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HARMONIZING GENDER JUSTICE AND TRIBAL AUTONOMY: ADOPTING THE "LIVING CUSTOMARY LAW" DOCTRINE IN INDIA

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ABSTRACT

The constitutional structure of India is one which has just ensured gender equality and at the same time, the Indian constitution has provided a means of preserving the culture of the tribal groups as two imperatives that have long been considered as being mutually hostile. This is because, as argued in this paper, this perceived antagonism is unnecessary jurisprudentially and politically avoidable. This paper suggests a reformulation of the concept of the Living Customary Law doctrine as a principled approach to the Indian legal system by critically addressing it in the context of the South African constitutional jurisprudence which has formulated it in the most robust manner. The doctrine of Living Customary Law, as opposed to the traditional codification of tribal custom or blanket constitutional override, acknowledges the customary law as an organic, community-based system of norms that can internally evolve. This paper discusses the constitutional architecture of the Articles 13, 14, 15, 21, 244 and 342 of the Constitution of India, the Fifth and Sixth Schedules, the Panchayats (Extension to Scheduled Areas) Act 1996, and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2 New conceptual instruments such as a proposed Triadic Validity Test and a model of adjudicatory embedded in the community are provided to implement this doctrine in the Indian context.

Keywords: Living Customary Law, Tribal Autonomy, Gender Justice, Scheduled Tribes, Constitutional Law, Fifth Schedule, Sixth Schedule, PESA, Article 13, Customary Practices

1. Introduction

There can be no more disputed area in India than the area of tribal customary law in which the constitutional promise of equality hasn't been challenged. In the many tribes across India, the Khasi matrilineal and the Donyi-Polo patriarchal societies of Arunachal Pradesh, the Gondwana belt of central India and the Santhal villages of Jharkhand women are faced with the concurrent tug-of-war between constitutional rights and community attachment.g. The traditional juridical answer to this tension has swung between two equally unsatisfactory poles: on the one hand, to place the constitutional guarantees under cultural autonomy; on the other, to place the constitutional norms everywhere alike, without reference to the context of the community.

It is argued in this paper that the two answers are invalid. The subordination approach puts tribal women in a juridical vacuum as they are considered as carriers of culture and not carriers of rights. The alternative imposition style, in turn, reiterates the colonial reasoning of

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civilizational correction, the deprivation of epistemic power to regulate their own normative existence. What is required is a third jurisprudential way one that does not give up gender justice or colonize tribal self-governance.

The doctrine of the Living Customary Law provides just such a way. Started in scholarly commentaries on the codification of the African customary law in statute as dead law, and later taken up in South African constitutional adjudication, the doctrine states that customary law is not a dead thing, but a living normative system one that communities keep on reinterpreting with the shifting social realities, including the experience of women..[300] This paper suggests the intelligent modification of this doctrine to the constitutional order of India, showing how it is textually compatible with the provisions that are in existence and how it is functional superiority to the existing judicial methods.

2. The Constitutional Architecture: A Framework of Productive Tensions

2.1 Equality, Non-Discrimination, and Cultural Rights

Equal treatment of equality and cultural identity is not mutually exclusive in the Constitution of India 1950. Articles 14 and 15 ensure equal standing before the law and forbid discrimination on the basis of sex and under Article 15(3), special treatment may be given to women and children.[301] The Supreme Court has expanded Article 21 guarantee of life with dignity to include the right to be free of patriarchal violence and to choose ones own law.[302] At the same time, Article 29 assures to minority communities such as tribal communities the right to preserve their unique culture, language, and script.t.[303]

This co-existence of rights in a structure is not by chance. The Constitution framers were well conscious that transformative equality and preserving culture were both critical to the republican project. The caution given by B.R. Ambedkar as a warning of the grammar of anarchy was as much of a warning of cultural imperialism as it was of lawlessness. The Constitution therefore envisions a dialogic relationship between these values and not a hierarchy where one win or lose over the other.

