. However, the past few decades have witnessed a shift towards decentralized governance in both jurisdictions. This recent trend manifests an attempt to devolve powers and authority to Indigenous institutions. In India, the constitutional recognition of decentralized governance and the enactment of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 emphasized the significance of traditional tribal institutions in resource governance. By contrast, in Canada, although the development of co-management regimes is sometimes highlighted as showing the changing face of forest resource governance, the devolution of power to traditional Aboriginal institutions in decision-making over resources remains unsettled.

The first chapter sets a background for the thesis by giving an introduction to the history of alienation faced by the indigenous peoples in India and Canada during colonial times. It further expands on the rationale for choosing both the jurisdiction as two comparable units. The second chapter provides a theoretical framework to the thesis by discussing various theories on decentralization. This part highlights the role of indigenous peoples and their institutions in forest resource governance. The third chapter examines the efforts towards decentralization in India through the Constitutional recognition and enactment of the *FRA*. Here it is argued that a radical shift in the tribal self-governance in India has achieved decentralization of forest resource governance. This argument is developed through an analysis of the implementation of the *FRA* at Mendha Lekha in Maharashtra. Some of the important judicial decisions that legitimized the decision-making powers of the tribal institutions in the forest resource governance are also discussed at this juncture. The fourth chapter analyzes decentralized forest governance in Canada through the evolution of co-management. Through an illustration of Clayoquot Sound in British Columbia, it is argued that there is an ongoing absence of strong decentralized institutional arrangements for decision-making on forest resource governance in Canada. Some of the important

judgments of the Supreme Court of Canada on duty to consult and accommodation are also discussed here to argue that an absence of a Constitutional recognition of these rights as compared to India has limited the scope of judicial interventions that legitimizes Aboriginal consent in the resource governance. The fifth chapter offers concluding remarks by comparing both the jurisdictions. Through a comparative analysis, this part argues that the *FRA* provides a stronger platform for the decentralization of forest governance in India than the co-management efforts in Canada.

ACKNOWLEDGMENTS

I owe my deepest gratitude to my supervisor, Prof. Dwight Newman. His continuous optimism, patience, and encouragement was always a source of inspiration for me to complete my research. I am grateful to Prof. Heather Heavin and the College of Law for providing me with financial support throughout my period of study in the University. I acknowledge with thanks my committee members, Prof. Ibironke Odumosu-Ayanu and Prof. Felix Hoehn for giving their insightful comments and accommodating the review of my work in their busy schedules.

I will also like to fondly remember the contributions of :
Lorrie Sorowski, Executive Assistant to the Associate Dean, whose doors were always open for any help from the first day. Prof. Lucinda Vandervort and Prof. Benjamin Ralston for the illuminating discussions I had with them during the period of my study which helped me get acquainted with the Aboriginal culture in Canada.

Prof. Roopa Madhav and Prof. Murali Karnam for the discussions that shaped my perspectives.

My family for being my emotional anchors all through my life. My grandmother, my husband Shree, my brother Sreenath and my little Kuckunni.

It will be unfair not to mention a few other names here. Most importantly, my good friend Antwi Frimpong who was always a strength from the day I landed here, without whom my life in this new setting would have been beyond difficult. Purush Purushothaman whose support and advice was invaluable during the last two years.

DEDICATION

"To the Indigenous peoples in India and Canada whose day-to-day survival itself is a protest against the establishment."

TABLE OF CONTENTS

ABBREVIATIONS

C 107 – International Labour Organization's Convention No 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Population in Independent Countries

C 169 – International Labour Organization's Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries

CFR – Community Forest Rights

CPR – Common- Pool Resources

DLC – District Level Committee

FCA – Forest Conservation Act, 1980

FCRSA – Forest Consultation Revenue Sharing Agreement

FNWL – First Nation Woodland License

FRC – Forest Rights Committee

FTOA – Forest Tenure Opportunity Agreement

IFA – The Indian Forest Act, 1927

INAC – The Indian and Northern Affairs

IMA – Interim Measure Agreement

JFM – Joint Forest Management

NABARD – National Bank for Agriculture and Rural Development

PESA – The Provisions of Panchayats (Extension to Scheduled Areas) Act, 1996

SDLC – Sub-Divisional Level Committee

SLMC – State Level Monitoring Committee

The FRA – The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006

UNDRIP – The United Nations Declaration on the Rights of Indigenous Peoples

UNPFII – UN Permanent Forum on Indigenous Issues

WLPA – The Wild Life Protection Act, 1972

CHAPTER I: INTRODUCTION

India and Canada are colonial cousins, sharing not only the abuses of their colonial eras, but also the destruction of the economic and social structure of Indigenous communities at the hands of the colonial settlers.[1] The culture of Indigenous peoples in both these jurisdictions has evolved in environments that were insulated from external influences during pre-colonial times. In India, the majority of the tribal population relied on the forests for their livelihood. Likewise, Canada's Aboriginal peoples included communities that depended on the forests, amongst other resources. Indigenous communities in both these countries therefore maintained traditional practices to conserve their resources. Indeed, these resources needed to be managed efficiently, as they were critical for the survival of such communities, who consciously sustained a symbiosis between themselves and the forest. Therefore, it could be said that Indigenous communities valued the continuity of their relationship with nature, rendering it crucial to conserve natural resources for the future. This created a sense of oneness between communities and their resources, whereby resource management was emphasized in their cultural practices. However, this close ecological relationship was profoundly disturbed during the colonial era in India and Canada, during which the State restricted the legitimate use of forest resources.

To elaborate on the above, colonial powers imposed a system on forest communities, which was sharply at odds with their traditional lifestyle. Such a change adversely affected their land holdings and livelihood. The Western model of centralized conservation techniques, adopted under the colonial regimes in both India and Canada, was more exclusive than inclusive, thus leading to a separation of traditional communities from their natural resources and environment. Subsequently, post-colonial legislation followed the same exclusionary principles of resource management. Numerous statutes relating to forests and Indigenous communities in the post-colonial era played a leading role in weakening traditional institutions and thereby disturbing the relationship between Indigenous peoples and the forests.

McGregor (2011) argues that the

[1] See Christoph von Fürer-Haimendorf, *Tribes of India: The Struggle for Survival* (Berkeley: University of California Press, 1982) at 79-82.; John Borrows, "Living Between Water and Rocks: First Nations, Environmental Planning and Democracy" (1997) 47 UTLJ 417 at 425-28.

> acquisition of land was an important policy objective of the colonial governments. Aboriginal people, like forests, were regarded as impediments to the path of such progress and were therefore systematically moved "out of the way" through treaties, policies and legislation.[2]

In Canada, through expropriation, colonial settlers established their claim over the land, which was already being managed and conserved by the Aboriginal peoples.[3] Similarly, in India, "eminent domain"[4] and *terra nullius* were the rationale adopted for the exclusion of the Indigenous population.[5] These principles, in brief, propose that in the name of "public purpose", the government or Crown has the authority to alienate any land owned by an Indigenous population, in the absence of any express claims. These were broad terms; enabling both colonial and post-colonial governments to legitimize their arguments against Indigenous peoples. Moreover, in their application, these principles had an enormous impact on the populations concerned. The implementation of forestry science and Western knowledge systems also played a significant role in disturbing the connection between Indigenous communities and their natural resources. The State thus imposed a scientific approach to forestry through legislation regarding Indigenous populations and the forests, ultimately shaping the resource governance regimes in India and Canada.

The impact of these colonial legal instruments persisted during the post-colonial phases in different ways. State agencies were mainly focused on generating revenue, and the inclusion of Indigenous people in resource governance was considered an impediment. However, a new trend towards democratic decentralization, which emphasizes the relevance of including Indigenous peoples, has gained momentum in both jurisdictions over the past few decades. This shift has added a new

[2]Deborah McGregor, "Aboriginal/non-Aboriginal relations and Sustainable Forest Management in Canada: The Influence of the Royal Commission on Aboriginal Peoples" (2011) 92:2 J Envtl Mgmt 300 at 302.
[3]Louis A Knafla & Haijo Westra, eds, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (Vancouver: UBC Press, 2010) at 15 [Knafla & Westra].
[4] *Eminent domain* is understood as the power that the state may exercise over all land within its territory. There are two assumptions that underlie the doctrine: (i) In the absence of clear titles, land belongs to the state. (ii) This principle may be invoked for a public purpose. In most cases, governments have legitimized displacements in the courts with the support of this doctrine.
[5]Sanghamitra Padhy, *Greening Law: A Sociological Analysis of Environmental Human Rights in India* (D Phil Thesis, University of South California, 2008) at 133 online: USC Libraries < http://digitallibrary.usc.edu>.; *Terra nullius* means land that is unoccupied or uninhabited. This is another doctrine which is used to dispossess the land occupied by Indigenous peoples.

dimension to deliberations over the inclusion of Indigenous peoples in resource governance, thus contributing to the transformation of the resource governance regimes in both countries.

In India, the Constitutional recognition of decentralized governance and the enactment of *the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006*[6] (the *FRA*) asserted the role of traditional tribal institutions in resource governance. The *FRA* is ground-breaking legislation; even in its preamble, it admits to seeking to undo the "historic injustice" committed against tribal peoples in India.[7] It also strengthens the conservation regime, while simultaneously securing the tenure and access rights of tribal peoples in this context. In fact, the *FRA* constitutes a shift away from a power-sharing model towards a rights-based model, which recognizes the decision-making autonomy of tribal institutions in resource governance. Moreover, it has facilitated a number of optimistic judicial interventions in this area. Meanwhile, in Canada, the discourse on democratic decentralization in resource governance has been rejuvenated by the evolution of co-management models. The development of co-management regimes is highlighted as showing the changing face of forest resource governance, with an emphasis on power-sharing between government agencies in this area. However, the devolution of power to traditional Aboriginal institutions in decision-making over resource governance is still unsettled in Canada. Moreover, the jurisprudence evolving around the "duty to consult and accommodate" in Canada does not mandate "consent" from traditional Aboriginal institutions with regard to forest resource governance. Thus, the obligations imposed by the legal frameworks in both jurisdictions are evolving differently.

The concept of decentralization is gaining momentum across the globe as a means to address the failures of colonial resource governance models. My discussion in this thesis will refer frequently to the idea of emerging legality on forest resource governance in India and Canada. Emerging legality here refers to institutionalized norms originating from *inter alia* the text of laws, policies, guidelines surrounding Indigenous institutions and their decision-making powers as well as traditional norms based on customs surrounding Indigenous institutions. These institutionalized and traditional norms have developed within a broader landscape of decentralization. Hence, the

[6] *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006* (January 2, 2007) Gazette of India Extraordinary II, s 1, No.2 [*FRA*].
[7] *Ibid.*

term "emerging legality" indicates the legal developments resulting from a response to the call for greater community involvement in decision-making processes. This normative progression may appear to be following a similar trajectory in both the jurisdictions under study here. However, it varies subtly, thereby failing to produce similar results in effect. The focus of this research is not dissecting the elements or forms of this "emerging legality" (regulations, institutions, principles, and so on) but the ways in which it has responded to the challenges and the degree to which it is successful. Therefore, the current thesis will examine the contrasting ways in which this emerging legality on forest governance in India and Canada responded to the demand for decentralization.

Decentralization in this study refers to the devolution of power from the central government to the actors and institutions at the local level, more specifically traditional indigenous institutions in India and Canada. Devolution denotes to the process of transfer of power and authority to these local institutions. Democratic decentralization on the other hand is a robust form of decentralization, the emphasis in which is on the authorities at the local level to whom such power is transferred. Here, the presence of a democratic and downwardly accountable self-governing traditional institution in the local level makes the decision-making process more participatory. Theoretical framework surrounding decentralization is discussed in detail in a later part of this thesis.

Subsequently, the thesis will inquire into the status of decentralized institutional arrangements for decision-making on forest resource governance in Canada. The main claim of the thesis is that this comparative study of the emerging legality in these two jurisdictions highlights that there is an ongoing absence of decentralization in Canada.

1.1 Situating Indigeneity: Mainstream and Other

Clarity over the debates surrounding indigeneity in India and Canada is of paramount importance in this present study. The status of indigeneity has developed through the history of alienation faced by Indigenous peoples in both countries. Greater clarity on this issue will thus permit a deeper understanding of the impact of settler colonialism on the "original inhabitants" in both jurisdictions. This section will consequently examine discussions surrounding "indigeneity" in each case.

The question of indigeneity is a complex one in the Indian context. The geographic vastness of the country, together with waves of migration during both historic and prehistoric times, which brought diverse races into the region, and the assimilation of ethnic groups, makes any attempt to trace a dichotomous distinction between Indigenous peoples and settlers difficult.[8] Moreover, the caste system, which was a historically significant feature of the dominant Aryan (Hindu) culture, assimilated other racial groups into the lower rungs of its hierarchical folds. Irrespective of whether the Aryans were settlers or not, it is indisputable that the settlements made up of tribal/forest-dwelling Dravidian/Austro-Asiatic speakers date back thousands of years before the recorded presence of Aryan society.[9] In addition, avoiding the politically charged issue over the actual original inhabitants—irrelevant to the present research—it may be stated that the dominant narratives from ancient times maintained a demarcation between forest-dwellers and "mainstream" society. As the caste system ossified into the fabric of mainstream Hindu society, forest-dwellers were considered to be lower than the very lowest untouchable caste or *ati-sudra.*[10] Romila Thapar, a well-respected historian, speaks of "tribal societies" and forest-dwellers, who were dehumanized and demonized in the ancient Indian epics.[11]

The general othering of forest dwellers, an apparent mistrust of their culture, and the calls to uproot and/or conquer them, is therefore a recurrent feature of texts dating back to both more ancient periods and later periods.[12] However, despite the hostility of mainstream society, the forest-dwelling populations remained to some extent insulated from outside influences, since migrants and settlers avoided densely forested areas for quite some time.[13] Later, however, forays by the British into these resource-rich forests—which will be discussed in detail later on in this study—exposed these populations to the colonial State and its discriminatory legislation. With the advent

[8] See generally Romila Thapar, *The Penguin History of Early India: From the origins to AD 1300* (London: Penguin, 2002) [Thapar].
[9] See generally Satish Kumar et al, "The earliest settlers' antiquity and evolutionary history of Indian populations: evidence from M2 mtDNA lineage" (2008) 8:1 BMC Evolutionary Biology 230. See also Virginius Xaxa, "Tribes as Indigenous People of India" (1999) 34:51 Economic & Political Weekly 3589 at 3590 [Xaxa].
[10] C R Bijoy, Shankar Gopalakrishnan & Shomona Khanna, "India and the rights of indigenous peoples" (2010) at 16, online: Asia Indigenous Peoples Pact Foundation (AIPP) <aippnet.org/india-and-the-rights-of-indigenous-peoples-2> [Bijoy et al].
[11] Thapar, *supra* note 8 at 56. See also, CR Bijoy, "Adivasis of India : A history of discrimination, conflict and resistance" in Aditi Chanchani et al, eds, *This is our Homeland - A Collection of essays on the betrayal of adivasi rights in India* (Bangalore: Equations, 2007) at 56 [Bijoy, "Adivasis of India" in Chanchani et al].
[12] Thapar, *supra* note 8 at 57.
[13] *Ibid* at 45.

of the British in India's forest regions, the instruments of the newly consolidated, feudal *zamindari* system began demanding revenue from forest-dwelling tribes, with these demands followed by other forms of opportunism such as the activities of money-lenders.[14] There were numerous tribal uprisings and rebellions against the British policy of dispossession and subjugation, which the state brutally suppressed in most cases.[15] The colonial and post-independence periods, then, ensured a seamless policy of state violence, targeting the livelihood of forest-dwelling communities.[16] As a result, throughout history and into modern times, there has been a recurrent pattern of "othering" and exploitation of forest-dwelling tribal communities by mainstream society and the state. Thus, the question of indigeneity in the Indian context needs to be understood not from the standpoint of time or origin, but from the point of view of rights and the treatment meted out to these populations.[17]

Although the question of the origins of Canada's Indigenous peoples is less complicated than it is in India, it has had its share of associated controversy. Western science previously retained the theory that Canada's Indigenous peoples are themselves migrants from Asia, who crossed over the Bering Strait land bridge.[18] More recent studies have challenged this construction of history.[19] Nevertheless, as far as the present research is concerned, a broad division into post-contact settlers and Indigenous peoples will suffice. The boreal forest and its resources were a major target for European settlers, and the assistance of Indigenous peoples was sought when required, with Indigenous peoples then being subjugated or destroyed once they had served these purposes.[20]

1.2 India and Canada as Comparable Units

Unlike Canada and the US, India is a country of old immigrants. The Supreme Court of India in *Kailas v State of Maharashtra*, while dealing with a criminal case where the modesty of a tribal

[14] See generally Bijoy, "Adivasis of India" in Chanchani et al, *supra* note 11 at 16.
[15] See *ibid* at 54-55.
[16] Bijoy et al, *supra* note 10 at 18.
[17] See generally Xaxa, *supra* note 9.
[18] Some have argued that, this theory was advanced to alleviate the guilt for the treatment meted out to the indigenous population by the settlers. See Vine Deloria Jr, *Red Earth, White Lies: Native Americans and the Myth of Scientific Fact* (Goldon: Fulcrum Publishing, 1997).
[19] See generally Mikkel W Pedersen et al, "Postglacial Viability and Colonization in North America's Ice-free corridor" (2016) 537 Nature 45.
[20] See generally Sarah Carter, *Aboriginal People and Colonizers of Western Canada to 1900* (Toronto: University of Toronto Press, 1999).

woman had been violated, explained this point:

> While North America (USA and Canada) is a country of new immigrants, who came mainly from Europe over the last four or five centuries, India is a country of old immigrants in which people have been coming in over the last ten thousand years or so. Probably about 92% of people living in India today are descendants of immigrants, who came mainly from the North-West and to a lesser extent, from the North-East.[21]

However, one key feature that justifies a comparative study between India and Canada is a shared colonial past, which destroyed the traditional governance structures of Indigenous peoples. The colonial State completely ignored Indigenous resource governance practices and sustainable management techniques. Instead, the colonial State initiated a Western concept of state legality in the process of forest governance. Resource management in both jurisdictions takes place through multi-level governance structures, due to the countries' size and diversity.[22] The corresponding institutions derive their power from exclusionary legislation, dating back to their colonial Eras. Furthermore, the phenomenon of globalization has played a significant role in changing the "developmental perspectives" of government agencies.[23] This shift has further resulted in the significant eviction and displacement of Indigenous peoples from their environment.

In a 2012 article, Pooja Parmar, while discussing law and indigeneity in India, compares India's legal system with Canada's and argues that "even as constitutional recognition and remedies differ, political and legal decisions in both countries have often deployed similar rationales towards similar outcomes".[24] The present study therefore relies on similarities between the legal approaches adopted in these countries, including the Westminster style of parliamentary democracy and a shared Common Law legal system. The current research will be developed on the basis of these similarities and will adopt a functional approach to comparative law, as a means of explaining the necessity for a revised view of the Canadian framework.

---

[21] *Kailas v State of Maharashtra*, (2011) 1 SCC 793, 2011 AIR SC 598, 2011 (1) SCALE 40, (2011) 1 SCR 94 (Supreme Court of India) [*Kailas* cited to SCC].

[22] C Duffield et al, "Local Knowledge in the Assessment of Resource Sustainability: Case Studies in Himachal Pradesh, India and British Columbia, Canada" (1998) 18 Mountain Research & Development 35 at 36 [C Duffield et al].

[23] See generally Alochana Sahoo, "Traditionalism and Globalization : A Discourse on Tribal Transformation" (2014) 1959 Odisha Rev 92.

[24] Pooja Paramar, "Undoing Historical Wrongs: Law and Indigeneity in India" (2012) 49 Osgoode Hall LJ 491 at 493 [Paramar].

Functional methodology has different purposes like presumptive function, systematizing function, epistemological function, and so on. However, the comparative function of functionalism is the most vital one. Ralf Michaels has clearly encapsulated the concept of the functionalist comparative law as follows:

> First, functionalist comparative law is factual, it focuses not on rules but on their effects, not on doctrinal structures and arguments, but on events. As a consequence, its objects are often judicial decisions as responses to real life situations, and legal systems are compared by considering their various judicial responses to similar situations. Second, functionalist comparative law combines its factual approach with the theory that its objects must be understood in the light of their functional relation to society…… Institutions, both legal and non-legal, even doctrinally different ones, are comparable if they are functionally equivalent, if they fulfil similar functions in different legal system. … functionality can serve as an evaluative criterion.[25]

Although he discusses seven different concepts of functionalism like finalism, adaptionism, classical functionalism, instrumentalism, refined functionalism, epistemological functionalism and equivalence functionalism, Michaels indicates that equivalence functionalism is the most effective concept.[26] Equivalence functionalism questions the prevalent understanding that emphasizes on an ideal type of solution for different problems.[27] It presumes that "similar problems may lead to different solutions; the solutions are similar only in their relation to the specific function under which they are regarded".[28] Hence, equivalence functionalism offers a platform for discussing the scope of a legal change through a comparative analysis and thereby ensures a better solution to various challenges within a specific legal regime. It approaches law as a tool for addressing social changes that can find different solutions for similar problems.

India and Canada have a history of oppression that separated Indigenous peoples from forest governance, and there are certain similarities in the ways in which colonial legislation in these two jurisdictions has played an important role in the process. However, both these countries are evolving, with two models of decentralization put forward as a solution. The assumption of this thesis is that the co-management regime in Canada and the *FRA* in India have functional similarities in their approach towards decentralization in forest governance. Hence through the

[25] Ralf Michaels, "The Functional Method of Comparative Law" in Mathias Reimann & Reinhard Zimmermann, eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2008) at 339, 342 [Michaels].
[26] *Ibid* at 344, 345.
[27] *Ibid* at 356, 357.
[28] *Ibid* at 358

functional method based on equivalence functionalism, this thesis investigates how the functional linkages (emerging legalities in this context) in the jurisdictions being reviewed respond differently to these commonalities.

This study also examines the impact of state legalities on the self-rule of Indigenous peoples in forest areas. Consequently, a "micro comparison" is proposed, which compares only specific areas of law. Of course, a clear line of demarcation between micro- and macro-comparisons will not be constructive, since a micro-comparison is incomplete without an element of macro-comparison.[29] As discussed previously, both jurisdictions examined here are common law countries, with a similar colonial past. Keeping these macro-factors in mind, this study will explore the extent of decentralization in terms of forest governance in each case.

There are numerous other similarities between India and Canada as two comparable units. Geoffrey Samuel, while discussing the dichotomy of similarities and differences in his work on comparative law methodology, argues that "similarities and differences depend, at least to an extent on the level at which the comparatist is operating."[30] India has a quasi-federal system, with a hybrid form of federal and unitary government. To be more precise, it has a federal structure, with an inclination towards the centre. If an attempt is made to trace the origins of it, interestingly, one ends up in Canada's 1867 *British North America Act* (*BNA Act*). Arun Thiruvengadam, describes the influence of the *Government of India Act of 1935* (*Act of 1935*) which reinforced the federalism that was being instilled into the Indian system by the British. The aspects of federalism in the Constitution of India, according to him, are more or less transposed forms of the same concepts from the *Act of 1935*.[31] Canada's *BNA Act*, which was the basis for India's *Act of 1935*, in this way, can be considered as the basis for the existing federal system in India. The federal system in both countries, thus, has common origins. Similarly, the judicial branch in both countries is generally separated from the other two branches of the government with the Supreme Courts occupying the apex position.

[29] Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Oxford: Hart Publishing, 2014) at 50.
[30] *Ibid* at 174.
[31] Arun K Thiruvengadam, *The Constitution of India: A Contextual Analysis* (Oxford, Hart Publishing, 2017) at 75-78.

Article 246 of the Constitution of India defines the legislative powers of the Central and State governments in terms of three lists: the Union, State, and Concurrent lists.[32] Forests fall under the Concurrent list, which gives the central government the authority to overrule any decision of state government that is inconsistent with central legislation. The central legislation on forest issues consists of the *FRA*, which overrides all state legislation in India. For instance, the *FRA* has made tribal consent a constitutional right in India. Here, the *Gram Sabhas*[33]have been granted some crucial powers to protect and preserve their community resources in India. Indeed, due to India's quasi-federal structure, this study will examine legality as it emerges through the implementation of central legislation in this context, namely the *FRA*.

A useful example to illustrate these developments in India is the effective implementation of the *FRA* in Mendha Lekha, a village in the State of Maharashtra. Mendha Lekha was one of the first villages in India to implement the *FRA* in its true spirit. Since the *FRA* is a relatively new piece of legislation, the jurisprudence surrounding tribal consent to resource governance is still evolving. Hence, this present research will focus on some of the critical decisions of the Supreme Court of India and various state High Courts in light of the *FRA*, emphasizing the role of *Gram Sabhas* and their consent in resource governance questions.

Conversely, in Canada, constitutional powers are distributed between the federal and provincial governments. Although section 92(5) of the *Constitution Act*, 1867[34] affirms provincial legislative authority over forest land, there have been some persistent conflicts. In 1982, for instance, an amendment was made to the *Constitution Act*, 1867, in order to address federal-provincial resource conflicts and strengthen the role of the provinces in resource governance.[35] Section 92A empowers the provincial governments to enact laws on matters relating to the exploration of non-renewable

[32] See *The Constitution of India*, 1950 (India), art 246 [*Constitution of India*]. Article 246 of the Constitution of India deals with the distribution of powers between the central and state governments. This provision provides three lists:, Union list (power vests with the central government); State list (power vests with state governments); and Concurrent list (both the central government and state governments have concurrent powers of legislation under this list. However, the union Parliament has predominant legislative powers over the state legislatures).
[33] *FRA*, *supra* note 6, s 2(g). The term "*Gram Sabha*" means a tribal village assembly that consists of all adult members of a village. In states having no panchayats, padas, tolas and other traditional village institutions and elected village committees, it has full and unrestricted participation of women.
[34] Originally enacted as *The British North America Act, 1867*, 30 & 31 Vict., c. 3 (UK).
[35] Robert D Cairns, "The Resource Amendment (Section 92A) and the Political Economy of Canadian Federalism" (1985) 23 Osgoode Hall LJ 253 at 253-254.

resources. It further provides an opportunity for provincial governments to develop, conserve and manage non-renewable and forest resources. Thus, in Canada, while the provincial legislatures have the authority to make laws relating to the governance of forest and other natural resources, in India, the upper hand over matters concerning the forests lies with the central government. However, co-management regimes in Canada are an essential facet of evolving forest governance, whereby the provincial governments and Aboriginal communities have shared roles. The emphasis on the part played by Aboriginal peoples in these co-management regimes is a significant facet of allegedly decentralized governance in Canada. However, unlike in India—despite experiencing similar political movements—the struggle to establish a robust legal regime for the autonomy of traditional Aboriginal institutions over forest resource governance is still incomplete in Canada. Although some studies highlight the co-management of forest resources as a means of resolving conflicts over resource use between Aboriginal communities and the government, it is still alleged to be an arrangement to promote the assimilation of the Aboriginal population.[36] By way of illustration, the case of Clayoquot Sound in British Columbia is often cited by various authors as a significant example of a co-management regime in Canada.[37]

Hence, the example of Clayoquot Sound will be used in this current thesis to discuss co-management regimes, in order to try to understand the advancement of a democratic decentralization process in Canada and the limits thereon.

The cases of Mendha Lekha and Clayoquot Sound are significant examples of a decentralization process, where the role of Indigenous peoples has converged with forest governance in India and Canada. These instances give a clear indication of how emerging legalities concerning the involvement of Indigenous communities in forest resource governance in India and Canada reflects different responses. However, these examples also illustrate a common factor of mobilization on the part of the people against the exploitation of forest resources, from the very outset. Nevertheless, whereas Mendha Lekha has evolved as a noteworthy case of robust self-governance

[36] See generally M A Peggy Smith, "Natural Resource Co-management with Aboriginal Peoples in Canada" in D B Tindall, Ronlad L Trosper & Pamela Perreault, eds, *Aboriginal Peoples and Forest Lands in Canada* (Vancouver: UBC Press, 2013) 89 [Smith].

[37] Holly Spiro Mabee et al "Co-Management of Forest Lands: The Cases of Clayoquot Sound and Gwaii Haanas" in Tindall, Trosper & Perreault, *supra* note 36, 242 at 242 [Mabee, "Co-Management of Forest Lands"]. See also Tara C Goetze, "Empowered Co-management: Towards Power-Sharing and Indigenous Rights in Clayoquot Sound, BC" (2005) 47:2 Anthropologica 247.

in India, Clayoquot Sound is still struggling to achieve this status. In fact, one of the central factors uncovered in the present research is the absence of a strong legal framework in Canada. The forest rights recognized through the *FRA* in India have delegated a number of remarkable powers and authority to tribal communities via traditional institutions. For example, the decision-making power vested in *Gram Sabhas* under the *FRA* concerning forest governance has reduced the discretionary powers of the Forest Department. Thus, the emerging legality on forest governance in India and Canada has responded differently to the demand for democratic decentralization.

Another factor on the Canadian side is the doctrine of the duty to consult and accommodate. The Supreme Court in Canada is Canada's apex court, with decisions that are binding on other courts. Hence, judgments of the Supreme Court on the duty to consult and accommodate play a significant role in determining Aboriginal rights jurisprudence in Canada. Lower court decisions are constantly brought before the Supreme Court in Canada on appeal, and it is the Supreme Court's decisions that carry the most weight on the duty to consult and accommodate. Therefore, in discussing this additional aspect, this study mainly focuses on Canada's Supreme Court judgments on the duty to consult and accommodate.

At this juncture, it is perhaps necessary to clarify that any thought on legal transplantation falls outside the scope of this study. An attempt will be made purely to expose gaps in the existing legal framework, which currently limits the scope for Aboriginal self-governance in Canada. This research is based on an analysis of primary as well as secondary sources, thus enabling the researcher to gain a good overview of the question at hand. The content of the legislation, judgments and relevant policies will consequently be analysed in both jurisdictions, as part of an initial investigation. This will involve conventional legal research, in order to understand and describe the respective jurisprudence in Canada and India, as applicable to indigenous interests in forested areas. This will ultimately introduce a critical perspective on the performance of legalities in the Canadian context.

1.3 Understanding the Terminology

The terms "Adivasi"[38] and "Scheduled Tribe" are used synonymously in India. However, these

[38] The term "Adivasi: is a combination of the word "Adi" (of earliest times or from the beginning) and "vasi" (inhabitant) and is used to denote original inhabitants.

terms are not precisely equivalent, since their origins stem from different histories.[39] The term "tribe" was first used during the British colonial period, in reference to India's Indigenous peoples. The Constitution of India, 1950 retained the term after independence under Article 342, namely in its reference to "Scheduled Tribes" (otherwise known as "tribes"). This category was defined on the basis of "primitive traits, distinctive culture, geographical isolation, backwardness, etc."[40] However, it is merely an administrative category, created to ensure a degree of protection and privilege to these populations. Moreover, the Indian Parliament has the power to update the list of "Scheduled Tribes" in India. The term "Aboriginal" was also put forth during the framing of the Constitution of India by Adivasi representatives, but the term "Scheduled Tribe" prevailed.[41] Nevertheless, the designation "Adivasi peoples" corresponds more closely to "Aboriginal peoples" in Canada, but it was rejected during the Constituent Assembly debates due to the absence of "legal specificity".[42] Therefore, for pragmatic reasons, "Scheduled Tribes" are considered as equivalent to "Indigenous peoples" by various agencies, such as the United Nations.

By contrast, in Canada, the term "Aboriginal" is commonly used to refer to the nation's original populations. The *Constitution Act, 1982* deals with "Aboriginal rights" in its section 35.[43] Although s. 35 does not specifically define the term "Aboriginal", section 35(2) indicates that Indians, Inuits, and Métis are included under this umbrella. However, while "Inuit" is a legal term for the Indigenous people of Canada's northernmost regions, "Métis", although sometimes broadly used to denote mixed European-Aboriginal ancestry, appears to refer in legal terms to "distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears".[44] Meanwhile, "Indian" is a further legal term covering, at the minimum, all peoples subject to the *Indian Act* but seemingly also "non-status" Indians who are within the constitutional category

[39] Paramar, *supra* note 24 at 496.
[40] Ministry of Tribal Affairs, *Definition of Scheduled Tribes*, online: Tribal Department < tribal.nic.in/Content/DefinitionpRrofiles.aspx>.
[41] Pooja Paramar, *Claims, Histories, Meanings: Indigeneity and Legal Pluralism in India* (PhD Thesis, University of British Columbia, 2012) at 6, online: The University of British Columbia Library < https://open.library.ubc.ca/cIRcle/collections/ubctheses/24/items/1.0073483>.
[42] *Ibid.*
[43] *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c. 11.
[44] *R v Powley*, 2003 SCC 43 at para 10, [2003] 2 SCR 207.

though outside the statutory one.[45] Conversely, "First Nation" is not a legal term in the *Constitution Act, 1982*—it is rather a more recent synonym of and replacement for "Indian", which some consider an offensive term.[46] The term "First Nation" does not include any reference to Inuit or Métis peoples.

Aside from the above, there are varying opinions regarding this administrative categorization in both the jurisdictions examined here. However, since some of the crucial laws and judgments are dealt with in this review, it is appropriate to use such administrative terms, as defined under their corresponding legal regimes. Irrespective of this, the Aboriginal or tribal peoples in both jurisdictions will generally be referred to as "Indigenous peoples" for the sake of convenience and so as to align the discussion with emerging international discourse.

1.4 Structure of the Study

In Chapter II, a theoretical outline will be developed for an in-depth response to the question at hand. This theoretical background will be formulated according to the concept of democratic decentralization, as developed by Jesse Ribot, Arun Agarwal, and others. It will be conceptualized here on the premise that forest governance amongst Indigenous communities has been more sustainable in both jurisdictions, with resource governance practices relying on a decentralized (bottom-up) approach. From this theoretical standpoint, it could be argued that forest governance, which emphasizes the role of Indigenous institutions and their decision-making powers, is more sustainable than a state-centric approach. In Chapter II, the concept of "consent" under international instruments will also be briefly explored, with reference notably to the Indigenous and Tribal Peoples' Convention, 1989, issued by the Governing Body of the International Labour Office in Geneva (ILO 169 or "C 169")[47] and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[48]

---

[45] *Indian Act, 1876*, SC 1876, c. 18; James S Frideres, "Circle of Influence Social Location of Aboriginals in Canadian Society" in Tindall, Trosper & Perreault, *supra* note 36, 31 at 32 [Frideres]. On non-status Indians, see *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 SCR 99.
[46] *Ibid.*
[47] *Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 1650 UNTS 383 (registration number I-28383, entered into force 5 September 1991) [C 169].
[48] *United Nations Declaration on the Rights of Indigenous Peoples*, Annex to GA Res 61/295, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) [UNDRIP].

