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**The Dynamic between States, Resources and Indigenous Peoples in South Asia:
Implications for Common Property Resource Governance**

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Introduction

It has been estimated that 70 per cent of the world's tribal and indigenous people live in Asia. Of the approximated 200 million indigenous people across the world, 54 million are found in India alone. That indigenous and tribal people are amongst the poorest is an undisputed fact seen in various human development indicators. As poverty alleviation has become the overarching agenda in international development policy, the issues facing the world's indigenous peoples have received increasing attention over the past two decades. This attention has also emerged as a response to the struggles waged by indigenous peoples themselves to reinstate their claims over continued encroachment of their lands and territories under pressures of globalization and integration into the market economy. Perhaps it would not be an overstatement to argue that much of this attention has also been brought about the manifestation of discontent borne from depredation and destitution in the form of conflicts. Although historically, Asia has been witness to strong peasant rebellions and environmental movements, the link between political and cultural identity and the right to land and livelihoods has crystallized most clearly in contemporary times. Indigenous peoples across the globe have begun to evoke the international human rights discourse to stake claim over their ecological rights.

New spaces and mechanisms at the international level which indigenous people can invoke have accorded a new legitimacy to 'indigenous' identity. The declaration of 1993 as the 'International Year of Indigenous Peoples' and thereafter of 1995-2004 as the first 'International Decade of Indigenous Peoples' by the United Nations led to the creation of these new spaces and mechanisms. In so far as the forces of globalization have posed renewed threats to the livelihoods of indigenous people, the dissent to these very forces has also helped in forging greater solidarity amongst representatives of indigenous groups at the international level.

This paper will explore the dynamic between states and indigenous peoples over access and ownership of natural resources in South Asia in the context of this increased international attention towards indigenous peoples' issues. To what extent have changes in international rights and treaties discourse influenced the negotiation between states and

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indigenous peoples in access to natural resources and what are the implications of this for common property resource governance is the central question that this paper seeks to analyze. Empirical illustration will be provided primarily from India and Bangladesh.

The first section of the paper will provide a brief historical background to state policy towards indigenous and tribal peoples. This will be followed by a description of the impact of globalization and privatization on indigenous peoples' access to the commons. How indigenous people have responded to these changes on the one hand but equally how state policies as well as international discourse have made a transition in response to the struggles waged by indigenous peoples will be the subject of the third section of the paper. Finally, the fourth and concluding section will analyze the implications of this dynamic between states and indigenous peoples over natural resources for common property resource theory and governance.

Indigenous peoples rights and state policy: A historical background

Although there is no universally accepted definition of the term 'indigenous peoples', the definition provided by the UN Special Rapporteur, Jose Martinez Cobo to study the discrimination suffered by indigenous peoples is respected within the UN system and widely used internationally (Roy: 2005). It reads as follows:

'Indigenous communities, peoples and nations are those which, having historical continuity with pre-invasion and pre-colonial societies that developed on their own territories, consider themselves distinct from others sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems'.

Clearly, colonial history has played a large part in shaping the identity of indigenous peoples and communities. This is amply illustrated by the example of the adivasi / tribal (indigenous people) in India. Indigenous people in India are predominantly comprised of its large and diverse tribal populations scattered across several states. Anthropological literature suggests that the 'tribal' is a colonial construct; where all those living on the margins of mainstream agrarian society within structures of the Hindu caste system were delineated by British administrators as 'primitive' and tribal. In fact, the margins of mainstream society were demarcated by a clear ecological marker – the forest. Majority of the tribes in India have traditionally lived in and around forest areas¹. Further, it is interesting to note that in Indian languages there is no synonym for the term 'tribe'. Tribes are virtually synonymous with forest dwellers, alternatively called *vanvasi's*. Tribes were considered to be outside of civilization by the British with images of the barbaric attached to them. This meant that they not only remained outside the general social organization and world-view of the larger society and kingdom, but also outside

¹ It is estimated that 60 per cent of state forests in India are today concentrated in 187 tribal districts confined to only one-third of the country (Sarin 2005).

the politico-administrative structures of the empire (Xaxa 1999). This explains the part on ‘...historical continuity with pre-colonial societies’ in Cobo’s definition. The reason the assertion of this continuity is important to indigenous identity today is that it encapsulates the entire history of disenfranchisement of tribal / indigenous people to their lands and territories beginning with the colonial period. As mentioned earlier, since majority of tribal / indigenous people were primarily forest dwellers, the history of this disenfranchisement is the history of the changing ownership and rights of access to forests in the Indian sub-continent / South Asia, exemplifying state policy towards indigenous peoples rights to the commons.