2.2 Special Constitutional Provisions for Tribal Communities

This co-existence of rights (structure) is not by chance. The framers of the Constitution were keen to the realization that both the transformative equality and cultural preservation were crucial to the project of republic. The grammar of anarchy as warned by B.R. Ambedkar did not only work against lawlessness, but also against cultural imperialism. The Constitution therefore envision such a dialogical relationship between these values rather than a hierarchy where one value is overpowering the other all the time.[304] The Sixth Schedule, which applies in the northeast, establishes Autonomous District Councils, endowed with legislative, executive and judicial authority in the affairs of the customary law, including the authority overseeing and controlling "social customs."[305]

Perhaps the biggest statutory acknowledgement of tribal self-governance is the Panchayats (Extension to Scheduled Areas) Act 1996 (PESA). PESA Section 4 provides that Scheduled Areas legislation should be in accord with local customary law and social and religious practices of the community. More importantly, PESA also requires gram sabhas to be consulted in acquiring land and resettling or rehabilitating people affected by the projects which entail a participatory logic which at least formally reaches all members of the community including women.

[300] Chuma Himonga and Craig Bosch, 'The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning?' (2000) 117 South African Law Journal 306.
[301] Constitution of India 1950, arts 14, 15.
[302] *Francis Coralie Mullin v Administrator, Union Territory of Delhi* [1981] SCR (2) 516.
[303] Constitution of India 1950, art 29.
[304] Constitution of India 1950, art 244 and Fifth Schedule.
[305] Constitution of India 1950, Sixth Schedule, para 3.

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2.3 The Critical Gap: Article 13 and Customary Law

Article 13 of the Constitution makes illegal all the laws that are in force at the time that are inconsistent with the provision of fundamental rights.[306] The important question one that the Supreme Court has answered inconsistently is whether tribal customary practices are considered to be laws in force under Article 13(3)(b) which defines the term to mean, customs or usages with a force of law in the territory of India.."[307]

In *State of Bombay v Narasu Appa Mali*,[308] Article 13 the Bombay High Court also ruled that personal laws did not qualify as law to be subject to Article 13 since they were not enacted by any legislature. Although this ruling was made within the framework of Hindu personal law, it has put a long dark cloud over the jurisprudence of customary law. When tribal practices are likewise shielded against Article 13 review, then structural challenges to discriminatory practices against fundamental rights become crippled.

This paper will present the argument that this insulation is constitutionally unsustainable and has no jurisprudential basis in the path that the Supreme Court has taken in other cases such as Mary Roy v State of Kerala and Joseph Shine v Union of India,[309] in which the Court showed a readiness to place the personal law-related practices under the scrutiny of the Constitution. This tension is shedding some light by the adoption of the Living Customary Law doctrine, which does not simply declare customary law as being simply void under Article 13, but provides a route by which it can be treated as constitutionally valid, provided it moves towards tending to minimum standards of dignity and equality.

3. Mapping the Problem: Gender Injustice in Tribal Customary Law

3.1 Inheritance and Property Rights

Inheritance is the most widespread area of gender discrimination in the customary law of the tribes. Women are systematically denied the right to inherit ancestral property in the Scheduled Tribes where customary law applies to most regions of central, eastern and northeast India.[310] In the Santhal society, an example of customary law is the strong right of the male lineage to village land, and women are treated as temporary members of the natal family who only obtain rights on marriage.[311] The Bhumij, Ho and Mundari communities are no different in acknowledging male exclusive succession to ancestral land.

It is not some personal denial. Tribal societies are characterized by land relationship. The gram sabha relies on land as the foundation of political representation, the Forest Rights Act 2006 as the foundation of claims to forest rights, and economic security. The denial of inheritance rights of women is also the denial of political voice, economic autonomy and dignified personhood that are all guaranteed under Articles 14, 15, 19, and 21.[312]

The verdict of the Supreme Court in Danamma @ Suman Surpur v Amar restated the rights of the daughters as equal before Hindu Succession (Amendment) Act 2005, though, this protection is subject to Scheduled Tribe by exclusion under Section 2(2) of the Hindu Succession Act 1956,[313] effectively leaving tribal women in a constitutional lacuna.