In Chapter III, tribal self-governance in India will be examined in the light of the legislative framework of the *FRA*. The chapter will argue that vesting power in the *Gram Sabhas* caused a radical shift in India's forest governance regime. In order to support the argument that the *FRA* reinforced *Gram Sabhas* and thereby significantly decentralized forest resource governance, reference will first be made to the Mendha Lekha Model in the State of Maharashtra. This example will help to explain how the *FRA* contributed to tribal self-rule by empowering the *Gram Sabhas*. Second, some of the crucial constitutional judgments relevant to the issue will be analyzed, emphasizing the role of tribal institutions and their decision-making powers over forest resource governance.

In Chapter IV, the Canadian context will be investigated to show how the constitutional recognition of Aboriginal title has redefined the relationship between Aboriginal peoples and the forest. Judgments on the duty to consult and accommodate issued by the Supreme Court of Canada will consequently be examined, with the thesis trying to trace briefly the role of consent in these decisions. It will be argued that a lack of recognition of traditional Aboriginal institutions, together with the absence of their consent in resource governance, has adversely affected Aboriginal self-governance in Canada. Here, the example of Clayoquot Sound in British Columbia will be analysed, in order to explain the challenges faced by community-based forest management in Canada. An attempt will subsequently be made to compare to what degree the forest governance regime has transferred power to traditional institutions in India and Canada.

In Chapter V, concluding comments will be made to reflect the findings for each jurisdiction covered. The aim of this thesis is not to make prescriptive recommendations, but instead to highlight the lacunae in Canada's decentralization process by analyzing tribal self-governance on forests in India and drawing out a micro-comparison with Canada in functional equivalence terms.

CHAPTER II: THEORETICAL FRAMEWORK

The colonial powers considered the presence of Indigenous populations in the forest areas of Canada and India as the biggest obstacle to their extraction and exploitation of natural resources.[49] Hence, the exclusion of Indigenous peoples from their land and resources was fundamental to the establishment and sustenance of colonial resource governance mechanisms. The centralized bureaucratic governance mechanisms developed under these colonial regimes restructured Indigenous institutions and their identity, thus emphasizing the political authority of colonial power over forest resources. This centralization continued even after the end of the colonial era in these jurisdictions. Over an extended period, Indigenous peoples were considered incapable of managing natural resources, both in India and Canada. However, the past few decades have witnessed a new trend towards decentralized governance in these countries.

The debates surrounding decentralized governance have provided new direction to resource management by strengthening Indigenous institutions and their decision-making powers in both India and Canada. This part of the present research examines the literature on decentralization as a meaningful step towards devolving power over resource governance to Indigenous institutions. It analyzes the concepts that legitimize the transfer of power to Indigenous institutions by enhancing the decision-making powers of local communities. This chapter also examines the visibility of this decentralization approach within international instruments, such as C 169 and UNDRIP, which highlight the role of the institutions that represent Indigenous peoples and their consent in resource governance. Thus, through the concept of decentralization, this chapter will develop a framework to examine the emerging legalities of forest governance in India and Canada.

2.1 Colonialism, Indigenous Institutions and the Centralization of Governance Mechanisms

The redefinition of Indigenous identity due to the interference of modern states has caused substantial damage to traditional Indigenous institutions. Colonialism and the globalized economy have encroached on Indigenous institutions and their powers. Craig Proulx argues that the "power to define Aboriginal identity and community has not been in the hands of the people due to

[49] Rebecca Tsosie, "Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge" (2016) 21 Vt L Rev 1 at 36.

historically and geographically distinct colonial discourses and practices".[50] A different identity has consequently been imposed on Indigenous peoples through a variety of centralized statutes/legal instruments. The depth of this colonial mindset is evident from the way in which colonial states have classified Indigenous peoples. The dominant perception in society, which is indeed an outcome of colonialism, is the biggest determinant of Aboriginal identity.[51] Some modernization theorists argue that social changes have been "liberating humanity from the limited world of the past", but the voices of dissent against these are also loud and clear. In an important article analyzing theorists like Ferdinand Tonnies, Emile Durkheim and John Dewey, the scholars Arun Agarwal and Clark Gibson, argue that the apparatus of modernization has contributed to the dissolution of the "ties that anchor humans to their milieu, providing a sense of selfhood and belonging".[52]

It may be stated in relation to this study that the concept of centralized governance, which is the hallmark of colonialism, has had an adverse impact on the organic nature and evolution of Indigenous communities and their institutions, resulting in a significant restructuring of the latter. It has also had scant regard for the role played by Indigenous peoples in resource governance. Theorists such as Garrett Hardin and Scott H. Gordon have held extreme views on this point, arguing that the use of "common property" by communities is unsustainable.[53] Hardin also argued that the overuse of resources by communities was a primary reason for resource depletion. These arguments were prevalent in the dominant discourses prior to the 1980s, resulting in the creation of a centralized bureaucratic governance model.[54] This centralization of power continued incessantly through various forest policies, imposing the rule of forest bureaucracy on Indigenous peoples. For a long period, forest bureaucracies branded Indigenous populations as dependent on the forest and therefore encroaching upon it. Indigenous peoples' access to forests and forest resources was therefore restricted. However, Edward Webb argued that centralized administration was not successful in achieving its projected goals of forest conservation and the preservation of

[50] Craig Proulx, *Reclaiming Aboriginal Justice, Identity, and Community* (Saskatoon: Purich Publishing Limited, 2003) at 152.
[51] Karyn Tracey, *Landscapes of Difference: An Inquiry Into the Dicourse of the National Park and its Effects on Aboriginal Identity Production* (MA Thesis, University of Saskatchewan, 2003) at 21.
[52]Arun Agarwal & Clark Gibson, "Enchantment and Disenchantment: The Role of Community in Natural Resource Conservation", (1999) 27 World Dev 629 at 631 [Agarwal & Gibson].
[53]Fikret Berkes & Mina Kislalioglu, *Community Based Management and Sustainable Development* (New York: Belhaven Press, 1989) at 568.
[54]*Ibid.*

forest cover.[55] Webb further emphasises that the whole process has resulted in "legally stripping away access, use and management rights from communities", which were once maintained by "locally crafted institutions".[56] Jean-Marie Baland and Jean-Philippe Platteau even go to the extent of claiming that an analysis of centralized power reveals deteriorating resource management under such arrangements.[57] Thus, it may be argued that centralization mechanisms have not been successful as sustainable governance models projected by modern states. This dominant resource governance practice continued during the post-colonial phase, which further impacted traditional Indigenous governance structures and the relationship of these communities with the natural resources that they conserved and managed as part of their cultures.

As a result, there has been a gradual shift in the discussion, with the emphasis increasingly being placed on the participation of local communities in resource governance. Theorists such as Elinor Ostrom, through her principles of sustainable governance for common-pool resources, have questioned notions that disregard the role of communities in resource governance. Ostrom firmly rejects the concepts of "Leviathan authority" and "privatization" as deeply problematic.[58] She argues that neither state nor private property offers a better alternative for resource governance, since a community-centered resource governance approach necessarily deconstructs the image of the community as an obstacle to resource governance.[59] Top-down conservation models, wherein state actors attempt to discipline resource users, are thereby rejected in favour of a community-centered self-governance mechanism.

Ostrom proposes eight universal principles for common self-governance,[60] highlighting the significance of "clearly defined boundaries," and the "non-involvement of state mechanisms in self-governance". In one of her subsequent works, she argues that "CPR [common-pool resources] Institutions with high levels of performance demark who has the right to use the resources; have

[55] Edward L Webb, "Forest Policy as a Changing Context in Asia" in Edward L Webb & Ganesh P Shivakoti, eds, *Decentralization, Forest and Rural Communities: Policy Outcomes in Southeast Asia* (California: Sage, 2007) at 28.
[56] *Ibid* at 27.
[57] Jean-Marie Baland & Jean-Philippe Platteau, *Halting Degradation of Natural Resources: Is There a Role for Rural Communities* (London: Oxford University Press, 2005) at 244.
[58] Elinor Ostrom, *Governing the Commons: Evolution of the institutions for Collective Action*, (Cambridge: Cambridge University Press, 1990) at 8, 12 [Ostrom].
[59] Agarwal & Gibson, *supra* note 52 at 631.
[60] The eight universal principles are (1) Clearly defined boundaries (2) Congruence between appropriation and provision rules and local condition (3) Collective-choice arrangements (4) Monitoring (5) Graduated sanctions (6) conflict-resolution mechanisms (7) Minimal recognition of rights to organize (8) Nested enterprise for CPRs that are parts of larger systems, See Ostrom, *supra* note 58 at 90.

themselves crafted rules that are considered fair and well matched to local physical, biological, cultural circumstances..."[61] She pushes to avoid "the multiplicity of failed projects and institutions that have dominated past policies".[62] Ostrom put forth an approach that underlined the significance and potential of self-governing communities in resource governance. Her work undeniably pushed ahead the larger discussions on decentralized governance.

2.2 Towards Decentralization

Over the past three decades, various policies embedded in decentralization have ensured increased participation by Indigenous peoples in resource governance.[63] Decentralization provides legitimacy to non-state actors and traditional Indigenous institutions in resource governance frameworks. The decentralization of power is the mechanism through which "governments or other political coalitions use institutional change to redistribute power away from the center in a territorial–administrative hierarchy".[64] Indeed, some studies have found that efficiency, equity, long-term sustainability, and democracy can actually offer fundamental justifications for decentralization.[65] The process of decentralization signifies power re-distribution to various territorial units or local groups and thereby transfers decision-making authority to those who will be most affected by such a transfer. However, despite its various drawbacks, some scholars admit that "well-functioning democratic processes" amongst these territorial units will guarantee the interests of Indigenous peoples in terms of forest resource governance.[66] In turn, traditional

[61]Elinor Ostrom, "Neither Market Nor State: Governance of Common-Pool Resources in the Twenty-First Century" (Lecture presented at the International Food Policy Research Institute, Washington DC, 2 June,1994) at 13, online Monoscop < https://monoskop.org/images/d/d8/Ostrom_Elinor_Neither_Market_Nor_State_Governance_of_Common-Pool_Resouces_in_the_21st_Century.pdf>.
[62]*Ibid* at 20.
[63] Reem F Hajjar et al, "Is Decentralization Leading to 'Real'" Decision Making Power for Forest Dependent Communities? Case Studies from Mexico and Brazil" (2012) 17 Ecology & Society 1 at 1.
[64] Arun Agarwal & Elinor Ostrom, "Decentralization and Community-Based Forestry: Learning from Experience" in Edward L Webb & Ganesh P Shivakoti, eds, *Decentralization, Forest and Rural Communities: Policy Outcomes in Southeast Asia* (California: Sage, 2007) at 47.
[65]See generally Jesse C Ribot et al, "Recentralizing while Decentralizing: How National Governments Reappropriate Forest Resources" (2006) 34 World Dev 864 [Ribot et al, 2006].
[66] Lawrence C Christy et al, *Forest Law and Sustainable Development: Addressing Contemporary Challenges Through Legal Reform* (Washington DC: World Bank, 2007) at 83.

Indigenous institutions that have existed in synchrony with the forests and forest resources have a better understanding of the community's requirements, as well as of these resources.[67]

The revitalization of local institutions that have faced severe damage during colonial periods is one of the critical goals of forest governance decentralization programs.[68] These institutions are elected democratically from within local populations. Thus, the "social contract" infers downward accountability to the people who elected them. This devolution of power enables lower-level actors to exercise autonomy in the decision-making process.[69] Arun Agarwal and Jesse Ribot, in a study on decentralization accountability in South Asia and West Africa, established four main broad decision-making powers:

> (a) the power to create rules or modify old ones, (b) the power to make decisions about how a particular resource or opportunity is to be used, (c) the power to implement and ensure compliance to the new or altered rules, and (d) the power to adjudicate disputes that arise in the effort to create rules and ensure compliance.[70]

They assert that these decision-making powers of local traditional institutions can lead to effective decentralization.

Elsewhere, Jesse Ribot argues that the democratization of decentralization in local governance ensures accountability and autonomy in decision-making.[71] Thus, it may be understood that decentralization is an attempt to render unheard voices audible in resource governance. He further explains that democratic decentralization is the strongest form of decentralization, since it makes authorities "downwardly accountable to the local population". This form of decentralization transfers powers to local institutions in order to ensure sustainable forest governance through the maximization of local discretion. This then results in the formation of new communities, which can become the new actors deciding on matters of forest resources.[72]

---

[67] See generally Ribot et al, 2006 *supra* note 65.
[68] Donald Allan Gilmour & R J Fisher, *Villagers, Forests and Foresters: The Philosophy, Process and Practice of Community Forestry in Nepal* (Nepal: Sahayogi Press, 1989) at 212.
[69] See generally Philip Booth, "Decentralization and Land-Use Planning in France: A 15-Year Review" (1995) 26 Policy & Politics 89.
[70] Arun Agarwal & Jesse Ribot, "Accountability in Decentralization: A Framework with South Asian and West African Cases" 1999 (33) J Developing Areas 473 at 476.
[71] Jesse Ribot, *Democratic Decentralization of Natural Resources: Institutionalizing Popular Participation* (Washington: World Resources Institute, 2002) at 10-15 [Ribot].
[72] Arun Agarwal & Elinor Ostrom, "Collective Acton, Property Rights and Decentralization in Resource Use in India and Nepal" (2001) 29:4 Politics & Society 485 at 489. See generally Ribot, *supra* note 71.

Leading Indigenous rights scholar James Anaya discusses decentralization in the context of Indigenous peoples, arguing as follows:

> In the particular context of indigenous peoples, notions of democracy (including decentralized government) and of cultural integrity join to create a sui generis self-government norm. The norm included two distinct but interrelated strains. One upholds spheres of governmental or administrative autonomy for indigenous communities; the other seeks to ensure the effective participation of those communities in all decisions affecting them that are left to the larger institutions of decision making.[73]

Anirudh Krishna goes further and connects the decision-making power of institutions with consent, arguing that institutional performance relies on public consent and clarifying that "consent derives… from a locally shared notion of legitimacy and appropriateness. So, institutions will need to be designed that are both technically proficient and locally legitimate".[74] On reading this passage alongside discussions on the decision-making powers of Indigenous institutions, one could venture that the consent of these institutions is important on questions over the use of resources. Thus, the transfer of power to institutions will have a meaningful realization when the consent of local actors is awarded the same significance as that of resource governance mechanisms.

The significance of Indigenous representative institutions and their consent in resource governance took a new turn with international instruments, such as ILO C 169 and UNDRIP. The development of these instruments occurred in parallel with the evolution of a theoretical framework for decentralization, which underlined the significance of Indigenous self-management of land and territories. These developments all underlined the need to strengthen the role of Indigenous institutions in resource management.

2.3 Indigenous Institutions and Consent under Important International Instruments

The C 169 and UNDRIP are the most significant international instruments providing a normative framework to indicate the significance of Indigenous peoples and their representative institutions in resource governance. Hence, this part of the present research highlights the discussion on self-

[73] S James Anaya, *Indigenous Peoples in International Law*, 2d ed (New York: Oxford University Press, 2004) at 151.
[74] Anirudh Krishna, "Partnership between Local Government and Community-based Organizations: Exploring the scope of Synergy" (2003) 23 Public Administration & Development 361 at 361.

management under C 169 and Free, Prior, and Informed Consent (FPIC) discussions within UNDRIP.

C 169 is a significant legal instrument since it plays an essential role in strengthening the debate on Indigenous self-governance at international level. It discusses in detail the importance of Indigenous participation, consultation and self-management, regarding matters relating to such populations. Cathal Doyle points out that the purpose of C 169 was originally to "set up conditions for self-management", which would inevitably reinforce the participation of Indigenous peoples in resource management.[75] Therefore, although it does not discuss the autonomy of Indigenous institutions, it does explain in detail the conditions for Indigenous self-management.[76] It further asserts the significance of the rights of Indigenous people and their institutions, regarding their role in the self-management of their land and territories. It is critical to note here that neither India nor Canada have ratified this Convention. However, in a discussion of Indigenous self-governance and the consenting powers of Indigenous populations, reference to these international instruments is inevitable.

The ILO Convention 107 (C 107) was an earlier first international law treaty dealing specifically with groups recognized as Indigenous peoples.[77] For example, this treaty acknowledged the land ownership rights of Indigenous peoples. It also asserted the need to acknowledge their customs. Therefore, despite the fact that it did not require any consultation of or consent from Indigenous peoples, it pointed towards collaboration between Aboriginal peoples and the state.[78] However, "collaboration" is a term used very loosely here and is insufficient to encompass the original spirit of consent in matters concerning Indigenous peoples. Moreover, C 107 left some pertinent questions unanswered, leading to the drafting of C 169. For instance, C 169 emphasizes the relationship between Indigenous peoples and their land. Its Article 6 is vital, since it binds the government to consult Indigenous peoples through their "representative institutions" and

[75] Cathal M Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (London: Routledge: 2015) at 96 [Doyle].
[76] Jérémie Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (New York: Transnational Publishers, 2006) at 231.
[77] *Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, 26 June 1957, 328 U.N.T.S.247 (adopted by the International Labour Conference at its 40th session, entered into force 2 June 1959) [C 107].
[78] Doyle *supra* note 75 at 77.

establishes a platform to ensure their free participation in such decision-making processes.[79] However, it is crucial to read this provision in consonance with Article 15 of the treaty, in order to understand its significance for resource governance. This is because Article 15 insists on safeguarding the right of Indigenous peoples to use, manage and conserve natural resources. The ILO has clarified that these requirements reflect the political will of the state, which mandates either effective consultation or consent, but the question of whether or not the state displays such a will remains an important issue. C 169 also mandates that the State shall recognize "the rights of ownership and possession of [indigenous peoples] over the lands which they traditionally occupy".[80] Furthermore, Article 16 of C 169 ensures procedural safeguards "to address any exceptions and requires appropriate legal procedures including public inquiries ensuring the effective representation of the people whose consent is being sought".[81] Thus, it emphasizes procedural formalities in obtaining consent on issues relating to natural resource management.

Nevertheless, there may be differences in the impact of C 169 on Indigenous peoples, even though it cannot be denied that it represents an attempt to address some of the mounting concerns left by C 107. It goes further and discusses the need for Indigenous consent in resource governance. The absence of such consent is one of the major threats faced by Indigenous peoples to their way of life at present, in their interaction with state-centered resource governance. C 169 attempts to address this obstacle by strengthening the role of Indigenous peoples in resource management.[82] Thus, to adopt Doyle's argument, one can argue that C 169 urges a focus on the sustainable existence of Indigenous peoples.[83]

2.4 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

The adoption of UNDRIP was a pioneering development in international law. The contribution of Indigenous peoples to the drafting of UNDRIP played a significant role in making this a comprehensive document that addressed their various concerns. It discusses various aspects of Indigenous peoples' connection with their land and territory. However, one of its key challenges

[79] C 169, *supra* note 47 art 6.
[80] *Ibid* at art 14.
[81] Doyle, *supra* note 75 at 87.
[82] *Ibid* at 96.
[83] *Ibid* at 99.

is the fact that it identifies Indigenous peoples as the beneficiaries of various rights, without defining the term "Indigenous peoples".

Similarly, to C 169, however, UNDRIP recognises the rights of Indigenous peoples to their identity, corresponding to their traditions and customs. Hence, it is claimed that UNDRIP is a "just document [that] expresses minimum standards of human rights".[84] However, although C 169 developed a strong background for debates concerning Indigenous institutions and their consent in resource governance, UNDRIP has gone ahead and attempted to rectify some of the limitations of these debates. Self-determination rights, as envisaged under UNDRIP, enable Indigenous institutions to determine "their political status and freely pursue their economic, social and cultural development".[85] UNDRIP also provides the "right to autonomy or self-government in matters relating to their internal and local affairs". In fact, Free, Prior, and Informed Consent (FPIC) plays a crucial role in reinforcing the self-determination rights of Indigenous peoples and thereby provides them with the opportunity to change over time through the development of their interests. UNDRIP insists on consultation with Indigenous peoples and obtaining consent on matters connected with their traditional lifestyle;[86] it safeguards the interests of Indigenous peoples as they participate in issues affecting their land and resources.[87] UNDRIP is in fact based on collective rights, and the Human Rights Committee has made it clear that the consent requirement in UNDRIP is rooted in the self-determination rights of Indigenous peoples.[88]

The FPIC requirement under UNDRIP has contributed substantially to new directions in discussions on Indigenous self-management in both India and Canada. The United Nations Permanent Forum on Indigenous Issues, which is a high-level advisory body of the United Nations Economic and Social Council, discusses in depth the application of FPIC in the *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and*

[84] James Sàkej Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition* (Saskatoon: Purich Publishing Limited, 2008) at 75.
[85] UNDRIP, *supra* note 484848, art 3.
[86]Doyle, *supra* note 75 t 6.
[87] Tara Ward, "The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law" (2011) 10:2 NW J Intl Human Rights 54 at 56 [Ward].
[88] *Ibid.*

Indigenous Peoples.[89] This Report provides detailed explanation of elements of FPIC and highlights how consent should be free of "coercion, intimidation or manipulation" and how the consultation and participation of Indigenous peoples should be ensured through their representative and customary institutions.[90] These institutions possess decision-making power "in phases of assessment, planning, implementation, monitoring, evaluation and closure of a project",[91] thus ensuring the participation of Indigenous peoples through these representative institutions, thus fostering a co-management arrangement. Article 19 of UNDRIP vests in the state a duty to consult the "representative institutions" of Indigenous peoples to seek FPIC before the adoption of any legal framework that could have an impact on them. Similarly, Article 32 also mentions FPIC in the context of "project approval". Furthermore, Article 32(1) specifies the rights of Indigenous peoples in determining priorities for their "land or territories". However, the second clause of Article 32 is the most relevant. It proposes that

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[92]

It is critical to read the above along with Article 33(2), which gives Indigenous peoples the authority to "determine the structures and to select the membership of their institutions in accordance with their own procedures". Together, these provisions address some critical issues faced by Indigenous peoples in their consultation with the state and project proponents on resource governance.

Thus, one might argue that decentralization processes across the globe have attracted renewed interest through international instruments, such as the ILO Convention 169 and UNDRIP. They have widened the space for conversation between the state and Indigenous communities on matters relating to resource governance. As mentioned previously in the present study, neither India nor Canada has ratified ILO Convention 169 so far. Moreover, when India voted in favour of UNDRIP,

---

[89] See generally United Nations Permanent Forum on Indigenous Issues, *Report of the UNPFII Workshop on Methodologies Regarding Free Prior and Informed Consent and Indigenous Peoples*, ESC, 2005, UN Doc E/C.19/2005/3.
[90] *Ibid* at 12.
[91] *Ibid* at 13.
[92] UNDRIP, *supra* note 4848, art 6.

Canada was amongst four countries that rejected it during its initial stages. However, after years of persuasion, Canada announced its full support for UNDRIP in 2016,[93] but only within the confines of the Canadian constitution. Nevertheless, there is a gap between constitutional requirements in Canada and the requirements of international law. For instance, international law emphasizes FPIC, whereas the Canadian constitution requires consultation and focuses on the consent of Aboriginal peoples in only certain limited situations.

Recently, the Committee on the Elimination of All Forms of Racial Discrimination established under the International Convention on the Elimination of All Forms of Racial Discrimination, in its report dated September 2017, expressed deep concerns about Canada's continuing violations of the land rights of Indigenous peoples and stated that

> in particular environmentally destructive decisions for resource development which affect their lives and territories continue to be undertaken without the free, prior and informed consent of the Indigenous peoples, resulting in breaches of treaty obligations and international human rights law.[94]

UNDRIP does not have a directly binding effect on the Canadian courts. There are some significant discussions evolving on the inclusion of a consent framework under the duty to consult and accommodate jurisprudence in Canada, subsequent to UNDRIP. However, the scope for applying UNDRIP in Aboriginal rights claims is highly restricted.[95] The Crown can largely proceed without the consent of Aboriginal peoples.

This situation is not very different in India when it comes to the application of C 169 and UNDRIP. The Indian government excludes the concept of "Indigenous peoples" by pointing out that all Indians are indigenous. Moreover, the Supreme Court of India, through a series of judgments, has shown its unwillingness to apply international law (whether by treaty or custom) at the domestic level.[96] However, unlike in Canada, the enactment of the *FRA* in India has given rise to some positive trends in providing FPIC to Indigenous peoples, which is an essential mandate of UNDRIP. The *FRA* insists on FPIC from the *Gram Sabhas* before any resettlement programs can

---

[93] Indigenous and Northern Affairs Canada, "United Nations Declarations on the Rights of Indigenous Peoples" (3 August 2017), online: INAC <www.aadnc-aandc.gc.ca/eng/1309374407406/1309374458958>.

[94] Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada,* UN CERD, 21-23rd Sess., UN Doc. CERD/C/CAN/CO/21-23 (2017).

[95] *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44 at paras 76, 77, [2014] 2 SCR 257 [*Tsilhqot'in*].

[96] Bijoy et al, *supra* note 10 at 10, 50.

take place in national parks or sanctuaries.[97] Furthermore, the *FRA* vests the *Gram Sabhas* with autonomy in decision-making over the management of forest resources in India. This was affirmed by the Supreme Court of India through one of its historic judgments in *Orissa Mining Corporation Ltd. v Ministry of Environment & Forest* (the *Niyamigiri* decision).[98] Its decision clarified that any diversion of forest land for non-forest purposes could only be made after obtaining consent from the *Gram Sabha*.[99] Thus, the consenting power of the *Gram Sabhas* over forest governance is asserted through this judgment, as detailed further in Chapter III.

As a result, it could be argued here that although there is no scope for the direct application of these international legal instruments in either India or Canada, the role of representative institutions in resource governance has gained visibility through discussions surrounding these instruments. These instruments have carried ahead discussions, which insist on the stronger role of consent for Indigenous communities vis-à-vis their decision-making powers over forest governance.

2.5 Analytical Framework of this Study

The forest governance regimes in both India and Canada have undergone several fundamental transformations over the past few decades. These transformations have involved an evolution from a top-down model to a decentralized governance model. To be more specific, co-management is one form of decentralized governance adopted in both countries.

In Canada, the shift commenced in some ways with the decision of the Supreme Court of Canada in *Calder v Attorney-General of British Columbia* (1973).[100] In this case, the Supreme Court of Canada acknowledged for the first time, "Aboriginal title in Canada".[101] Although half the judges dissented on an extinguishment issue on the facts of the case, *Calder* led the way for discussion on the unextinguished rights of Aboriginal peoples and recognized the legitimacy of their claim to title, unless specifically surrendered. *Calder* recognized the rights of the Nisga'a of the Nass

[97] *FRA*, *supra* note 6, s 4.
[98] See generally *Orissa Mining Corporation v Union of India,* (2013) 6 SCC 476, (2013) 6 SCALE 57, (2013) 6 SCR 881 (Supreme Court of India]) [*Niyamgiri* cited to SCC].
[99] *Ibid* at para 58.
[100] *Calder v Attorney General of British Columbia* [1973] SCR 313, [1973] 4 WWR 1 [*Calder* cited to SCR].
[101] Knafla &Westra, *supra* note 3 at 8.

Valley in British Columbia and developed a platform for negotiation between this population and the government. The corresponding negotiations continued for 30 years, and the first modern-day treaty in British Columbia came into effect on May 11, 2000.[102] The Nisga'a, who were wards of the federal government prior to this agreement, received a fee simple title to around 2000 km^2 of land under a trilateral agreement. Furthermore, the law-making power provided to them under the treaty resulted in the drafting of the *Nisga'a Forest Act*, which ensured "both sustainable harvests and a fair share of economic benefits".[103] Thus, *Calder* introduced a pluralistic perspective into the Canadian legal regime and catalyzed the first federal land claims agreement.

Aside from these developments, the *James Bay and Northern Quebec Agreement* also represented a significant shift in Canada's co-governance regimes. The protests by the James Bay Cree against the Quebec government's plan for a hydroelectric project led to the creation of the first modern land claim agreement in 1975. However, the forest development in this region resulted in the exploitation of Cree land and resources for more than two decades. After years of negotiations and series of lawsuits, the James Bay Cree and the Quebec provincial government drafted a "nation-to-nation agreement" in 2001. This agreement dealt with diverse issues, such as forestry, mining, and hydroelectricity, and it facilitated Cree participation in forest management decision-making through two co-management structures.[104]

The *Nisga'a Forest Act* and the *James Bay and Northern Quebec Agreement* saw crucial moves towards incorporating Aboriginal forest values into resource governance.[105] A co-management regime thus evolved in parts of Canada, legitimizing the role of Aboriginal institutions and their decision-making power over the administration of resources. Although such co-management arrangements are still in the process of evolution, they are a remarkable step in participatory forest conservation[106] (Chapter IV contains an expanded discussion on this topic). Conversely, in India, the co-management process began with the *Joint Forest Management Policy, 1990*, which

[102] Monique Passelac-Ross & M A Peggy Smith, "Accommodation of Aboriginal Rights" in Tindall, Trosper & Perreault, *supra* note 36, 129 at 139 [Passelac-Ross & Smith].
[103] *Ibid* at 141.
[104] *Ibid* at 144.
[105] *Ibid* at 144.
[106] Matthew Stephen Pudovskis, *Traditional Ecological Knowledge and Environmental Governance In Canada: The Role of Law and Comprehensive Agreements in Facilitating Incorporation* (LLM Thesis, University of British Columbia Faculty of Law, 2013) at 32, online: University of British Columbia Library < https://open.library.ubc.ca/cIRcle/collections/ubctheses/24/items/1.0077773>.

reiterated the need for forest conservation through local participation.[107] However, it took a new turn in the form of the 73rd Constitutional amendment, which gave legal legitimacy to tribal self-rule.[108] The first dynamic shift in forest legislation was the enactment of the *FRA.* From an earlier co-management model of power-sharing, the *FRA* "embraces a rights-based approach and potentially creates space for democratic and inclusive forest governance".[109] The statutory powers vested in these institutions facilitate the actual decentralization process. The *FRA* is, therefore, a powerful instrument, which asserts the role of tribal institutions. Moreover, in the process of recognizing tribal rights, it ensures downward accountability (see Chapter II for further discussion on this). These two forest reforms offer a platform for understanding the evolution of two forms of democratic decentralization in Canada and India. In this current research, the following analytical framework has been adopted to understand the efficacy of two evolving forest reforms:

- The devolution of power and authority to Indigenous institutions
- The vesting of decision-making power in these institutions with regards to resource governance, as well as the capacity and power relations that will enable them to make appropriate decisions.

Based on this framework, the present study involves a comparative analysis of institutional arrangements under the *FRA*, as seen in the example of the village of Mendha Lekha in India's Gadchiroli District and a co-management regime in British Columbia, through an example of the Clayoquot Sound co-management structures. In both these examples, the political struggle of Indigenous peoples plays a significant role in asserting Indigenous peoples' democratic rights through their institutions. There are instances where "such assertions from below have forced governments to concede greater authority to local people in forest governance, which is substantially different than shared governance in a decentralization framework."[110] These rights asserted through political movements are capable of bringing about institutional reforms that create

[107] See generally Ministry of Environment and Forest, Government of India, *National Forest Policy* (Delhi: Ministry of Environment and Forest, 1988), online: <envfor.nic.in/legis/forest/forest1.html>.
[108] ST Shirsath, "Reinventing Tribal Local Governance Through Administrative Reforms in India: With Special Reference to Fifth Schedule Area", (2014) 2:4 International J Research in Humanities, Arts & Literature 15 at 18.
[109] Kundan Kumar et al, "Decentralization and democratic forest reforms in India: Moving to a rights-based approach" (2015) 51 Forest Policy & Economics 1 at 1.
[110] *Ibid* at 2.

a space for discussion on strong democratic decentralization.[111] Hence, the devolution of power and authority to Indigenous institutions will be examined here, as well as the autonomous decision-making power vested through these forest reforms. Furthermore, in order to understand the efficacy of evolving jurisprudence in both the jurisdictions under study, this research will briefly examine the consent framework in Aboriginal jurisprudence concerning the duty to consult and accommodate (drawing upon judgments of the Supreme Court of Canada) and jurisprudence on tribal consent under *FRA* judgments in India.

[111] *Ibid.*

CHAPTER III: THE INDIAN CONTEXT

This chapter deals with one of the most important research questions relating to the Indian context of the present study, namely the ways in which the emerging legal regime for forest governance has responded to the demand for democratic decentralization in this area. Here, there will be an attempt to analyze the emphasis on tribal institutions within the Indian legal regime, examining the devolution of power to these institutions and the scope for decision-making vested in them with regards to forest resource governance.

This chapter begins with a brief introduction to India's tribal populations and analyses the impact of exclusionary colonial and post-colonial forest legislation upon them. It then proceeds to the evolution of a new decentralized legal regime through the enactment of the *FRA,* discussing in detail the various rights envisaged and analyzing its use as an instrument for decentralizing resource governance. This part of the chapter, where the *FRA* is thoroughly explained, may be considered as central since it scrutinizes institutional reforms under this legislation. For clearly illustrating the implementation of the *FRA* and demonstrating how it has contributed to the devolution of power to tribal institutions, an example of the village of Mendha Lekha has been adopted in this thesis.

After setting out the current legal framework in detail under the *FRA,* this chapter, therefore, analyses some of the evolving judicial interventions around the *FRA* in India. As a result, it will be clarified how the proper legal foundation laid down by this legislation has assisted the courts in making few noteworthy judicial interventions.

