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Editorial Note

In 2012 SLR became a biannual publication, committing to publish a special themed issue every year. Since then the themes have varied from legal education; international law and human rights; gender and sexuality; to technology and the law. The past few years have seen some significant changes in India's environmental laws and policy and we thought it important to analyse the effect of these changes from a socio-legal perspective. We therefore chose 'Ecological Justice and Development' as the theme for this issue.

A nation state's economic standing is largely derived from the exploitation of its natural resources. In this issue, we look at how law and policy shape their use and distribution in India. An understanding of this is linked to questions of sovereignty i.e. who are these resources meant to serve? – the larger 'public interest' or the interest of those who are immediately dependant on it?; what is the role of the government in this? – to serve industrial growth or to protect the rights of all people and to use the resources in a sustainable manner? The answer of course is that a balance needs to be achieved between competing interests but this itself is riddled with numerous questions: What is this balance? Against the might of the eminent domain, how best to protect the rights of citizens? Is it an evolving standard? This issue delves into all these questions, and also looks at the conflicts between the competing considerations of development and environmental protection.

The first three essays examine the management of two very important resources – land and water. In *Dholera and the Myth of Voluntary Land Pooling,* Preeti Sampat and Simi Sunny turn the socio-legal lens to the land pooling mechanism. Due to the determined move towards urbanisation, the government is invoking processes like the land pooling mechanism which is ostensibly built on the principle of voluntariness. Through a case study of the Dholera Special Investment region and the Gujarat Town Planning and Urban Development Act, 1976, the authors show that because of the history of the concept, the prevalence of eminent domain in the structure of the Act and judicial

interpretations, the principle of voluntariness is severely watered down- calling into question the legality of the whole framework.

The next essay examines the land acquisition process. Even though the Land Acquisition, Rehabilitation and Resettlement Act, 2013 has procedural safeguards in the form of consent, compensation and resettlement and rehabilitation provisions for land owners, Arjun Joshi and Namrata Maheshwari in *The Sabarmati Riverfront Development Project: the Issue of Resettlement and Rehabilitation* illustrate how these principles are not applied to informal settlers. They argue that because of the neoliberal underpinnings of our policies, the poor are seen as a hindrance to growth but if a more inclusive and transparent consultative and rehabilitation process is adopted, the displaced will be able to engage with the system to protect their fundamental rights; thus turning on its head the binary understanding to development.

The next article discusses another important resource. Groundwater is the main source of fresh water in India making it an important source for drinking water and irrigation, a fact which has huge economic implications in an agrarian dependent economy. Sujith Koonan in *Revamping the Groundwater Legal Regime in India: Towards Ensuring Equity and Sustainability* exposes how our ground water regime is woefully inadequate as it is based on the colonial period principle where landowners had the uncontrolled right to groundwater. This has resulted in the dilution of access to water and resulted in its mismanagement and pollution. The author compares our system to internationally accepted principles and suggests an alternative, more equitable and sustainable system.

Arpitha Kodiveri in *Changing Terrain of Environmental Citizenship in India's Forests* discusses the concept of environmental citizenship. The article discusses how this principle was used by the Indian forests rights movement and how it is being steadily diluted by recent policies and the increase in corporate citizenship. The article also holds valuable lessons on decision making with respect to natural resources- by understanding citizenship to mean not only rights but also direct participation and inclusion, environmental citizenship allows for a more equitable system where a wide-range of interests including the ecological are incorporated.

Our last article challenges us to reconsider what we deem to fall within the scope of the term- 'ecological'. Aurelien Bouayad in *Law and Ecological Conflicts: the Case of the Sacred Cow* in India considers the term to include the manner in which people interact with their environment to create different ecologies. To illustrate his point he analyses the different symbolism that is associated with the cow by religious groups in India- through history, religion and judicial interpretation. By analysing an age-old problem i.e. the veneration of the cow by Hindus vis-à-vis its ritual sacrifice by Muslims through the perspective of an ecological conflict, he adds a new dimension to the analysis of the problem and also lays down the framework to consider other conflicts through the lens of an 'ecological conflict'.

This collection of essays demonstrates that while there is no simple answer to the course of development we should take, it is imperative to question the premises of colonial environmental laws and adopt a more consultative law making process. We believe that the fate of resources that are essential for the life and livelihood of the population should not be left to the domain of the privileged few. We look forward to our readers' response to this issue and hope that it facilitates constructive debate.