3.2 Exclusion from Community Governance

PESA stipulates that gram sabhas should consist of everyone in the village who is an adult. However, field work in Scheduled Areas in Jharkhand, Odisha and Chhattisgarh, records the constant exclusion of women in the effective work of gram sabha a phenomenon that is not imposed upon by legal statute but rather by the

[306] Constitution of India 1950, art 13.
[307] Constitution of India 1950, art 13(3)(b).
[308] *State of Bombay v Narasu Appa Mali* AIR 1952 Bom 84.
[309] *Joseph Shine v Union of India* (2019) 3 SCC 39.
[310] Virginius Xaxa, 'Women and Gender in the Study of Tribes in India' (2004) 39 Indian Journal of Gender Studies 149.
[311] Hari Mohan Mathur, *Tribal Development in India: The Contemporary Debate* (Sage 1995) 87.
[312] Constitution of India 1950, arts 14, 15, 19, 21.
[313] Hindu Succession Act 1956 (India), s 2(2).

traditional laws of gender segregation in the open discussion.[314]

This exclusion is of constitutional interest as Article 243D of the Constitution provides not less than one-third reservation of women in the panchayat seats.[315] When the customary norms so successfully invalidate this constitutional guarantee they not only discriminate but actually undermine the constitutional design. However, courts have been loath to intrude on what can only be described as internal community organization.

3.3 Divorce, Maintenance, and Bodily Autonomy

In some of the tribal societies, divorce can be granted to men under the grounds that are customary which encompass obedience of a woman, but grounds of women are very limited. The maintenance requirements are often not enforcible by community dispute resolution procedures where women are not allowed to appear or speak on their own.[316] Where traditional rituals of ceremonial servitude or ritual prostitution are still practiced in some places like the Devadasi-related practices of some tribal sub-groups bodily autonomy is violated in a manner that directly touches on Article 21's provision of life with dignity.[317]

4. The Living Customary Law Doctrine: Genesis and Core Principles

4.1 Origins and Theoretical Foundations

Living Customary Law is a term that was coined by the efforts of scholars who criticized what was eventually known as an official customary law the codified, court-applied form of African customary law that colonial rulers in order to ease their administrative load, frozen into text.[318] The codification turned living practices of the community into fixed rules and stripped women of a voice in the processes of generating the customary norms and left the colonial courts (and their heirs) to decide what constituted an authentic customary law.

The Living Customary Law doctrine has its theoretical basis on three propositions. To start with, the customary law itself is an evolutionary process where the norms of the communities are changed in reaction to the internal debate, external contact, economic transformation, and moral revisiting.. Second, customary law is not supported by the consent and practice of the community, but rather by the codification of the law outside the community. Third, women are not simply objects of customary law but actors in its production as they continue to adopt or reject certain norms, this is their own customary law-making.[319]

4.2 South African Constitutional Jurisprudence

The Living Customary Law doctrine has been mostly discussed in the South African Constitutional Court. Khayelitsha, Bhe v Magistrate,[320] the Court held that the rule of primogeniture in the Black Administration Act 1927, which barred women to intestate succession was unconstitutional. Notably, the Court did not merely invalidate customary law with which it interacted with evidence of how practice in actual community had already shifted out of strict primogeniture, and directed legislative change to embrace this changed practice.

In Shilubana v Nwamitwa,[321] the Constitutional Court made a finding that the appointment of a woman as traditional leader was constitutional since the community itself made a decision to create their own customary law to allow women to be chieftains, which was itself an exercise of legitimate customary authority. The Court stated that the historical practice is not the only matter that should be taken into account by the court when interpreting the customary law

[314] Nandini Sundar, 'Laws, Policies and Practices in Jharkhand' (2003) 38 Economic and Political Weekly 5441.
[315] Constitution of India 1950, art 243D.
[316] Archana Parashar, 'Gender Inequality and Religious Personal Laws in India' (2008) 14 The Brown Journal of World Affairs 103.
[317] *Budhadev Karmaskar v State of West Bengal* (2011) 10 SCC 477.
[318] Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge University Press 1985) 4.
[319] TW Bennett, 'Comparative Law and African Customary Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 641.
[320] *Bhe v Magistrate, Khayelitsha* [2004] ZACC 17; 2005 (1) SA 580 (CC).
[321] *Shilubana v Nwamitwa* [2008] ZACC 9; 2009 (2) SA 66 (CC).

issues; the evidence of the contemporary community development should also be taken into account.[322]

All of this determines that the constitutional rights are not external forces that are assumed to override the customary law but rather can act as catalysts of the internal processes of normative evolution of the communities.

4.3 Distinguishing the Indian Context

The Indian context has a variety of key differences with South Africa that should be taken into consideration when adapting the doctrine. To begin with, the tribal communities of India are much more heterogenous in terms of linguistic, ecological, kinship and economic inequalities which complicate any homogenous way of dealing with them to a significant extent.. Second, the constitutional scheme in India already provides special protections on tribal self-government by the Fifth and Sixth Schedules, PESA, and the Forest Rights Act, which provide a more elaborate institutional structure than that faced by South African courts. Third, India has a more extensive history of codification of some of her tribal customary practices via state-level laws, establishing strata of "official" customary law that must be separated out of real practice in the community.[323]

These are the differences that render the doctrine inapplicable. They render it more context-dependent and challenging to adapt it to the context exactly what this paper will attempt to do.