Before the advent of colonialism, forest areas were governed and used by indigenous people as commons – with well defined bundle of rights governed by customary norms and practices. However, with colonial rule, state monopoly over forests was established, wherein large tracts of forest areas were reserved for timber extraction as well as revenue earned by putting cleared tracts to cultivation. This led to the steady loss of rights of local tribal communities to the forest from which they not only derived their livelihoods but also held great symbolic significance in shaping their world-view. It is interesting to note, that when the need for legislation to curtail the previously untouched access enjoyed by these forest dwellers arose, this was perceived to be a difficult task by Brandis, the first Inspector General of Forests in India (Gadgil & Guha 1995: 122). This was because early colonial policy in seeking to distance the ‘barbaric tribes’ from the mainstream, had ‘deliberately alienated’ the proprietary right of the state in forests according recognition of these as common property. However, with the passing of the Indian Forest Act of 1878, the customary rights of the tribal to the forest were completely curtailed wherein forest use became a privilege of concession. This was followed by the introduction of scientific forestry which cloaked the encouragement of commercially viable species at the cost of the diversity of species used by the local communities. Thus, it was with colonial forest policies that the first confrontation with the local societies’ definitions of the commons emerged. This confrontation, as will be examined in the paper, laid the foundations for the crystallization of indigenous identity as we see it today – as ultimately a fundamental assertion to land, livelihoods and culture.

This loss of the commons continued in the post-colonial era as post-colonial polices showed very few changes in forest management atleast upto the 1980s, when the imperative to reverse the degradation of forests, led to the introduction of participatory forest management programmes. However, rights and concessions accorded to local communities through these, are, one may argue, well over-ridden by the encroachment of the commons under the pressures of globalization and integration into a larger market economy.

Interestingly, while there is continuity between the colonial and post-colonial era in the curtailment of access to the commons and their destruction, there was a shift away from the policy of isolation of tribal and indigenous people from mainstream society in the colonial times to one of *assimilation* in the post-colonial state of India. As Xaxa writes, ‘In the first few decades after independence, the dominating tone of deliberation among

scholars, administrators and social workers and politicians on the tribal question has been to facilitate their integration within larger society' (Xaxa 2005). Towards this end, although no formal statement or policy document exists in this regard; specific provisions were laid down for tribes in the Indian Constitution, including bringing areas inhabited by tribes under the Fifth and Sixth Schedules for purposes of special treatment in respect of administration of tribal people.

While in letter these provisions provide a space for 'integration', the underlying assumption being that it provides a space for diversity unlike 'assimilation', in reality the transition from assimilation to integration has still a long way to go. This is best illustrated taking the case of language and religion of indigenous communities. Prior to 1942, the census classified tribes as animists and their religion as tribal religion. However, today the census has done away with these categories enumerating tribals as Hindus if they do not profess any other major religion. Thus, the state's administrative practices in effect demonstrate an unstated policy of assimilation. Similarly, a level playing field does not exist for tribal languages despite constitutional provisions, wherein the dominant regional languages have been actively supported and promoted by state governments in India (ibid). The continued lack of recognition of the term indigenous by states of both India and Bangladesh is precisely a reflection of this. Most Asian governments legitimize this stand by arguing that because the majority of their populations have long resided on their territory (unlike majority populations in the Americas and Australasia, who originated from elsewhere) all are "indigenous" and thus the term is invalid.