We would not have been able to bring out this issue without the help of numerous people who we owe our deepest thanks: our fellow editors on the Editorial Board of 2015-16, who have consistently done rigorous reviews and painstaking editing without which this issue would not be of its current quality; our peer reviewers who patiently replied to all our emails and never let us down; our Faculty Advisor, Professor Sarasu Thomas, who we are indebted to for her encouragement and advice; Ms. D.S. Usha who was a dream in smoothening out all the logistical difficulties and finally to our Vice Chancellor, Dr. Venkata Rao for his unwavering support.

Mannat Sabhikhi & Nayantara Ravichandran,
Editor-in-Chief and Deputy Editor-in-Chief
Socio-Legal Review,
Bangalore, July 2016.

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Dholera and the Myth of Voluntary Land Pooling

Preeti Sampat & Simi Sunny*

Land pooling is being increasingly promoted as a mechanism for land consolidation, especially for greenfield urbanisation projects. In Dholera smart city along the Delhi Mumbai Industrial Corridor, the mechanism is enabled under the the Gujarat Town Planning and Urban Development Act 1976. In this paper we analyse this law's procedures; its provisions for public consultation, participation and compensation; its colonial and post-colonial antecedents; and the jurisprudence around it. We find that the GTPUDA is grossly inadequate, significantly in establishing the consent of landowners, and in addressing the range of dispossessions that the Dholera project engenders.

I. Introduction

Land pooling is increasingly promoted as a mechanism for urban development that can circumvent the so-called cumbersome or staggered land acquisition process under the 2013 national land acquisition law. The Right to Fair Compensation and Transparency in Land Acquisition and Rehabilitation and Resettlement Act (RTFCTLARRA) 2013 is particularly singled out by a range of pro-business and privatization interests for criticisms against its provisions for consent, social impact assessment, compensation, rehabilitation and resettlement. The land pooling mechanism, premised on the principle that the development authority in charge of undertaking urban development temporarily brings together a group of landowners, is thus preferred for urbanization projects, rather than the RTFCTLARRA, to avoid the latter's contentious provisions. Originally conceived for the expansion of existing cities, the pooling mechanism is now applied to 'greenfield' cities, or for the conversion of existing rural areas to new urban centers as well. Old and new legal and policy formulations that include land pooling are being invoked for land consolidation in various states. There have been intense and often violent contestations over

* Preeti Sampat is an anthropologist working on land rights and infrastructure policy. She is faculty, Ambedkar University Delhi. Simi Sunny is a Master of Public Policy Graduate from the National Law School of India University, Bangalore.

rights to land and resources over the last decade in the country, that have involved diverse alliances of big farmers, peasants' and citizens' groups[1] on the one hand, and allied state actors and capitalist investors on the other. In this backdrop, the land pooling mechanism emerges as a renewed attempt by state governments to negotiate a vitiated terrain of conflicting interests and policy provisions over land and resources.

Amaravati Capital City in Andhra Pradesh and Dholera Special Investment Region (SIR; alternatively, Dholera smart city) in Gujarat are two 'greenfield' urbanization projects that are attempting to consolidate land through pooling, with varying results. Of twenty-nine affected villages in Amaravati, pooling has reportedly been successful in twenty-three, although not without resistance; the remaining six villages are largely against the project.[2] In March 2015, the Andhra Pradesh High Court directed the government not to use force to acquire land from farmers under the land pooling scheme and to exempt farmers who are not willing to participate in the land pooling process.[3] Land pooling for Amaravati is implemented under the Andhra Pradesh Capital Region Development Authority Act 2014, modeled on the Gujarat Town Planning and Urban Development Act (GTPUDA) 1976.

In Dholera smart city's twenty-two affected villages, no land has been pooled to date on account of widespread local resistance. While land already in possession of the state has been handed to the Dholera Special Investment Region Development Authority, local resistance to the project remains steadfast. Residents of the twenty-two villages have formed a *Bhal Bachao Samiti* (Save Bhal

1 Peasants here include small and marginal landowners, landless agrarian workers, pastoralists, fisherfolk, forest dwellers and others. Citizens' groups refer to coalitions of individuals, often concerned professionals and representatives of non-governmental organizations (NGOs) that coalesce around contentious issues. They are not NGOs in themselves, but people working voluntarily for campaigns and raising resources through individual donations.