5. Adapting the Living Customary Law Doctrine to India: A Proposed Framework

5.1 Constitutional Anchoring

To be functional within the Indian constitutional order, the Living Customary Law doctrine needs to be developed out of the current constitutional provisions and not be imported in bulk out of a foreign jurisprudence. There are three constitutional hooks that are identified in this paper.

The former is Article 13(3)(b) itself. Instead of adopting this provision as a sledgehammer where all discriminatory practices become null or fail to be struck at all, the courts must apply it as asking them to make a contextual evaluation of whether a given custom has attained the force of law by establishing a real, present-day community acceptance including the acceptance of women into the community.. A practice that is perpetuated by coercion, by exclusion, by the systematic silencing of the women, would not pass this test not because it is practice, but because it is not the genuine community consent which is what makes custom normative.[324]

The second hook is Article 21, the broad reading of which by the Supreme Court has acknowledged the right to human dignity to include substantive freedom of social domination.[325] The doctrine of the Living Customary Law, when used correctly, would entail that customary practices should be based on a flooring of respect not the ceiling of urban liberal standards, but a flooring of acknowledgment of the personhood of women within the value system of the community itself..

The third hook is the Articles 244 and 244A read in accordance with the Fifth and Sixth Schedules. These provisions already consider that tribal self-governance is to be working within a constitutional framework. That this frame (the requirement to gradually accommodate the role of women in the process of defining, application, and amendment of customary law) would be explained by the doctrine of Living Customary Law.

5.2 The Proposed Triadic Validity Test

The paper suggests a Triadic Validity Test to measure the constitutional validity of tribal

[322] ibid [45]–[47].
[323] Sanjukta Bhatt, 'The Uneasy Status of Customary Law in Indian Constitutional Jurisprudence' (2016) 28 National Law School of India Review 44.
[324] Upendra Baxi, 'The State's Emissary: The Place of Law in Subaltern Studies' in Partha Chatterjee and Gyan Pandey (eds), *Subaltern Studies VII* (Oxford University Press 1992) 247.
[325] *Navtej Singh Johar v Union of India* (2018) 10 SCC 1.

customary practice that has an impact on women rights. The test is based on three dimensions:

First Dimension Authenticity: Is the practice really practiced as a living norm in the community or has it been maintained mainly by male elites who have the power to make official institutions of customary law? Evidence on this dimension would involve field testimony by women community members, record of the community dispute resolution practices, anthropological accounts and evidence of how the practice is being followed by various generations. Customs that are only found in the archives of ethnographers who worked in the colonial era or in the petitions of the customary law courts but which are moribund or internally disputed by the community would not pass the authenticity dimension.

Second Dimension Participation: Did women play a significant role in the ways in which this practice was instituted, preserved, or lastly reinforced? This dimension does not even presuppose historical equality a practice might have developed within a patriarchal setting. It poses the question whether modern manifestations of the practice are indicative of the role women play in its continued interpretation. This is especially significant considering the constitutional right of women representation in panchayati raj institutions under Article 243D and participatory requirement of PESA.[326]

Third Dimension Minimum Dignity: The practice does it cause physical injury, systematic economic marginalization or forced subordination that deprives women of the fundamental ability to determine themselves freely in the society? This dimension is based on Article 21 jurisprudence and not a comparison of tribal custom to an external liberal norm that it seeks to know whether the practice reflects the articulated values of dignity, reciprocity and belonging in a community which now incorporates its women as full members.[327]

A constitutive practice, which meets the three dimensions, would be constitutionally sound regardless of its nonconformance with the uniform civil norm. Any practice that fails on any of the dimensions would be challenged in court on constitutional grounds and the remedy will not be the automatic invalidation but a guided community process of deliberation on how to come up with a modified practice that passes the test.