Combined with a continued loss of access to land and livelihoods, the marginalization of other elements of a tribal / indigenous social and cultural identity, such as language and religion, have led to the crystallization of an ever stronger indigenous identity. We see today that the identity of 'indigenous' collapses within it multiple values making an intrinsic link between social, political, cultural and economic rights. In international debates, "indigenous status" is increasingly claimed by, and recognized with regard to politically marginalized, territorially based ethnic groups – who are culturally distinct from the majority populations of the states where they reside. (www.minorityrights.org). Thus, we see how the loss of lands and access to resources (from commons) becomes an issue of territoriality which in turn links to economic and political empowerment.

Today the rights of indigenous people are ultimately asserted as the right to 'self-determination', which is enshrined in the International Covenants on 'Civil and Political Rights' and 'Economic, Social and Cultural Rights'. Before examining however, what this means for the negotiation between states and indigenous peoples, it is important to describe the process of disenfranchisement that is taking place, to fully understand the emphasis being placed on self-determination by indigenous peoples and what exactly this means for the governance of the commons.

Globalization and privatization: The impact on indigenous peoples' rights

Polanyi's work on the 'great transformation' to a market society conceptualized the commoditization of nature as a central element in this process (Herring?). Although the process of commoditization of the commons, most notably forests, began in the colonial era in the form of timber logging, this process has assumed new and greater proportions in this age of globalization. This can be seen in the harnessing of common property resources as well as private property for hydroelectricity, mining, plantations and a myriad of other enterprises.

According to Polanyi, '...pre-market economic relations, norms and outcomes were "embedded" or submerged" in social relations generally; the extraction and elevation of market-driven dynamics from their social moorings produces significant social conflicts and centrally involves the state' (ibid). These social conflicts were precisely the conflict between indigenous and tribal people who were the ones uprooted from their social moorings with the state. As Herring writes, 'Indeed, much of the conflict over the "commons" is ideologically a conflict between alternative meanings of property and the rights of the states to impose novel proprietary claims' (ibid). These novel proprietary claims are at the most extreme manifest in the principle of eminent domain of the state in countries like India and Bangladesh, which overrides any constitutional provisions which may have been put in place to protect tribal rights. With globalization, we see the entry of a new player in the dynamic over resources between the state and indigenous peoples – that of private corporations. Constituting along with the state, what may be termed the 'power elite', private corporations are leased out lands by the state for harnessing of resources. In turn, it is not as if sections of indigenous peoples have not benefited from this process, through the privatization of lands that ensues in the process. However, this is not true for the vast majority.

The section below provides a few examples of the impact of globalization and the impact of the market economy on indigenous peoples' access to the commons.

Mining:

It has been seen, taking the example of India, that areas where there is extensive mining are also areas which have traditionally been inhabited by indigenous people. Evidence of this are the states of Jharkand and Orissa in India. According to the Indian Confederation of Indigenous and Tribal Peoples (ICITP), the Government of India has taken over sections of forests in indigenous areas and have been handing them over for mining and large scale development to private corporations. With the help of the Supreme Court, some states in India have evicted indigenous peoples from their land calling them encroachers. Although indigenous peoples have inhabited their lands / territories for centuries, they do not hold formal legal rights. The access to forests, lands and other common property resources have been governed by customary rights which are not always recognized. Existing legal protections cannot stand in the court as Indian laws recognize individual ownership of land but not community ownership. Most of the mining land in Orissa is the common land of tribals and therefore has less protective value.

Several cases of tribal destitution and loss of access to land and livelihoods have been coming from the state of Orissa in India, where several new projects for the mining of bauxite and aluminum have been commissioned. There is unprecedented foreign direct investment in mining projects in Orissa. Tribal / indigenous people in Orissa are facing an unprecedented loss of traditional lands. To get a sense of the scale of this, in June 2005, the South Korean steel giant, Pohang Steel Company (POSCO) signed a memorandum of understanding with the government of Orissa to build a massive 12 million tonne steel plant with an investment of US\$13 million.