2 M. Chari, *Land pooling strategy for the new Andhra capital could become a model for India's Smart Cities,* SCROLL.IN (August 12, 2015) http://scroll.in/article/746040/land-pooling-strategy-for-the-new-andhra-capital-could-become-a-model-for-indias-smart-cities (Last visited on July 6, 2016).

3 *High Court relief to AP farmers,* DECCAN HERALD, (May 1, 2015); http://www.deccanherald.com/ content/475159/high-court-relief-ap-farmers.html (Last visited on July 6, 2016).

Committee)[4] and have filed a petition in the Gujarat High Court contesting the project. A recent order has pronounced a stay on all proceedings until the case is resolved.[5]

Following in the footsteps of Gujarat and Andhra Pradesh, the Delhi Development Authority also notified a Land Pooling Policy (LPP) for the National Capital Region in May 2015, although this policy retains the original intent of the expansion of an existing city. However, the implementation of the policy is in limbo as a result of a delay in the declaration of ninety-five villages as 'urban development areas.' The policy aims to facilitate the proposed construction of 2,500,000 housing units by 2021, for which ten thousand hectares of land are required under the Master Plan Delhi – 2021. Interestingly, the LPP allows private developers to pool land as the development authority conceives its role as a facilitator in the process of urban expansion.

In this paper we critically evaluate the land pooling mechanism under the GTPUDA, drawing from its implementation in the context of the greenfield Dholera smart city project. We particularly focus on the claims of voluntarism that presume the consent of landowners and other affected parties within the pooling mechanism. These claims are critical to establish the legitimacy that is sought by state actors for the mechanism, especially given the conflicted nature of contemporary land consolidation processes. Is land pooling under the GTPUDA voluntary, and does it establish or violate the consent of landowners and other affected parties? How have the colonial antecedents of the law influenced its evolution and application? Does the jurisprudence and case law around GTPUDA uphold the right of landowners to dissent? We examine the procedures for land pooling; the GTPUDA's provisions for public consultation, participation and compensation; the colonial and post-colonial legal antecedents of the law; and some significant recent jurisprudence around it. We draw a salient link from the colonial legacy of urban development laws that assert state sovereignty over development processes that are at odds with grassroots democratic participation. We conclude that claims regarding the voluntary nature of land pooling are at best ambiguous, and at worst, outright disingenuous. As we explain below, the threat of eminent domain, disguised by

4 The Dholera smart city project is coming up in the Bhal region along the Gulf of Khambhat.

5 Gujarat Khedut Samaj v. State of Gujarat, Writ Petitions 227 of 2014 and 57 of 2015. (Oral Order delivered on December 10, 2015.)

the language of voluntarism, is the stick that backs the carrot of so-called urban development. Further, we demonstrate that compensation under the GTPUDA barely addresses the range of dispossessions that a greenfield urban development project like Dholera engenders.

II. Land Pooling Procedures And Consent Under The GTPUDA

While the GTPUDA was also historically used for the conversion of rural-agrarian land for expanding existing cities, in Gujarat the law has recently been brought under the purview of the Gujarat Special Investment Region Act, 2009 ('SIR'), enabling its use for greenfield cities. It should be noted that Gujarat's SIR law also allows for the alternate use of the land acquisition law for land consolidation in place of land pooling under the GTPUDA, but it is the GTPUDA that has thus far been invoked for Dholera to avoid the contentious provisions of the RTFCTLARRA. Unlike the latter, the GTPUDA makes no express provisions for establishing consent of affected parties or undertaking social impact assessments. As we explain below, compensation measures under the GTPUDA are grossly inadequate to the loss of livelihoods that urbanization projects like Dholera engender and rehabilitation and resettlement packages for those affected are avoided altogether by giving back partial 'developed' plots to landowners. There are no provisions of plots for the landless affected by the project, even if they are from Scheduled Caste or Scheduled Tribe categories. For all these reasons, the GTPUDA offers an 'easier' mechanism for land consolidation for investors and allied state actors than the RTFCTLARRA. We explain below the issues with consent and compensation that the GTPUDA throws open that are more regressive than the RTFCTLARRA.

Planning, consultation and consent

Development Plan (first stage)

Under the GTPUDA, planning is undertaken in two phases – a development plan (DP) is first prepared for the entire area affected by the project, followed by several town planning schemes (TPS) for smaller portions of the development area. The draft plan is to be prepared within three years of the declaration of the development area for a project, and is initially open for public inspection for two months, inviting objections and suggestions to its terms. The draft can then be modified and published again, inviting further objections and suggestions for incorporation. The state government may then

suggest modifications before the final DP is prepared, and may further invite suggestions and objections with respect to amendments before the DP is finalized. Again, there is no provision for the establishment of consent to the final Plan;[6] objections and modifications are invited only to the modalities of the Plan, and not to the declaration of the Plan itself. As we point out below however, there is a provision for the landowners to ask for the withdrawal of a scheme, but this is a weak provision as consent is not mandatory.