5.3 The Community Deliberation Remedy

The most innovative aspect of the suggested framework is its remedies approach. Once a tribal customary practice is determined to violate one or more of the three dimensions of the Triadic Validity Test, the usual judicial action is to invalidate a declaration that the practice is void under Article 13.. In this paper, we will present an argument that invalidation is not always the right and efficient approach to take in the tribal customary law. When invalidated and not replaced, a normative vacuum arises which is often filled directly by the norms under invalidation as there is no enforcement mechanism of the court within traditional communal frameworks. In a deeper sense, such invalidation by external judicial pronouncement is a recreation of the colonial logic of imposed law reform that produces community opposition that ends up being counterproductive to the women it was established to protect.

The Community Deliberation Remedy would operate in the following way. When a court has discovered that a traditional practice has failed the Triadic Validity Test, a court would grant a "Development Direction" in the form of the directions that the Supreme Court has given in public interest litigation obliging the appropriate gram sabha or Autonomous District Council to develop a revised practice within a defined time period through an organized

[326] Panchayats (Extension to Scheduled Areas) Act 1996 (India), s 4(d).

[327] Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press 2000) 78.

deliberative procedure that fully involves women members. The court would still have the supervisory control to determine whether the adjusted practice passes the Triadic Validity Test. An interim order would offer protection to the constitutional right in question and the women would not be left unguarded in the process of reforms during the deliberation period.[328]

This is based on the practice of the Supreme Court to give guidelines and retain jurisdiction on their own in cases such as Vishaka v State of Rajasthan.[329] where the Court acknowledged that the transformative social norms need to be scaffolded by institutions, as opposed to mere pronouncement.

6. Institutional Architecture for Implementation

6.1 Reinventing the Autonomous District Council

Existing judicial powers over customary law disputes already exist in the Sixth Schedule Autonomous District Councils (ASCs) in northeastern India. But their structure and process now shares the patriarchal principles that women are systematically underrepresented in the ADC membership and the traditional ADC-based courts of law seldom involve women adjudicators.[330]

The Living Customary Law would necessitate the redesignation of the ADCs to incorporate compulsory representation of women not as an act of tokenism but a pre-emptive requirement prior to the prerogative of ADC to pronounce on the customary law.. An ADC which declares on the customary right of women without their significant involvement in its decision making would be creating a colonial type of official customary law rather than living customary law..

Such reorganization may be achieved by amendment of the Sixth Schedule that there should be at least one-third women members of every ADC and that at least one-half women members of the benches of ADC customary law should be women when adjudicating family, marriage, inheritance or land rights. This amendment would not need constitutional amendment this could be done by an amendment of the Sixth Schedule with the procedure outlined in Article 368 which only requires a simple majority in Parliament to make amendments to Schedule 6.[331]

6.2 Gram Sabhas (Scheduled Areas) Gender Inclusive.

The gram sabha is the unit of tribal self-government under PESA in Scheduled Areas. The Act however does not provide any gender composition in gram sabha proceedings or procedural protection in the participation of women. PESA regulations at the state level in Jharkand, Odisha and Chhattisgarh also do not have any effective gender participation rules.[332]

This paper will therefore suggest the amendment of state PESA rules to include that: (i) gram sabha proceedings on customary law issues should be convened separately by women members at least once before a customary decision is made, to ensure the voice of women members is recorded independently; (ii) gram sabha proceedings must keep written records of all customary decisions made on family law, inheritance and property, and the dissent or absence of women members should.

6.3 A National Tribal Women's Customary Law Commission

In order to establish a long-term institutional support of the Living Customary Law structure, this paper suggests creating a National Tribal Women Customary Law Commission (NTWCLC). The Commission would be an independent

[328] *Vineet Narain v Union of India* (1998) 1 SCC 226 (discussing the Court's power to issue continuing mandamus).
[329] *Vishaka v State of Rajasthan* (1997) 6 SCC 241.
[330] Walter Fernandes, 'Tribal Women and Development in Northeast India' (2005) 12 Journal of North East India Studies 22.
[331] Constitution of India 1950, art 368.
[332] Panchayats (Extension to Scheduled Areas) Act 1996 (India); see also Pradip Prabhu, 'PESA, the Forest Rights Act, and Tribal Rights in India' (2010) 45 Economic and Political Weekly 35.

statutory agency of the Ministry of Tribal Affairs with the mandate to: (i) record living customary practices in the tribal communities with specific focus on the views of women; (ii) give expert evidence in courts where customary law conflicts are being adjudicated; (iii) facilitate Community Deliberation processes where Development Directions have been issued; and (iv) advise the state governments on amendments to codified