3.1 Tribes in India: An Introduction

Those responsible for framing the Indian Constitution, who identified "tribes" as "backward" groups, categorized them as "Scheduled Tribes" in an attempt to "assimilate" them into newly independent India.[112] As per the census of 2011, around 8.6% of India's total population was in these so-called Scheduled Tribes, constituting around 84.3 million people.[113] This figure represents

[112] *Constitution of India*, supra note 32, arts 366 (25), 342.
[113] Ministry of Tribal Affairs, *Report of the High-Level Committee on Social Economic, Health and Educational status of Tribal Communities of India,* (2014) at 34, online: <

the largest number of Indigenous/tribal peoples in any country worldwide.[114] Although the Constitution of India discusses the term "Scheduled Tribes" and establishes various privileges for this group, it does not explain the criteria for the classification. It was the Lokur Committee Report of 1965 that laid down a five-point framework of criteria: (a) primitive traits; (b) distinct culture; (c) geographical isolation; (d) shyness of contact with the community; and (e) backwardness.[115] Some of these criteria reflect the perspectives of India's colonial past.[116]

Tribal populations are spread across India in different administrative categories but are included in general administrative categories wherever they represent a minority. Nevertheless, tribal groups enjoy some special privileges in terms of educational and employment opportunities under the Constitution of India, irrespective of their numbers. In those areas where they dominate, they benefit from provisions in the Fifth and Sixth Schedules of India's Constitution. These Schedules contain several significant Constitutional safeguards since they recognize the cultural distinctiveness and self-government of India's tribal peoples. The Fifth Schedule protects them via separate laws for Scheduled Areas; including the special role of the Governor and Tribes Advisory Council.[117] Legislation such as the *Provisions of Panchayats (Extension to Scheduled Areas) Act* (*PESA*) has additionally ensured further legal and administrative reinforcement to the Fifth Schedule.[118] On the other hand, the Sixth Schedule relates to the administration of the north-eastern States, such as Assam, Meghalaya, Tripura, and Mizoram.

Until the enactment of the *Government of India Act*, 1935, the Scheduled Areas were referred to as "excluded areas" under the Sixth Schedule. Post-independence, however, a sub-committee on

---

http://www.indiaenvironmentportal.org.in/files/file/Tribal%20Committee%20Report,%20May-June%202014.pdf> [Xaxa Report].

[114] Ministry of Home Affairs, *Census of India, 2011*, (New Delhi: Ministry of Home Affairs, 2011) online: < www.censusindia.gov.in/?q=tribes>.

[115] Department of Social Security, Government of India, *The Report of the Advisory Committee on the Revision of the Scheduled Castes and Scheduled Tribes Lists* (New Delhi: Department of Social Security, 1965) online: Ministry of Tribal Affairs < https://tribal.nic.in/writereaddata/AnnualReport/LokurCommitteeReport.pdf> [Lokur Committee Report].

[116] Xaxa Report, *supra* note 113 at 25.

[117] See *Constitution of India*, *supra* note 32, Schedule V, para 4. Paragraph 4 mandates that a Tribal Advisory Council shall be established in each State having Scheduled Areas and, if the President so directs, also in any State having Scheduled Tribes but not Scheduled Areas therein, a Tribes Advisory Council consisting of not more than twenty members of whom, as nearly as may be, three-fourths shall be the representatives of the Scheduled Tribes in the Legislative Assembly of the State.

[118] *The Provisions of the Panchayats (Extension to the. Scheduled Areas) Act, 1996* (December 24, 1996) Gazette of India Extraordinary II, s 1, No.40 [*PESA*].

the North-East Frontier (Assam) Tribal and Excluded Areas (otherwise known as the "Bardoloi Committee") was formed, and on its recommendation, the Constituent Assembly identified the Sixth Schedule areas.[119] An Autonomous District Council was set up under this Constitutional mandate, which provided for decentralized governance in this region through a representative structure. Aside from these Constitutional safeguards, there is also extensive central and state policy and legislation, aimed at ensuring various rights and protection for India's tribal peoples. However, India's poverty statistics show that this constitutional and legislative protection is insufficient to address the interests of its tribes, which have mainly been dependent on the country's forests and forest resources over a prolonged period.

Exclusive forest legislation, a large number of development projects, and the globalization or liberalization policies of changing governments have worsened the conditions endured by India's tribal peoples.[120] The development model induced by state machinery and corporations has, in fact, provoked widespread resistance from them. It has even led to the growth of left-wing extremism in forest lands, which is where the tribal population is mostly located.[121] In the nine States that are most affected by left-wing extremism, six are classed as Scheduled Areas under the Constitution.[122] As mentioned before, one of the common features of such regions is the large-scale displacement of their tribal population and misappropriation of tribal resources. The impact of restrictive forest legislation in the colonial and post-colonial period is another major contributory factor since most of the tribal populations rely on the forest for survival. The next part of this research will examine how this forest legislation has resulted in the systematic exclusion of traditional tribal institutions by imposing a centralized bureaucratic governance structure.

[119] Xaxa Report, *supra* note 113 at 78.
[120] See Madhav Gadgil & Ramachandra Guha, *This Fissured Land: An Ecological History of India* (Berkeley: University of California Press, 1993) at 149-151 [Gadgil & Guha]; Ramachandra Guha, "Adivasis, Naxalites and Indian Democracy" (2007) 42 Economic & Political Weekly 3305 at 3306.
[121] See generally *ibid* at 3309.
[122] Xaxa Report, *supra* note 113 at 31.

3.2 Colonialism and Exclusionary Conservation: A Glimpse of Colonial/Post-colonial Forest Legislation in India

The legal category of "forest" in India constitutes one-quarter of its land. Out of a total tribal population of 67 million, most depend on the forest and its resources for their life and livelihood.[123] India's tribal peoples have a symbiotic relationship with the forest and have even played an important role in managing and conserving these resources through their customary practices, perpetuated via traditional institutions.[124]

Although it cannot be denied that disparity due to caste and class existed in Indian society during the pre-colonial period, there was a general coherence and stability.[125] Even the reach of Islam through the Mughal invasion did not modify existing resource use patterns or the social structures of the tribal population.[126] However, some scholars argue that it was the Christian invasion from Europe—undergoing its Industrial Revolution at the time—that which substantially transformed India's patterns of resource use.[127] Thus, the wood normally used by communities for domestic purposes, or to build shelters, became a source of revenue. The development of technology as a result of the Industrial Revolution in Europe further contributed to the exploitation of forest resources.[128] Moreover, the demand for railway sleepers and the construction of railway networks destroyed vast tracts of forest. The expansion of India's railways from 1349 km in 1860 to 51,658 km in 1910 contributed to this mass exploitation.[129]

This process continued for a longer period through the formation of a government Forest Department, with a centralized bureaucratic structure and the support of experts from Germany.[130] This Department, established through important colonial legislation, still plays a significant role in the governance of India's forests. In this section, the history of forest legislation in India is explored, in its evolution from a centralized governance structure to one that is more decentralized.

---

[123] Kundan Kumar & John M Kerr, "Democratic Assertions: The Making of India's Recognition of Forest Rights Act" (2012) 43 Development & Change 751 at 754.
[124] Madhav Gadgil et al, "Indigenous Knowledge for Biodiversity Conservation" (1993) 22 Ambio 151 at 151. See generally Madhav Gadgil & V.D. Vartak, "Sacred Groves in India- A Plea for Continued Conservation" (1975) 72 Journal of the Bombay Natural History Society 314.
[125] Gadgil & Guha, *supra* note 120 at 113.
[126] *Ibid* at113.
[127] *Ibid* at 113-114.
[128] *Ibid* at 114.
[129] *Ibid* at 121.
[130] *Ibid* at 122.

In fact, the colonial regime had already established its monopoly over India's forests and forest resources through the enactment of specific forest legislation by the early 19th century, while there is no evidence of any codified forest laws during the pre-British period. On the contrary, these resources were revered and protected.[131] The British, who established their colonial roots during the mid-19th century, recognized the significance of state control over forest resources, leading to the hurried enactment of the first *Indian Forest Act* in 1865.[132] The 1865 *Act* was intended to hasten the acquisition of forest areas for railway provisions and was therefore silent on the rights of users.[133] A further amendment was made to this *Act* in 1878, emphasizing the authority of the colonial government to declare all forest land as government land through the reservation of the forest. It changed the concept of common property and pushed for direct state control by categorizing forest as "Reserved", "Protected" and "Village" forest. This categorization enabled the government to collect more revenue by taxing forest produce. Later, the *Forest Policy Resolution* developed by the British government in 1894 also argued in favour of the commercialization of Indian forests. Although the objective of this *Resolution* was projected as forest conservation, it was a reassertion of state control over the forest.[134]

In 1927, the *Indian Forest Act* (*IFA*) was enacted as a slightly altered version of the *Indian Forest Act* of 1878. The 1927 *IFA* is one of India's most significant pieces of forest legislation, as it was the first to consolidate the laws on forest and forest produce. It reiterated the absolute state monopoly over resource governance and completely eliminated any ambiguities that could challenge this monopoly.[135] It thus laid down the foundation for the scientific management of the forest and encouraged commercial timber production. Furthermore, the *IFA*,[136] like existing forest policies, clearly focused on revenue-yielding aspects, rather than conservation. The very preamble of this legislation reiterates that the 1927 *IFA* was intended "to consolidate the law relating to forests, the transit of forest-produce and the duty that could be levied on timber and other forest-

[131] *Ibid* at 122-123.
[132] *Ibid* at 123.
[133] Sharad Singh Negi, *Himalayan Forests and Forestry* (Delhi: Indus Publishing Company, 2002) at 246.
[134] Antara Roy & Sroyon Mukherjee, "The Forest Rights Act, 2006: Settling Land, Unsettling conservationists" (2008) 1 NUJS L Rev 293 at 296 [Antara & Sroyon].
[135] Gadgil & Guha, *supra* note 120 at 124.
[136] *The Indian Forest Act, 1927*, (September 21, 1927) Gazette of India Extraordinary II, s 1, No.16.

produce".[137] Thus, it could be argued that India's colonial past resulted in a state monopoly, ecological destruction, and a decline in customary rights over its forests.

Nevertheless, the post-independence scenario was no different; independent India carried over the forest governance regime evolved during the colonial period by relentlessly maintaining state control over forest resources. The tribes and their livelihood were never a priority for policymakers, who were instead engaged in forest management aimed at extending the *IFA* as an umbrella over all forest legislation, even after independence. The prevailing presumption was that colonial forest conservation was more scientific than was conservation based on the traditional knowledge exemplified by tribal peoples. In fact, attempts were even made to criminalize these tribal communities, alleging that their use of the forest was ecologically detrimental.[138] Forestry laws, including the 1927 *IFA*, even relied on paramilitary principles to establish the Forest Department.[139] This resulted in several ongoing conflicts between the Forest Department and tribal communities, which continue to this day. Armed insurgency over India's forests was a further outcome of this. However, the first *Forest Policy* declared in 1952 confirmed that all interests were subservient to the national interest, highlighting that:

> Village communities in the neighbourhood of a forest will naturally make a greater use of its products for the satisfaction of their domestic and agricultural needs. Such use, however, should in no event be permitted at the cost of national interests. The accident of a village being situated close to a forest does not prejudice the right of the country as a whole to receive the benefits of a national asset.[140]

The concept of forest conservation was not on the priority list until the 1970s, with a change of government in India. However, following the Stockholm Declaration of 1972, the rationale for uprooting tribes was shifted from "revenue generation" to "conservation". This gave rise to a wider political discourse centered around an "elite urban environmentalism" in the country. It was a movement that led to the enactment of the *Wild Life Protection Act* (*WLPA*), which excluded the tribal population from "protected areas" and placed more emphasis on flora and fauna (such as

[137] *Ibid* at preamble.
[138] Sarah Jewitt, "Europe's others'? Forestry policy and practices in colonial and postcolonial India" (1995) 13:1 Environment & Planning D: Society & Space 67 at 67.
[139] Kundan Kumar, Neera Singh & Giri Rao, "Promise and Performance of the Forest Rights Act" (2017) 52:25-26 Economic & Political Weekly 40-43 at 41 [Kumar, Singh & Rao].
[140] See generally Ministry of Environment and Forest, Government of India, *National Forest Policy*, (Delhi: Ministry of Environment and Forest, 1952).

tigers).[141] However, further destruction of habitat ensued as did the alienation of the tribal population from their source of livelihood, including what is called "minor forest produce." The incorporation of section 27[142] and Section 35[143] of the *WLPA* consequently restricted the movement of tribes within sanctuaries and national parks, thus perpetuating the blatant violation of rights guaranteed to them by Articles 19(1) and 19(1)(e) of the Indian Constitution. Neither could this be justified as a reasonable restriction permitted by Clause 5 of the Article. Ironically, even this Clause 5 specifies that the state may impose such reasonable restrictions for, *inter alia*, the "protection of the interest of any scheduled tribe".

The 42nd Constitutional amendment of 1976, which inserted Articles 48(A) and 51(A)(g) into India's Constitution also stressed this conservation approach. The amendment provided directions to the state and imposed a fundamental duty on the citizen to protect and enhance the environment. The next important step was the *Forest Conservation Act, 1980* (*FCA*), which took a similar path by nullifying the use of forest land for any other purpose, except with the approval of the central government. This legislation also reiterated the old centralized conservation mechanism and even laid down penal measures for violating its provisions. Therefore, although the 1970s witnessed a shift towards conservation-based forest governance, the emphasis was still on a centralized approach.

Later, India's Supreme Court bolstered this alienation through its decision in *T.N. Godaverman Tirumulpad v Union of India* (*Godaverman*).[144] *Godaverman* was a writ petition filed in the Supreme Court of India to protect illegal timber operation in the Nilgiris Forest, situated in India's Western Ghats region. The scope of this case was later extended from the question of illegal tree-felling to the revamping of India's entire forest policy. A dynamic shift in forest policy, therefore, took place after the interpretation of "forest" by the Supreme Court in this case.[145] The corresponding *amicus curiae* invited the attention of the Supreme Court to encroachment upon forest land. In its view, this was the main reason underlying deforestation. The primary argument was that encroachment was a major threat to the forest, leading to a request for the suppression of

[141] *The Wildlife (Protection) Act, 1972*, (9th September, 1972) Gazette of India Extraordinary II, s 1, No.53 [*WLPA*].
[142] *Ibid*, ss 26, 35.
[144] *T N Godaverman Tirumulpad v Union of India*, (1996) 9 SCR 982 (Supreme Court of India) [*Godaverman*].
[145] *The Forest (Conservation) Act*, 1980, (December 27, 1980) Gazette of India Extraordinary II, s 1, No.69, s 2 [*FCA*].

any illegal encroachment, which had not been regularized before 1980. The case resulted in a circular being issued by the Ministry of Environment, Forest, and Climate Change (or the Ministry of Environment and Forest, as it then was) demanding the eviction of encroachers within a stipulated time. Consequently, there was a massive displacement of around 300,000 people from approximately 150,000 hectares of forest land between 2002 and 2004, "which even included violence".[146] *Godaverman* thus worsened the separation of the forest from India's tribal population by treating the latter as illegal encroachers on their own traditional land.

After a series of deliberations and court battles against this serious violence against tribes, the government ultimately acknowledged the need for legislation that would recognize the forest rights of tribal peoples. It was during this period that demands rose for the inclusion of local people in forest resource governance. Various social movements, such as the *Chipko* and *Appiko* movements, along with changing conservation discourse across the globe, contributed to the introduction of Social Forestry Programs in the 1970s and 1980s.[147] Later, the *National Forest Policy, 1988* and the *Joint Forest Management Policy, 1990* reiterated the need for forest conservation through local participation.[148] The primary objective of the *National Forest Policy, 1988* was to "ensure environmental stability and maintenance of ecological balance including atmospheric equilibrium which is vital for sustenance of all lifeforms, human, animal, and plant".[149] Meanwhile, the "Joint Forest Management" model was adopted as a

> …strategy under which the government represented by the Forest Department and the village community enter into an agreement to jointly protect and manage forestlands adjoining villages and to share responsibilities and benefits.[150]

The Ministry of Environment, Forest and Climate Change at the central government level and the state government at the state level subsequently provided guidelines for implementing Joint Forest

[146] Armin Rosencranz, Edward Boenig & Brinda Dutta, "The Godaverman Case: The Indian Supreme Court's Breach of Constitutional Boundaries in Managing India's Forests" (2007) 37 Environment L Reporter 10032 at 10035, online: ELR News and Analysis <https://elr.info/sites/default/files/articles/37.10032.pdf>.
[147] Kumar, Singh & Rao, *supra* note 139 at 3.
[148] See generally Ministry of Environment and Forest, Government of India, *National Forest Policy* (Delhi: Ministry of Environment and Forest, 1988), online < http://envfor.nic.in/legis/forest/forest1.html >
[149] *Ibid.*
[150] Ministry of Environment and Forest, Government of India (1990), cited in Nicholas K. Menzies, *Our Forest, Your Ecosystem, Their Timber: Communities, Conservation, and the State in Community-Based Forest Management* (New York: Columbia University Press, 2007) at 104.

Management. The strategy adopted by the Ministry of Environment, Forest and Climate Change was to implement Joint Forest Management by establishing village-level Forest Protection Committees, which constituted all the eligible voters in the community. These Committees were assigned different names in different States and were responsible for electing executive committees for their daily management. There are now has almost 100,000 Joint Forest Management committees, co-managing more than 22 million ha of forest land.[151] However, there are persuasive arguments that this program has not contributed to any transformation of the strained relationship between the Forest Department and tribal peoples.[152] Some scholars argue that no democratic decision-making has been achieved in this way and that the program has even led to violence.[153] Meanwhile, the Forest Department has continued to enjoy its authority in a different form through the program. Madhu Sarin also highlights the fact that Joint Forest Management is one of the instruments that has been misused to extend forest fringes for settled cultivation and grazing land, ultimately leading to the eviction of tribal peoples.[154]

It was during this period that the 73rd and 74th Constitutional amendments were passed by the Indian Parliament, namely in 1992. These amendments were intended to introduce self-governance into rural and urban areas of India. The Bhuria Committee, appointed in 1994 to assess the scope of tribal self-rule made recommendations to extend the provisions of the 73rd Constitutional Amendment into Scheduled Areas. It emphasized that:

> Tribal life and economy, in the not too distant past, bore a harmonious relationship with nature and its endowment. It was an example of sustainable development. But with the influx of outside population, it suffered grievous blows. The colonial system was established on the basis of expropriation of the natural and economic resources of tribal and other areas in the country… *Since, by and large, the politico-bureaucratic apparatus has failed in its endeavour, powers should be devolved on the people so that they can formulate program which suit them and implement them for their own benefits.*[155] [Emphasis added]

---

[151] Susan S Wadley, *South Asia in the World: An Introduction* (Delhi: Routledge, 2014) at 183.
[152] See generally Oliver Springate-Baginski, Madhu Sarin & Gopinath Reddy, "Resisting Rights: forest bureaucracy and the tenure transition in India" (2012) 12:1 Small Scale Forestry 107 at 110, 111 [Oliver Springate-Baginski et al].
[153] *Ibid* at 110.
[154] Madhu Sarin, "Democratizing India's forests through Tenure and Governance Reforms" (2010) 60 Social Action 104 at 105.
[155] Government of India, Ministry of Rural Development, *Report of the Committee of Members of Parliament and Experts Constituted to Make Recommendations of Law Concerning Extension of the Provisions of the Constitution (Seventy Third Amendment) Act 1992 to the Scheduled Areas* (New Delhi: Ministry of Tribal Affairs, 1995) cited in

In furtherance of this, a decision was made to include *Gram Sabhas*[156]or "village assemblies" in resource governance, through the enactment of the *PESA* in 1992.[157] *PESA* was envisaged to extend the provisions of the *Panchayats* to Scheduled Areas. Its primary focus was the devolution of power and authority to *Gram Sabhas.* Thus, provisions of this Act reiterated the significance of customary laws and the traditional resource management processes of communities covered by the Fifth Schedule. It further mandated state governments to authorize *Gram Sabhas* and *Panchayats* as institutions of local self-governance over certain important subjects, such as the ownership of "minor forest produce", thus preventing the alienation of land and promoting its restoration. *PESA* also authorized the *Gram Sabhas* to make plans and programs for social and economic development and to protect natural resources, including Minor Forest Produce. Furthermore, it ensured that *Gram Sabhas* would be consulted on matters relating to land acquisition. However, this legislation was confined to the nine States under the Fifth Schedule, as defined by the Constitution of India. As such, the north-eastern States governed by the Sixth Schedule are excluded from its application.

Although a range of powers are conferred on the *Gram Sabhas*, as envisaged under *PESA*, its implementation is still at a nascent stage, since most of India's States have not made any effort to draft rules for such implementation. Hence, the powers described under the Act are not adequately utilized across many of the Fifth Schedule areas. However, the *Biological Diversity Act, 2002* and *National Environmental Policy, 200*6 have since followed, which acknowledge the significance of local participation in the conservation process. Moreover, it is the enactment of the *FRA* that is considered to have effectuated a paradigm shift in the history of India's forest governance.

C R Bijoy, *Policy Brief on Panchayat Raj (Extension to Scheduled Areas) Act of 1996,* (United Nations Development Program, 2002) at 13, online: UNDP <http://www.in.undp.org/content/dam/india/docs/UNDP-Policy-Brief-on-PESA.pdf>.

[156] See *PESA supra* note 118118 ss 4 (b), (c). It defines a village and the Gram Sabhas as "(b) a village shall ordinarily consist of a habitation or a group of habitations or a hamlet or a group of hamlets comprising a community and managing its affairs in accordance with traditions and customs; (c) every village shall have a Gram Sabha consisting of persons whose names are included in the electoral rolls for the Panchayat at the village level.".

[157] Preeti Sambat, "Limits to Absolute Power: Eminent Domain and the right to land in India" (2013) 48:19 Economic & Political Weekly 40 at 41.

3.3 Emerging Legality through the Forest Rights Act, 2006: Towards the Devolution of Powers to the *Gram Sabhas*

Unlike most of the legislation discussed in the current context, which is the outcome of bureaucratic efforts and generally reflects a top-down approach, the drafting of *the FRA* was a collaborative effort, involving various struggles and movements amongst those at the bottom. This fact ensured that the *FRA* did not resemble legislation with an indifferent attitude towards the interests of tribal communities. For populations that had been treated as encroachers on their land for centuries, the *FRA* was an instrument to reclaim their identity and citizenship rights. A group of similarly minded activists, left-wing politicians and academics, under a national forum called the Campaign for Survival and Dignity, demanded that a "comprehensive replacement of the oppressive control of the forest bureaucracy on forested tribal homelands" be made "by restoring democratic control over forest governance to statutorily empowered village assemblies."[158]

The next significant step consisted of the National Common Minimum Program, introduced by the United Progressive Alliance (UPA) Government in 2004, which included tribal ownership rights in its agenda.[159] The program described that "UPA [would] urge the states to make legislations for conferring ownership rights in respect of Minor Forest Produce (MFP), including tendu patta, on all those people from the weaker sections who work in the forests".[160] It added that the "eviction of tribal communities and other forest-dwelling communities from forest areas [would] be discontinued".[161] However, these attempts inevitably faced wide resistance from individual/environmental organizations across the country, which claimed that vesting powers in *Gram Sabhas* would lead to the destruction of the forest. The Ministry of Environment, Forest, and Climate Change also challenged such an argument, claiming that mass destruction of the forest could result. In the midst of all these challenges, the *FRA* was enacted in 2006 to recognize the rights of Forest Dwelling Scheduled Tribes and to assert the role of consent of *Gram Sabhas* in the conservation and management of forest/wildlife resources. The *FRA* initiated the process of

---

[158] Madhu Sarin & Oliver Springate-Baginski, *India's Forest Rights Act-The Anatomy of a Necessary but not Sufficient Institutional Reform* (IPPG: Manchester, 2010) at 6, online: Improving Institutions for Pro-Poor Growth <www.ippg.org.uk/papers/dp45.pdf> [Madhu & Oliver].
[159] Jeffrey Sayer, Stewart Maginnis & Michelle Laurie, *Forests in Landscape: Ecosystem Approaches to Sustainability* (London: Routledge, 2007) at 98.
[160] *Ibid*.
[161] *Ibid*.

decolonization and democratized governance in India's forests, amounting to an attempt to shift the governance from forest bureaucracy to forest dwellers. The emphasis on community forest resource rights and the strengthening of *Gram Sabhas* for the conservation and management of biodiversity, forestry, and wildlife gave a democratic face to this legislation.[162]

For the first time in the history of legislation in India, the *FRA* admitted in its preamble that it would attempt to undo the "historic injustice" committed against forest dwellers through colonial and post-colonial forest legislation. The provisions of the *FRA* offered scope for bringing in the aspect of livelihood rights for tribal peoples, along with various conservation strategies. They also awarded significant powers to the *Gram Sabhas*, with the potential to transform the conservation regime and strengthen the process of local self-governance. The *FRA* included a category called "Other Traditional Forest Dwellers" as beneficiaries, along with "Forest Dwelling Scheduled Tribes," but this was done with the intention of including people who are not categorized as Scheduled Tribes under the Constitution of India. Nevertheless, this current research is confined to Forest Dwelling Scheduled Tribes since the categories of Other Traditional Forest Dwellers include non-tribal populations against the backdrop of India.

3.3.1 Rights under the Forest Rights Act (*FRA*)

The *FRA* mainly speaks of Individual Forest Rights, Community Forest Rights (CFR) and Developmental Rights, which also include habitat rights**.** Aside from forest lands, the *FRA* extends to wildlife sanctuaries and National Parks**.** To be more precise, section 3 of the *FRA* lists thirteen important forest rights that it recognizes. Section 3(1), for example, discusses both the individual and community tenure of Forest Dwelling Scheduled Tribes and Other Traditional Forest Dwellers, as follows:

a) The right to hold and live on forest land in individual or common occupation as habitation or self-cultivation and for livelihood by a member or members.[163]

December 13, 2005 is the cut-off date for recognition of rights under the *FRA*. However, these provisions do not provide any scope for converting forest lands for non-forest purposes. This

[162] Kumar, Singh & Rao, *supra* note 139139 at 41.
[163] *FRA*, *supra* note 6, s 3(1)(a).

provision, read with section 4(6), enables beneficiaries to claim a maximum limit of four hectares of land under Individual Forest Rights.

b) Community rights, such as Nistar.[164] This section re-establishes customary usufruct rights, which were legal before India's independence. After the integration of Princely States into the Indian Union, these rights were terminated in many cases. Section 3(1)(b) enables communities to claim this Nistari forest, which is clearly recorded as a "Community Forest Resource".

c) "Right of ownership, access to collect, use and dispose of minor forest produce", which is collected traditionally by communities.[165] This should be read in conjunction with section 2(i) of the *FRA*, which defines "minor forest produce" as "all non-timber forest produce of plant origin including bamboo, brush wood, stumps, cane, tussar, cocoons, honey, wax, lac, tendu or kendu leaves, medicinal plants and herbs, roots, tubers".[166] Under the *FRA*, the term "minor forest produce" is synonymous with "non-timber forest produce". It is controversial since colonial legislations such as *IFA* condescendingly views every forest produce except timber as "minor", irrespective of their value to the communities.[167] However, this produce is not "minor" in reality and, rather, represents important forest produce, upon which the majority of India's forest-dwelling tribal populations relies for their livelihood. Although *PESA* vested the *Gram Sabhas* with ownership rights over minor forest produce in the Fifth Schedule areas—inhabited by numerous tribal populations—many States were reluctant to proceed with drafting legislation in consonance with it. In fact, minor forest produce is not properly defined under *PESA*. Moreover, *PESA* is confined to Fifth Schedule areas and not extended to protected or reserved forests. However, these challenges have been addressed by the *FRA*, with the latter going further to include *tendu* leaves (*Diospyros melanoxylon*), cane collected by traditional means and bamboo within or outside village boundaries (classed as Minor Forest Produce).

[164] *FRA*, *supra* note 6, s 3(1)(b); Nistar rights are Community rights, by whatever name called, including those used in erstwhile Princely States, Zamindari or any intermediary regimes.
[165] *Ibid*, s 3(1)(c).
[166] *Ibid*, s 2 (1).
[167] Madhu & Oliver, *supra* note 158158 at 9.

d) Rights over watercourses/water products and the restoration of traditional seasonal access to resources for nomadic and pastoral communities.[168]

e) The right to habitat and habitation of "Primitive Tribal Groups"[169] and pre-agricultural tribal groups.[170] It is very important to read this provision alongside the definition of "habitat" in section 2(h), which includes any customary Primitive Tribal Group areas or pre-agricultural communities in reserved or protected forests. These communities include communities that practice shifting cultivation or those which possess semi-nomadic hunter-gatherer traits. This was an attempt to include marginalized tribal populations, categorized as Primitive Tribal Groups in the purview of the *FRA*, to protect their customary habitats from various forms of exploitation.

f) Rights to claim land in disputes with the Indian State.[171] This was an attempt to enable beneficiaries to "reclaim their rights over lands disputed between them and forest departments arising out of faulty or non-existent forest settlements."[172] Such an attempt permitted the *FRA* to address issues that included the injustice of making declarations about the forest without following due process in places like central and eastern India after Indian independence. This provision allowed both community and individual claims, but it did not prescribe any limit on the area that could be claimed for.

g) The right to convert any *pattas*/leases or grants to title over forest land, issued by any authority.[173] This was an attempt to undo the conflict arising from the non-recognition of *pattas* or grants issued by the Ministry of Environment, Forest and Climate Change, due to its conflict with the Revenue Department.[174] In States like Madhya Pradesh and Chattisgarh alone, around 1.24 million ha of land are disputed between the Revenue Department and the Ministry of Environment, Forest, and Climate Change.[175] This clause,

---

[168] *Ibid*, s 3(1)(d).
[169] The term "Primitive Tribal Groups", which is now "Particularly Vulnerable Tribal Groups" (PVTGs), is a specific classification created by the Government of India to improve the conditions of certain tribal groups which are under low development indices.
[170] *FRA*, *supra* note 6, s 3(1)(e).
[171] *Ibid* at s 3(1)(f).
[172] Madhu & Oliver, *supra* note 158154154 at 10.
[173] *FRA*, *supra* note 6 s 3(1)(f).
[174] Madhu & Oliver, *supra* note 158154154 at 11.
[175] Anil Garg, *Orange Areas Examining the Origin and Status* (Pune: National Centre for Advocacy Studies, 2005) online: < www.doccentre.org/docsweb/adivasis_&_forests/orange_areas.htm >.

therefore, provides a platform for converting any *pattas*/ leases issued before Indian independence, which were no longer recognized as legal titles after independence. The four-hectare limit explained earlier under section 3(1)(a) is not applicable in this case.

h) The right to convert "Forest Villages"[176]—created by the Forest Department (to ensure bonded laborers for forestry activities) —into "revenue villages".[177] Many tribal populations in these Forest Villages are denied access to development programs since their surroundings continue to be registered as "forest". Only the Forest Department has the power to pursue development activities on forest land under the existing legal regime. Hence, the residents in such areas must endure considerable hardship to secure a mere domicile certificate. This is due to the fact that the Revenue Department is not entitled to issue such certificates for forest land. Without such documents, these inhabitants become legally invisible and vulnerable to displacement induced by development, and without compensation. Some scholars highlight that there are 2500-3000 officially recognized Forest Villages and over 10,000 unofficial Forest Villages in India.[178] Hence this provision covers a huge tribal population in India.

i) The right to protect, regenerate, conserve or manage any Community Forest Resource that is traditionally protected and conserved for sustainable use.[179] The FRA defines a Community Forest Resource as:

> …customary common forest land within the traditional or customary boundaries of the village or seasonal use of landscape in the case of pastoral communities, including reserved forests, protected forests and protected areas such as Sanctuaries and National Parks to which the community had traditional access.[180]

[176] "Forest villages" are defined under the *FRA as* the settlements which have been established inside the forests by the forest department of any state government for forestry operations or which were converted into forest villages through the forest reservation process, and they include forest settlement villages, fixed demand holdings, all types of taungya settlements, by whatever name called, for such villages and includes lands for cultivation and other uses, permitted by the government. See *FRA, supra* note 6**,** s 3(1)(f).
[177] *Ibid*, s 3(1)(h).
[178] Madhu & Oliver, *supra* note 158154154 at 11.
[179] *FRA*, *supra* note 6, s 3(1)(i).
[180] *Ibid*, s 2(a).

This is a very significant provision in the process of democratic decentralization, which legislation such as the *FRA* is aimed at. It is an aspect that will be dealt with in more detail below.

j) Recognition of the rights ensured under various State laws/Autonomous District Councils in the Fifth and Sixth Schedule areas.

k) "Right of access to biodiversity and community right to intellectual property and traditional knowledge related to biodiversity and cultural diversity."[181] This was intended to protect the diverse traditional knowledge of tribal peoples concerning biodiversity.

l) Rights over and above any traditional rights that are not specifically added in Clauses (a) to (k) and which exclude the "traditional right of hunting or trapping or extracting a part of the body of any species of wild animal".[182]

m) The right to *in situ* rehabilitation of Forest Dwelling Scheduled Tribes and Other Traditional Forest Dwellers, who are displaced without legal entitlement or rehabilitation prior to the cut-off date of December 13, 2005. This provision was added to address the massive displacement suffered by tribal populations, due to an excessive number of developmental projects on forest land.

Furthermore, section 4 of the *FRA* prescribes conditions for the recognition and vesting of rights specified within it. These comprise the following:

a) Land should be under the occupation of forest dwellers before the cut-off date (December 13, 2005).[183]
b) The rights claimed under the *FRA* are inalienable and non-transferable, and they can be passed to others only by inheritance. If the claimant is married, the land rights shall be registered in the name of both spouses, while in the case of a single person, they shall be registered in the name of a single head.[184]

[181] *Ibid*, s 3(1)(k).
[182] *Ibid*, s 3(1)(l).
[183] *Ibid*, s 4(3).
[184] *Ibid*, s 4(4).

c) A potential claimant shall not be evicted or removed until the process of recognition and verification is completed.[185]
d) The forest rights recognized shall not exceed four hectares of land and are constrained to areas occupied by forest dwellers (the area of four hectares is not applicable to Community Forest Resource rights).