Town Planning Schemes (second stage)

The TPS are the micro plans for the development of smaller areas of about one hundred hectares as per the final plan. There is no stipulated time period between the final DP and the schemes but the draft schemes have to be prepared within nine months of the declaration of intent to make them. The appropriate authority in consultation with a Chief Planner declares the intent to make the TPS in the official gazette and through advertisements in Gujarati newspapers.

The schemes comprise the physical planning of the scheme and its financial aspects. There are three stages of the TPS — draft, preliminary and final — that serve to expedite the process of implementation.[7] For the purpose of making the draft scheme, the appropriate authority can call meetings of the owners of the land plots included in the scheme with a public notice. Any person negatively affected by the draft scheme can communicate the same in writing to the appropriate authority within two months of the publication of the draft scheme. The objections are considered by the state government as it deems fit.

Significantly, under Section 66 of the Act, there is an opportunity to make a representation by a majority of landowners for a scheme (not DP) to be withdrawn, before the preliminary scheme is sent on to the state government. Before the Town Planning Officer sends the preliminary scheme to the state government, the local authority and a majority of the landowners of the area can make a representation to the Officer for the withdrawal of the scheme. The

6 We refer to the final Development Plan simply as the Plan to aid readability through the rest of the paper.

7 *Town Planning History,* TOWN PLANNING AND VALUATION DEPARTMENT, GOVERNMENT OF GUJARAT, http://townplanning.gujarat.gov.in/planning-development-policies/town-planning-history.aspx.

Officer can then invite any objections to the representation from other interested persons and forward the representation and any objections to the state government. After making an inquiry as it considers fit, the state government may officially notify the withdrawal of the scheme. It is important to note that this is the *only* space for registering dissent to a scheme (and not to the overall Development Plan).

Once the draft scheme is sanctioned, all land required for development vests in the appropriate authority. Although the 'right of the land' remains with the owner, no person can carry out any development in the area without necessary permissions. The final scheme includes the total values of the original and final plots, the benefits for the residents and the general public, the compensation on each plot, the contribution levied on each plot and the increment in the value of land. The final scheme is submitted to the state government, that either sanctions, sanctions with modifications or refuses sanction to the final scheme within three months. Although the Act allows the appropriate implementing authority to make variations in both the final Plan and the final schemes individually, nothing in the Act suggests that schemes could result in amendments to the Plan, indicating a clear 'top-down' approach to planning.

After serving appropriate notice to the landowners, the appropriate authority removes, pulls down or alters such building or work that does not comply with scheme specifications. Any variation in the scheme or amendment of regulations of the scheme is now made through an application to the state government. The authority has the power to either grant or refuse permission to retain work, or use of a building or land, with penalties for unauthorised use.

Thus, while the town planning law contains provisions for the participation of local bodies and residents to the extent of a majority petition for withdrawal of a scheme or changes in the modalities of the Plan, it contains no provisions for ascertaining *consent* to land pooling for the project. According to Section 107 of the Act, "Land needed for the purposes of a town planning scheme or development plan shall be deemed to be land needed for a public purpose within the meaning of the Land Acquisition Act." This potentially renders open the possibility for interpreting 'public purpose' under the principle of eminent domain and hence paving the way for forcible acquisition under the RTFCTLARRA, if such an enabling provision is introduced within the

GTPUDA framework. The colonial antecedents of the law establish this link historically,[8] which renders the voluntary aspect of land pooling even more ambiguous.

There is thus an *a priori* assumption of consent built into the so-called voluntary land pooling mechanism, without any express provisions for establishing it. As such, the mechanism falls far short of the principle of prior informed consent as well as decentralized and democratic decision making in development processes in keeping with the 73rd Amendment Act (Panchayati Raj) provisions. This significant oversight is made glaring by the fact that Dholera and presumably other such greenfield city-making projects are to be developed through public private partnerships. Under the 2013 land acquisition law, in public private partnership projects, seventy percent consent of original landowners is required before a project can be undertaken. The pooling mechanism circumvents consent-based development through the disingenuous language of consultation and voluntary pooling. We turn below to the issues around compensation under the GTPUDA.