The Commission would be different in that it would have a clearly defined mandate of intersection of gender and customary law and its composition would be such that the tribal women members are equal in number to the legal professionals. It would be based on the example of the Law Commission of India but it would make sure that tribal communities are not consulted but they are represented as people of authority in their normative systems.[333]

7. Judicial Engagement: Reading Indian Case Law Through the Living Customary Law Lens

7.1 The Supreme Court's Hesitations

The Supreme Court of India has been ambivalent in its involvement in tribal customary law and gender rights. Cricket Association of Bengal v Secretary, Ministry of Information and Broadcasting, in which case?[334] the Court expressed a very wide conception of constitutional liberties that did not allow any room to discriminatory practices. However, where the matter particularly concerns tribal customary law the Court has shirked into deference.

Madhu Kishwar v State of Bihar,[335] a case that squarely questioned traditional rules of succession to land in the Oraon tribe that did not allow women to inherit land, the Supreme Court did not rule that such traditions were unconstitutional. Although the Court observed the discriminatory nature of the practice, it refused to intervene, virtually giving preference to the customary autonomy over constitutional equality. The judgment of Justice Jeevan Reddy admitted the issue but suggested a legislative approach to the problem over judicial intervention a constitutional abdication which deprived Oraon women of redress in more than 20 years.[336]

This ruling is exemplary of the issue. The Court was right in realizing that judicial override without community participation was an issue. However, by merely yielding to the legislature that has not demonstrated any urgency in amending tribal personal law the Court left tribal women in a rights vacuum.m. The Living Customary Law approach offers an alternative way: the Court might have passed a Development Direction that would compel the involved tribal communities to engage in deliberation, reserved jurisdiction, and granted interim protection to the rights of the women to inheritance in the process.

7.2 The Forest Rights Act as a Precedent for Dialogic Reform

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 is an important precedent to the dialogic approach to tribal rights.[337] The Act established the community forest rights based on community claims as opposed to state-determined eligibility with a participatory logic that obligated communities to generate evidence of their own customary use and occupation. Gram sabhas were given the authority to receive, process and forward claims, which resulted in a process of rights recognition that was based on the community.[338]

Notably, gender-sensitive provisions were also introduced by the Act Section 3(1)(m) acknowledges the right of settlement and

[333] Law Commission of India, *Report on Customary Law and the Constitution* (Report No 227, 2009).
[334] *Secretary, Ministry of Information and Broadcasting v Cricket Association of Bengal* (1995) 2 SCC 161.
[335] *Madhu Kishwar v State of Bihar* (1996) 5 SCC 125.
[336] ibid [34]–[38] (Jeevan Reddy J).
[337] Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 (India).
[338] ibid, s 6.

conversion of forest villages to revenue villages; joint titling of forest rights in the name of husband and wife, has been encouraged in the provisions of the Act through administrative means in accordance with the guidelines of the Ministry.[339] This change in the administration of joint titling to the point of not being statutory, in itself, is a manifestation of the gender-progressive evolution of customary law, in circumstances where the institutional requirements are favourable. It is a practical exercise of the Living Customary Law dynamic in the Indian context, albeit not fully and lacking principled jurisprudential frameworks.

7.3 *Laxmi Mandal v Deen Dayal Harinagar Hospital* and Structural Remedies

The Delhi High Court's approach in *Laxmi Mandal v Deen Dayal Harinagar Hospital*[340] that the Court provided elaborate guidance to state agencies to make sure that marginalized women can get access to maternal health services reflects the ability of Indian courts to creatively adopt structural solution to socially sensitive cases. This case law helps substantiate the idea that a development directions court that applied the Living Customary Law framework might stay in charge of supervisory jurisdiction without going beyond its institutional capability.

The intersection of structural remedies jurisprudence with the Living Customary Law paradigm provides a synthesis that is both indigenous and powerful to the Indian judicial tradition one that is not passive or imperious, but as facilitative of the realisation of rights in community processes.

8. Responding to Objections

8.1 The "False Universalism" Objection

Another major criticism of any attempt to impose constitutional gender norms on tribal customary law is that it recreates an illusion of universalism that would force a liberal, urban, caste-Hindu concept of gender equality on to a community whose gender relations exist under a different, but equally valid, set of values. This is an objection that should be given serious consideration.