There have been huge protests from tribal communities in Orissa to the loss of their traditional lands. The stories of the protest of communities from Kalinganagar and Kashipur show how these protests are sought to be quelled through brute police force and repression. Local NGOs and social scientists have also been raising questions about issues of resettlement and rehabilitation, the adequacy of which are lacking on several fronts. According to a paper on tribal people prepared by the National Advisory Council of India, nine million tribal people have been displaced by development projects in the country over the last fifty years and only 60 per cent of them have benefited from any sort of rehabilitation².

It is interesting to note that under a World Bank funded coal mining project in East Parej district of Jharkand, the main elements of the resettlement and rehabilitation package are income restoration and land compensation. There is no mention of the loss incurred due to loss of access to common property resources like forests and water. Although, one of the long standing recommendations of the Bank's appraisal team for higher level policy changes has been to create legal frameworks for the recognition of land formally in possession of people under customary tenure arrangements. However, typically this has been proposed in the form of a baseline survey to enumerate common property resources, value them, establish the income from them and provide a proper basis of compensation. There is little questioning of the loss of non-material ties to the land let alone the fact that monetary compensation never really compensates for the ultimate loss of livelihoods which derive from these CPRs(Herbert & Lahiri-Dutt 2004).

Commercial Plantations

More recently there have been reports of large scale felling of natural forests in Chattisgarh in India, another state where large numbers of tribal communities live. Since December 2005, the Forest Development Corporation has been felling Natural Sal and Mixed forests on a huge scale in three districts and replacing them with teak plantations. The local people contend that the corporation obtained permission falsely by stating that the forest is open and degraded, whereas in reality the natural forest is neither open nor degraded. About 30,000 people from the tribal *Baiga and Paharvi Korwa groups* across 72 villages are being directly affected by this operation. Sal seeds are one of the most valuable non-timber forest products for the people in this area, and such large scale destruction of their habitat and livelihoods is endangering their survival. Local NGOs add

² Commentary by Prafulla Das (18th November 2005) and Ranjit Devraj on DNRM list-serve.

that in the 2006 Budget, the state government of Chattisgarh has announced that private companies will be invited to carry out plantation work in the Chattisgarh forests, thus paving the way for privatization of forests in the state³.

Discouragement of shifting cultivation

One of the major victims of the rapid process of integration of hitherto subsistence-oriented economies of indigenous peoples into national and further global economic systems have been swidden / shifting cultivators. Both in India and Bangladesh, swidden cultivating indigenous communities have been made to abandon swidden cultivation either through forceful means or through inducements in favour of market oriented agriculture or horticulture. Such interventions have often been extremely disruptive and paid little respect to the indigenous peoples' customary land rights (Roy 2005:13). The argument used to legitimize this has been that shifting cultivation has been responsible for destruction of forests, and that it is unscientific and environmentally unsound. However, studies by experts have shown that shifting cultivation is infact an appropriate practice within geo-physical limitations and social institutions of the territories and areas concerned. Just like the promotion of commercial plantations in India, the Chittagong Hill Tracts in Bangladesh have also seen the implementation of rubber plantations or fruit orchards by relocating indigenous communities. Like in India, in Bangladesh too, 'forestry laws, polices and practices have tended to either totally deny indigenous peoples' claims over what they regard as commons, or to diminish such claims to mere usufruct status' (Roy 2005: 20).

Privatization to the benefit of indigenous people?

While there is overwhelming evidence of the increasing deprivation and destitution faced by indigenous peoples as a result of loss of access to the commons, some studies have also shown how privatization in some cases helps both in the conservation of resources but is also to the benefit of some indigenous communities. Kelkar and Nathan's study of the impact of a shift in production systems from meeting subsistence needs to gearing towards income maximization as indigenous communities get integrated into larger market systems, on non-timber forest products demonstrates this point. They find that in the North-East Indian hill state of Meghalaya, the growth of external markets for various forest products has often led to a rapid depletion of these. They argue that the rules prohibiting the extraction of NTFPs for sale break down in the face of the double pressure of the external market and the internal need for cash income. In some Khasi areas, this led to the grabbing of community forests by village headmen and registering them as their own. Clearly, one sees here the privatization of the commons to the benefit of the elite amongst some indigenous communities. It is interesting to note that, there was widespread protest by the poorer sections of the community to this grabbing, as a result of which some community forests were then divided up more or less equally among all members of the village community. Even though this may suggest some equity, at any rate this is a case of the demise of the commons. However, even Kelkar and Nathan go on to add that, 'But privatization works against those who don't have any land or who have