Compensation

As there is no 'forcible acquisition' or 'transfer of ownership' of land under the GTPUDA, the case for compensation for loss of land, it is claimed, does not arise, except for the proportion of the land deducted for the basic infrastructure provisions for town planning. For Dholera, fifty percent of the original plot of land is deducted for infrastructure provision in the city, and the rest of the land remains with the original landowner. The benefit of 'development' in terms of the increment in land value after development accrues to the owner, rather than the development agency. The original owner continues to enjoy access to the land without being 'displaced'.[9]

Under the DP, individual plots of land are marked with their original survey number on a map and all original plots form one consolidated area for planning purposes. In the layout plan, after setting aside the area for roads, streets and public and semi-public spaces, the remaining area is divided into regular plots (evenly allocated plots in designated zones) called final plots. The compensation for the final plots is given out after part of the incremental value

8 See Table 2, infra.

9 *See,* S. BALLANEY, THE TOWN PLANNING MECHANISM IN GUJARAT, INDIA (2008).

is charged as the cost for development. For Dholera, the fifty percent of deducted land is valued at market price, and the rest of the land is returned to the original owners as 'developed' plots in re-designated zones as per the Plan. A betterment charge is to be levied on the original owners for the provision of new infrastructure facilities, deducted from the compensation award for fifty percent of the land. In addition in the case of Dholera, each affected family is promised one job per family in the Dholera SIR.

Table 1: Compensation Calculation

Compensation to each landowner= Difference between (Original Plot Value* x Original Plot Area) and (Original/Semi-Final Plot Value** x Final Plot Area) ***Plot Value is calculated as the market price at the time of declaration of intent of the scheme.** ****Final plot Value= Cost of development+ Original Plot Value** Total Increment= Final Plot Value x Final Plot Area
Contribution levied on each landowner= fifty percent of the total increment* ***The net demand or betterment charges are estimated by taking fifty per cent of the increment in the land value from each plot and deducting the compensation.**
Cost of development per unit area of land= Total cost of the scheme/ Total land under final plots

Source: Compiled by authors from the GTPUDA provisions.

In case of conflict on decisions related to the compensation, contribution levied or estimated increment value, the aggrieved party can appeal to the Board of Appeal (comprising the Principle Judge of the City Civil Court, Ahmedabad or the District Judge as the President of the Board and two other persons possessing such qualification and experience as may be prescribed as Assessors) constituted by the state government.

As one of us has argued elsewhere,[10] setting aside the merits or demerits

10 *See,* P. Sampat, *Dholera: The Emperor's New City,* 51(17) Economic And Political Weekly 59-67 (2016).

of the pooling approach to brownfield urban expansion, the incorporation of the town planning law into the SIR Act in Gujarat for a greenfield city poses a peculiar set of issues with regard to benefits and compensation. Some of these issues also apply to brownfield urban expansion. In the process of urbanization, existing agrarian infrastructure, relationships and livelihoods are devalued, as rent accruing from urbanization creates higher order economic value of relations with land in comparison with the former. The primary beneficiaries of the appreciation of land values are presumably large and medium landowners. The extent of land required for a new city implies the loss of a far greater extent of land than in the course of expansion of an existing city. With the re-zoning of land according to the new development plan, landowners do not retain their original agricultural plots, and must relocate. Further, with the development of a new city (or the expansion of an existing city), even if village settlements are protected with buffer zones, the old rural settlements can invariably no longer continue in the same form with the transformation in agrarian relations and the new urban development around such older settlements. This inevitably forces the original inhabitants (landed and landless, including those dependent on those working on land for livelihoods) to move, in search of livelihoods or as they are priced out, for easier living options.

With the disruption of the agrarian economy and the rezoning and subdivision of plots, agricultural livelihoods face severe temporal and physical dislocation, and only large farmers with enough surplus land and the holding power to wait for years for the 'development' of the rezoned plots may retain their hold on cultivation and allied agricultural activities. Agrarian livelihoods and resources experience a severe downward pressure with the growth of industry, tourism, construction and other related economic activities and are uncompensated. Given that the skill sets of most rural residents are dependent on agrarian relations, this could result in a serious livelihood crisis, especially for those without adequate landholdings that can transition to rentiering. With immediate attractive returns, the push is towards greater commodification of land and acquiring income from rent as opposed to existing productive agricultural activity, further creating issues around food security and local food sovereignty.Eventually, developing and returning fiftypercent of the land to the original owners can presumably take a few years. In the intervening years, the livelihood and food security options available for local residents who are significantly dependent on land remain unclear.The compensation provisions of

the GTPUDA are thus grossly inadequate to the livelihood losses a project engenders. They undercut the logic of factor multiples and 100 percent solatium that the RTFCTLARRA was at pains to establish to make up the difference between actually existing market rates of land and the officially recorded circle rates. [11]