3.3.2 Institutional Reforms under the Forest Rights Act (FRA)

The *FRA* unambiguously clarifies that "the Gram Sabhas are the authority to initiate the process for determining the nature and extent of individual or community forest rights or both". Section 5 of the *FRA* provides for certain major institutional reforms by altering the relationship between the Forest Department and tribal peoples. It empowers *Gram Sabhas* to

(a) "…[P]rotect the wildlife, forest, and biodiversity;
(b) Ensure that the adjoining catchment area, water sources, and other ecologically sensitive areas are adequately protected;
(c) Ensure that the habitat of forest-dwelling Scheduled Tribes and other traditional forest dwellers are preserved from any form of destructive practices affecting their cultural and natural heritage;
(d) Ensure that the decisions made in the *Gram Sabha* to regulate access to community forest resources and stop any activity which adversely affects wild animals, forest, and biodiversity are complied with".[186]

The word "empowers" provides legal validation for the powers of the *Gram Sabhas* in some important areas, such as the protection of wildlife, forest, and biodiversity. *Gram Sabha* decisions in fact, are binding on the right-holders. This way, decision-making powers are devolved from the Forest Department to traditional tribal institutions. The *Gram Sabhas* are the competent authority for determining, receiving and verifying claims under the *FRA*. They are also authorized to hear and resolve conflicts regarding the claim process. Furthermore, these village assemblies are entrusted with the power to constitute a committee for the protection and management of resources. For such committees, known as Forest Rights Committees (FRCs), they are entitled to elect

[185] *Ibid*, s 4(5).
[186] *Ibid*, s 5.

members. The FRCs thus constituted should have a minimum of 10 and maximum of 15 persons. Moreover, two-thirds of their members must be from Scheduled Tribes, and at least one third should be women.[187] These FRCs are intended to assist the *Gram Sabhas* with the process of collating, verifying, and approving claims. In effect, the processes carried out under the *FRA* decentralize forest governance from forest bureaucracy to village assemblies. Furthermore, in Chapter IV, the *FRA* explains other authorities and procedures for vesting forest rights. A four-tier institutional structure is constituted under the Act. Apart from the *Gram Sabhas*, there is the Sub-Divisional Level Committee (SDLC), District Level Committee (DLC) and State Level Monitoring Committee (SLMC).

The SDLC is the next level of authority, consisting of government officials, such as the Sub-Divisional Officer and one Forest Officer-in-charge. Moreover, three members are drawn from *Block* or *Tehsil.*[188] Two of these members must be from Forest-dwelling Scheduled Tribes.[189] SDLCs are intended to ensure the functioning of a free and fair *Gram Sabha* and are expected to raise awareness of provisions of the law.[190] These Committees have the authority to collate, examine, and consolidate claims decisively filed by *Gram Sabhas.* They are also entrusted with the task of coordinating with other SDLCs to resolve overlapping claims from different Districts.

SDLCs subsequently forward these claims to a DLC, which is a body chaired by the District Collector, Divisional Forest Officer, and three members of the District *Panchayat* (two of these being from Scheduled Tribes/forest dwellers).[191] DLCs have to ensure that necessary information about the *FRA* is provided to the *Gram Sabhas* and FRCs. They also ensure that the *FRA*'s objectives are kept in mind throughout the process of verifying and approving a claim. Nevertheless, although they have the authority to examine, consider and approve claims, they are bound to hear the claimants/*Gram Sabhas*, before issuing any rejections and must give a valid reason for any such rejection.[192]

[187] *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest rights) Rules, 2007*, (2008) Gazette of India Extraordinary II, s 3(i), 10, r 3(1) [*FRA Rules, 2007*].
[188] Tehsil or Block is local government at a sub-district level which consists of some villages and towns.
[189] *FRA Rules, 2007*, *supra* note 187187187, r 5.
[190] *Ibid*, r 6.
[191] *Ibid*, r 7.
[192] *Ibid*, r 14(5).

Finally, SLMCs are State-level committees, consisting of: a Chief Secretary as Chair; Secretaries in Charge of the Revenue Department; the Forest Department; *Panchayati Raj*; a Tribal or Social Welfare Department; three members of the Tribal Advisory Council of members of the state legislative assembly, as nominated by the State Government; and the Commissioner for Tribal Development. SLMCs are appointed to regularly monitor the process of recognizing and vesting in claims and reports submitted to them. The *FRA* also guarantees any aggrieved person, by order of the *Gram Sabha* and an SDLC, the right to petition an SDLC and DLC, respectively, within 60 days of the date of a decision.

3.3.3 Evidence under the Forest Rights Act (FRA)

One of the main hurdles in the implementation of legislation such as the *FRA,* is the evidence to be produced by tribal communities to prove that they are the occupants of land that was claimed before December 13, 2005 and that they depend on the forest for their *bona fide* livelihood. Although there were certain procedural ambiguities in the evidence requirements under the *FRA*, these were later clarified by Rule 13 of the Forest Rights Rules, which clarify the oral and documentary evidence admissible for recognizing and vesting forest rights. They consist of:

a) public documents, government records such as gazetteers, census, survey and settlement reports, maps, satellite imagery, working plans, management plans, micro-plans, forest enquiry reports, other forest records, record of rights by whatever name called, pattas or leases, reports of committees and commissions constituted by the government, government orders, notifications, circulars, resolutions;

(b) government-authorized documents such as a voter identity card, ration card, passport, house tax receipts, domicile certificates;

(c) physical attributes such as a house, huts and permanent improvements made to land including leveling, bunds, check dams and the like;

(d) quasi-judicial and judicial records including court orders and judgments;

(e) research studies, documentation of customs and traditions that illustrate the enjoyment of any forest rights and having the force of customary law, by reputed institutions, such as the Anthropological Survey of India;

(f) any record including maps, a record of rights, privileges, concessions, favours, from the erstwhile Princely States or provinces or other such intermediaries;
(g) traditional structures establishing antiquity such as wells, burial grounds, sacred places;
(h) genealogy tracing ancestry to individuals mentioned in earlier land records or recognized as having been a legitimate resident of the village at an earlier period of time;
(i) statement of elders other than claimants, reduced in writing.

Indigenous populations across the globe have tended to rely on oral as opposed to written history. Hence, the acceptance of both documentary and oral evidence, as in Rule 13(g) and (i) of the Forest Rights Rules, has made the verification and claim process more accessible to tribal populations. Furthermore, Rule 13(2) of the Forest Rights Rules, which provides for the Community Forest Resource evidence requirement, has enlarged the scope of Community Forest Resource claims under the *FRA*. It even includes:

> traditional grazing grounds; areas for collection of roots and tubers, fodder, wild edible fruits and other minor forest produce; fishing grounds; irrigation systems; sources of water for human or livestock use, medicinal plant collection territories of herbal practitioners" and "remnants of structures built by the local community, sacred trees, groves and ponds or riverine areas, burial or cremation grounds.[193]

Thus, one could argue that the acceptance of even oral evidence for the *FRA* claim process has legitimized the role of traditional knowledge and widened the scope of the *Gram Sabhas* in these processes.

3.3.4 The Forest Rights Act (*FRA*) and Its Interface with Other Major Forest Legislation and Policies

The existence of conflicting legalities in forest governance is a major challenge and one that was widely discussed after the enactment of the *FRA*. Section 13 of the *FRA* unambiguously states that "the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force".[194] It has already been discussed above how the categorization of forest under the *IFA* and *WLPA* has resulted in the alienation of tribal peoples from the forest. The *FCA* is another major piece of legislation with a centralized institutional

[193] *Ibid*, r 13(2)(c).
[194] *FRA*, *supra* note 6, s 13.

structure, which functions through central government on the "dereservation of forests or use of forest land for non-forest purposes".[195] As mentioned earlier, the *IFA* categorizes forest as Reserved Forest, Protected Forest, and Village Forest, whereas the WLPA classifies it as a national park, wildlife sanctuary, or tiger reserve. However, in many areas, the settlement processes associated with these categories run counter to the interests of tribal populations, whereby they are exposed to mass displacement if their rights are not recorded during settlement. Nevertheless, the *FRA* recognizes forest rights in all these categories of forest and clarifies that no distinction shall prevail between them. Since the *IFA*, *WLPA*, and *FCA* are three important pieces of forest legislation, with direct impacts on *FRA* implementation, this section examines whether the *FRA* and its rules have attempted to rectify overlaps and inconsistencies within the central legislation.

The *FRA* is exclusively concerned with the recognition and vesting of pre-existing rights in an attempt to rectify past erroneous processes under the *IFA*. The latter granted the authority to any claimant residing within a proposed Reserved Forest to file a claim for forest produce.[196] The Forest Settlement Officer possessed the authority to verify, grant, or reject such a claim. As mentioned previously, tribal populations in India are largely dependent on forest and forest produce. Therefore, the presence of a Forest Official in the verification process has had a huge impact on establishing the rights of tribal peoples for a very long period. However, the authority of the Forest Settlement Officer was reversed on the enactment of the *FRA*, which granted ownership rights over minor forest produce to tribal peoples and more specifically, to traditional village institutions or *Gram Sabhas*.[197] This deviated from earlier conservation regimes, which surrendered all their controlling power to the Forest Department. Tribal peoples were thus given the right to participate in benefits only from timber or usufruct. In addition, at present, it is the *Gram Sabha* or committee authorized by the *Gram Sabha* that has the power to grant transit permits for Minor Forest Produce, even for Community Forest Resources.

The *WLPA* is another important piece of legislation with a direct impact on *FRA* implementation. Section 5 of *the FRA* speaks about protecting wildlife and biodiversity through a more participatory and decentralized approach. It seeks to ensure conservation through the *Gram Sabhas*

[195] *FCA*, *supra* note 145, s 2.
[196] *IFA*, *supra* note 136136136, s 12.
[197] *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest rights) Amendment Rules, 2012*, (2012) Gazette of India Extraordinary II, s 3(i), 8.

or committees constituted by them. The *FRA* unambiguously clarifies that forest rights are to be recognized in protected areas under the *WLPA*. The *FRA* thus makes it very clear that any attempt to evade the recognition of forest rights, such as rights over minor forest produce, constitutes a violation of the *FRA*. Another important aspect to be highlighted here is the creation of Critical Wildlife Habitats,[198] and the adoption of "inviolate areas for wildlife protection" inside such Habitats, following the recognition of forest rights through a democratic process.[199] The *FRA* prevents any subsequent diversion of Critical Wildlife Habitats by Central or State Government, or indeed by any other entity.[200] It is also quite clear that any subsequent modification or resettlement shall be made only after obtaining the "free, informed consent of the Gram Sabhas in the areas concerned to proposed resettlement".[201]

The *FCA* is equally cruicial, as it significantly impacts the forest conservation regime in India. In this thesis, it has already been explained how a centralized bureaucratic governance structure has been preserved through this legislation and reasserted via court cases. In *Godaverman,* for instance, the Indian Supreme Court upheld the position that the state government should obtain the prior approval of the central government before undertaking a forest diversion. However, the *FRA* clarifies that the recognition of forest rights need not involve the *FCA*. To clarify, section 4(7) of the *FRA* mandates that any forest rights conferred must be free of all encumbrances and procedural requirements, including clearance under the *FCA*, which requires paying the net present value and "compensatory afforestation" for the diversion of forest land.[202] Thus, through the *FRA*, the Supreme Court decision on net present value and compensatory afforestation has been overridden.

The *FCA* also has a significant relationship with development rights, as mentioned under section 3(2) of the *FRA*. It has already been stated elsewhere in this study that there are two important conditions attached to development rights, these being the one-hectare limit on the land for

[198] Critical Wildlife Habitat (CWH) is an area within a national park or sanctuary under the *WLPA* that is required to be kept inviolate for the purpose of wildlife conservation.
[199] See *FRA*, *supra* note 6, s 4 (2).
[200] See *Ibid*, s 4(2). In the Indian context, the term "Diversion of forest land" denotes the reallocation of forest land for various non-forest purposes including mining projects, hydel projects, defense, construction of electrical transmission lines etc. Deforestation may or may not result from it.
[201] See *Ibid*, s 4(2)(e).
[202] See *Ibid*, s 4(2)(7); Ministry of Environment and Forest, Government of India, *National Forest Policy* (Delhi: Ministry of Environment and Forest, 1988), online <envfor.nic.in/legis/forest/forest1.html >.

diversion and the limit on the trees to be cut during the diversion process. The mandate for obtaining clearance under the *FCA* previously hindered even minor development projects on forest land, such as the construction of primary schools, community centers, primary health centers, small canals, electricity lines, etc. However, these obstacles were dispensed with through the enactment of section 3(2) of the *FRA*, which legitimized the powers of the *Gram Sabha* as an authority to make such decisions. Furthermore, in a circular, the Ministry of Tribal Affairs mandated that consent is required from Forest-Dwelling Scheduled Tribes and Other Traditional Forest Dwellers to the diversion of forest land. Specifically, this is to be by a letter from the *Gram Sabha* "indicating that all formalities processed under the *FRA* have been carried out and they have given their consent to the proposed diversion".[203]

A further important policy framework, which developed community participation in forest resource governance in India, is the *National Forest Policy, 1988*—otherwise known as the Joint Forest Management Policy. Mounting pressure from below, namely from civil society, organizations, and other agencies has forced the government to concede greater authority to local populations over forest governance. This grant of authority is substantially different from shared governance in a decentralization framework. Joint Forest Management is a policy that still prescribes an outline for forest management in India and is projected as an important development in forest management policy. It was proposed to be implemented through an arrangement that included communities, NGOs, and the Forest Department. However, as highlighted by Max Krott and others, forest policy discourse, with its emphasis on a supervisory role by the state agencies, essentially displays a tendency to move away from a political process that ensures structural equality.[204] In contrast, the Joint Forest Management policy, which revolves around a centralized bureaucratic resource governance process, overlooks the role of tribal peoples. The associated usufruct rights are therefore not extended to individuals, but rather limited to co-operative and Village Forest committees. However, its major contradiction lies at the point where it requires close supervision by the Forest Department of the beneficiaries' activities. This was later revisited through the enactment of the *FRA*, which prescribed a plan for conservation management and the

[203] Ministry of Environment and Forest, *Government of India Circular on the Diversion of Forest Land for Non-Forest Purposes under the Forest (Conservation) Act, 1980* (New Delhi: Ministry of Environment and Forest, 2009) online: <envfor.nic.in/moef/Forest_Advisory.pdf>.
[204] See generally Max Krott et al, "Actor-centered Power: The driving force in decentralized community based forest governance" (2014) 49 Forest Policy & Economic 32 at 35-37.

regeneration of community forest resources under its section 5, Rules 4(e) and (f). The *FRA* also mandated that such plans should be incorporated into the micro-plans of the Forest Department with necessary modification, as proposed by the committee under section 4(e). Thus, the *FRA*, along with its amendment rules of 2012 has restructured the institutional arrangement under the *National Forest Policy, 1988*.

However, although there have been circulars clarifying that Joint Forest Management committees are not a substitute for a CFR management committee, there are instances where the Forest Department would nonetheless propose Joint Forest Committees as a viable alternative. Nevertheless, this has been clarified by the Ministry of Tribal Affairs, which states that equating FRA committees with Joint Forest Management committees is not legally appropriate and does not stand.

3.3.5 Community Forest Rights (CFR) as an Instrument of Decentralized Governance: Re-recognition of a Common Property Regime

The common property regimes that were prevalent during the pre-colonial era were successful in yielding long-term benefits.[205] However, some faded into non-existence, due to a variety of factors that included economic transformation. In India, they were "legislated out of existence", both by formalizing and codifying property rights to forest lands and, later, through the nationalization of the forest.[206] The rationale was that state ownership would be more efficient in ensuring sustainable resource governance. Nevertheless, an analysis of the relevant literature has unequivocally clarified that such an argument against community ownership is unfounded. India has made a noteworthy effort to undo the colonial influence in its legal framework, notably through the adoption of the *FRA*. The most important aspect of this is the CFR provision that grants rights to tribes over the protection and management of forest land. This has enabled the democratization of forest governance through the devolution of powers to *Gram Sabhas*. Therefore, CFR implementation has played a significant role in ensuring the authority and consent of *Gram Sabhas* concerning resource governance. The FRA has achieved this by legally validating various powers

[205] Margaret McKean, "Common Property: What is it, What is it Good for and What Makes it Work?" in Clark C. Gibson Margaret A. McKean & Elinor Ostrom, eds, *People and Forests: Communities, Institutions and Governance* (Cambridge: MIT Press, 2000) at 27, 34.
[206] Antara & Sroyon, *supra* note 134134134 at 308.

that the traditional tribal bodies exercised during the colonial era. Livelihood security is ensured by vesting the right to collect and sell minor forest produce in communities under state control for more than a century throughout the colonial and post-colonial periods.[207] The *FRA* also prevents any further eviction or displacement of tribal peoples, until the completion of various processes to recognize and verify the different rights under it. It thereby seeks to vest control over forest land in *Gram Sabhas.*

Various rights defined under section 3(1) of the *FRA* have already been discussed in this study. For example, the CFR concept includes all community rights defined under section 3(1), including rights over non-timber forest produce, the rights of particularly vulnerable tribal groups, the right to convert forest villages into "revenue villages," the right of access to biodiversity, and so on. Hence, for the current case study analysis, this research will focus on CFR implementation, since it plays a significant role in asserting the role of *Gram Sabhas* in resource governance.

Although official government data from India's Census and Forest Survey indicates that half of India's forests fall within the CFR category, only a small proportion of these lands have been recognized and distributed so far.[208] As a result, there are still 34.6 million hectares of forest that could be recognized as CFR lands in India, and the potential beneficiaries of this land could amount to around 200 million tribespeople and Other Traditional Forest Dwellers from over 170,000 villages.[209]

CFR implementation in India has gained momentum over the past two-three years. To address the inadequacies of its implementation, India's Ministry of Tribal Affairs issued a *Guideline for the States* and amended FRA Rules in 2012, which mapped out the CFR concept. Various issues, such as the lack of awareness of the relevant laws, the compulsion to produce certain evidence, and the improper convening of *Gram Sabhas* have been cited as slowing down CFR implementation.[210] Moreover, the majority of state agencies have focused on the implementation of individual forest

[207] *FRA*, *supra* note 6, s 3(1)(c).
[208] Rights and Resources Initiative, Vasundhara & Natural Resource Management Consultants, *Potential for Recognition of Community Forest Resource Rights Under Indias Forest Rights Act- A Preliminary Assessment* (2015) at 3, online: < http://www.rightsandresources.org/wp-content/uploads/CommunityForest_July-20.pdf >.
[209] Kumar, Singh & Rao, *supra* note 139139 at 41.
[210] Geetanjoy Sahu & Prerna Chaurashe, "Implementation of Community Forest Rights Under Forest Rights Act 2006 in Gondia District of Maharashtra An Analysis of Process and Impact" at 17, online: <http://dspace.tiss.edu/jspui/bitstream/1/7800/1/CFR%20Implementation%20in%20Godia-Working%20Paper.pdf >.

rights. Nevertheless, it cannot be denied that even after all these efforts, there are problems with CFR implementation. However, many villages in states like Maharashtra, Odisha, Madhya Pradesh, Kerala, and Karnataka Gujarat have made promising efforts in this area.[211] There has clearly been landmark progress made in certain states, with Maharashtra being one of the most pioneering. Here, Gadchiroli is a high-performing District. In fact, it has a history of organized resistance on the part of its tribal population, which has gradually strengthened its traditional institutions via *Gram Sabhas* and its Indigenous tribes. *Gram Sabhas*, which were almost defunct for a long period, was revitalized through a political process on the part of the local tribal population, together with subsequent *FRA* implementation. Hence, in an example involving the Gadchiroli District of Maharashtra, the next part of this research analyzes the strength of the *Gram Sabhas* and their contribution to effective *FRA* implementation.

3.4 Example of the Village of Mendha Lekha in the Gadchiroli District of Maharashtra

Maharashtra is the second most populous state in India, located in the west of India and home to a tribal population of over 8.9%. Its forest totals more than 20% of the State. Better *FRA* implementation and more specifically, CFR implementation in Maharashtra is owed to various historical and political factors. The "forest land" determined by law during the colonial period was treated as a source of timber for a significant length of time. The rights of the people living on such land were consequently displaced, and they were considered as encroaching upon the land. Their socio-economic deprivation and lack of political voice resulted in various tribal uprisings. Political mobilization in Maharashtra overall also influenced these movements, partly triggering the enactment of the *FRA*.[212] Aside from this, a history of strong political movements and active civil society groups also played an important role in improving *FRA* implementation in this area.[213]

However, a major challenge faced by most of the states lagging behind in their *FRA* implementation has been ignorance of the concept of *Gram Sabhas* under the *FRA*.[214] Maharashtra,

[211] *Ibid* at 7.
[212] CFR Learning and Advocacy Group Maharashtra, *Promise and Performance: Ten years of the Forest Rights Act in India* (Pune: CFRLAGM, 2017) at 18, online: <www.atree.org/sites/default/files/Maharashtra_FRA_CFR_Promise_and_Performance_June2017.pdf >. [CFR-LA Report].
[213] *Ibid.*
[214] *Ibid* at 22.

is an exception. An interesting example of *FRA* implementation involving a politically conscious *Gram Sabha* in this region is the village of Mendha Lekha in the Gadchiroli District of Maharashtra.[215] Gadchiroli is in the north-east of Maharashtra and is considered as one of the least developed districts in the state. It has a total geographical area of 14412.0 km^2, with around 75.96% of this area falling into the administrative categories of reserved or protected forest.[216] It has one of the highest levels of forest cover in the State of Maharashtra and borders on two other States, Andhra Pradesh to the south and southwest and Chhattisgarh to the east. It is also home to the endogamous Madia and Gond tribes. According to the 2011 Census, these tribal groups constituted 38.70% of the district's total population, resulting in a tribal population of 414,306 in the district. Moreover, Gadchiroli is a mineral-rich forest region, with a high concentration of forest resources. However, it is also denounced as the epicenter of left-wing extremism in the state of Maharashtra. At the same time, it was the first district to actively sanction CFR claims covering 98% of the land under CFR utilities.

Therefore, this present study explores a village, namely Mendha Lekha, where over 80% of the land is covered with forest. As a result, the local tribal population, mainly made up of Gond tribes, relies on the forests and forest resources. Moreover, the implementation of *PESA* (since most of the land falls under the Fifth Schedule) and the *FRA* have played a profound role in resource governance there. Various reasons have been proposed for the high number of CFR claims made in Gadchiroli, such as a political scenario emerging through the influence of left-wing extremism and the availability of Nistar Patrak[217] in the District.

This section, therefore, describes what is considered to be one of the most important and workable models of CFR implementation in India. It also examines how the emphasis on devolution of decision-making powers to *Gram Sabhas* under the *FRA* has paved the way for a sustainable, decentralized development model in Mendha Lekha. Although there have been initiatives for the implementation of individual forest rights, the emphasis has mainly been on CFR, used as an instrument to reach out to local tribes and secure rights that are denied to them.

---

[215] *Ibid.*

[216] See generally Office of the District Collector and District Magistrate, *District at a Glance*, online: Gadchiroli District <http://gadchiroli.nic.in/enmglagad2.htm >.

[217] Nistar Patrak is a register in which communities' rights to fuel, water, and grazing on government land is recorded.

3.4.1 Tracing Tribal Mobilization towards a Village Republic

The history of a strong *Gram Sabha* and tribal self-rule may be traced back to tribal resistance in the area. Even under local landlords, the Gond tribes enjoyed unrestricted use of the forest and its resources during the pre-British period.[218] However, as in other Indian States, their customary rights were deeply infringed by the British government, and this injustice continued for a long period, even beyond Indian independence.[219] In the name of issuing permits for collecting grass and non-timber forest produce, forest officials started collecting bribes from local tribes. This increased corruption substantially in the area.[220] A century of oppression followed, with such corruption amongst public servants resulting in unrest amongst the region's Gond tribes. The situation was aggravated in the 1970s when the Maharashtra government decided to construct two dams in Gadchiroli. For the local tribal population, these dams meant socio-cultural disruption and displacement from their land.[221] Subsequently, due to strong tribal resistance, the government decided to withdraw from this project. This anti-dam movement was followed by others, such as "*Jungle Bachao, Manav Bachao*"(Save Forest, Save Humanity) under activists like Hirabai Hiralal and Devaji Tofa, who were deeply involved in tribal issues in Mendha Lekha that led to the foundation for tribal self-rule in the village.[222] However, it also necessitated the restoration of traditional governance structures and reduced government influence in the area.

In 1988, through a study and discussion group, the *Gram Sabha* was consequently revitalized in Mendha Lekha and focused on gathering all the relevant legal and revenue documents concerning the village. Furthermore, a decision was made to revive the *Ghotul*, a traditional cultural space, in order to disseminate knowledge about tribal life to adolescents in the village.[223] Unfortunately, this led to conflict between the tribal populations and the Forest Department, which seized the bamboo used to construct the *Ghotul*.[224] In response to this violent action, thirty-two villages came together and convened a *Gram Maha Sabha* (an assembly of several different *Gram Sabhas*), including

[218] Supriya Singh, "Participatory Forest Management in Mendha-Lekha, India" in Hali Healy et al, eds, *Ecological Economics from the Ground Up* (London: Routledge, 2012) 191 at 221 [Singh].
[219] *Ibid.*
[220] *Ibid.*
[221] *Ibid.*
[222] *Ibid* at 222.
[223] *Ibid.*
[224] *Ibid.*

Mendha Lekha.[225] There was a decision reached to construct a *Ghotul* in different places as an act of non-violent agitation. It represented a temporary victory for the tribal population, as a *Ghotul* was constructed in different places, but given that colonial legislation provided indeterminate powers to the Forest Department over these resources, with bamboo being one of the most important resources of economic use, this conflict was prolonged until the enactment of the *FRA*. Nevertheless, the outcome of these efforts was that Mendha Lekha's *Gram Sabhas* evolved into a more transparent and participatory body, which adopted consensus-based decision-making.[226] This later contributed substantially to FRA implementation, since the *Gram Sabha* is the most important institution in this process.

Although all those who live in the village are permitted to attend meetings of the *Gram Sabha*, irrespective of their age or gender, the *Gram Sabha* itself is comprised of one male and one female member of each household. It convenes once a month to discuss different issues. In cases of emergency, the meeting extends until a consensus is reached. Around 75% of *Gram Sabha* members are normally expected to attend meetings, with the uniform participation of men and women.[227] Along with government departments, the *Gram Sabha* plays an vital role in implementing various forestry and development programs. However, it will accept only funds generated through such government programs and rejects any major external funding. In fact, a significant source of funding for the *Gram Sabha* is the 10% donation made by its members from their wages.[228] Most importantly, an informal study circle known as the *Abhyas Gats* regularly gathers in Mendha Lekha to discuss various issues related to the forest. Occasionally, experts are brought in from outside to discuss specific topics, in order to increase villagers' awareness of their legal and political rights. This enables informed decisions to be made by the *Gram Sabha* and enhances communication skills amongst the tribespeople. The *Abhyas Gats* analyzes forest-related legislation and policies. Consequently, the village of Mendha Lekha has gradually evolved into a "village republic" by reviving and empowering its traditional governance structure.

---

[225] *Ibid.*
[226] Nilesh Heda, "Folk Conservation Practices of the Gond Tribal of Mendha (Lekha) Village of Central India" (2012) 11 Indian J Traditional Knowledge 727 at 728.
[227] Neema Pathak & Erica Taraporewala, "Towards Self-Rule and Forest Conservation in Mendha-Lekha Village, Gadchiroli" (2008) at 6, online: < https://www.iccaconsortium.org/wp-content/uploads/2015/08/grassroot-india-mendha-2008-en.pdf>.
[228] *Ibid* at 21.

The *Gram Sabha* has formed part of various forest conservation and management activities in this region since the end of the 1980s, while local communities rely exclusively on the forest to meet their daily domestic needs.[229] However, they regulate their levels of resource extraction through consensual decision-making, with external forces, including the Forest Department or other government departments, being prevented from conducting forest activities without the permission of the *Gram Sabhas*. The only commercial activity allowed within the forest is the collection of non-timber forest produce. Moreover, local tribes fight against any destructive ecological practices.[230]

3.4.2 Sustainable Watershed Management Efforts

An empowered *Gram Sabha* and the influence of regular study circles have made the village aware of sustainable resource governance strategies in the forest surrounding Mendha Lekha. The most significant of these are the *Gram Sabha*'s watershed management efforts, with over a thousand gully plugs. This represents an attempt to clear forest streams and ponds of debris. Although the *Gram Sabha* approached government agencies and the National Bank for Agriculture and Rural Development (NABARD) for financial aid to support this mission, it was denied by both the above-mentioned entities. Remarkably, the *Gram Sabha* decided to proceed without the support of these agencies, relying instead on the voluntary labour of its own people.[231] Nevertheless, their attempt to construct a pond within the forest during a dry month in 1993 was initially denied by government agencies on the grounds that construction is not permitted on forest land. However, by appeasing these agencies, the local population succeeded in building a *van taalab* (forest pond) using their employment guarantee fund and claiming that it was being constructed for animals.[232] However, they did not have sufficient funds to complete the work and so the *Gram Sabha* decided to introduce fish into the pond. Permission to catch fish from the pond was subsequently given to anyone helping to complete the excavation work. Under this arrangement, the pond was completed by 1994. Even to this day, permission to fish in this pond is granted in exchange for the contribution of labour to clean it. After this successful effort, the local population constructed *baodis* (small

[229] *Ibid* at 13.
[230] Singh, *supra* note 218 218 at 225.
[231] *Ibid.*
[232] *Ibid.*

irrigation wells/ponds) near agricultural land for their farming needs. Although they approached NABARD again for the funds to construct these *baodis*, the Bank initially refused their request, but through relentless persistence, the *Gram Sabha* was eventually successful in convincing the Bank to support them in the construction of 17 *baodis*. Mendha Lekha now relies exclusively on these ponds and wells for its water.

Nevertheless, it is interesting to note that the Forest Department has completely overlooked all these proactive initiatives of the Gram Sabha towards forest conservation. In fact, the declaration of the Mendha Lekha forest as a reserved forest in 1991 was used as an instrument to alienate the local community from it. Moreover, the Joint Forest Management Resolution initiated by the State of Maharashtra in 1992 to regenerate degraded forest was not adopted in Mendha Lekha, based on the premise that the forests in Gadchiroli cannot be categorized as "Degraded".[233] However, in continued negotiation efforts by the *Gram Sabha*, Maharashtra included Mendha Lekha in its Joint Forest Management framework. Thereafter, the Forest Protection Committee or *Van Suraksha Samiti* was created under the Joint Forest Management program in Mendha Lekha.

The *Gram Sabha* has set out specific rules for Joint Forest Management implementation, emphasizing that any work conducted within the forest requires permission from the *Gram Sabha*. These rules also clarify that the villagers have powers to punish offenders within and outside the village.[234] Thus, the role of the *Gram Sabha* has gradually been reinforced. Bamboo harvesting was an important activity carried out by the village under Joint Forest Management in 1999. The bamboo left over from the villagers' personal use was sold to paper mills. However, the percentage profit expected by these communities from the sale of bamboo was never passed on to them. Moreover, there were concerns in the community over the method of bamboo harvesting applied through this joint effort. The attitude of the contractors from the private paper mills was that they "treated the bamboo resource as a stock to be depleted while the villagers saw the bamboo stands as a permanent fund that could provide a flow of regular, sustainable resources."[235] The tribal economy was therefore reliant on a non-commercial perception and the villagers' understanding

[233] *Ibid.*
[234] *Ibid* at 236.
[235] *Ibid* at 227.

was rather cultural and ecological.[236] This created a rift between the *Gram Sabha* and the Forest Department.

These efforts made the tribal population in this region aware of the significance of community existence. The population embraced "*Gramdan*",[237] declaring that "[w]e have our government in Mumbai and Delhi, but in our village, we ourselves are the government".[238] Through this, the villagers surrendered their individual rights to the *Gram Sabha*, and a decision was made to engage in community farming on the land. *Gramdan* is a step towards true democracy, which enables all voices in the decision-making process to be heard. These voices are thus involved in the final decision.[239] The idea is to retain the community over individual interests and it widens the scope of the *Gram Sabha'*s negotiating powers. This community-centric approach institutionalized in Mendha Lekha has contributed to gradual tribal empowerment, not just within the village but also in other tribal villages outside Gadchiroli.[240]

3.4.3 The *Forest Rights Act* (*FRA*) and Its Aftermath

The enactment of ***the*** *FRA* added new force to these self-rule practices of the *Gram Sabha* in Mendha Lekha. The rights under the *FRA* enabled the *Gram Sabha* to protect, manage, and conserve the forest and its resources. The *FRA* has therefore provided a strong negotiating platform for tribes by transforming the role of the Forest Department from that of "custodians of the forest" to that of mere facilitators of conservation. However, the presence of an active *Gram Sabha* and a responsive administration in Gadchiroli, prior to the enactment of the *FRA*, was a decisive factor in initiating the claims procedure. While the majority of Indian states mistakenly focused on individual rights under the *FRA*, Mendha Lekha, due to its strong community *Gram Sabha* structure, decided to give attention to CFR implementation. Furthermore, the study groups mentioned above played a significant role in reaching out to the rest of the population regarding

---

[236] *Ibid.*
[237] "Gram" means Village and "Dan" means gift. Thus, "Gramdan" means gift of a village whereby the villagers transfer the right to title and management of their property to their village assembly. See *The Maharashtra Gramdan Act, 1964*, Maharashtra Act No. XXIII of 1965, s 2(1)(a).
[238]See Interview of Devaji Tofa by Amit Mitra in "In our Village, we are the Government", *Down to Earth* (30 November 1995) 35.
[239] See generally Parag Cholkar, "Revisiting Bhoodan and Gramdan in the context of Land Rights and Social Transformation" in Varsha Bhagat-Ganguly, ed, *Land Rights in India: Policies, Movements and Challenges* (New York: Routledge, 2014) 230.
[240] Singh, *supra* note 218 at 225.

the legal formalities at the district and *Taluka*[241] levels. These efforts hastened the process for CFR claims in Gadchiroli, with Mendha Lekha becoming the first village in the country to be granted CFR in 2009.

Ultimately, more than 1800 hectares of forest were allocated as CFR lands in Mendha Lekha, and around 14,000 claims were granted during the 2011-12 period. The model developed in this village was later adopted as a standard format across the district, as well as in different parts of the country. A forest management strategy was prepared by the Mendha Lekha *Gram Sabha*, "which included need-based extraction and sale of forest produce such as bamboo, the establishment of no-go zones for wildlife protection, and drafting a village biodiversity register".[242] Support from strong institutional arrangements in the village ensured effective forest governance, which helped secure livelihoods, as well as ensuring ecological security. The constitution of the *PESA* monitoring group, comprising the *Gram Sabha* and civil society groups, took place after the enactment of the Maharashtra Rules under the *PESA* in 2014, but it also played a role in properly implementing the *PESA* and the *FRA* in the State.[243]

3.4.4 Post-Claim Scenario

Section 5 of the *FRA* entrusts the right to manage and plan CFR lands to *Gram Sabhas*. A committee must then be constituted under Rule 4(1)(e) to safeguard these rights and prepare plans for the conservation and management of these CFR areas. This provision facilitates the strengthening of CFR implementation in the post-claim stage, but various *Gram Sabhas* have adopted different strategies. Interestingly, the Mendha Lekha *Gram Sabha* has brought in ecological experts, such as Madhav Gadgil,[244] to sit on the committee entrusted with the task of collecting information and preparing a management plan.[245] It has also developed a plan for the sustainable harvesting of bamboo in order to avoid its exploitation since bamboo is a major source of livelihood for the people of this region. Over the years, they have shifted their focus towards

[241] A Taluka is an administrative category in India which consists of multiple villages and town with a common administrative centre.
[242]CFR-LA Report, *supra* note 212 at 36.
[243]*Ibid* at 23.
[244] Madhav Gadgil is a famous ecological expert and a former member of the scientific Advisory Council to the Prime Minister of India.
[245] CFR-LA Report, *supra* note 212 212 at 39.

forest conservation and away from bamboo harvesting by deciding to limit harvesting to the minimum.[246] However, the model originally evolved in Mendha Lekha, with experts being brought in to prepare CFR management plans, which were later followed in different parts of the country.