Living Customary Law framework does not dictate a consistent liberal standard. In its Triadic Validity Test, it does not inquire on whether a tribal practice is in conformity with the norm of the educated urban woman. It poses the question of whether the practice actually has the very approval of the women of the community, whether the women of the community were involved in its creation and whether or not the practice respects the minimum requirements of human dignity that the community recognizes itself. It would not threaten this framework in communities where there is true gender complementarity where women have different roles than men but these are esteemed, safeguarded, and self-appointed.

The framework only interferes in situations where practices are perpetuated by being enforced, by being excluded or by systematically silencing the voices of women. that is no false universalism it is the least that any normative system that is to be said to have legitimacy must show.

8.2 The "Institutional Competence" Objection

The second objection is related to institutional competence in the judiciary. The argument goes, courts are ill-placed to determine the authenticity of customary practices, the extent of women involvement in their formulation and the internal sense of dignity in the community. This is why the Supreme Court left the legislature to the mercy of the legislature in the case of Madhu Kishwar.[341]

The answer to this objection is just the institutional architecture presented in this paper. The NTWCLC would make the courts have expert testimony on the habitual practices as it is in reality practiced by women. The

[339] Ministry of Tribal Affairs, *Guidelines on Joint Titling under the Forest Rights Act* (Government of India 2012).
[340] *Laxmi Mandal v Deen Dayal Harinagar Hospital* 2010 (174) DLT 23 (Delhi HC).
[341] *Madhu Kishwar v State of Bihar* (1996) 5 SCC 125 [40].

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Community Deliberation Remedy would place the normative development effort in the hands of communities themselves that courts would merely evaluate the products by the Triadic Validity Test. Supervisory jurisdiction would be retained so that the courts could also check on compliance without having to micromanage the deliberation of the community. Institutional competence is not a predetermined feature that it can be constructed by means of institutional design.

8.3 The "Political Economy" Objection

A third objection is structural: the male elites who dominate the institutions of customary law and the politics of tribal areas will oppose any changes in tribal customary law that would be beneficial to women. This is a significant empirical finding that should be dealt with at implementation but not framework design.

The compulsory nature of women to ADCs and gram sabha proceedings, creation of an independent NTWCLC with investigative authority will help lessen the political economy limits that allow the practice of discrimination to continue. Also, the Community Deliberation Remedy with the establishment of a formal legal process provides women with an institutional process of interaction that is beyond the power of conservative male elites. As the history of the Forest Rights Act, where self-help groups and mahila sabhas of women have been able to file and implement the claims of community forest rights in a number of states, indicates that even in the most hostile political conditions, women can be provided with space to act.[342]

9. Conclusion: Toward a Constitutional Jurisprudence of Dialogic Transformation

A major tradition in jurisprudence in India has long seen the relationship between gender justice and tribal autonomy as a zero-sum game an issue of which constitutional value prevails where these two are in conflict. As has been argued in this paper, this framing is false, unnecessary and harmful especially to tribal women who are left with no recourse when courts pronounce the practices of their community's untouchable, and who are left with no belonging when courts declare the practices of their communities simply void.

Another paradigm - the Living Customary Law doctrine, as customised in this paper to the Indian constitutional context - is that of dialogic transformation. It does not consider tribal communities as museum relics of pre-constitutional government but as normative communities that can evolve internally. It does not see tribal women as passive victims who need to be rescued by outsiders but as agents of normative development of their own communities. And it does not read the Constitution as a contest with tribal life as it is perceived to be an invitation to tribal communities to declare their most valuable values like their values regarding the dignity and belonging of their women in a manner that they are understood and safeguarded under the republican order.

A combination of the Triadic and the Community Deliberation Remedy, the gender inclusive reform of the ADCs and gram sabhas under the PESA and the proposed NTWCLC make up a framework that is both constitutionally justified, institutionally viable and normatively best than both the deference and override paradigms that dominate the Indian jurisprudence.

Ambedkar referred to the Constitution of India as one that was aimed at realizing a social revolution, rather than a political revolution. By its own standards, a social revolution that fails to reach tribal women who are some of the most multiply marginalised persons of India is not complete. The doctrine of Living Customary Law does not require the tribal communities to forget who they are. It challenges them and their courts, their legislatures and their administrative institutions to make certain that

[342] Neera Singh, 'Women and Community Forests in Odisha: Rights, Robustness and Resilience' (2009) 2 International Forestry Review 65.

they are themselves and by their own terms that they are women.

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