³ Posting by Vijaya Mishra on dnrm@panchayats.org

less land. Access to common forests is important for the poorest...privatization is inevitably inequitable' (Kelkar & Nathan: 2003).

Responses to loss of the commons

Tribal and indigenous people have not been mute witnesses to this widespread loss of access to their lands and common property resources. There have been a plethora of struggles and movements for justice since colonial times. However, these movements largely seen as environmental / ecological movements in the past have now developed into a global movement for the recognition and reconstitution of collective rights. Despite fragmentation within indigenous communities and tribal societies and increasing social differentiation, there is an increasing assertion of a more articulate political indigenous identity where the difference between tribe and non-tribe or indigenous and non-indigenous, has become even sharper than before (Xaxa: 2005). While in the 1960s, the prevailing wisdom of the time was that these 'backward' people would eventually become extinct, today this no longer holds true (Colchester 2005).

Indigenous peoples are increasingly asserting their rights over their lands and resources in the face of alienation of land and state induced displacement projects in the form of struggles for autonomy and greater *self-determination*. The underlying causes of economic marginalization have been clearly linked to political marginalization – as an overall lack of voice in decisions affecting their lives and livelihoods. No longer are indigenous people content with the rhetoric of 'integration'.

Increased international attention to indigenous peoples was sharpened with the declaration of 1995-2004 as the first 'International Decade of Indigenous Peoples' by the United Nations. One of the declared aims of the Decade was for the United Nations General Assembly to adopt a declaration on the rights of indigenous peoples on a draft that was passed by a sub-commission of the UN Commission on Human Rights in 1994. As the International Decade of Indigenous Peoples came to a close towards the end of 2004, only two of the 45 articles of the draft declaration had been adopted with severe disagreements over crucial provisions such as legal rights, self-determination and other rights of a collective nature. According to Roy, 'Although they accepted that indigenous people could freely practice their customary laws, several governments were unwilling to regard the indigenous people's legal and procedural systems as 'juridical' systems' (Roy 2005).

These disagreements have also been reflected in the reluctance of nation states to recognize 'peoples' as opposed to 'people'. The 's' of indigenous peoples is very significant – for it subsumes within it the entire bone of contention between states and indigenous peoples on all issues pertaining to collective rights. Nowhere are these more tangible as over the issue of collective rights to resources or in other words a legitimate recognition of the importance of the commons.

This also explains why only as few as 17 states have signed ILO Convention 169, the successor of ILO Convention 107. An important terminological difference in the

formulations of Convention 107 compared to 169 is the shift from “indigenous populations” to “indigenous peoples”. The other significant difference between Convention 107 and 169 is that the latter articulates a policy based on participation and maintenance of identity to replace encouraging integration of indigenous peoples into the mainstream. Convention 169 specifies governments’ responsibilities for coordinated, systematic, participatory and active consultation and safeguards indigenous people’s use of land and a right to participate in the management and conservation of natural resources (Bleie: 2005).

However, it is important to note that ‘... in claiming the right to self-determination, few indigenous communities seek independence from nation states that now encompass them. They are instead seeking new ways of being recognized by national laws and systems of decision making without losing autonomy and their own values. They are in effect in search of a middle ground’ (Colchester: 2004).

The rights of indigenous peoples to lands and resources are today deeply embedded within a larger human rights discourse. The negotiation that indigenous peoples are engaged in have not all met with failure. At least at the international level, norms established by human rights standard setting bodies have also begun to be accepted by international development agencies and are evident in clauses for the protection of indigenous peoples’ rights in several conventions and treaties. Special commissions have been established to examine specific sectors, like the World Commission on Dams and the Extractive Industries Review. While these have also been the subject of some critical reviews, they mark a step forward in otherwise conservative thinking and practices. Today, it is difficult even for national governments to argue against principles such as that of ‘free, prior and informed consent’.