3.4.5 Rights over Non-timber Forest Produce, Including Bamboo

The emphasis on rights over minor forest produce for communities is one of the most important highlights of the *FRA*. Section 2(i) brings non-timber forest produce, such as bamboo and *tendu* leaves, under the purview of minor forest produce, while section 3(1)(c) of the *FRA* provides for the collection, usage, and disposal of these lucrative resources to forest-dwelling communities. However, the harvesting of bamboo cannot merely be viewed as a measure to ensure the security of the livelihood of tribal communities. Sunita Narain, an Indian environmentalist and proponent of sustainable development, has rightly pointed out that "since 1857, bamboo has remained shackled in the grips of India's forest bureaucracy, which has refused to let go of this money-spinning forest product".[247] Thus, it is also an attempt to ascertain the power of the *Gram Sabhas* over a vital resource, which has been in possession of the Forest Department for more than a century now.

The strengthening of the role of the *Gram Sabha* through the *FRA* so that it can make decisions over the harvesting and sale of bamboo using sustainable practices has ensured the protection and regeneration of bamboo. The Gadchiroli District contributes to around 85% of bamboo production in Maharashtra.[248] It was under the control of the forest bureaucracy for more than a century, and in 1968, the Government of Maharashtra leased out bamboo forests to Ballarpur Industries Ltd. Even after the enactment of the *FRA* in 2006, local communities faced various obstacles from government agencies regarding issues that included the auctioning and transit of bamboo. Furthermore, the Forest Department granted permission to Ballarpur Industries Ltd. to clear bamboo from the forest in 2011. This created unrest in areas covered by CFR, since bamboo was mainly found in these. The acknowledgment by the Director of the Maharashtra Bamboo Mission that bamboo forests in Maharashtra are mostly located on forest land recognized under CFR was

[246] *Ibid.*
[247] Aparna Pallavi, "Bamboo Freed", *Down to Earth* (16-31 May 2011) 22.
[248] CFR-LA Report, *supra* note 212 at 41.

"technically" an admission that the *Gram Sabhas* in these forests are the largest producers of bamboo in Maharashtra.[249]

Mendha Lekha, as the first village to be granted CFR, began collecting bamboo from its 1800 hectares of CFR land. Even after years of repeated efforts, since the Department was not keen to issue a transit pass,[250] the *Gram Sabha* launched a series of protests.[251] These efforts bore fruit when the Ministry of Environment, Forest and Climate Change intervened after their repeated struggles and directed the Forest Department to recognize the right of the *Gram Sabha* to issue transit passes for selling and auctioning bamboo after harvesting.[252] This initiated a transformation in the state's bamboo regime. In 2012, an amendment was made to the rules under the *FRA*, which authorized the committee set up under section 4(1)(e) to modify and issue transit permits in relation to the transportation of minor forest produce. Although different villages in Gadchiroli approached government officials for assistance with the bamboo trade, the response was very passive, pushing Mendha Lekha's *Gram Sabha* to conduct a successful independent sale and auction to contractors.[253] Thus, Mendha Lekha became the first village to exercise CFR over the harvesting of bamboo. Through their strategies and planning in this area, the Mendha Lekha *Gram Sabha* overturned the common perception that local communities are not competent to manage forest produce. It also set a record by earning more than Rs.10 million in the initial years of bamboo harvesting. However, as mentioned earlier, the Mendha Lekha *Gram Sabha* has since shifted its focus from bamboo harvesting to forest management, thereby pushing the agenda of needs-based bamboo harvesting.

The Mendha Lekha model of forest conservation and governance was later adopted as a guideline by various other *Gram Sabhas* in the implementation of section 2(1) of *the FRA*. Thus, at present, bamboo production, employment creation, and forest conservation go hand in hand at Mendha Lekha, with a focus on clump management and various soil conservation techniques. A new method of forest management has consequently been applied to ensure a secure livelihood. The

[249] *Ibid.*
[250] Transit passes were issued by the Forest Department for the transfer of timber and other forest produce under the 1927 *Indian Forest Act*.
[251] *Ibid.*
[252] *Ibid* at 42.
[253] CFR-LA Report, *supra* note 212 at 42.

bamboo harvesting initiative under CFR in Mendha Lekha underlines how the conservation of forest produce is best achieved by providing support to *Gram Sabhas*.

The Mendha Lekha case study is an important one in the history of sustainable resource governance amongst traditional institutions. The decision-making process involved was unique in that it relied completely on the *Gram Sabha* while ensuring that decisions were based on consensus. Informed decision-making is an important challenge, which most traditional institutions face in the process of resource governance the world over. India is no different in this respect. However, arrangements such as study groups in Mendha Lekha gave the villagers a platform for informed decision-making on various issues, including matters of conservation and resource management. Moreover, the equal gender representation made governance more inclusive, while transparent decision-making brought the village closer to the process of self-rule. These efforts were strengthened after the implementation of the *FRA*, which enabled them to make decisions that optimally suited them. Furthermore, instruments like the *FRA* provided a legal framework for the *Gram Sabha*'s assertion of power and authority. It widened the scope of this traditional institution to resource governance, while simultaneously ensuring secure livelihoods by extending rights to forest produce, namely bamboo. These rights were subsequently affirmed through several important judicial interventions by the Supreme Court of India.

3.5 Important Judicial Interventions in Application of the Forest Rights Act (FRA)

The judiciary has always played an important role in confirming the alienation faced by India's tribal populations since independence. *Terra nullius* and "eminent domain" principles have been indiscriminately used by various constitutional courts to justify development projects that are detrimental to the interests of tribal communities. For instance, the Supreme Court of India's verdict in the *Godaverman* case worsened the relationship between tribal communities and the forest and depicted them as encroachers on their own traditional land. It has already been discussed in this paper how the enactment of the *FRA* in 2006 provided a legal foundation for the claims of tribal communities to forest land. The *FRA* rights regimes were later interpreted through some judicial decisions. This section explores such judgments that have asserted the role of *Gram Sabhas* under the *FRA*. As the legislation is evolving, the courts have had only limited opportunities to interpret its provisions.

The extraction of a natural resource has been one of the main challenges faced by Indigenous communities across the globe, ever since the colonial phase. In India, natural resources and tribal communities are mostly located in forest areas. Hence, development projects that are always claimed for the "economic advancement of the tribal population" have resulted in multiple displacements of tribal communities from such areas over the past few decades. However, this conflict between the Forest Department and tribal communities underwent a paradigm shift following the judgment of the Supreme Court of India in *Niyamigiri*.[254] This case successfully displayed how a strong *Gram Sabha* with significant legislative support can prevent a multinational Goliath from proceeding with a mining project that could have been detrimental to the interests of the communities affected and their resources.

The Niyamgiri Hills, which are rich in several endemic and threatened species of flora and fauna, extend over 250 km^2 in two districts of the state of Orissa.[255] They are inhabited by the Dongria Kondh, a particularly vulnerable tribal group distributed in around three hundred settlements across the Niyamgiri Hills. These communities traditionally depend on the forest and Minor Forest Produce for their livelihood.[256] In fact, the very existence of the Dongria Kondh communities has depended on the Niyamgiri Hills for more than a century.[257] This tribe believes that the Niyamgiri ('Hills of Law') is the abode of their deity, Niyam Raja ('King of Law'). However, in 1997, the State of Orissa signed a Memorandum of Understanding with the Vedanta Corporation to launch an aluminum refinery in the Kalahandi District.[258] The setting up of this industry required bauxite mining in the Niyamgiri Hills. The process of land acquisition started in 2002 and the refinery became operational by mid-2006. Like most development projects, it largely bypassed environmental legislation. Nevertheless, tribal activists and organizations resisted the project and initiated court proceedings against it, which helped delay the forest clearance. In 2005, after finally obtaining environmental clearance in 2004, the Government of Orissa approached the Ministry of

[254] *Niyamgiri*, *supra* note 989898.
[255]Meenal Tatpati, Ashish Kothari & Rashi Mishra, "The Niyamgiri Story: Challenging the Idea of Growth without Limits" (Pune: Kalpavriksh, 2016) at 6, online: <www.kalpavriksh.org/images/alternatives/CaseStudies/NiyamgiricasestudyJuly2016.pdf > [Tatpati et al, "Niyamgiri Story"].
[256]*Ibid.*
[257] The Dongria believe that they were settled in the plains around Lanjigarh and would go into the hills to hunt and gather food. However, eventually they started dwelling in the hills.
[258]Tatpati et al, "Niyamgiri Story", *supra* note 255 255 at 10.

Environment, Forest and Climate Change for the diversion of 660 hectares of forest land.[259] The Supreme Court intervened at this juncture through a Central Empowered Committee and a different committee was appointed by the Ministry of Environment, Forest and Climate Change to examine the environmental compliance of the project.[260] The most important of these committees was the Saxena Committee, which categorically held that

> [s]ince the company in question has repeatedly violated the law, allowing its further access to the proposed mining lease area at the cost of the rights of the Kutia and Dongria Kondh… [this] will have serious consequences for the security and well-being of the entire country. [261]

The Saxena Committee highlighted the violation of sections 3(1)(i) and 3(1)(e) of the *FRA* and in its report, further emphasized that the project violated important forest legislation, such as the *FCA* and the *Environment Protection Act, 1986*. Hence, the Ministry of Environment, Forest and Climate Change rejected the request for Stage II Forest Clearance. Aggrieved by this decision, the Orissa Mining Corporation approached the Supreme Court to quash the Order. In 2013, the apex court, through its path-breaking judgment, redefined tribal jurisprudence in India, holding that the *Gram Sabha* constitutes the competent authority to safeguard the culture and traditions of the tribal population.

For the first time, through its judgment dated 18th April 2013, the Supreme Court of India acknowledged the collective cultural claims that were missing in India's legal jurisprudence.[262] It examined the application of the *FRA* in its true spirit and held that

> the Legislature has also addressed the long-standing and genuine felt need of granting a secure and inalienable right to those communities whose right to life depends on right to forests… thereby strengthening the entire conservation regime by giving a permanent stake to the STs [Scheduled Tribes] dwelling in the forests for generations in symbiotic relationship with the entire ecosystem.[263]

---

[259]Rajshree Chandra, "Understanding change with(in) law: The Niyamgiri case" (2016) 50 Contribution to Indian Sociology 137 at 149 [Chandra, 2016].
[260] *Ibid.*
[261] See generally N C Saxena et al, *Report of the Four Member Committee for Investigating into the Proposal submitted by the Orissa Mining Company for Bauxite Mining in Niyamgiri* (2010) at 65–82, online: <envfor.nic.in/sites/default/files/Saxena_Vedanta-1.pdf>.
[262] Chandra, 2016, *supra* note 259259 at 151.
[263] *Niyamgiri*, *supra* note 9898 at para 42.

It further asserted the duty and power of the *Gram Sabha* in preserving the habitat from destructive practices that could affect cultural and natural heritage.[264]

The judgment thus clarified that any diversion of forest land for non-forest purposes could be undertaken only after obtaining the consent of the *Gram Sabha*, as prescribed under the *Ministry of Environment and Forest Guidelines* of 12 July 2012.[265] Furthermore, the Court held that the *Gram Sabha* could decide whether the mining project affected the "religious rights" of the local tribal population, "especially their right to worship their deity, known as Niyam Raja, in the hilltops of the Niyamgiri range of hills", as this right needed to be "preserved and protected".[266] Subsequently, the *Gram Sabha* concerned rejected the mining project through a resolution, and the Ministry of Environment, Forest and Climate Change thereafter canceled its Stage II Clearance.[267] Regardless of this, however, the Orissa Mining Corporation filed an interlocutory application on 25 February 2016, pointing to the need to review this *Gram Sabha* resolution against the mining project. Their primary argument was that such a resolution should not be perpetual, but rather needed to be re-examined. The Supreme Court of India directed the Government of Orissa to file a fresh petition, making all stakeholders party to the case, which is still under their consideration.

All said, it should be noted that there are relentless attempts from the side of the Ministry of Environment, Forest and Climate Change to dilute the *FRA* and remove the consent provision from it, since it is a major hindrance to the government and corporations to proceed with development projects in the name of "public purposes". However, strong opposition from the Ministry of Tribal Affairs and other grassroots movements has thwarted such attempts to date. Efforts have also been made to influence the Dongria Kondh community, who led the Niyamgiri struggle, and to silence their dissenting voices through state action, including police arrest.[268] It is essential to note here that it is due to the sheer fortitude of this community and the resilience of the *FRA* as a legal instrument that such suppressive actions have proved unsuccessful.

---

[264] *Ibid* at para 43.
[265] *Ibid* at para 58.
[266] *Ibid* at para 58
[267] Chandra, 2016, *supra* note 259259 at 150.
[268] Priya Ranjan Sabhu, "Battle for Niyamgiri: Odisha Police's story on Adivasi girl accused of being Maoist does not add up" *Scroll.in* (06 May 2017), online: <scroll.in/article/836756/battle-for-niyamgiri-odisha-polices-story-on-adivasi-girl-accused-of-being-maoist-does-not-add-up>.

Since 2013, there have been various judicial interventions, both consistent with and contrary to the spirit of the *Niyamgiri* judgment. Moreover, certain Orders issued prior to *Niyamgiri* stand in the way of effective *FRA* implementation in some states. Of these, the most important has been the interim Order issued by the High Court of Madras, which stayed the granting of all claims under the *FRA*.[269] Although the High Court allowed the verification process under the *FRA*, it required the permission of the High Court to issue a certificate of title to indicate that proceedings under the *FRA* amounted to an "encroachment" of forest land. This matter was later transferred to the Supreme Court and in its Order dated 1 February 2016, the Court removed this ambiguity arising from the Madras High Court Order.[270] The Supreme Court subsequently made it clear that no reason stood to sustain this Order.

Another important decision following the *Niyamgiri* judgment concerned the Kinnaur District in Himachal Pradesh. After a seven-year struggle, the *Gram Sabha* of Lippa village challenged the decision of the Himachal Pradesh government to set up a hydroelectric project in their village, which required the diversion of over seventeen hectares. Around 150 hydroelectric projects had mushroomed in this region, even after various committees had repeatedly clarified that "there cannot be a totally environment-friendly hydroelectric project in the Himalayas."[271] Hence, a petition was filed in the National Green Tribunal, invoking provisions of the *FRA* to stop the various processes initiated by the Government of Himachal Pradesh for such projects. [272] The National Green Tribunal *vide* order dated 4 May 2016 accepted the argument that the project violated the *FRA* and demanded that the proposal be brought before the *Gram Sabha* for its consent. The Tribunal also directed the *Gram Sabha* to examine whether there was any violation of religious/cultural claims or livelihood rights of the relevant tribal communities.[273] Although the Government of Himachal Pradesh appealed against the National Green Tribunal's Order before

[269] See *V Sambasivam v Government of India & Others*, (21 February 2008), MP No. 1/2008 in W.P. No. 4533/2008 (Madras High Court).
[270] See *V Sambasivam v Government of India & Others*, (01 February 2016) TC (C) No.39 of 2015 with SLP(C) No. 11408-09 of 2009 (Supreme Court of India).
[271] Ajay Shukla, *Report of the High Level One Man Committee to Monitor Environmental Compliance of Hydel Projects in CWP No. 24/09* (Shimla: High Court of Himachal Pradesh, 2010) at 5, online: http://hphighcourt.nic.in/pdf/Environmental_Compliance.pdf.
[272] The National Green Tribunal (NGT) is constituted under the *National Green Tribunal Act, 2010* in India to dispose expeditiously of matters relating to environmental protection and forest conservation.
[273] *Paryawaran Sanrakshan Sangarsh Samiti Lippa v Union of India and Others* (04 May 2016), Appeal No. 28 of 2013 (National Green Tribunal, India) at 19 [Paryawaran].

the Supreme Court of India, they were later obliged to withdraw their petition due to resistance and political pressure.[274]

It is also pertinent to mention here that there have been attempts to sabotage the consent provision by the government agencies themselves. The cancellation of the CFR area in the Sarguja District of the state of Chattisgarh without the consent of *Gram Sabhas* is an important example of one such attempt.[275] Although seventeen *Gram Sabhas* passed a resolution against this coal mine, the Chattisgarh government was obstinate in its decision, simply going ahead and violating the provisions of the *FRA* and *PESA*. Furthermore, various government agencies and corporations collaborated to coerce and circumvent *Gram Sabha* proceedings, even attempting to forge and fabricate *Gram Sabha* resolutions. In fact, in more recent times, fabricated *Gram Sabha* resolutions in the Keonjhar District of Orissa State apparently consented to hand over more than sixteen hundred hectares of forest land to the Orissa Mining Corporation. However, the local tribal population denied ever consenting to this forest clearance.

The greatest impediment when attempting to challenge a development project before any court in India is posed by the application of the "eminent domain" principle by a court. Although the *FRA* is legislation in its nascent stage, with very little case law interpreting it, it may be broadly argued that these judicial interventions have created both positive and negative ripples. However, by and large, the rights of tribal populations are given priority in such court decisions, unlike in past judgments. In the *Niyamgiri* case, the Supreme Court clearly weighed the interests of local tribes over development projects that were likely to be detrimental in ecological and socio-economic terms to these communities. In its verdict, the Supreme Court underlined that "the gram sabha could get to speak the language and formalize their cultural and religious beliefs into a legal language".[276] One scholar has argued that

> within law's broad and enduring commitment to individuated rights and property relations, and the modern states' commitment to developmentalism, there is a duty of

[274] *Himachal Pradesh Power Corporation v Paryawaran Sanrakshan Sangarsh Samiti Lippa & Others* (08 September 2016), Civil Appeal No. 8345 of 2016 (Supreme Court of India) online:< http://supremecourtofindia.nic.in/jonew/courtnic/rop/2016/25354/rop_829313.pdf>.
[275] Nitin Sethi, "Chattisgarh Govt. Cancels Tribal Rights Over Forests to Facilitate Coal Mining" (17 February 2016), online: The Wire< thewire.in/21909/chhattisgarh-govt-cancels-tribal-rights-over-forests-to-facilitiate-coal-mining/>.
[276] Chandra, 2016, *supra* note 259 at 159.

> consultation and an imperative of 'consent' that may serve as a precedent for future iterations of forest and community rights.

For this negotiation purpose, there is now a binding legal instrument. The *Niyamgiri* case is a significant one since it questioned jurisprudence that, until then, had been based on "developmentalism and cultural homogeneity".[277] Although there are also some feeble dissenting voices, the legal construction of the FRA in the *Niyamgiri* judgment is now the law of the land and binding on every High Court in India.

3.6 Conclusion on the Indian Context

Irrespective of the progress made in this area, community-centric resource governance practices emerging in India through programs like Joint Forest Management have been treated as a privilege offered to tribal communities rather than the recognition of their rights. However, the enactment of the *FRA* has granted extensive powers to *Gram Sabhas* on matters relating to the conservation and management of forest and wildlife resources, thereby strengthening the self-governance mechanisms of India's tribal communities. The *FRA* itself acknowledges in its preamble that "the forest rights on ancestral lands and their habitat were not adequately recognized in the consolidation of state forests during the colonial period as well as in independent India".[278] In this chapter, the importance of devolving power and the process of democratic decentralization have therefore been discussed. In its legal framework, the *FRA* entrusts *Gram Sabhas* with significant rights, including the right to determine the nature and extent of individual and community rights. Other important committees, such as SDLCs and DLCs under the *FRA* are entrusted with the duty to assist *Gram Sabhas* in the process of verifying claims. A further clarification of the authority of *Gram Sabhas* may be observed in the directions issued by one state government to its officers in 2009, where it was stated that:

> role of the official is to render proper and timely assistance to these committees and to ensure custody of the records. No individual officer has been given the powers under

[277] *Ibid.*
[278] *FRA*, *supra* note 6 preamble.

> the Act to overrule or object to the decisions of the appropriate authority, other than filing an appeal to the next higher authority as prescribed.[279]

This letter further points to the fact that any reverification by the Committees under the *FRA* shall be conducted only after giving "due intimation to the Forest Rights committees".[280]

The transfer of ownership of minor forest produce to tribal communities is considered as one of the most important rights obtained through the *FRA*. Moreover, apart from their right to own and use minor forest produce, *Gram Sabhas* are authorized to auction/dispose of it as they see fit. This is intended to secure the livelihood of tribal peoples. The Mendha Lekha example is therefore noteworthy in how effective *FRA* implementation can result in tribal self-governance while simultaneously ensuring a self-sufficient economy through a community's authority over forest resources. The existence of a strong *Gram Sabha* in Mendha Lekha, due to previous political movements, has contributed substantially to developing the capability of these tribal institutions to implement the Act. The revitalization of local bodies, which is an important requirement for the effective transfer of power to Indigenous communities, can in fact be observed in Mendha Lekha. This example also illustrated how a community-led and decentralized forest governance system is more sustainable than a centralized one. The successful adoption and implementation of a forest management strategy by the Mendha Lekha *Gram Sabha* emphasize the need-based extraction and sale of forest produce; found to be more sustainable than a state-led strategy that is reliant on purely economic advantage.

The legal scenario developed by the *FRA* empowers tribal institutions to challenge any government decision on the diversion of forest lands for non-forest purposes, such as mining. The *FRA* mandates the procurement of tribal consent before such diversions. The Supreme Court of India has since affirmed this through its verdict in the *Niyamgiri* case. Thus, it may be argued that the *FRA* serves as a powerful and robust instrument to ensure the autonomy of traditional tribal institutions in India. India's emerging forest regime in India has a strongly decentralized approach, which effectively deconcentrates power to the local level through the *Gram Sabhas*. However, since the powers of these institutions are transferred as rights rather than privileges, they have

[279] Ministerial Instructions (Chief Secretary, Government of Orissa to District Collectors on the Implementation of Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006) (2009) No. 6061/SSD dated 04 February 2009 at 1, online <http://www.stscodisha.gov.in/pdf/6061dt4209.pdf>.
[280] *Ibid* at 2.

greater accountability. Furthermore, this devolution of power has created a space for effective decision-making, which is an important component of democratic decentralization. Forest reform through the implementation of the *FRA* is an effective example of how devolving authority to tribal institutions can result in a significant transformation of forest resource governance regimes.

CHAPTER IV: THE CANADIAN CONTEXT

This chapter discusses the emerging legality on forest governance in Canada and the extent of democratic decentralization in its approach. Through an analysis of Canada's co-management regime, the role of Aboriginal institutions will be examined in terms of forest governance and the relevant authority vested in these institutions. It starts with a brief outline of the impact of colonialism on these Aboriginal institutions and resource governance mechanisms. Thereafter, this chapter extends to the post-colonial phase to trace the evolution and development of self-governance mechanisms and the impact of co-management regimes on resource governance. The example of co-management systems developed in Clayoquot Sound on the west coast of Vancouver Island in British Columbia is adopted to understand the potential and limits of the co-management process. Furthermore, this chapter examines the role of Aboriginal consent under the duty to consult and accommodate doctrine by analyzing pertinent judgments of the Supreme Court of Canada.

4.1 Forests and Aboriginal Peoples in Canada: An Introduction

Forests constitute half of Canada's entire land mass. The national identity and history of the country, therefore, have close ties with the forest environment.[281] In fact, Canada is home to 10% of the world's forests, which is mostly undisturbed, while the country continues to be the world's largest exporter of forest products. Aboriginal people constitute 4 percent of the total Canadian population.[282] More than 85 percent of the Aboriginal peoples live in productive forest areas of Canada and around half the Aboriginal peoples in Canada live in the boreal forests.[283] To draw a distinction, First Nations and Métis largely rely on forest areas, whereas the Inuit are based in non-forest areas.[284] Thus, it may be argued that the lives of the Aboriginal population in Canada are generally closely intertwined with the forest and forest resources.

[281]Wynet Smith et al, *Canada's Forest at a Crossroads: An assessment in the Year 2000* (Washington, DC: Worl Resources Institute, 2000) at 13, online: <pdf.wri.org/gfw_canada.pdf> [Smith et al].
[282] Frideres, *supra* note 45 at 33.
[283] National Aboriginal Forestry Association, *A Proposal to a First Nation* (2005) cited in *ibid* at 35.
[284] Smith et al, *supra* note 281 at 73.

While they have deep historical roots, Aboriginal rights are still under deliberation in various legislative and judicial efforts. One important event in the evolution of the legal framework surrounding Aboriginal rights in Canada is the drafting of the *Constitution Act* in 1982, which recognized and affirmed Aboriginal and treaty rights. This recognition of rights had a strong influence on forest resource governance in Canada. The majority of forest land falls under various treaties. For instance, the Maritime Peace and Friendship Treaties were entered into between the British and First Nations on Canada's east coast, to develop co-operation between these communities and colonial forces. However, in northern Canada and British Columbia, where treaties were largely never signed, governments are in an ongoing process of negotiating various comprehensive and specific land claims. The British Columbia treaty process was initiated in 1992 to address various issues to do with Aboriginal rights and title. More than half the First Nations in British Columbia are involved in such treaty negotiation processes.[285]

A key challenge facing Canada at present is to reconcile the interests of Aboriginal peoples in Canadian forests with the process of economic development. In this regard, there are a number of different stakeholders in Canada's forest management. Federal, provincial and territorial governments, as well as the private sector, Aboriginal communities, and others play important roles. However, the *Constitution Act* vests the primary responsibility for forest governance in the provincial governments. As a result, different provinces have varying forest legislation and forest management policies. Many Aboriginal peoples claim the actual forest land where they reside and are unwilling to settle for mere monetary benefits.[286]

The treaties signed with Canada's Aboriginal peoples normally deal with aspects such as land ownership, collaboration in resource management, resource revenue-sharing, and wildlife harvesting rights.[287] Thus, it could be argued that the role of Aboriginal peoples in forest governance is crucial. However, the history of alienation faced as a result of colonialism has adversely affected Aboriginal institutions and claims to forest land. The next part of this research examines the extent of alienation faced by Aboriginal peoples in centralized forest governance as

[285] *Ibid.*
[286] Patricia Marchak et al, *Fall down: Forestry Policy in British Columbia* (Vancouver: David Suzuki Foundation and Ecotrust Canada, 1999) at 121.
[287] Elaine L Simpson, *Aboriginal Claims in Canada* (Edmonton: University of Alberta) online: <www.ualberta.ca/~esimpson/claims/ introduction.htm > cited in Smith et al, *supra* note 281281 at 73.

an effect of colonialism. It further explores the emerging legality that shifts its focus from assimilation to a devolution process, in which the form of decentralized governance responds to the forest governance regime.

4.2 Colonialism and Its Impact on the Aboriginal Population

Similarly, in India, colonialism has played an important role in alienating Aboriginal populations in Canada from the resources that they have traditionally governed for centuries. The historic treaties in Canada between the Crown and the Aboriginal peoples were introduced as a step to eliminate conflicts over land and resources.[288] They played a crucial role in deciding the Native-newcomer relationship.[289] Scholars such as Jim Miller also argue that these treaties established social harmony between Indigenous and non-native peoples.[290] However, there are other arguments that such treaties were peculiar agreements between the Crown and some of its subjects and did not necessarily act as a foundation for asserting Canada's authority over Aboriginal peoples.[291]

Meanwhile, Aboriginal peoples perceived treaties as agreements that allowed their land to be shared, but as Miller suggests, they "had no idea they were considered wards, nor did they think they were selling their land."[292] It has even been argued that the consent obtained from Aboriginal peoples in terms of resource governance was through compulsion.[293] The treaty-making process has resulted in the dispossession of a large number of Indigenous peoples.[294] The consent that colonial forces claimed to have obtained through treaties and agreements was arguably not sought with any honest intention of giving recognition but was rather aimed at diluting resistance from the Aboriginal peoples.

---

[288] Mark L Stevenson, "Treaty Daze Reflections on Negotiating Treaty Relationships under the BC Treaty Process" in Tindall, Trosper & Perreault, *supra* note 363636, 48 at 48 [Stevenson].
[289] J R Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009) at 283 [Miller].
[290] *Ibid* at 306.
[291] D J Hall, *From Treaties to Reserves: The Federal Government and Native Peoples in Territorial Alberta* (Montreal: McGill-Queens University Press, 2015) at 21.
[292] Miller, *supra* note 289 at 283, 284.
[293] Doyle, *supra* note 75 at 61.
[294] See generally Miller, *supra* note 289.

In short, there was an attempt to dismiss Indigenous sovereignty *de jure,* while obtaining *de facto* consent from the Indigenous population to assert Crown supremacy over Aboriginal title to territories. The sovereignty established by the state without the consent of those being governed consequently infringed various rights, including the right to self-governance. The legislation enacted during the Colonial phase then carried over this exclusionary spirit, and the principle of *terra nullius* played a pivotal role in justifying and executing the colonial agenda[295]while disregarding the presence of Aboriginal nations. *Terra nullius* was a principle that presumed Aboriginal peoples to be primitive and asserted the dominance of Crown sovereignty.[296] As a result, settlers asserted their power over land and resources.[297] Furthermore, the relationship between settler society and Aboriginal peoples shifted from "mutually beneficial associations… between equal nations to the coercive and imposed structure of domination.."[298] As argued by Dominic O'Sullivan, it led to resource alienation and the "collective political and economic marginalization" of Aboriginal peoples.[299]

This exclusion of Aboriginal peoples through colonial legal frameworks had an impact on Aboriginal institutions. The transformation from traditional modes of conservation—already in existence prior to colonialism—into a centralized system resulted in continued non-recognition of Aboriginal rights and title. Stephen Wyatt argues that

> as forestry science and the economic importance of timber and paper developed during the 1900s, government and the forest industry shared the responsibility for forest planning and forest management, with the actual balance of rights and obligations depending on the specific situation and wider government policy.[300]

[295] Michael Asch, "Self-Determination and Treaty Making: Consent and the Resolution of Political Relations between First Nations and Canada" (Paper presented at the Consent as the Foundation for Political Community, inaugural conference of the Consortium on Democratic Constitutionalism, University of Victoria, 1-3 October 2004), online: < www.law.uvic.ca/demcon/papers/Asch_Demcon_f2-1.doc> [Michael Asch].
[296] *Ibid* at 5.
[297] Frideres, *supra* note 45 at 31.
[298] James Tully, "Aboriginal Peoples: Negotiating Reconciliation," in Alain-G Gagnon & James Bickerton, eds, *Canadian Politics,* 3d ed (Peterborough: Broadview Press, 2000) at 419.
[299] Dominic O'Sullivan, *Beyond Biculturalism: The Politics of an Indigenous Minority*. (Wellington: Huia Publishers, 2007) at 76.
[300]Stephen Wyatt, "First Nations, Forest Lands, and "Aboriginal Forestry" in Canada: From Exclusion to Comanagement and Beyond" online: (2007) 38 Can J Forest Res 171 at 172 [Stephen Wyatt].

The establishment of the Canadian Forestry Association represented a major shift towards this scientific forestry model.[301] The resources that Indigenous communities had legitimately used for centuries became inaccessible to them, and they lost their decision-making power over the conservation process.

The *Royal Proclamation of 1763* was another major instrument establishing the authority of the Crown over Aboriginal land. Furthermore, The *Indian Act, 1876* (the *Indian Act*) umbrella legislation concerning Canada's Aboriginal population was enacted along similar lines. Interestingly, however, this Act excluded Inuit, Métis and non-status Indians. It is one of the most controversial pieces of legislation enacted during the colonial period to impose federal supremacy over Aboriginal peoples. Nevertheless, since its inception, the *Indian Act* has become the central legislation dealing with Aboriginal affairs in Canada. This Act, through the imposition of a colonial government system, played a significant role in altering the political structures of the Aboriginal population for generations. It reflected the dominant mainstream perception of the assimilation of Aboriginal people into mainstream society and made status Indians effectively wards of the Crown. Furthermore, the missionary dissemination of Christianity during this period resulted in the destruction of many aspects of Aboriginal culture and practices.

Ken Coates and Keith Carlson have rightly pointed out that "First Nations bore the major share of the dislocations and cultural change and had to fight to secure both basic and Aboriginal rights."[302] The *Indian Act* has thus been frequently amended by Parliament, in an attempt to assimilate and "civilize" the Aboriginal people, which has adversely affected the organic nature of their governance structures. Moreover, the *Indian Act* has been used as an instrument to establish a monopoly over Aboriginal land and resources. For generations, the political structures and culture of Aboriginal communities across the country have been created and distorted by the imposition of governance systems under the *Indian Act*.[303] Moreover, this suppression has had ample support

[301] See generally Monte Hummel, *Environment and Conservation Movements* (21 February 2010) online: Historica Canada <www.thecanadianencyclopedia.ca/en/article/environmental-and-conservation-movements>
[302] Ken Coates & Keith Thor Carlson, "Different Peoples, Shared Lands: Historical Perspectives on Native Newcomer Relations surrounding Resource Use in British Columbia" in Tindall, Trosper & Perreault, *supra* note 36, 15 at 28 [Coates & Carlson].
[303] See generally Wayne Dougherty & Dennis Madill, "Indian Government under Indian Act Legislation, 1868-1951" (Ottawa: Department of Indian Affairs and Northern Development, 1980) online <http://publications.gc.ca/collections/collection_2017/aanc-inac/R5-183-1980-eng.pdf>.

from Canada's judicial and economic system.[304] Aside from this, Aboriginal women, who played an important role within Aboriginal governance structures, are completely ignored under the *Indian Act*.[305]

The 19th and 20th centuries, therefore, witnessed extensive legal and political resistance from Aboriginal people against the *Indian Act*. Even the Confederation document, the *Constitution Act, 1867*, made only brief reference to Aboriginal communities and did not acknowledge that prior to European contact they "belonged to nations structured by ancient forms of government exercising sovereign authority over persons and territory."[306] In fact, the constitution provided wide proprietary and legislative powers to provincial governments on matters relating to forest resources. The provinces were granted ownership rights over "land, mines, minerals and royalties" under Section 109. The *Constitution Act, 1867* also entrusted the provinces with the power to make exclusive legislation for the "management and sale of the public lands belonging to the province and of the Timber thereon".

4.3 Assertion of Provincial Jurisdiction over Resource Governance in the Post-Colonial Phase

The *Constitution Act, 1982* is an important legal document, with section 35 recognizing and affirming Aboriginal and treaty rights. It also confirms provincial jurisdiction over forest conservation and management. An important natural resources amendment was adopted through the 1982 constitutional amendments, authorizing the provincial governments to make laws on the exploration of "non-renewable natural resources in the provinces"[307] as well as on the "development, conservation and management of non-renewable natural resources and forestry resources in the province."[308]

---

[304] Frideres, *supra* note 45 at 31.
[305] Julieta Uribe, *A Study on the Relationship between Canadian Aboriginal People and the Canadian State*, online: (Ottawa: Canadian Foundation for the Americas, 2006) at 11 online: <www.focal.ca/pdf/Aboriginals_Uribe_Relationship%20Canadian%20Aboriginal%20Peoples%20and%20Canadian%20State_March%202006.pdf >.
[306] Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 152.
[307] *The Constitution Act*, *supra* note 43, s 92A(1)(a).
[308] *Ibid*, s 92A(1)(b).

Total Provincial forest ownership in Canada amounts to 90%, compared to federal forest ownership of 4% and private ownership of 6%.[309] The various provinces have forest policies that vary in their substance. However, the Aboriginal community's access to forestry activities is confined to limited forest tenure systems in Canada. All the forty-two major forest tenure systems give only a limited access to various Aboriginal communities with regard to forestry activities [310]. Even within the federal government's limited forest ownership, Aboriginal participation is further curtailed in section 7 of the *Indian Act* and the Indian Timber Regulations. Frideres (2013) observes that the "…government's objective in forestry programs rarely coincide with Aboriginal land use and socio-economic priorities."[311] Additionally, the arguments are very strong that the exclusion of Aboriginal treaty rights in federal/provincial/territorial forest policies are also major obstacles in the way of involving Aboriginal people in sustainable forest management.[312]

Nevertheless, attempts by Aboriginal peoples to negotiate alternative forest tenure have been strongly opposed by both the federal and provincial governments.[313] For instance, in British Columbia, three transnational companies own around 90% of the annual allowable cut from Crown forest land, with an extendable lease spanning 15-20 years.[314] However, the financial benefits for Aboriginal communities are far less than British Columbia's total revenue stream.[315] In furtherance of various court interventions, the province has initiated 35 direct awards of timber, as well as over 100 agreements in favour of the Aboriginal people, with the latter being entitled to $35 million per year. Communities were also allowed to log more than $33 million cubic meteres of timber per annum. This is less than 4 percent of the Province's total revenue stream since British Columbia earns more than $1 billion annually from forestry companies in stumpage fees for logging public land. Thus, there is a genuine reason to suspect that attempts to include Aboriginal peoples in forest activities may not be intended to develop self-governance mechanisms within this population.

[309] *Forest Land Ownership*, online: Natural Resources Canada <http://www.nrcan.gc.ca/forests/canada/ownership/17495>.
[310] A forest tenures system is an agreement between the provincial government and the industrial forest users that enables the latter to have access to extract timber products.
[311] Frideres, *supra* note 45 at 34.
[312] *Ibid* at 34.
[313] *Ibid* at 35.
[314] *Ibid.*
[315] See generally *ibid* at 31.

Albeit restricted, the federal government has played some role in forest management in Canada. This is part of "cooperative federalism", which enables both federal and provincial Government to reach an understanding through agreements over matters relating to the environment and policy.[316] *The Constitution Act* provides a strong legal framework for provincial governments to make laws on conservation and the management of non-renewable natural and forestry resources. However, on matters relating to the harvesting of timber and manufacture of forest products, the private sector retains an important position.

Until recently, the responsibility for forest management was shared between private industry and the government, with the role of Aboriginal communities were completely overlooked. Although Canada's Aboriginal peoples continued to perform various activities on forest land, they did not have a voice concerning forest management.[317] The treaties signed between Aboriginal peoples and the Crown, together with Western scientific forest management practices, gave legitimacy to the arguments excluding Aboriginal people.[318] Aboriginal decision-making institutions were rendered passive and placed in submission to the interests of the dominant society. The Royal Commission on Aboriginal People rightly observed that

> control over Indian political structures, land holding patterns, and resource and economic development gave Parliament everything it appeared to need to complete the unfinished policies inherited from its colonial predecessors.[319]

The outcome has been numerous ethnocentric mono-cultural institutions, which emphasize state dominance through "institutional racism."[320]

4.4 Democratic Decentralization through Co-management in Canada

Irrespective of previous shortcomings, forest governance systems in Canada have made a significant shift in the past three decades through the inclusion of Aboriginal self-governance.

---

[316] See generally Mark Walters, "Ecological Unity and Polmcal Fragmentation: The Implications of the Brundtland Report for the Canadian Constitutional Order "(1991) 29:2 Alta L Rev 420 at 432.
[317] Stephen Wyatt, *supra* note 300300 at 172.
[318] Bruce Willems-Braun, "Colonial Vestiges: Representing Forest Landscapes on Canada's West Coast" (1997) 112 BC Studies 5 at 12.
[319] Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back, Part Two: False Assumptions, Failed Relationship,* vol 1 (Ottawa: Canada Communication Group, 1996) at 255.
[320] David C Natcher, "Co-Management: An Aboriginal Response to Frontier Development" (2001) 23 The Northern Rev 146 at 147 [Natcher].

Scholars such as Jennifer Dalton argue that self-government is the embodiment of self-determination in Canada since it can lead to "decision-making, law-making capabilities, and varying degrees of autonomy, including about a land base or territory".[321] Aboriginal self-governance in Canada was recognized more than a century ago in a lower court decision in *Connolly v Woolrich* (1867), which redefined the constitutional links between Aboriginal peoples and the Crown.[322] However, a subsequent Privy Council decision that endured for a prolonged period minimized any such determination. The 1888 Privy Council decision in *St. Catharines Milling and Lumber Company v. the Queen*[323] involved a land dispute between the province of Ontario and the Government of Canada. On appeal from the Supreme Court of Canada, the Privy Council acknowledged the existence of an Aboriginal interest in the unsurrendered lands as a "personal and usufructuary right dependent on the goodwill of the sovereign".[324] The exact nature of this right was, unfortunately, left undefined and this position continued unchanged until the decision in *Calder* of 1973.[325] *St. Catharines* is generally considered to be reflecting a Eurocentric perspective which resulted in an unconvincing balancing act.[326]

Acknowledgment of Aboriginal title claims in 1973 through *Calder* revived the debates surrounding this topic. *Calder* resulted in the drafting of the Comprehensive Land Claims Policy and Specific Land Claims by the federal government in 1973.[327] The Comprehensive Land Claims Policy, which led to the creation of "modern treaties" after *Calder*, specified a self-governance mechanism intended to guide the federal government in its negotiations with Aboriginal groups.

---

[321] Jennifer E Dalton, "Aboriginal Self-Determination in Canada: Protections Afforded by the Judiciary and Government" (2006) 21: 11 CJLS 1 at 12 [Dalton].
[322] *Connolly v Woolrich* (1867), 11 LCJ 197, 17 RJRQ 75, 1 CNLC 70 (Sup. Ct.).
[323] *St. Catharines Milling and Lumber Company v The Queen (Ontario)* [1888] UKPC 70.
[324] *Ibid* at 5; See also Simon Young Sol, *Trouble with Tradition: Native Title and Cultural Change*, (New South Wales: The Federation Press, 2008) at 25.
[325] Catherine Bell & Michael Asch, "Challenging Assumptions: The impact of Precedents in Aboriginal Rights Litigation in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect and Respect for Difference*, (Vancouver: UBC Press, 1997) 38 at 48.
[326] Jacinta Ruru, "Concluding Comparatively: Discovering in the English colonies" in RJ Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (New York, Oxford University Press, 2010) 207 at 254.
[327]See generally Aboriginal Affairs, Northern Development & Indegenous Services Canada, *Renewing the Comprehensive Land Claims Policy : Towards a Framework for Addressing Section 35 Aboriginal Rights* (2014) at 6, online: < https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/texte-text/ldc_ccl_renewing_land_claims_policy_2014_1408643594856_eng.pdf>.

It subsequently acknowledged the participation of Aboriginal communities in resource administration.

Co-management provides an opportunity for power-sharing between governments and Aboriginal peoples. Efforts to shift towards co-management have played a significant role in reshaping Canada's forest resource governance. Thus, it has evolved into a collaborative resource governance mechanism by ensuring community participation through a meaningful decision-making process. Alfonso Castro and Erik Nielsen emphasize the significance of institutions involved in this decision-making process and argue that "co-management connotes a collaborative institutional arrangement among diverse stakeholders for managing or using a natural resource."[328] However, there are structural as well as procedural conditions attached to it. For instance, co-management regimes rely on a centralized bureaucratic set-up with Western language and hierarchy at its core.[329] The hierarchy in such governance impacts the role of Aboriginal communities in the governance process. There are even arguments that co-management regimes render traditional communities submissive to the dominant knowledge system, without placing much emphasis on their traditional ecological knowledge.[330]

Conversely, there exists a huge gap in the perception of the federal government's self-governance policy and Aboriginal perceptions of self-governance.[331] Shin Imai argues that the differences not only lie in the "expectation of the process", but also conceptualizes "differences" in various ways.[332] He goes to the extent of arguing that co-management regimes in Canada are a "softer way for governments to access Aboriginal lands through co-management boards."[333] Nevertheless, arguments in favour of co-management regimes are very robust. They are held to give communities an advantage over their familiarity with Western environmental governance in co-management frameworks. Communities thus use this space to challenge state hegemony and regain their crucial

[328]Alfonso Peter Castro & Erik Nielsen, "Indigenous People and Co-management: Implications for Conflict Management" (2001) 4 Environmental Science & Policy 229 at 230 [Castro &Nielsen].
[329]Paul Nadasdy, *Hunters and Bureaucrats: Power, Knowledge, and Aboriginal-State Relations in the Southwest Yukon* (Vancouver: UBC Press, 2013) at 114.
[330] Stephen Wyatt, *supra* note 300 at 176.
[331] Shin Imai, "Indigenous Self-Determination and The State" (2008) *Comparative Research in Law & Political Economy Research Paper No. 25/2008* at 9, online: < http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1196&context=clpe> [Imai].
[332] *Ibid.*
[333] *Ibid* at 25.

role in management.[334] Such regimes offer the democratization of resource governance through settled rules and agreements. Even the fact that most co-management boards have a**n** Aboriginal membership of 50% is projected as an indication of their inclusive nature in Canada. There is a further claim that this cooperative arrangement enhances the capacity of communities at the local level and contributes to the exercise of self-determination rights.[335]

Many Aboriginal communities assert their self-determination rights through a co-management process.[336] The struggle to reclaim land and resources by Aboriginal peoples in Canada receives a new dimension through the evolution of a co-management regime.[337] However, although co-management is highlighted as a method of resource governance, it also plays a pivotal role in reshaping the relationship between people with different interests and powers.[338] As discussed before, in its most basic form, co-management is understood to be a power-sharing arrangement, supported by an agreement. The roles of governments and stakeholders in the decision-making process constitute a significant factor in determining the nature of co-management arrangements.[339]

Co-management efforts have various primary and secondary objectives, which include sustainable resource governance, with an emphasis on Indigenous knowledge systems, decentralized decision-making, and revitalized Indigenous institutions and culture.[340] Institutional arrangements play a significant role in the implementation of co-management processes since a governing power without a proper institutional process to implement it is futile.[341] Some argue that a systemic

---

[334] Natcher, *supra* note 320320 at 148.
[335] Anne Kendrick, "The Flux of Trust: Caribou Co-Management in Northern Canada" (2003) 31:1 Environments 43 at 44.
[336] *Ibid*.
[337] See generally Castro & Nielsen, *supra* note 328 at 229.
[338] See generally, Andre Hoekema, "Do joint Decision-making Boards enhance chances for New Partnership between the State and Indigenous Peoples?" in Williem J. Assies & Andre Hoekema, eds, *Indigenous Peoples' Experiences with Self-Government* (Copenhagen: University of Amsterdam, 1994) 177.
[339] Nicki Mazur, "Evaluating Fisheries Co-Management Trials - A Discussion Paper" (Canberra: Bureau of Rural Sciences, Commonwealth of Australia, 2010) at 21, 27, online: Analysis and Policy Observatory <http://apo.org.au/node/21411 >.
[340] See generally Gail Osherenko, *Sharing Power with Native Users: Co-Management Regimes for Native Wildlife* (Ottawa: Canadian Arctic Resources Committee, 1988); Fikret Berkes et al, "Co-Management: The Evolution of the Theory and Practice of Joint Administration of Living Resources" (Paper presented at the Second Annual Meeting of IASCP University of Manitoba, Winnipeg, Canada, September 26-29, 1991) [unpublished].
[341] *Speaking Truth to Power-Self-Government: Options and Opportunities*, vol 3 (Vancouver: BC Treaty Commission, 2002) at 4-10 cited in Mabee & Hoberg, "Equal Partners? Assessing Comanagement of Forest Resources in Clayquot Sound" (2006) 19 Society & Natural Resources 875 at 877-878.

change in institutional design, which is competent to alter decision-making cultures, can be highly significant in achieving the goals of co-management.[342] These co-management institutions perform a key function in addressing the social, legal and political claims of Aboriginal peoples.[343]

The Royal Commission on Aboriginal People has set out three broad categories of co-management arrangement in Canada.[344] These consist of claim-based, crisis-based, and community-based resource management. This categorization is primarily based on the events contributing to the creation of a co-management agreement. Claim-based co-management involves long-term legal agreements, which establish shared bodies for the management of resources in a specific area. It consists of co-management under comprehensive claims agreements and deals, involving negotiation between the Canadian Government and Aboriginal peoples.[345] In contrast, crisis-based co-management is an *ad hoc* and temporary institutional arrangement to address a crisis due to development, the over-use or mismanagement of resources, etc. It is operated through an Interim Measures Agreement, with a limited period of application. The third and final category mentioned above is community-based resource management, which is a Government initiative with minimal Aboriginal participation.

The *James Bay and Northern Quebec Agreement* is a claim-based agreement that originated as an outcome of the court action by the Cree Nation against hydroelectric power developments in Quebec. Quebec's territorial claim over the Cree and Inuit homeland without consulting them was legally ambiguous since there was no treaty between federal or provincial governments.[346] Hence the Cree and Inuit approached the Quebec Superior Court against the provincial plans to move forward with a hydroelectric project. In 1973, the court ordered an injunction on the project, and subsequently, the parties entered into a series of negotiations which resulted in the first comprehensive land claims settlement in Canada.

---

[342] See generally Paul R Lachapelle et al, "Barriers to Effective Natural Resource Planning in a "Messy" World" (2003) 16:6 Society & Natural Resources 473 at 473.
[343] Natcher, *supra* note 320 at 148.
[344] Canada, *Report of the Royal Commission on Aboriginal Peoples*. *Restructuring the Relationship, Part 2, Land and Resources*, Vol. 2 (Ottawa: Minister of Supply and Services Canada, 1996) at 640 [RCAP, *Restructuring the Relationship*].
[345] *Ibid* at 642.
[346] Castro & Nielsen, *supra* note 328 at 233.

The *Nisga'a Final Agreement* was also an outcome of the hard-fought legal battle between the Nisga'a of the Nass Valley and the government. The Yukon Land claims, which dealt with land claim agreements between First Nations and the federal government in Yukon is also a notable example. Before the negotiation of this agreement, Indian and Northern Affairs Canada (INAC) was controlling affairs in the Yukon Territory. The First Nations in this region had only limited powers until the negotiation of self-governance agreements. The *Umbrella Final Agreement* which was first negotiated provided a model for the Yukon First Nations' Final Agreements as well as the Self-Government Agreements. It recognized First Nations jurisdiction and vested authority in them for the management of resources and land use planning.[347] Similarly, the *Nunavut Land Claims Agreement* established an Inuit-majority territory and extensive co-management arrangements. Finally, the *Inuvialuit Final Agreement* is another example of an agreement underlining the significance of communities in the decision-making process.

On the other hand, a reference to some of the crisis-based co-management in Canada is also very important at this juncture since constant struggles of communities have resulted in the negotiation of some of the notable crisis-based co-management agreements. The *Gwaii Haanas Agreement* is a unique co-management arrangement which asserted the authority of Haida Nation people in the preservation of Gwaii Haanas, a protected area in the province of British Columbia. The unsustainable timber logging practices led to widespread protests from the Haida Nation peoples and various other groups.[348] This led to different treaty negotiations and finally resulted in the drafting of the *Gwaii Haanas Agreement*. This agreement contained parallel statements that acknowledged the sovereignty, ownership, and jurisdiction of the Haida Nations Council and the federal government simultaneously.[349]

These instances illustrate how different co-management arrangements have become a standard tool to address the resource use conflicts in Canada. These negotiations were adopted as attempts towards non-confrontational resource governance. Various legal and political struggles have contributed to the growth of co-management regime in Canada. It has provided a platform for

[347] Natcher, *supra* note 320 at 272.
[348] Mabee et al, "Co-Management of Forest Lands", *supra* note 3737 at 245-246.
[349] *Ibid* at 246.

including Aboriginal values and their traditional ecological knowledge in resource governance, thereby reducing the conflicts between Aboriginal peoples and the government agencies in the management of resources. Co-management was adopted as an attempt towards integrating Aboriginal peoples into the decision-making process. It seeks to ensure capacity development along with the integration of their cultural traditions.[350] The provincial governments adopted this arrangement as a "tangible expression of a fundamental rethinking of rights and relationship."[351]

There are also places in Canada where Aboriginal groups entered into Interim Measure Agreements while negotiations were taking place. Interestingly, the upper hand that these interim agreements provided to the Aboriginal groups sometimes offered stronger protection to them than in some of the final agreements.[352] Clayoquot Sound of Vancouver Island in British Columbia would potentially be an excellent example for such an attempt. Co-management efforts have developed as a key instrument in asserting the role of Aboriginal voices in forest resource management in British Columbia since it is "a province where few historic treaties were signed and where ownership of the land remains in question."[353] Hence, this research examines co-management between Aboriginal peoples and the British Columbia provincial government through the example of Clayoquot Sound.

4.5 Forest Land and Aboriginal Rights in British Columbia: From Colonial Alienation towards Co-management

One-sixth of Aboriginal peoples in Canada live in British Columbia and the Aboriginal forest in this Province totals around 198,000 hectares.[354] British Columbia is, in fact, the Province with the

[350] Holly Spiro Mabee and George Hoberg, "Equal Partners? Assessing Comanagement of Forest Resources in Clayquot Sound" (2006) 19 Society and Natural Resources 875 at 877 [Mabee & Hoberg].
[351] Claudia Notzke, "A New Perspective in Aboriginal Natural Resource Management: Co-management" (1995) 26 Geoforum 187 at 207.
[352] Smith, *supra* note 3636 at 99.
[353] In early 1900s, First Nations and the Crown in Canada have signed various treaties in large parts of Canada. However, in British Columbia, treaty-making was confined to the Douglas treaties (small areas of Vancouver Island) and Treaty 8 (Northeastern British Columbia).
[354] National Aboriginal Forestry Association, *Third Report on First Nation-Held Forest Tenure in Canada 2015* at 26, online: NAFA Forestry < http://www.nafaforestry.org/pdf/2015/First%20Nation-Held%20Forest%20Tenure%20Report%202015.pdf> [NAFA, *Third Report*]; BC Treaty Commission, *Negotiation Update* (2010), online: < www.bctreaty.ca/negotiation-update >.

second largest forest cover in Canada after Quebec, with a total of 57,910 million ha [355]of forest land. Of this, provincial Crown land constitutes 96%, and 3% is privately owned.[356]

Similarly, to in other parts of Canada, colonialism has pervasively influenced Aboriginal governance structures in British Columbia. The relationship with Aboriginal peoples was more of a partnership during the period between the 1770s and 1840s since the Aboriginal people had the upper hand over resource management.[357] Nevertheless, it cannot be denied that this period transformed Aboriginal governance structures. New values, such as the accumulation of private land ownership, were imposed on Aboriginal communities at this time.[358] The first phase of cooperative existence ended after the decline of the fur trade and the exploration of mineral resources by colonial powers.[359] The Confederation of British Columbia in 1871 opened up the Province to further exploitation, which resulted in a strained relationship between Aboriginal peoples and government. The exclusion of Aboriginal communities from their land and resources, amongst other reasons (including income loss), adversely affected the Aboriginal population. This exclusion was concretized in the 20th century through various provincial government policies.[360]

Notwithstanding the above, there was no substantial change in the condition of the Aboriginal peoples in British Columbia after British Columbia joined Confederation in 1871. Moreover, as in any other Canadian Province, the *Indian Act* influenced Aboriginal culture and governance structures in British Columbia. John Giokas refers to Judge Scows's statement which affirms that the *Indian Act* disturbed "the respected forms of government" of the Aboriginal people.[361] For a very long period, the provincial government and the forest industry were the most important players in the management of the forests in British Columbia.[362] Aboriginal peoples, with a value

[355] Bryan E.C. Bogdanski, "Canada's Boreal Forest Economy: Economic and Socioeconomic Issues and Research Opportunities" (2008), online: Natural Resources Canada <http://cfs.nrcan.gc.ca/pubwarehouse/pdfs/28200.pdf >
[356] NAFA, Third Report, *supra* note 354 at 26.
[357] Coates & Carlson, *supra* note 302302302 at 18.
[358] *Ibid* at 19.
[359] H Srikanth, "Political Autonomy and Economic Development of Indigenous Peoples: A Comparative Study of North-East India and British Columbia" cited in A. S. Narang, ed, *State Society and Economy in the Twenty-First Century: Canada- India Perspective* (New Delhi: Manohar Publishers and Distributors, 2009) at 338.
[360] Coates & Carlson, *supra* note 302357 at 23.
[361] John Giokas, "The Indian Act: Evolution, Overview and Option For Amendment and Transition" (1995) at 42, 43, online: Government of Canada, <http://publications.gc.ca/collections/collection_2016/bcp-pco/Z1-1991-1-41-130-eng.pdf>.
[362] See generally Paul Sabatier & Grace Skogstad, *Policy Communities and Public Policy in Canada: A structural Approach* (Toronto: Copp Clark Pitman, 1990).

system that was quite distinct from that of the government and industrial agencies, initially failed to penetrate into a formal forest governance regime. This exclusion created wide resistance in the form of direct action by Aboriginal peoples to establish sovereignty over their land. To an extent, this resistance helped Aboriginal peoples to retain their culture.[363] In addition, British Columbia is a province that has been at the forefront of Indigenous legal activism.[364] Haida activism is an example of how these direct actions have sometimes resulted in important government decisions.[365]

The Supreme Court of Canada first acknowledged the self-government rights of Aboriginal people in *Delgamuukw v British Columbia*, which recognized unextinguished Aboriginal rights.[366] This led to the creation of the British Columbia Treaty Commission to facilitate and negotiating treaties. The "negotiation update" of the British Columbia Treaty Commission clarified that two-thirds of Aboriginal people were involved in the modern treaty process in British Columbia. In many cases, Interim Measures Agreements were entered into during claims negotiation, and some evolved as significant forms of co-management in Canada. Further, Aboriginal resistance resulted in recognition of Aboriginal rights in some provincial legislation.

As a result of all these activities, forest governance and Aboriginal policies in British Columbia have undergone a substantial transformation over the past few decades. The decisions in *Delgamuukw* and *Haida* also pressured the provincial government into establishing a new forest governance regime that is inclusive of Aboriginal peoples.

In 2003, the provincial government of British Columbia initiated some crucial steps through the enactment of the *Forest (First Nations Development) Amendment Act, 2002* (Bill 41) and the adoption of the *Forest Revitalization Plan*.[367] Bill 41, which added section 47.3 to the Forest Act, provided discretionary powers to the Minister of Forests of British Columbia to invite applications

[363] Frideres, *supra* note 4545 at 31.
[364] Coates & Carlson, *supra* note 302302357 at 25.
[365] Rima Wilkes & Tamara Ibrahim, "Timber: Direct Action over Forests and Beyond" in Tindall, Trosper & Perreault, *supra* note 3636, 74 ("[h]aida activism in the 1980s led to the creation of Gwaii Hanaas National Park in 1993" at 81).
[366] See generally [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw* cited to SCR].
[367] Jason Forsyth, George Hoberg & Laura Bird, "In Search of Certainty: A Decade of shifting Strategies for Accommodating First Nations in Forest Policy" in Tindall, Trosper & Perreault, *supra* note 36, 298 at 299 [Forsyth, Hoberg & Bird].

from First Nations for granting small-scale timber tenures if they enter into an agreement with the provincial government. These agreements were called "forest and range agreements" or "direct award agreements."[368] Further, a comprehensive provincial policy was introduced by the Provincial Government to incorporate the Aboriginal interests through consultation on matters relating to the management and development of land and resources of the Crown.

However, dissatisfaction amongst Aboriginal peoples lingered on since their participation was almost ornamental and forest industry representatives were playing a crucial role in shaping these policies along with the Government agencies.[369] Also, the forest and range agreements based on a per-capita formula were causing discontentment in many First Nation groups. Huu- Ay-Aht First Nations challenged this in the Supreme Court of British Columbia and was successful in obtaining an order which categorically held that the existing forest and range agreements that are reliant on the population-based formulae do not satisfy the requirement of good-faith consultation and accommodation.[370]

In 2010, the Provincial Government of BC initiated steps to revamp the forest and range agreements and devised forestry specific interim measure agreement i.e. Forest Consultation Revenue Sharing Agreement (FCRSA) and the Forest Tenure Opportunity Agreement (FTOA). Various factors including the decision of the British Columbia Supreme Court in *Huu-Ay-Aht* triggered the process of adoption of these agreements.[371] FCRSAs offered economic benefits to First Nations through revenue-sharing procedures. On the other hand, FTOAs were more of an area-based tenure arrangement that lent a vital role to First Nations in resource management. FCRSAs were a notable shift from the previously existing population-based formulae to a revenue-sharing formula. They relied on the percentage of revenue derived from forest-related activities in a First Nation territory.[372] However, the agreement is passive on the extent of infringement that a particular forestry activity may cause. Moreover, the provincial government continues to have the upper hand in the decision-making relating to these agreements.

---

[368] *Ibid* at 303.
[369] *Ibid* at 299-300.
[370] *Huu-Ay-Aht First Nation v British Columbia (Minister of Forests)*, 2005 BCSC 697 at para 56-59, 33 Admin LR (4th) 123.
[371] Forsyth, Hoberg & Bird, *supra* note 367367 at 308.
[372] *Ibid* at 308-309.

Similarly, First Nations Woodland Licenses (FNWLs) developed in 2010 were a further tenure innovation but without different consequences. FNWLs were adopted to provide licenses to harvest timber on the Crown land. This was also an important tenure reform which enhanced the role of Aboriginal peoples in the forest management in British Columbia. However, as rightly observed by Lisa Ambus and George Hoberg, the tenure structures "are not as substantive, comprehensive, or innovative as originally envisioned."[373]

Having said that, we cannot deny the fact that the adoption of these policies and agreements has contributed to a substantial transformation of the forest economy in the province of British Columbia. The evolution of a new Aboriginal forest tenure played an important role in the transformation of the forest governance regime in British Columbia. Above, the development of co-management in the forms of various legislations and policies has been discussed, including its significance as emerging legality. The increased participation of Aboriginal peoples in decision-making processes has been a critical step in forest management within British Columbia. For the Aboriginal population, their empowerment is not only about authority but also about claiming rights over their traditional territories. Clayoquot Sound in British Columbia is a noteworthy example since it is an advanced co-management arrangement that has been active for more than a decade.[374] The next section will discuss the example of Clayoquot Sound and examine the role of Aboriginal institutions, especially in decision-making over forest management.

4.6 An Analysis of Clayoquot Sound

Canada's co-management regimes are evolving and promising institutional arrangements for a resource governance framework.[375] Their significance for forest management has already been discussed previously in this thesis. Co-management is highlighted as a pragmatic decolonization instrument to challenge the authoritarian position adopted by the state against Aboriginal peoples. The forest and its resources are recognized as an integral part of the life and culture of Aboriginal

[373] Lisa Ambus & George Hoberg, "The Evolution of Devolution: A Critical Analysis of the Community Forest Agreement in British Columbia" (2011) 24 Society and Natural Resources 933 at 945.
[374] Mabee et al, "Co-Management of Forest Lands", *supra* note 3737 at 242.
[375] Smith, *supra* note 36 at 91.

communities in Canada. However, various developmental projects, such as mining, and resource extraction have affected the mutuality of the relationship between Aboriginal peoples and the forest.[376] An example of Clayoquot Sound is consequently an important illustration of one of the most evolved co-management processes in Canada.[377] Clayoquot Sound is mostly inhabited by the Ahousaht, Hesquiaht, Tla-o-qui-aht, Toquaht, and Ucluelet of Nuu-chah-nulth First Nations. It is one of the most pristine forests on Vancouver Island, spread over 350,000 hectares. To understand more about Clayoquot Sound, it is vital to grasp the historical and political context that empowered First Nation communities to bring about effective co-management.

The Province of British Columbia witnessed its biggest incidence of civil disobedience in the mid-1980s and 1990, when conflict flared up between the government and First Nations over natural resources.[378] The main factors triggering this movement consisted of the forestry policies of British Columbia's provincial government, which allowed foreign investors to obtain long-term logging leases in the region. The idea was to generate foreign capital, without giving any attention to the protection and conservation of old growth forests. Neither were the interests of most of the local inhabitants considered. First Nations and some environmental non-governmental organizations consequently set up blockades on logging roads, which even resulted in an international boycott of forest products from British Columbia.[379] For example, media coverage, along with these protests, discouraged international buyers of MacMillan Bloedel products.[380] However, the blockaders were not interested only in protecting the forest, but also in promoting the recognition of Aboriginal title. The Clayoquot Sound band declared this land as a "tribal park" in an attempt to claim their title on the basis of socio-cultural and economic values.[381]

The ensuing political struggle contributed to the transformation of forest policy in British Columbia, where timber companies and the provincial government had the upper hand over

[376] See generally John Lewis & Stephen R. J. Sheppard, "First Nations' Spiritual Conceptions of Forest and Forest Management" in Tindall, Trosper & Perreault, *supra* note 3636, 205.
[377] Mabee & Hoberg, *supra* note 350 at 876.
[378] Ronald Hatch, "The Clayoquot Show Trials" in Ronald Hatch & Veronica Hatch, eds, *Clayoquot and Dissent* (Vancouver: Ronsadale, 1994) 105 at 105-106.
[379] Mabee et al, "Co-Management of Forest Lands", *supra* note 37 at 243-244.
[380] Brian J Parai & Thomas C Esakin, "Beyond Conflict in Clayoquot Sound: The Future of Sustainable Forestry" in Alfonso Peter Castro & Erik Nielsen eds, *Natural Resource Conflict Management case studies: An analysis of power, Participation and Protected Areas* (Rome: FAO, 2003) 163 at 166 [Parai & Esakin].
[381] Michael Lee Ross, *First Nations Sacred Sites in Canada's Courts* (Vancouver: UBC Press, 2005) at 26.

determining the timber harvest and other important forest policies.[382] The conflicts then took a radical shift in 1985, when the Chiefs of the Ahousaht and Tla-o-qui-aht First Nations obtained an injunction to prevent logging at Meares Island until their land claims were recognized. This was the first court intervention with an impact on resource development efforts in British Columbia, based on a claim to Aboriginal title.[383] Further to this, the Clayoquot Sound Sustainable Development Task Force was established by the Government of British Columbia to resolve these conflicts in 1989. However, the Task Force failed to resolve them, since they could not reach a consensus on the land use plan. It resulted in the issuing of the Clayoquot Sound Land Use Decision in 1993, guaranteeing protection to just 34% of the land base.

Environmentalists and the Nuu-chah-nulth First Nation were dissatisfied with the above decision, since they had not been adequately consulted in the process.[384] This further triggered a massive protest in the region, which resulted in over 800 arrests. One of a kind, the protest put immense pressure on the provincial government to expedite negotiation efforts with the Nuu-chah-nulth First Nation. An Interim Measures Agreement was subsequently signed, thus establishing the Clayoquot Sound Central Region Board in 1994.[385] This Interim Measures Agreement guaranteed the Nuu-chah-nulth First Nation with some control over their traditional land and resources. Meanwhile, the Central Region Board had equal participation from both the Provincial Government and Nuu-chah-nulth First Nation, with the power to review all land use and resource management.

The Central Region Board consists of five First Nation representatives from each First Nation in Canada's central region (one member each from the Ahousaht, Hesquiaht, Tla-o-qui-aht, Toquaht and Ucluelet of Nuu-chah-nulth First Nations), five non-First Nations representatives from the British Columbia Government, and finally, one Co-chair appointed by the Province and one Co-chair appointed by the First Nations. One of the main functions of the Central Region Board includes the promotion of sustainable economic development, the evaluation of compliance with forest standards, and the development of sustainable forest industry in line with increasing local

[382] George Hoberg & Edward Morawski, "Policy change through sector intersection: Forest and Aboriginal Policy in Clayoquot Sound" (1997) 40 Cdn Public Administration 387 at 388.
[383] Mabee et al, "Co-Management of Forest Lands", *supra* note 37 at 243-244.
[384] Mabee & Hoberg, *supra* note 350350 at 243-244.
[385] Parai & Esakin, *supra* note 380 at 174.

ownership, *inter alia*. The decision-making of the Central Region Board is mainly consensus-based and in the absence of a consensus, determined by a double majority vote, whereby most of the First Nation representatives and Board members must approve. If the Central Region Board recommendations are not complied with by the end of a stipulated period of 30 days, the matter may be referred for an Interim Measures Agreement and to a corresponding cabinet. If any of the parties are then dissatisfied with the decision of the cabinet, a dispute resolution body, known as the Central Region Resource Council may be called upon to intervene .[386]

Thus, an Interim Measures Agreement is projected as a system of provincial and First Nation co-management in the area. Moreover, through the Central Region Board, some scope is ensured for dialogue with the community over the use of land and resources in Clayoquot Sound. Additionally, a Scientific Panel for Sustainable Forest Practices was formed in Clayoquot to trace the community's sustainable forest management practices, combining these with scientific and traditional knowledge. In addition, this Panel was entrusted with the responsibility to examine forest policies in the Clayoquot region. The provincial government accepted over 170 of the Panel's recommendation and the Central Region Board was obliged to ensure that these were applied.[387] Furthermore, the Clayoquot Sound Planning Committee was established by the provincial government to implement the recommendations of the Scientific Panel.