Slowly national policies governing the commons are also changing. In India, the proposed ‘Scheduled Tribes and Forest Dwellers Bill (Recognition of Forest Rights), 2005’ is a step in this direction. It seeks to accord tribal communities customary rights within the forests that they have been denied historically. The draft bill attempts to ‘legally restore the ruptured tribal-forest relationship, subscribed to in all environmental policy documents but violated daily’ (Sarin 2005).

Concluding remarks

The value that the common property school of thought has brought to the theory on property rights is the legitimization of forms of ownership that are neither state owned nor individual. Secondly, it also reiterates the continued importance of modes of production which are not only geared to the market economy but are even today equally central to subsistence economies. As Herring puts it, ‘The radical content of the commons ideological framework is the direct confrontation with the inevitability or desirability of markets as arbiters of the futures of natural and social systems. Grounded in pre-market and non-market conceptualizations of nature and society, the commons perspective asserts the legitimacy of extra –market claims on the surface of the planet’ (Herring ?).

Implications for common property theory and advocacy

As we have seen in the course of this paper, indigenous peoples claims to the commons are being asserted within the frame of a different discourse – that of international law from a human rights perspective. I argue that this perspective has much to offer to not just the current theory on the commons, but more importantly it enables advocates of the commons to strengthen their arguments in additional ways. Recognizing the difference between ‘group rights’ and ‘collective rights’ is one of the insights that looking at the issues of the commons from the perspective of indigenous peoples rights offers us towards this.

In international law there is a clear cut distinction between ‘group rights’ and ‘collective rights’. In the case of ‘collective rights’ the right holders are individuals and the direct beneficiaries. In the case of ‘group rights’, the group holds the rights and directly benefits as a whole from their exercise, in terms of well specified criteria of enhancement of the worth and interests of the group. It is important to note that unlike indigenous peoples who in international law are entitled to ‘group rights’, this is not the case for minorities entitled only to collective rights. It is the recognition of indigenous communities as ‘peoples’ that provides them group rights. Unlike in the case of ‘minorities’, the struggles waged by indigenous peoples have succeeded in according them the recognition of ‘peoples’ at the international level, if not at the national level. This has come about primarily through their demand for self-determination.

So far, advocacy for the maintenance of common property resources has used the terminology of collective rights. Even if a mere semantic change in and of itself, the case of the common property theorists would benefit by taking cognizance of this distinction in international law.

Implications for governance of the commons

While the assertion of rights drawing upon notions of self-determination and territorial rights have gained some legitimacy at the level of international law, these have not significantly influenced nation states, as can be seen from the narratives of the impact of globalization and privatization or from the lack of recognition of the very term indigenous. This leads one to ask, what then is the future of the commons? Should one be optimistic or pessimistic about their survival? I would argue that, the changes at the international level provide optimism on two counts. Firstly, mechanisms and spaces at the international level such as the international decade have created a heightened awareness both in civil society (international agencies, NGOs, donors) and states on indigenous peoples issues, creating what one may term a moral pressure, where their voices cannot be dismissed so easily. Secondly, at a more tangible level, as mentioned earlier what has been achieved is a certain level of norm setting. Violations of land and resource rights can now be more easily and legitimately connected to human rights violations. This also exerts indirect influence on the nature of court judgments and allows for the expansion of precedent setting law within countries. In other words, new avenues for legitimizing the

existence of the commons open up. To this extent one can be optimistic about the survival of the commons.

This paper thus, makes a case for researchers and advocates of the commons to integrate the spaces available within this new discourse to suggest different options for common property resource governance. As mentioned earlier, notions such as self-determination do not necessarily challenge the sovereignty of states. The challenge for theorists of the commons is to expand on this lack of contradiction to reflect the changing dynamics between states and indigenous peoples over the commons.

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