In 1997, MacMillan Bloedel began the permanent closure of its Clayoquot Sound operations, owing to various factors, including the recommendations of the Scientific Panel, First Nation negotiations with the provincial government, the fall in the timber market, and various protests and campaigns organized by local communities and environmental organizations.[388] However, in 2000, MacMillan Bloedel's operations were taken over by Weyerhauser Canada. At present, there are two major forest tenures in Clayoquot Sound: International Forest Products Limited (Interfor) and Lisaak Forest Resources Limited (Lisaak).[389] Lisaak is highlighted as a significant effort, due to its inclusion of Indigenous values in sustainable logging and its conservation-based forest

[386] The Central Region Resource Council composed of the hereditary chiefs of the Central Region Nuu-chah-nulth Tribes and Ministers of the Province.
[387] Parai & Esakin, *supra* note 380 at 175.
[388] *Ibid* at 175.
[389] Interfor Corporation is one of the largest lumber producers in the world and Lisaak was created under IMA with 51 percent ownership for five First Nations in Clayoquot Sound and 49 percent ownership to Wayerheauser Company.

management. It is in fact a joint venture, wherein both Aboriginal and non-Aboriginal people are parties. Thus, it was a shift from volume-based forestry to value-based forestry.[390] Nevertheless, an analysis of Lisaak's progress to date will reveal that the entire focus is on the economic aspect of the forest, rather than developing an Aboriginal institutional arrangement for sustainable resource governance.

4.6.1 Challenges in Clayoquot Sound

An analysis of co-management arrangements in Clayoquot Sound will prove that various challenges have been faced by Nuu-chah-nulth First Nation communities in the process of co-management. The Clayoquot co-management effort was an attempt to offer equal partnership to First Nations and the Provincial Government with regard to forest management. However, there have been various obstacles faced by communities during these efforts, even though the Scientific Panel specified participation from First Nations and decision-making over forest management.

, In their study on co-management efforts in Clayoquot Sound, Mabee and Hoberg conducted interviews with various stakeholders involved in the process.[391] Their study clarified that the majority of First Nation communities, as well as government agencies, admit that the decision-making process of the Central Region Board does not provide equal partnership for First Nations.[392] Central Region Board decisions are vested with the right to make recommendations to provincial Ministers, while the statutory decision-making power is vested in the Ministry of Forests.[393] Above all, the extension period of the Interim Measures Agreement was reduced to one year in 2008, which rendered communities powerless to make any long-term plans.[394]

There are various problems relating to the crisis-based co-management efforts implemented at Clayoquot Sound.[395] The dispute resolution body of the Clayoquot Sound Central Region Resource Council does not have proper guidelines for its work, and this has led to serious ambiguities,

[390] Gabriela Pechlaner & D. B. Tindall, "Changing Contexts: Environmentalism, Aboriginal Community and Forest Company Joint Ventures, and the Formation of Lisaak" in Tindall, Trosper & Perreault, *supra* note 36, 260 at 269.
[391] See generally Mabee & Hoberg, *supra* note 350.
[392] *Ibid* at 881.
[393] Mabee et al, "Co-Management of Forest Lands", *supra* note 37 at 248-249.
[394] *Ibid* at 243-256.
[395] Alfonso Peter Castro & Erik Nielsen "Indigenous people and Co-management: implications for conflict management" (2001) 4 Environmental Science & Policy 230.

whenever there are conflicting interests.[396] The territorial overlap when two or more First Nations are involved also plays an important role in delaying the whole process of land claims in Clayoquot. These factors indicate that there are various institutional challenges to the Clayoquot Sound model, which are mainly due to a difference in perceptions between Aboriginal peoples and State Government, regarding the role and responsibilities of the co-management board.

Additionally, the ultimate statutory decision-making power is vested in the Provincial Government. Hence, the projection of First Nations as equal partners with Provincial Government is not realistic. Various other factors were projected as reasons for limiting the equal partnership of First Nations and the Government. These include the lower number of politically active First Nation members involved, the capabilities of First Nation members, complex scientific planning processes, and distrust of existing colonial systems.[397] The Scientific Panel's recommendation that the "co-management of the Clayoquot Sound ecosystem must be based on an equal partnership between the Nuu-chah-nulth and the Province of British Columbia" also granted equal powers to the Provincial Government over the co-management process. The institutional arrangement, whereby the role of Government agencies and First Nations are not properly demarcated, has led to more difficulties in implementation.[398] Scholars such as Mabee highlight that there is an absence of "strong institutional and legal structures" with "proper decision-making powers" and this has slowed the Clayoquot Sound co-management.[399]

4.7 Important Judicial Interventions Regarding Aboriginal Consent in Resource Governance

Above, the challenges to forest governance in Canada were discussed, with the example of Clayoquot Sound highlighting these in an applied context. This section will now examine the jurisprudence surrounding resource governance. The significance of Aboriginal consent in resource governance is well-defined in Chapter II. Furthermore, the development of tribal consent in India through an analysis of FRA judgments has been examined.

[396] Mabee et al, "Co-Management of Forest Lands", *supra* note 37 at 249.
[397] Mabee & Hoberg, *supra* note 350 at 882.
[398] Mabee et al, "Co-Management of Forest Lands", *supra* note 37 at 248.
[399] *Ibid* at 248-250.

In Canada, Aboriginal jurisprudence took a new direction after the decision of the Supreme Court in *Calder*. Moreover, Aboriginal rights are "recognized and affirmed" under section 35(1) of the Constitution Act, 1982. Imai argues that these developments, acknowledging Aboriginal title, triggered a process of legal efforts to undo the historical injustices inflicted on Canada's Aboriginal peoples.[400] It affirms the role of Aboriginal institutions and their consent in resource governance. This transformation in the legal framework has in turn given rise to various forms of social and legal activism in Canada. The discussions surrounding the role of Aboriginal peoples in resource governance became lively after the intervention of the Supreme Court through a series of important decisions under section 35(1) of the Constitution Act. However, there is still some reluctance on the part of the "settler government" "to acknowledge that Indigenous "consent" is required".[401]

Free Prior and Informed Consent has already been discussed in this thesis, as mandated elsewhere under UNDRIP. The major concern indicated by Canada against the adoption of UNDRIP was its incompatibility with the existing Constitutional framework. For example, current constitutional standards are not directly in consonance with the requirement for FPIC.[402] The conflicts between federal government policy and judicial decisions also cause delays in the process of adopting UNDRIP in Canada.

This research focusses on consent, as discussed within Aboriginal title and rights cases decided by the Supreme Court of Canada. *Calder*, which discussed Aboriginal claims submitted by the Nisga'a Nation, was the first significant decision of the Supreme Court to recognize the existence of Aboriginal title in Canada. Judges of the Supreme Court were divided over the question of extinguishment in this case. However, it was in *R v Sparrow* that the Supreme Court of Canada first interpreted section 35(1) of the Constitution.[403] This decision discussed the fishing rights of the Musqueam Nation in British Columbia. The Musqueam Nation raised various claims, including their right of self-determination and the right to ownership over hunting and fisheries under section 35(1) of the Constitution. Nevertheless, the Supreme Court denied the claim for self-governance and maintained the indisputability of the Crown's sovereignty, stating that "there was

[400] Imai, *supra* note 331 at 3.
[401] *Ibid* at 24.
[402] Sasha Boutilier, "Free Prior and Informed Consent and Reconciliation in Canada" (2017) 7 W J Legal Stud 1 at 5.
[403] *R.v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow* cited to SCR].

from the outset never any doubt that sovereignty and legislative power… [was] vested in the Crown".[404] McNeil (2006) argues that denial by the Supreme Court to accept the self-governing authority of the Musqueam Nation "may have been a conscious decision by the Supreme Court to leave 'the issue of self-regulation open for subsequent consideration'".[405] Concurrently, a justification analysis was set out through *Sparrow* to assess the infringement of section 35(1) of the Constitution Act. This test analyzes the extent of infringement caused by legislation, which "has the effect of interfering with an existing [A]boriginal right." It also examines the justification put forth in this regard and vested in the Federal Government, for the power to extinguish Aboriginal rights before the enactment of the Constitution Act, 1982. However, the Supreme Court clarified that "the consent to its extinguishment before the Constitution Act, 1982, was not required."[406]

The question of infringement was discussed in *R v Van der Peet*,[407], and Lamer CJ in his majority opinion added with reference to the test laid down in *Sparrow* that

> …after the claimant has demonstrated that the legislation in question constitutes a prima facie infringement of his or her aboriginal right, the onus then shifts again to the Crown to prove that the infringement is justified. Courts will be asked, at this stage, to balance and reconcile the conflicting interests of native people, on the one hand, and of the rest of Canadian society, on the other.[408]

It should be noted that the authority, here, is given to the Crown to assess whether there has been an infringement. In itself, this indicates the upper hand of the Crown and the emphasis placed by the Supreme Court on Crown sovereignty over Aboriginal sovereignty. Thomas Isaac presents a different view of this aspect, although he subscribes to the argument that *Sparrow* failed to make any specific mention of Aboriginal sovereignty or self-government: "in *Sparrow*, the Supreme Court has opened the door for using section 35 to promote the recognition and affirmation of Aboriginal self-government".[409] However, it was in *Delgamuukw* v *British Columbia* that the

---

[404] *Ibid* at 1103.
[405] Kent McNeil, "Judicial Approaches to Self-Government since *Calder*: Searching for Doctrinal Coherence" at 7 cited in Jennifer E. Dalton, "Aboriginal Self-Determination in Canada: Protections Afforded by the Judiciary and Government" (2006) 21: 1 CJLS 11 at 15.
[406] *Sparrow*, *supra* note 403 at 1099.
[407] [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet* cited to SCR].
[408] *Ibid* at para 135.
[409] Thomas Issac, "Balancing Rights: The Supreme Court of Canada, R*v Sparrow*, and the Future of Aboriginal Rights" (1993) 13 Can Native Studies 199 at 211.

Supreme Court attempted to interpret Aboriginal consent in resource governance.[410] This case underwent a thirteen-year long legal process and considered Aboriginal title claims of the Gitksan and Wet'suwet'en peoples. *Delgamuukw* distinguishes Aboriginal title from other "normal" proprietary interests; describing it as *sui generis*. Also discussed was the significance of Aboriginal consent, clarifying that "in some cases 'full consent of an Aboriginal nation' should be a requirement, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands".[411] In the same decision, while considering the question of the right to self-government, the Supreme Court relied on the judgment in *R v Pamajewon*[412]and held that Aboriginal "rights to self-government, if they existed, cannot be framed in excessively general terms".[413] On the other hand, the Court was slow to acknowledge the colonial origin of state sovereignty. John Borrows argues that "the court was quite willing to frame Crown rights to self-government in the most "excessive and general" of terms."[414]

Delgamuukw has certainly carried forward discussions on Aboriginal consent. However, overemphasis on Crown sovereignty has diminished the impact of these attempts. For instance, even the three-part test set out in paragraph 26 of the judgment puts the burden on Aboriginal groups to prove that

> (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.[415]

Delgamuukw confirmed the position held in *Sparrow,* which gave Federal Government the power to extinguish Aboriginal rights before the enactment of the Constitution Act, 1982, without the consent of the Aboriginal people. It could be convincingly argued here that this emphasis on Crown sovereignty in *Delgamuukw* has impaired Aboriginal consent and Aboriginal self-governance substantially.

---

[410] See generally *Delgamuukw*, *supra* note 366.
[411] *Ibid* at 168.
[412] [1996] 2 SCR 821, 4 CNLR 164 [*Pamajewon* cited to SCR].
[413] *Delgamuukw*, *supra* note 366 366 at para 170.
[414] John Borrows, "Sovereignty's Alchemy: An analysis of *Delgamuukw v British Columbia*" (1999) 37:3 Osgoode Hall LJ 537 at 575.
[415] *Delgamuukw*, *supra* note 366366 at 1097.

Up until 2004, there were other deep ambiguities regarding the obligations of the Crown towards Indigenous peoples. The intervention of the Supreme Court of Canada in three different cases, *Haida Nation v British Columbia (Minister of Forests)*[416], *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*[417] and *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* (2005)[418] changed the jurisprudential history of Aboriginal governance. These judgments highlighted the Crown's duty to consult and accommodate Aboriginal peoples in cases where the existence and scope of their rights remain uncertain. The three judgments redefined the relationship between Aboriginal and non-Aboriginal populations in the country.[419] Dwight Newman argues that a "new realm of Aboriginal law" was subsequently established.[420] In *Haida*, the Minister abstained from consulting the Aboriginal communities concerned on their license claim to the archipelago of Haida Gwaii, but Chief Justice McLachlin held that the Crown has the "ultimate legal responsibility" to consult and accommodate Aboriginal rights.[421]

Haida may require the Crown to engage in "deep consultation," where there may be a challenge to Aboriginal rights. Although there are ambiguities over the "duty to accommodate", *Haida* makes it clear that "the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted rights or title and with other social interests."[422] This accommodation is not mandated within the framework of consultation, but in some cases, it will "be required as a component of the duty to consult".[423] The duty to accommodate in this instance is only considered as "good faith efforts to understand each other's concerns and move to address them". "Full consent of [the] aboriginal nation" on serious issues is only necessary in cases of "intrusions on settled claims."[424] This implies that consent discussed in this decision is confined to established rights and not stretched to unresolved Aboriginal title claims, whereby the courts emphasize only a "balancing of Aboriginal and other interests." Although "spectrum analysis",

[416] 2004 SCC 73, [2002]2 CNLR 121 [*Haida* cited to SCC].
[417] 2004 SCC 74, [2004]3 SCR 550 [*Taku* cited to SCC].
[418] 2005 SCC 69, [2005]3 SCR 388 [*Mikisew* cited to SCC].
[419]Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishing Ltd, 2014) at 16, 17 [Newman].
[420]*Ibid* at 19.
[421] *Haida*, *supra* note 416 at para 53.
[422]*Ibid* at 50.
[423] Newman, *supra* note 419 at 103.
[424] *Ibid* at 24.

explained in *Haida*, is a step towards seeking Aboriginal consent, it varies depending on the strength of the claims.

The *Taku River* decision discussed a conflict over the transboundary claims of the Taku River Tlingit First Nation, with a proposed road for a mining project. The Supreme Court followed the same proposition as in *Haida*, namely that accommodation requires a balance between Aboriginal and non-Aboriginal considerations. The *Mikisew* decision, dealing with the rights of the Mikisew Cree First Nation under Treaty 8, was decided along similar lines. It discussed the failure of the Federal Government to consult Mikisew Cree First Nation when approving the construction of a winter road in Wood Buffalo National Park. In *Mikisew*, the Supreme Court extended the Duty to Consult and Accommodate, as discussed in *Haida* concerning treaty rights[425]and held that this case comes at the end of the spectrum, with minimal potential impact. Although this case did not directly discuss the consent framework, it touched upon the veto rights of the Aboriginal people over matters affecting their treaty rights. The Supreme Court clarified that

> had the consultation process gone ahead, it would not have given the *Mikisew* a veto over the alignment of the road. As emphasized in Haida Nation, consultation will not always lead to accommodation, and accommodation may or may not result in agreement.[426]

Hence, it could be argued that even though *Mikisew* clarified some issues surrounding the duty to consult and accommodate, it did not take the debates on Aboriginal consent any further. Similarly, in 2010, the Supreme Court confirmed its position through *Beckman v Little Salmon/Carmacks First Nation* (2010), holding that "the First Nation does not have a veto over the approval process."[427]

4.7.1 *Tsilhqot'in* - A New Dimension of Aboriginal Consent

Tsilhqot'in is a watershed decision of the Supreme Court of Canada, which redefined the history of Aboriginal consent in Canada. The Tsilhqot'in Nation consists of six bands and around 3000 citizens in central British Columbia. Here, the Supreme Court extended the scope of Aboriginal title "beyond physically occupied sites, to surrounding lands over which a Nation has effective

[425] *Mikisew supra* note 418 at para 3.
[426] *Ibid* at para 66.
[427] 2010 SCC 53 at para 14, [2010] 3 SCR 103 [*Little Salmon* cited to SCC].

control."[428] The Court recognized the Tsilhqot'in Nation's Aboriginal title to approximately 1,700 square km by upholding

> ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.[429]

Although there were differing opinions regarding the governance capacity of a nomadic community like the Tsilhqot'in Nation, the Court gave them the benefit of the doubt and ruled in their favour, citing

> evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group.[430]

Tsilhqot'in made the consent of Aboriginal people compulsory in the case of a proven Aboriginal title. Nevertheless, although the Supreme Court in *Tsilhqot'in* shows some inclination towards Aboriginal consent, the vesting of the Crown with some exceptional powers limits its application. There are in fact many statements within the case which restrict the scope of Aboriginal consent. *Tsilhqot'in* confirmed *Delgamuukw* and provided the Crown with the authority to infringe Aboriginal rights, referring to Lamar, C.J. in *Delgamuukw* where he stated that when land is required for

> agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title.[431]

The Supreme Court gave the Crown the authority to justify infringement, if "(1) it has discharged its duty to consult and accommodate; (2) its actions were backed by a compelling and substantial objective; and (3) the action was consistent with the government's fiduciary duty".[432] The *Sparrow* test mandates proof of a "compelling and substantial" purpose as a precondition for this

[428] *Tsilhqot'in supra* note 95 at para 36.
[429] *Ibid* at para 73.
[430] *Ibid* at para 38.
[431] *Tsilhqot'in supra* note 95 at para 8.
[432] *Ibid* at para 77.

infringement, which in itself, has a nullifying effect on any attempt to bring Aboriginal consent into Aboriginal title claims. The Supreme Court also decided that the Crown's overriding power must not "substantially deprive future generations of the benefit of the land".[433]

A significant gap in *Tsilhqot'in* was its recognition of Crown sovereignty over Aboriginal sovereignty. The finding of the Court that *terra nullius* is not applicable in Canada was far from descriptively true of the path of Canadian law, and the approach of the court has created many challenges for the Aboriginal peoples in asserting their sovereignty over their land.[434]Having said that, it cannot be denied that *Tsilhqot'in* was a decision on the right path, since a change in the relationship between the Crown and Aboriginal peoples cannot be achieved in a day. Neither can it be denied that judgments like *Tsilhqot'in* provided an opportunity to think beyond the limitations of Colonial institutions in the decision-making process. However, the indication coming from recent Supreme Court judgments on the duty to consult and accommodate, like the 2017 decision in *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*[435] shows that a great deal of deliberation is required over this issue. The judgment makes it clear that unsatisfied claimants do not have any veto power and, in the case, "where adequate consultation has occurred, a development may proceed without consent."[436]

Thus, an analysis of the Supreme Court of Canada judgment makes it clear that the Canadian courts need to take further action to incorporate Indigenous consent into the decision-making process. They do indeed emphasize consultation, accommodation and the justification of infringement, but lack the concept of Aboriginal consent or veto power in decision-making. The adoption of consent in international instruments, such as the ILO, UNDRIP. etc. are an indication of its significance for resource governance. Analysis conducted in this part of the present thesis makes it clear that decolonization is an ongoing process and success in the court room is very limited.

[433] *Ibid* at para 86.
[434] John Borrows, "The Durability of Terra Nullius: Tsilhqot'in Nation v British Columbia" (2015) 48 UBC LRev 701 at 702, 727-740.
[435] 2017 SCC 54, 2017 Carswell BC 3020 [*Ktunaxa* cited to SCC].
[436] *Ibid* at para 83.

4.8 Conclusion on the Canadian Context

Co-management regimes facilitate a symbiotic relationship, which allows both Aboriginal peoples and state agencies to learn from each other.[437] However, various factors can hinder the co-management process in Canada, since communities are still struggling to overcome the damage caused by Colonial legislation and policies over the years, including the *Indian Act*. The Royal Commission on Aboriginal People rightly points out that co-management should be a merging of two different systems, so as to avoid the assertion and supremacy of one over the other. However, the present case study highlights that state agencies have a domineering power in co-management regimes.

An analysis of the co-management regime in Clayoquot Sound revealed that Aboriginal institutions and their decision-making powers are not given due importance in the process of forest resource governance. The top-down bureaucratic approaches developed through Colonial legislation and institutions play a significant role in policy formulation and execution, reflecting a reluctance to acknowledge Aboriginal autonomy.

In the present example, especially instances such as land use planning, state agencies like the Ministry of Forests play a pivotal role. In contrast, the Central Region Board merely serves as a *de facto* advisory body, since First Nations are not joint signatories to forestry plans.[438] The unequal representation of heterogeneous First Nation groups on the Central Region Board is a precipitating factor that delays the implementation of a co-management arrangement. Moreover, the fact that the functioning of a co-management board is dependent on funding from the provincial government has a strong bearing on the decision-making process. The provincial government, therefore, continues to perform its role as a hierarchical authority and dominates decision-making. As a result, it may be observed that the state remains at the center of the decision-making process and in effect, this reproduces a top-down model of resource governance. In many cases, the decision-making authorities are state agencies.

Aside from the above, the nature of this specific example is a determining factor. Clayoquot Sound is party to a crisis-based co-management agreement and unlike claim-based co-management, this

[437] D B Tindall & Ronald L Trosper, "The Social Context of Aboriginal Peoples and Forest Land Issues" in Tindall, Trosper & Perreault, *supra* note 3636, 3 at 10 [Tindall & Trosper].
[438] Mabee et al, "Co-Management of Forest Lands", *supra* note 374 at 248.

relies on an Interim Measures Agreement for its implementation. Ambiguous terms and conditions in agreements are an important factor impacting on the recognition of decision-making power to Aboriginal peoples. The shifting of government priorities, once the crisis fades from public memory, is an important drawback of crisis-based co-management.[439] That said, it may also be observed that there are instances where co-management efforts in Canada have offered institutional arrangements with scope for higher decision-making powers to be awarded to Aboriginal peoples. The *James Bay and Northern Quebec Agreement* were one of the first co-management agreements to ensure a legally defined role for the Cree and Inuit people of Northern Quebec, in the management of their traditional land and resources. It was cited as a significant deviation from the imposition of an industrial mode of forestry on Aboriginal peoples.[440] Claim-based co-management efforts in Gwaii Haanas for the preservation of a protected area represent another example. Under this *Gwaii Haanas Agreement,* the Haida Nation was given equal decision-making power alongside Parks Canada, since they demanded a joint signatory status.[441] However, the fact remains that these examples are exceptions and not rules and there is a consequent need for strong institutional and legal structures concerning the proper implementation of co-management efforts in Canada.

The demand for an autonomous Aboriginal government is based on the premise that their jurisdiction over their traditional territories will result in a strong decision-making process. However, it is not difficult to understand that Canada is reluctant to grant complete jurisdiction over these alleged Aboriginal territories, because of their high potential to generate revenue.[442] Hence, a decentralization process to empower Aboriginal Government with rights and responsibilities that are equal or comparable to those of Provincial and Federal Government is considered highly important. In contrast, recognition of these powers and responsibilities to Aboriginal Government will result in an equitable and sustainable governance process. It could even be argued that an appropriate administrative and political power transfer would enhance Aboriginal decision-making.[443]

---

[439] RCAP, *Restructuring the Relationship*, *supra* note 344 at 640.
[440] See generally Passelac-Ross & Smith, *supra* note 102102 at 131.
[441] Mabee et al, "Co-Management of Forest Lands", *supra* note 3737 at 248.
[442] Andrew Woolford, A. *Between Justice and Certainty: Treaty Making in British Columbia* (Vancouver: UBC press, 2002) at 6-14.
[443]See generally Natcher, *supra* note 320320 at 148.

In the final part of this chapter, Aboriginal jurisprudence on the duty to consult and accommodate was analyzed, since it is considered as the most promising development to vest decision-making power for resource governance in Aboriginal institutions. Consultation and accommodation is in fact an attempt to incorporate Aboriginal voices into the decision-making process on resource governance. Unfortunately, however, the duty to consult and accommodate rather empowers the Crown to justify infringement through the *Sparrow* test and underlines the fact that Canada's Aboriginal peoples do not have the right of veto. The contribution of the latest judgments of the Supreme Court of Canada in *Tsilhqot'in* and *Ktunaxa* is difficult to be considered to offer encouraging indications. It may be concluded that the present legal framework for the duty to consult and accommodate in Canada does not mandate for "consent" from traditional Aboriginal institutions in forest resource governance and this has had an adverse effect on the journey towards Aboriginal self-governance in Canada.

CHAPTER V: CONCLUSION

The principal focus of this thesis is to explore different ways in which the emerging legality of decentralization in India and Canada have accommodated Indigenous peoples' voices in forest resource governance. Although there is a common colonial past, the two jurisdictions evolved in two different ways on their approach towards decentralized forest governance. Two significant legal reforms in these countries have consequently been explored, namely the *FRA* in India and the co-management regime in Canada, in order to investigate decentralized forest governance in both jurisdictions. Functionalist method, in this context, offers an appropriate tool to analyze two different systems when similarity is observed in the nature of the problem that they face. [444]

Different circumstantial factors contributed to ushering in these changes with the legal systems in both these countries. Various treaties and agreements signed between the Aboriginal peoples and the Crown created a notion that the Aboriginal peoples are vested with some sovereign powers in Canada. However, in India, the situation was slightly different due to its unique socio-political and cultural setting. The prevalent hierarchies within the society including caste system were some of the predominant reasons which alienated the tribal people. Thus, the oppression faced by the tribal peoples in India was two-pronged, coming both from the upper caste, mainstream society as well as the colonial and post-colonial governments.

The situation worsened during the post-colonial phase and resulted in strengthening resentment within the tribal communities in India. The post-colonial exclusionary resource governance policies and the large-scale displacement of tribal communities in the name of development significantly worsened the plight of these communities. The tribal populations in India were considered as encroachers on their land for a very long period. The cultural, social as well as political disparities, so created, led to strong indignation amongst the tribal peoples in India. Although the Constitution of India ensured various rights and privileges to the tribal populations, it remained confined to the text. However, a major policy shift occurred after the adoption of a

[444] See James Gordley, "The Functional Method" in Pier Giuseppe Monateri, ed, *Methods of Comparative Law* (Masachusetts: Edward Elgar Publishing Inc, 2012) 107 at 119.

Joint Forest Management and 73rd and 74th Constitutional amendment. The amendment created a platform for democratizing the resource governance and underlined the role of tribal institutions in the process. Different grassroots movements and civil society organizations simultaneously pushed for a policy level change that demanded vesting of power with *Gram Sabhas* in the forest resource governance. Although initially uncoordinated, the parallel efforts of different groups, institutions, and individuals consolidated at a later stage, strengthening the overall push for reforms. The attempt was to create a new legal regime that stresses the role of traditional tribal institutions and their decisions in forest resource governance. The enactment of *the FRA* was in furtherance of these many varying reasons.

Although there are similarities in the nature of the institutions administering resource governance in Canada and India, the legal regime in Canada is evolving in a differing way. Co-management regimes, which are one of the major facets of such an evolution, emphasizes a power-sharing model rather than a devolutionary model with strong decision-making powers vested in the Aboriginal peoples. The primacy accorded to private industry as well as provincial governments in resource governance policies have impeded the interests of Aboriginal peoples in forest resource management. The focus of these policies tends to veer away from strengthening the Aboriginal institutions and instead approaches a limited concept of power-sharing. Furthermore, in most cases the central theme revolves around the idea of economic benefit-sharing.

The dependency of Indigenous peoples on forest resources in India and Canada is also a significant factor. In Canada, although the Aboriginal peoples are largely closely linked with the forests, their lives and livelihood are not fully dependent on it. On the other hand, in India, one-quarter of the land comes under the category of "forest," and the majority of the tribal peoples in India are dependent on the forest and its resources for their livelihood. Thus, the treatment of the tribal peoples as encroachers in their own land caused bitterness amongst them across India. This is one of the reasons for the divergence in the political and legal evolution between India and Canada. While such a movement pushed for the decentralization of powers to the tribal population in India and ultimately compelled the government to enact comprehensive legislation like the *FRA*, it was different in Canada. There is a marked absence of consolidated political and civil society

movements demanding a legal framework that asserts the role of the Aboriginal people in forest resource governance.

Distinctions between Canadian and Indian federalism are also an influential factor in causing a variance in the legal evolution within these two jurisdictions. Acute socio-cultural diversity within the country demanded a strong center in India that stressed a unitary state which has only a subsidiary federal nature. Matters relating to forests come under the Concurrent List. Although the state legislature has equal powers with the central government on subjects under the Concurrent List, the Constitution of India insists that it should not be in conflict with any of existing central legislation. Since the *FRA* is central legislation, it brings uniformity to the evolving legal regime across the states in India. On the other hand, in Canada, the provinces are vested with exclusive powers on matters relating to conservation and management of forest resource. Section 92A, added in 1982, "provides permanent safeguards of the provinces' constitutional position" and offers a greater footing to the Provinces in the negotiation process.[445] Therefore, Canadian federalism limits the scope for the enactment of legislation like the *FRA* and developing a legal framework in harmony with other federal and provincial legislation in Canada.

Thus, the two jurisdictions which are under study in this research have similarities within their differences. However, from a functionalist standpoint, what is to be paid attention to is the similarity in the nature of the challenges faced and the approach within the solutions devised. The challenges, as explained throughout this thesis, display striking similarities. The solutions also have an analogous conceptual background of decentralization, although contextual factors may have contributed to divergent outcomes. This divergence in outcomes is what this thesis attempted to decipher. Again, instead of focusing on the difference in those outcomes, the focus ought to remain "… on their relation to specific function under which they are regarded".[446]

The implementation of the *FRA* in the village of Mendha Lekha in the Indian State of Maharashtra and co-management efforts in Clayoquot Sound in British Columbia comprised the two

[445] Robert D Cairns, "Natural Resources and Canadian Federalism: Decentralization, Recurring Conflict, and Resolution" (1992) 22 Publius 55 at 69.
[446] Michaels, *supra* note 25 at 358.

illustrations adopted to analyze the question at hand. This research was subsequently developed around two main analytical frameworks, i.e. the devolution of power and authority to Indigenous institutions in both these forest reform contexts and the decision-making power vested in these institutions regarding resource governance.

Chapter II proceeded by outlining the significance of the devolution of power to local institutions in the process of democratic decentralization. Autonomous decision-making power vested in these institutions should ensure robust, decentralized governance. However, the system applied in the Clayoquot Sound co-management continues to follow a Colonial model of forest governance, which devolves essential powers to the Provincial Ministry of Forests. As rightly pointed out by Tindall and Trosper, forest governance in Canada is more or less at a transitional stage between "assimilation" and shared power,[447] with effective decentralization still in its nascent stage. Clayoquot Sound projects a power-sharing model that is reliant on an Interim Measures Agreement, with the equal participation of representatives from Provincial Government and Aboriginal peoples. However, the challenge is that each First Nation communities have only one representative against five Provincial Government representatives. This upsets the balance within the decision-making process. As a result, the demand from communities for equal nation-to-nation representation is not being properly met and representation is still on a regional basis.[448] The Central Region Board therefore serves as an agency to integrate First Nation perspectives, rather than simply projecting their voices. Moreover, the decisions of the Board are merely recommendations for the Ministry, which continues to hold final decision-making power over forestry plans. Thus, through the Ministry of Forests, Provincial Government still has the upper hand in the Central Region Board's final decision-making process.[449] Additionally, the statutory authority for decision-making is vested in Provincial Government for the majority of co-management efforts involving forestry.[450]

The analysis of the Clayoquot Sound example conducted here emphasizes that there is still a struggle to raise Aboriginal interests to equal status with those of the state under Canada's co-

[447] Tindall & Trosper, *supra* note 437 at 10.
[448] Mabee et al, "Co-Management of Forest Lands", *supra* note 3737 at 881.
[449] *Ibid* at 248-249. Although First Nations can make recommendations, they cannot sign off on forestry plans.
[450] Thomas Beckley, "Moving toward consensus-based forest management: A Comparison of Industrial, Co-managed, Community and Small Private Forests in Canada" (1998) 74 The Forestry Chronicle 736 at 738.

management regime. This inevitably falls within the "integration approach" discussed by the Royal Commission for Aboriginal People, which expects Aboriginal peoples to conduct their activities within existing forest management systems.[451] However, co-management arrangements in Canada still lack proper definition and rely on Colonial institutional structures for their implementation. In short, they are still evolving and there are strong arguments that they merely represent an interim measure for the equal sharing of power, rather than an arrangement for co-jurisdiction.[452]

Clayoquot Sound is no exception in this regard. The revitalization of traditional Aboriginal structures has yet to gain serious attention in the discourse surrounding co-management efforts in Canada. A systemic change in institutional design is still a long way from being a promising discourse around these arrangements. The rebuilding of such institutions clearly necessitates proactive political initiatives. However, in the majority of cases, the focus is on economic development, rather than ensuring the development of a stable institutional arrangement. Even joint venture initiatives, such as Lisaak Forest Resources, are merely business ventures, ultimately intended to generate profit. Therefore, it could be said that the state still acts as an enforcer, rather than a facilitator in Canada. The process of equal constitutional recognition for Aboriginal peoples as compared to India is not considered seriously in discussions about the co-management regime in this context. As rightly pointed by Claudia Notzke, the legitimization of a co-management regime is not drawn from "necessity, common sense, legislation, policy or a sense of social justice, but from a constitutionally entrenched right".[453] Thus, Canada's co-management regime would have more relevance if the principle of co-existence was adopted, instead of the present principle of assimilation.[454]

Conversely, in India, the inclusion of decentralized governance under the 73rd and 74th Constitutional amendment represented a crucial step towards decolonization, asserting the rights of tribal peoples in forest governance. It introduced some noteworthy institutional changes, such as the *FRA*, which removed the influences of past Colonial structures. India thus projects a strongly decentralized approach, where the *Gram Sabhas* are not only vested with shared powers but also autonomy in decision-making. The *FRA* offers broad powers to *Gram Sabhas* over the recognition

[451] Passelac-Ross & Smith, *supra* note 102102 at 131.
[452] Smith, *supra* note 3636 at 93.
[453] Claudia Notzke, *Aboriginal Peoples and Natural Resources in Canada* (Ontario: Captus Press, 1994) at 302.
[454] Smith, *supra* note 3636 at109.

of forest rights and the conservation and management of CFR. Furthermore, it holds decisions of the *Gram Sabhas* as final on various matters, including decisions to divert forest land for non-forest activities. Additionally, *Gram Sabhas* have the authority to constitute the committee that prepares the plans for conserving and managing CFR.

Unlike Clayoquot Sound, the rights vested in *Gram Sabhas* are against the backdrop of a strong *FRA* legal framework. This bolster claims and binds the Government with the statutory decisions of these *Gram Sabhas*. Meanwhile, the *FRA* provides a platform for reconstructing the role of colonial forest bureaucracy in India. Many tribal communities in this context have taken advantage of the opportunity to revitalize their traditional tribal institutions. In the example of Mendha Lekha, this has been discussed in detail. Here, importance has been given to reinforcing the *Gram Sabha*, while simultaneously focusing on economic benefits, such as the sale of forest produce like bamboo. The enactment of the FRA, which resulted in the devolution of powers to *Gram Sabhas*, is an important step towards the decentralization of India's forest governance regime. Extensive restructuring of the institutional design has consequently contributed to radical transformations of decision-making culture in forest governance.

In both the jurisdictions under study, the legal jurisprudence evolving around the significance of Indigenous consent in resource governance has been analyzed. The jurisprudence relating to the duty to consult and accommodate in Canada does not provide any space for Aboriginal consent; it merely includes consultation, deep consultation and accommodation. However, *Mikisew* made it clear that accommodation may or may not result in an agreement. Similarly, *Tsilhqot'in* legitimized the Crown's authority to justify infringement under section 35 of the Constitution Act, 1982. Thus, it could be argued that the space for jurisprudence on the expansion of rights through judicial decisions is becoming exhausted in Canada. This could be due to the absence of a Constitutional recognition of these rights as compared to India and the lack of a firm statutory platform for the courts to exercise their discretion, unlike India. Despite being nascent legislation, a promising pattern may nevertheless be observed in the few decisions that have followed India's *FRA*, irrespective of a general shortage of judgments in this area. The Supreme Court of India, in *Niyamgiri*, underlined the role of the *Gram Sabha* and its consent in forest resource governance. It thereby affirmed the relevance of the duty to consult and obtain consent from tribal peoples on matters relating to their land and resources. This could help identify the relative legislative vacuum

in Canada as compared to India, which leaves minimal scope for the judiciary to intervene and assert the role of Indigenous consent in resource governance.

The analysis of the above jurisdictions reveals that the legal framework in India is more effective for the decentralization of forest governance. The political mobilization that has contributed to the strengthening of traditional tribal institutions, the Constitutional recognition of decentralized governance, and progressive legislation, such as the *FRA* granting statutory powers to the *Gram Sabhas*, are just a few of the major factors contributing to this achievement. Among these, the *FRA* has made forest bureaucracy accountable to local tribal institutions and addressed the power asymmetries caused by colonial structures.

The institutional change achieved through this new face of forest governance in India has resulted in the redistribution of power away from the center, as envisaged by scholars on decentralization. It has consequently provided a platform for achieving equity and long-term sustainability in resource governance, while simultaneously strengthening traditional institutional structures. The downward accountability of these institutions ensures autonomy in the decision-making process, as argued by scholars such as Ribot. Thus, the role of traditional institutions in resource governance is asserted. A strong political will, constitutional recognition of Indigenous rights, empowered traditional institutions, and strong decision-making authority vested in these institutions are some of the most important factors bolstering democratic decentralization.

In contrast, although Canada's co-management regime has initiated some optimistic discourse, it is still in the process of evolution and has not yet succeeded in providing equal legal rights to Aboriginal peoples. Discretionary power still rests with the provincial governments on various critical issues. As such, Canada's co-management arrangement is in the form of a "privilege" granted to communities, rather than a "right". However, as argued by Ribot, the transfer of power to communities in the form of a privilege and not right, leads to upward accountability.[455] This has been reflected in decentralized governance under Canada's co-management regime.

Thus the present comparative analysis exposes how these two countries with a common colonial past have responded differently to a demand for the democratic inclusion of Indigenous voices in forest resource governance. Thus, it may be concluded that the *FRA* opens a broader space for the

[455] See generally Ribot, *supra* note 7171.

democratic decentralization of forest governance, compared to the co-management regime in Canada. In conclusion, the present author ventures that the Indian context at least demonstrates a model with the potential to inspire positive change in similar contexts, like Canada, which remains stuck halfway on a journey to undo the historic injustices inflicted on Aboriginal peoples.

BIBLIOGRAPHY

LEGISLATION: CANADA

The British North America Act, 1867, 30 & 31 Vict, c. 3 (UK).
Constitution Act, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c. 11.
Indian Act, 1876, S.C. 1876, c. 18.

LEGISLATION: INDIA

Forest (Conservation) Act, 1980, (December 27, 1980) Gazette of India Extraordinary II, s 1, No.69.
Indian Forest Act, 1927, (September 21, 1927) Gazette of India Extraordinary II, s 1, No.16.
Joint Forest Management Rules, Government of India, No.22-8.
Provisions of the Panchayats (Extension to the. Scheduled Areas) Act, 1996, (December 24, 1996) Gazette of India Extraordinary II, s 1, No.40.
Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, (January 2, 2007) Gazette of India Extraordinary II, s 1, No.2.
Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2007, (1st January 2008) Gazette of India Extraordinary II, s 3(i), 10.
Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest rights) Amendment Rules, 2012, (6th September, 2012) Gazette of India Extraordinary II, s 3(i), 8.
The Constitution of India, 1950 (India).
Wild Life (Protection) Act, 1972, (9th September, 1972) Gazette of India Extraordinary II, s 1, No.53.

LEGISLATION: FOREIGN

Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, 1650 UNTS 383.
Convention (No. 107) concerning the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries, 26 June 1957, 328 U.N.T.S.247.
United Nations Declaration on the Rights of Indigenous Peoples, Annex to GA Res 61/295, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

JURISPRUDENCE: CANADA

Beckman v Little Salmon/Carmacks First Nation, 2010 SCC 53, [2010] 3 SCR 103.
Calder v Attorney General of British Columbia [1973] SCR 313, [1973] 4 WWR 1.
Connolly v Woolrich (1867), 11 LCJ 197, 17 RJRQ 75, 1 CNLC 70 (Sup. Ct.).
Delgamuukw v British Columbia [1997] 3 SCR 1010, 153 D.L.R. (4th) 193.
Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73, [2002]2 CNLR 121.

Huu-Ay-Aht First Nation v The Minister of Forests, 2005 BCSC 697, 33 Admin LR (4th) 123 .
Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations), 2017 SCC 54, 2017 CarswellBC 3020.
Mikisew Cree First Nation v Canada (Minister of Canadian Heritage), 2005 SCC 69, [2005] 3 SCR 388.
R v Pamajewon, [1996] 2 SCR 821, 4 CNLR 164.
R v Powley, 2003 SCC 43, [2003] 2 SCR 207.
R. v Sparrow, [1990] 1 S.C.R. 1075, 70 DLR (4th) 385.
R v Van der Peet, [1996] 2 SCR 507, 4 CNLR 177.
St. Catherines Milling and Lumber Company v The Queen (Ontario) [1888] UKPC 70.
Taku River Tlingit First Nation v British Columbia (Project Assessment Director), 2004 SCC 74, [2004] 3 SCR 550.
Tsilhqot'in Nation v British Columbia, 2014 SCC 44, [2014] 2 SCR 257.

JURISPRUDENCE: INDIA

Himachal Pradesh Power Corporation v Paryawaran Sanrakshan Sangarsh Samiti Lippa & Others (08 September 2016), Civil Appeal No. 8345 of 2016 (Supreme Court of India).
Kailas v State of Maharashtra, (2011) 1 SCC 793, 2011 AIR SC 598, 2011 (1) SCALE 40, (2011) 1 SCR 94.
Orissa Mining Corporation v Union of India, (2013) 6 SCC 476, (2013) 6 SCALE 57, (2013) 6 SCR 881.
Paryawaran Sanrakshan Sangarsh Samiti Lippa v Union of India and Others (04 May 2016), Appeal No. 28 of 2013 (National Green Tribunal, India).
T N Godaverman Tirumulpad v Union of India, (1996) 9 SCR 982.
V Sambasivam v Government of India & Others, (21 February 2008), MP No. 1/2008 in W.P. No. 4533/2008 (Madras High Court).
V Sambasivam v Government of India & Others, (01 February 2016) TC (C) No.39 of 2015 with SLP(C) No. 11408-09 of 2009 (Supreme Court of India).

MONOGRAPHS

Anaya, S James. *Indigenous People in International Law* (New York: Oxford University Press, 2004).
Asch, Michael, ed. *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect and Respect for Difference*, (Vancouver: UBC Press, 1997).
Berkes, Fikret & Mina Kislalioglu. *Community based Management and Sustainable Development* (New York: Belhaven Press, 1989).
Baland, Jean-Marie &Jean-Philippe Platteau. *Halting Degradation of Natural Resources: Is There a Role for Rural Communities* (London: Oxford University Press, 2005).
Carter, Sarah. *Aboriginal People and Colonizers of Western Canada to 1900* (Toronto: University of Toronto Press, 1999).
Christy, Lawrence C et al, Forest *Law and Sustainable Development: Addressing Contemporary Challenges Through Legal Reform* (Washington DC: World Bank, 2007).

Deloria, Vine Jr. *Red Earth, White Lies: Native Americans and the Myth of Scientific Fact* (Goldon: Fulcrum Publishing, 1997).
Doyle, Cathal M. *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (London: Routledge: 2015).
Gadgil, Madhav & Ramachandra Guha. *This Fissured Land: An Ecological History of India* (Berkeley: University of California Press, 1993).
Gilbert, Jérémie. *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (New York: Transnational Publishers, 2006).
Gilmour, Donald Allan & RJ Fisher. *Villagers, Forests and Foresters: The Philosophy, Process and Practice of Community Forestry in Nepal* (Nepal: Sahayogi Press, 1989).
Government of Canada, *Report of the Royal Commission on Aboriginal Peoples*. *Restructuring the Relationship, Part 2, Land and Resources*, Vol. 2 (Ottawa: Minister of Supply and Services Canada, 1996).
Government of Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back, Part Two: False Assumptions, Failed Relationship,* Vol I (Ontario: Supply and Services, 1996).
Hall, DJ. *From Treaties to Reserves: The Federal Government and Native Peoples in Territorial Alberta (*Montreal: McGill-Queens University Press, 2015).
Henderson, James Sàkej Youngblood. *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition (*Saskatoon: Purich Publishing Limited, 2008).
Knafla, Louis A & Haijo Westra, eds, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (Vancouver: UBC Press, 2010)
Miller, J R. *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009).
Miller, RJ et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (New York, Oxford University Press, 2010).
Macklem, Patrick. *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001).
Marchak, Patricia et al, *Fall down: Forestry Policy in British Columbia* (Vancouver: David Suzuki Foundation and Ecotrust Canada, 1999).
Menzies, Nicholas K. *Our Forest, Your Ecosystem, Their Timber: Communities, Conservation, and the State in Community-Based Forest Management* (New York: Columbia University Press, 2007).
Nadasdy, Paul. *Hunters and Bureaucrats: Power, Knowledge, and Aboriginal-State Relations in the Southwest Yukon* (Vancouver: UBC Press, 2013).
Negi, Sharad Singh. *Himalayan Forests and Forestry* (Delhi: Indus Publishing Company, 2002).
Newman, Dwight. *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishing Ltd, 2014).
O'Sullivan, Dominic. *Beyond Biculturalism: The Politics of an Indigenous Minority*. (Wellington: Huia Publishers, 2007).
Osherenko, Gail. *Sharing Power with Native Users: Co-Management Regimes for Native Wildlife* (Ottawa: Canadian Arctic Resources Committee, 1988).
Ostrom, Elinor. *Governing the Commons: Evolution of the institutions for Collective Action*, (Cambridge: Cambridge University Press, 1990).
Proulx, Craig. *Reclaiming Aboriginl Justice, Identity, and Community* (Saskatoon: Purich Publishing Limited, 2003).

Ribot, Jesse. *Democratic Decentralization of Natural Resources: Institutionalizing Popular Participation* (Washington: World Resources Institute, 2002).
Ross, Michael Lee. *First Nations Sacred Sites in Canada's Courts* (Vancouver: UBC Press, 2005).
Sabatier, Paul & Grace Skogstad. *Policy Communities and Public Policy in Canada: A structural Approach* (Toronto: Copp Clark Pitman, 1990).
Samuel, Geoffrey. *An introduction to Comparative Law Theory and Method* (Oxford: Hart Publishing, 2014).
Sayer, Jeffrey, Stewart Maginnis & Michelle Laurie. *Forests in Landscape: Ecosystem Approaches to Sustainability* (London: Routledge, 2007).
Sol, Simon Young. *Trouble with Tradition: Native Title and Cultural Change*, (New South Wales: The Federation Press, 2008).
Thapar, Romila. *The Penguin History of Early India: From the origins to AD 1300* (London: Penguin, 2002).
Thiruvengadam, Arun K. *The Constitution of India: A Contextual Analysis* (Oxford, Hart Publishing, 2017)
Tindall, D B, Ronald L Trosper & Pamela Pamela Perreault, eds. *Aboriginal Peoples and Forest Lands in Canada* (Vancouver: UBC Press, 2013).
Von Fürer-Haimendorf, Christoph. *Tribes of India: The Struggle for Survival* (Berkeley: University of Calgary Press,1982).
Wadley, Susan S. *South Asia in the World: An Introduction* (Delhi: Routledge, 2014).
Webb, Edward L & Ganesh P Shivakoti eds. *Decentralization, Forest and Rural Communities: Policy Outcomes in Southeast Asia* (California: Sage, 2007).
Woolford, Andrew. *Between justice and certainty: treaty making in British Columbia* (Vancouver: UBC press, 2002).

SECONDARY MATERIALS: ARTICLES

Agarwal, Arun & Clark Gibson. "Enchantment and Disenchantment: The Role of Community in Natural Resource Conservation", (1999) 27 World Dev 629.
Agarwal, Arun & Jesse Ribot. "Accountability in Decentralization: A Framework with South Asian and West African Cases" 1999 (33) J Developing Areas 473.
Agarwal, Arun & Elinor Ostrom. "Collective Action, Property Rights and Decentralization in Resource Use in India and Nepal" (2001) 29:4 Politics & Society 485.
Ambus, Lisa &George Hoberg, "The Evolution of Devolution: A Critical Analysis of the Community Forest Agreement in British Columbia" (2011) 24 Society and Natural Resources 933.
Asch, Micheal. "Self-Determination and Treaty Making: Consent and the Resolution of Political Relations between First Nations and Canada" (Paper presented at the Consent as the Foundation for Political Community, inaugural conference of the Consortium on Democratic Constitutionalism, University of Victoria, 1-3 October 2004), online: < www.law.uvic.ca/demcon/papers/Asch_Demcon_f2-1.doc> [Michael Asch].
Beckley, Thomas. "Moving toward consensus-based forest management: A comparison of Industrial, Co-managed, Community and Small Private Forests in Canada" (1998) 74 The Forestry Chronicle 736.

Berkes et al, Fikret. “Co-Management: The Evolution of the Theory and Practice of Joint Administration of Living Resources” (Paper Presented at the Second Annual Meeting of IASCP University of Manitoba, Winnipeg, Canada, September 26-29, 1991).

Bijoy, C. R. “Adivasis of India : A history of discrimination, conflict and resistance” in Aditi Chanchani et al, eds, *This is our Homeland - A Collection of essays on the betrayal of adivasi rights in India* (Bangalore: Equations, 2007).

Bijoy, C. R et al, "India and the rights of indigenous peoples" (2010), online: Asia Indigenous Peoples Pact Foundation (AIPP) <aippnet.org/india-and-the-rights-of-indigenous-peoples-2>.

Bogdanski, Bryan E. C. “Canada’s boreal forest economy: economic and socioeconomic issues and research opportunities”, online: Natural Resources Canada cfs.nrcan.gc.ca/pubwarehouse/pdfs/28200.pdf .

Booth, Philip. “Decentralization and Land-Use Planning in France: A 15-Year Review,” (1995) 26 Policy & Politics 89.

Borrows, John. “Living Between Water and Rocks: First Nations, Environmental Planning and Democracy” (1997) 47 UTLJ 417.

Borrows, John. “The Durability of Terra Nullius: Tsilhqot’in Nation v British Columbia” (2015) 48 UBC L Rev 701.

Borrows, John. “Sovereignty’s Alchemy: An analysis of Delgamuukw v British Columbia” (1999) 37:3 Osgoode Hall LJ 537.

Boutilier, Sasha. “Free Prior and Informed Consent and Reconciliation in Canada” (2017) 7 W J Legal Stud 1.

Cairns, Robert D. “The Resource Amendment (Section 92A) and the Political Economy of Canadian Federalism” (1985) 23 Osgoode Hall LJ 253.

Dalton, Jennifer E. “Aboriginal Self-Determination in Canada: Protections Afforded by the Judiciary and Government” (2006) 21: 11 CJLS 1.

Castro, Alfred Peter & Erik Nielsen. “Indigenous people and Co-management: implications for conflict management” (2001) 4 Environmental Science & Policy 230.

Chandra, Rajshree. “Understanding change with(in) law: The Niyamgiri case” (2016) 50 Contribution to Indian Sociology 137.

Cholkar, Parag. "Revisiting Bhoodan and Gramdan in the context of Land Rights and Social Transformation" in Varsha Bhagat-Ganguly, ed, *Land Rights in India: Policies, Movements and Challenges* (New York: Routledge, 2014) 230.

Duffield, C et al,“Local Knowledge in the Assessment of Resource Sustainability: Case Studies in Himachal Pradesh, India and British Columbia, Canada” (1998)18 Mountain Research & Development 35.

Frideres, James S. “Circle of Influence Social Location of Aboriginals in Canadian Society” in D. B. Tindall et al, eds, *Aboriginal Peoples and Forest Lands in Canada* (Vancouver: UBC Press, 2013).

Gadgil, Madhav et al,“Indigenous Knowledge for Biodiversity Conservation” (1993) 22 Ambio 151.

Gadgil, Madhav & V. D. Vartak. “Sacred Groves in India- A plea for Continued Conservation” (1975)72 J Bombay Natural History Society 314.

Goetze, Tara C. “Empowered Co-management: Towards Power-Sharing and Indigenous Rights in Clayoquot Sound, BC” (2005) 47:2 Anthropologica 247.

Guha, Ramachandra. “Adivasis, Naxalites and Indian Democracy” (2007) 42 Economic & Political Weekly 3305.

Hajjar, F Reem et al,"Is Decentralization Leading to "Real" "Decision Making Power for Forest Dependent Communities? Case Studies from Mexico and Brazil" (2012) 17 Ecology & Society 1.

Hatch, Ronald. "The Clayoquot Show Trials" in Ronald Hatch & Veronica Hatch, eds, *Clayoquot and Dissent* (Vancouver: Ronsadale, 1994) 105.

Heda, Nilesh. "Folk conservation practices of the Gond Tribal of Mendha (Lekha) Village of Central India" (2012) 11 Indian J Traditional Knowledge 727.

Hoberg, George & Edward Morawski. "Policy change through sector intersection: Forest and Aboriginal Policy in Clayoquot Sound" (1997) 40 Can Public Administration 387.

Hoekema, Andre. "Do Joint Decision-making Boards Enhance Chances for New Partnership between the State and Indigenous Peoples?" in Williem J. Assies & Andre Hoekema, eds, Indigenous *Peoples Experiences with Self-Government* (Copenhagen: University of Amsterdam, 1994) 177.

Imai, Shin. "Indigenous Self-Determination and The State" (2008) Comparative Research in Law & Political Economy Research Paper 1, online: < http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1196&context=clpe>.

Issac, Thomas. "Balancing Rights: The Supreme Court of Canada, *R v Sparrow*, and the Future of Aboriginal Rights" (1993) 13 Can Native Studies 199.

Kendrick, Anne. "The Flux of Trust: Caribou Co-Management in Northern Canada" (2003) 31:1 Environments 43.

Krishna, Anirudh. "Partnership between Local Government and Community-based Organizations: Exploring the scope of Synergy" (2003) 23 Public Administration & Development 361.

Krott et al, Max. "Actor-centered Power: The Driving Force in Decentralized Community Based Forest Governance" (2014) 49 Forest Policy & Economic 32.

Kumar, Satish et al, "The Earliest Settlers' Antiquity and Evolutionary History of Indian Populations: Evidence from M2 mtDNA Lineage" (2008) 8:1 BMC Evolutionary Biology 230.

Kumar, Kundan et al, "Decentralization and Democratic Forest Reforms in India: Moving to a Rights-based Approach" (2015) 51 Forest Policy & Economics 1.

Kumar, Kundan & John M Kerr. "Democratic Assertions: The Making of India's Recognition of Forest Rights Act" (2012) 43 Development & Change 751.

Kumar, Kundan, Neera Singh & Giri Rao. "Promise and Performance of the Forest Rights Act" (2017) 1 Economic & Political Weekly.

Lachapelle, Paul R et al, "Barriers to Effective Natural Resource Planning in a "Messy" World" (2003) 16:6 Society & Natural Resources 473.

Mabee, Holly Spiro & George Hoberg. "Equal Partners? Assessing Comanagement of Forest Resources in Clayquot Sound" (2006) 19 Society & Natural Resources 875.

McGregor, Deborah. "Aboriginal/non-Aboriginal relations and Sustainable Forest Management in Canada: The Influence of the Royal Commission on Aboriginal Peoples" (2011) 92:2 J Environmental Management 300.

McKean, Margaret. "Common Property: What is it, What is it Good for and What Makes it Work?" in Clark C. Gibson Margaret A. McKean & Elinor Ostrom eds, *People and Forests: Communities, Institutions and Governance (Cambridge: MIT Press, 2000)*.

Michaels, Ralf. “The Functional Method of Comparative Law” in Mathias Reimann & Reinhard Zimmermann, eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2008).
Natcher, David C. “Co-Management: An Aboriginal Response to Frontier Development” (2001) The Northern Rev 146.
Notzke, Claudia. “A New Perspective in Aboriginal Natural Resource Management: Co-Management” (1995) 26 Geoforum 207.
Ostrom, Elinor. “Neither Market Nor State: Governance of Common-Pool Resources in the Twenty-First Century” (Lecture presented at the International Food Policy Research Institute, Washinton DC, 2 June, 1994) 1.
Paramar, Pooja. “Undoing Historical Wrongs: Law and Indigeneity in India” (2012) 49 Osgoode Hall LJ 491.
Pathak, Neema & Erica Taraporewala. “Towards Self-Rule and Forest Conservation in Mendha-Lekha Village, Gadchiroli”, online: ICCA Consortium < https://www.iccaconsortium.org/wp-content/uploads/2015/08/grassroot-india-mendha-2008-en.pdf>.
Rosencranz, Armin Edward Boenig & Brinda Dutta. “The Godaverman Case: The Indian Supreme Court’s Breach of Constitutional Boundaries in Managing India’s Forests” (2007) 37 Environment L Reporter 10032 online: ELR News and Analysis <https://elr.info/sites/default/files/articles/37.10032.pdf>.
Sahoo, Alochana. “Traditionalism and Globalization : A Discourse on Tribal Transformation” (2014) 1959 Odisha Rev 92.
Sambat, Preeti. “Limits to Absolute Power: Eminent Domain and the right to land in India” (2013) 48 Economic & Political Weekly 40.
Sarin, Madhu. “Democratizing India’s forests through Tenure and Governance Reforms” (2010) 60 Social Action 104.
A. S. Narang, ed, *State Society and Economy in the Twenty-First Century: Canada- India Perspective* (New Delhi: Manohar Publishers and Distributors, 2009).
Parai, Brian J & Thomas C Esakin. “Beyond Conflict in Clayoquot Sound: The Future of Sustainable Forestry” in Alfonso Peter Castro & Erik Nielsen eds, *Natura*l *Resource Conflict Management case studies: An analysis of power, Participation and Protected Areas* (Rome: FAO, 2003).
Pedersen, Mikkel W et al. “Postglacial Viability and Colonization in North America’s Ice-free corridor” (2016) 537 Nature 45.
Ribot, Jesse C et al. “Recentralizing while Decentralizing: How National Governments Reappropariate Forest Resources” (2006) 34 World Dev 864.
Roy, Antara & Sroyon Mukherjee. “The Forest Rights Act, 2006: Settling Land, Unsettling conservationists” (2008) 1 NUJS L Rev 293.
Shirsath, ST. “Reinventing Tribal Local Governance Through Administrative Reforms in India: With Special Reference to Fifth Schedule Area”, (2014) 2: 4 Intl J Research in Humanities, Arts & Literature 15.
Singh, Supriya. “Participatory Forest Management in Mendha-Lekha, India” in Hali Healy et al, eds, *Ecological Economics from the Ground Up* (Oxon: Routeledge, 2012).
Springate-Baginski, Oliver, Madhu Sarin & Gopinath Reddy. “Resisting rights: forest bureaucracy and the tenure transition in India” (2012) Small Scale Forestry 107.

Tsosie, Rebecca. “Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge” (2016) 21 Vt L Rev 1.
Tully, James. “Aboriginal Peoples: Negotiating Reconciliation,” in Alain-G Gagnon & James Bickerton eds, *Canadian Politics*, 3d ed (Peterborough: Broadview Press, 2000).
Walters, Mark. “Ecological Unity and Polmcal Fragmentation: The Implications of the Brundtland Report for the Canadian Constitutional Order” (1991) 29:2 Alta L Rev 420
Ward, Tara. “The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law" (2011) 10:2 NW J Intl Human Rights 54.
Webb, Edward L. “Forest Policy as a Changing Context in Asia” in Edward L Webb & Ganesh P Shivakoti eds, *Decentralization, Forest and Rural Communities: Policy Outcomes in Southeast Asia* (California: Sage, 2007).
Willems-Braun, Bruce. “Colonial Vestiges: Representing Forest Landscapes on Canada’s West Coast” (1997) BC Studies 5.
Wyatt, Stephen. “First Nations, forest lands, and “aboriginal forestry” in Canada: From Exclusion to Co-management and beyond” online: (2007) 38 Can J Forest Research 171.
Xaxa, Virginius. “Tribes as Indigenous People of India” (1999) 34:51 Economic & Political Weekly 3589.

OTHER MATERIALS

Aboriginal Affairs, Northern Development & Indegenous Services Canada. *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights* (2014) online: < https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/texte-text/ldc_ccl_renewing_land_claims_policy_2014_1408643594856_eng.pdf>.
BC Treaty Commission. *Negotiation Update,* (2010), online: < www.bctreaty.ca/negotiation-update >.
C.R.Bijoy, *Policy Brief on Panchayat Raj (Extension to Scheduled Areas) Act of 1996,* (United Nations Development Program, 2002), online: UNDP <http://www.in.undp.org/content/dam/india/docs/UNDP-Policy-Brief-on-PESA.pdf.
Canadian Forest Service Publications. *Forest land ownership*, online: Natural Resources Canada < http://www.nrcan.gc.ca/forests/canada/ownership/17495>.
CFR Learning & Advocacy Group Maharashtra. *Promise and Performance: Ten years of the Forest Rights Act in India*, online: Community Forest Right-Learning and Advocacy <www.atree.org/sites/default/files/Maharashtra_FRA_CFR_Promise_and_Performance_June 2017.pdf >.
Department of Social Security, Government of India, *The Report of the Advisory Committee on the Revision of the Scheduled Castes and Scheduled Tribes Lists* (New Delhi: Department of Social Security, 1965) online: Ministry of Tribal Affairs < https://tribal.nic.in/writereaddata/AnnualReport/LokurCommitteeReport.pdf>.
Dougherty, Wayne & Dennis Madill. “Indian Government under Indian Act Legislation, 1868-1951” (Ottawa: Department of Indian Affairs and Northern Development, Treaties and Historical Research Centre, 1980).
Garg, Anil. *Orange Areas Examining the Origin and Status* (Pune: National Centre for Advocacy Studies, 2005) online: < www.doccentre.org/docsweb/adivasis_&_forests/orange_areas.htm >.

Giokas, John. “The Indian Act: Evolution, Overview and Option for Amendment and Transition”, online: Government of Canada, <http://publications.gc.ca/collections/collection_2016/bcp-pco/Z1-1991-1-41-130-eng.pdf>.

Hummel, Monte. *Environment and Conservation Movements* (21 February 2010) online: Historica Canada <www.thecanadianencyclopedia.ca/en/article/environmental-and-conservation-movements>.

Indigenous and Northern Affairs Canada. “United Nations Declarations on the Rights of Indigenous Peoples” (3 August 2017), online: INAC <www.aadnc-aandc.gc.ca/eng/1309374407406/1309374458958>.

Karyn, Tracey. *Landscapes of Difference: An Inquiry Into the dicourse of the National Park and its effects on Aboriginal Identity Production* (Master of Arts Thesis, University of Saskatchewan, 2003).

Mazur, Nicki. “Evaluating Fisheries Co-Management Trials - A Discussion Paper”, online: Commonwealth of Australia <downloads.mywork.com.au/image_manager/envision/Mazur_2010_-_Evaluating_fisheries_co-management.pdf>.

Ministry of Tribal Affairs, Government of India. *Definition of Scheduled Tribes,* online: Tribal Department < tribal.nic.in/Content/DefinitionpRrofiles.aspx>.

Ministry of Tribal Affairs, Government of India. *Report of the High-Level Committee on Social Economic, Health and Educational status of Tribal Communities of India,* (2014), online: < http://www.indiaenvironmentportal.org.in/files/file/Tribal%20Committee%20Report,%20May-June%202014.pdf>

Ministry of Environment and Forest, Government of India. *National Forest Policy* (Delhi: Ministry of Environment and Forest, 1988), online < envfor.nic.in/legis/forest/forest1.html >.

Ministry of Environment and Forest, Government of India. *National Forest Policy,* (Delhi: Ministry of Environment and Forest, 1952).

Ministry of Environment and Forest, Government of India. *National Forest Policy* (Delhi: Ministry of Environment and Forest, 1988), online < http://envfor.nic.in/legis/forest/forest1.html >.

Ministry of Home Affairs, Government of India. *Census of India, 2011*, (New Delhi: Ministry of Home Affairs, 2011) online: < www.censusindia.gov.in/?q=tribes>.

National Aboriginal Forestry Association, *Third Report on First Nation-Held Forest Tenure in Canada 2015*, online: NAFA Forestry < http://www.nafaforestry.org/pdf/2015/First%20NationHeld%20Forest%20Tenure%20Report%202015.pdf>.

Paramar, Pooja. *Claims, Histories, Meanings: Indigeneity and Legal Pluralism in India* (PhD Thesis, University of British Columbia, 2012), online: The University of British Columbia Library < https://open.library.ubc.ca/cIRcle/collections/ubctheses/24/items/1.0073483>.

Permanent Forum on Indigenous Issues. *Report of the UNPFII workshop on Methodologies regarding Free Prior and Informed Consent and Indigenous Peoples,* ESC, 2005, UN Doc E/C.19/2005/3.

Pudovskis, Matthew Stephen. *Traditional Ecological Knowledge and Environmental Governance In Canada: The Role of Law and Comprehensive Agreements in Facilitating Incorporation* (LLM Thesis, The University of British Columbia, 2013) online: University of British Columbia Library < https://open.library.ubc.ca/cIRcle/collections/ubctheses/24/items/1.0077773>..

Rights and Resources Initiative, Vasundhara & Natural Resource Management Consultants. *Potential for Recognition of Community Forest Resource Rights Under Indias Forest Rights Act- A Preliminary Assessment* (2015), online: Rights and Resources Initiative < http://www.rightsandresources.org/wp-content/uploads/CommunityForest_July-20.pdf >.

Sabhu, Priya Ranjan. "Battle for Niyamgiri: Odisha Police's story on Adivasi girl accused of being Maoist does not add up" *Scroll.in* (06 May 2017), online: < scroll.in/article/836756/battle-for-niyamgiri-odisha-polices-story-on-adivasi-girl-accused-of-being-maoist-does-not-add-up>.

Sahu, Geetanjoy & Prerna Chaurashe. "Implementation of Community Forest Rights Under Forest Rights Act 2006 in Gondia District of Maharashtra An Analysis of Process and Impact", online: <http://dspace.tiss.edu/jspui/bitstream/1/7800/1/CFR%20Implementation%20in%20Godia-Working%20Paper.pdf >.

Sarin, Madhu & Oliver Springate-Baginski. *India's Forest Rights Act-The Anatomy of a Necessary but not Sufficient Institutional Reform* (IPPG: Manchester, 2010) online: Research Program Consortium for Improving Institutions for Pro-Poor Growth <www.ippg.org.uk/papers/dp45.pdf>.

Saxena, N.C et al, *Report of the Four Member Committee for Investigating into the Proposal submitted by the Orissa Mining Company for Bauxite Mining in Niyamgiri* (2010), online: <envfor.nic.in/sites/default/files/Saxena_Vedanta-1.pdf>.

Sethi, Nitin. "Chattisgarh Govt. Cancels Tribal Rights Over Forests to Facilitate Coal Mining" (17 February 2016), online: The Wire< thewire.in/21909/chhattisgarh-govt-cancels-tribal-rights-over-forests-to-facilitiate-coal-mining/>.

Simpson, Elain. "Aboriginal Claims in Canada", University of Alberta (28 January 2000) online: University of Alberta <www.ualberta.ca/~esimpson/claims/ introduction.htm> .

Smith, Wynet et al, *Canada's Forest at a Crossroads: An assessment in the Year 2000,* at 13, online: World Resources Institute: <pdf.wri.org/gfw_canada.pdf>.

Tatpati, Meenal et al, "The Niyamgiri Story: Challenging the Idea of Growth without Limits", online: Kalpavriksh<www.kalpavriksh.org/images/alternatives/CaseStudies/NiyamgiricasestudyJuly2016.pdf >.

Uribe, Julieta. "A study on the Relationship between Canadian Aboriginal People and the Canadian state", online: Canadian Foundation of the America: <www.focal.ca/pdf/Aboriginals_Uribe_Relationship%20Canadian%20Aboriginal%20Peoples%20and%20Canadian%20State_March%202006.pdf >.