While the RTFCTLARRA replaced the colonial Land Acquisition Act 1894 and overhauled crucial aspects related to contemporary land acquisition, the GTPUDA retains fundamental principles and ambiguities established by the colonial Bombay Town Planning Act 1915. We turn below to examine the historical continuities (and some changes) in the legal framework of town planning.

III. Antecedents of the GTPUDA

The land pooling and reconstitution method of urban planning originated in Holland and Germany in the 1890s and was subsequently adopted across the world for planned urban development. Variants of the land pooling mechanism have since been used in countries such as Australia, Japan, Korea, Nepal and even parts of United States. In Europe the process is popularly known as land consolidation. In countries like Germany, land consolidation emerged with the goal of improving the efficiency of farmland by planning rational farmland boundaries.[12] Improved land divisions have been the general objective of all the European land consolidation projects. The process of land consolidation in Europe however, has included Environmental and Social Impact Assessments.[13]

In East Asia, the 'Land Readjustment' mechanism is supposed to have played a major role in the development of cities like Tokyo in Japan and Seoul in South Korea. The Japanese model was inspired by the German model and

11 Sampat has argued elsewhere that official market rates of land, or what are known as circle rates, are often depressed by transacting parties to avoid taxes, and compensation based on official rates is inadequate. P. Sampat, *Limits to Absolute Power: Eminent Domain and the Right to Land in India,* 48(19) Economic and Political Weekly 40-52 (2013).

12 Lincoln Institute of Land Policy, *Land Pooling: A possible alternative to eminent domain and tool for equitable urban redevelopment ,* Metropolitan Area Planning Council Boston (2011), http://www.mapc.org/sites/default/files/FINAL_MAPC%20Presentation%20-%20Land.

13 A. Vitikainen, *An overview of land consolidation in Europe,* 1(1) Nordic Journal Of Surveying And Real Estate Research 25-41(2014).

initially targeted agricultural land consolidation and irrigation improvement projects, but was soon used for urban expansion.[14] The Japanese model has faced criticisms on issues of consent, particularly for using persuasive and even coercive techniques for arriving at consensus among landowners.[15]

In India, the origins of the town planning schemes can be traced to the colonial Bombay Town Planning Act, 1915 (BTPA), the first town planning scheme that was applied to the Bombay province (which at the time included Maharashtra and Gujarat). The legislation was a response to rapid urbanization as a result of industrialization, especially given the growing textile mills in the region. The objective was largely to control the use of land and development through the instruments of zoning and building regulations, acquire land for public purposes, and recover betterment contributions with respect to land parcels benefiting from improvements.[16]

However, the dispersed nature of schemes formulated under the BTPA and the arbitrary application of the law by local authorities resulted in inadequate planning and chaotic growth under the law, incommensurate with the needs of growing urban populations. This gave rise to a more comprehensive town planning scheme and post independence, the Bombay Town Planning Act 1954 (modeled on Britain's Town and Country Planning Act 1947), replaced the 1915 Act. The BTPA 1954 made preparation of macro development plans compulsory along with the micro town planning schemes. It also laid down provisions for survey of the area under jurisdiction by the local authority. However, this law also faced local planning problems and unplanned development in the peripheries, given the long duration of the process involved, and the limited jurisdiction of the local authority.

The GTPUDA 1976 was enacted post the reorganization of the states in 1956, to address these problems and provide for the town planning schemes in detail in accordance with a Development Plan, as discussed above. The 1976 law

14 *Supra* note 11.

15 A. Sorensen, *Conflict, consensus or consent: implications of Japanese land readjustment practice for developing countries,* 24(1) HABITAT INTERNATIONAL 51-73 (2000).

16 Ballaney, *supra* note 8; NEW FORMS OF URBAN GOVERNANCE IN INDIA: SHIFTS, MODELS, NETWORKS AND CONTESTATIONS (I. S. A. Baud & J. De Wit, J. Eds., 2009).

has been amended several times– one of the major amendments was made in 1999 to expedite the process of land pooling through stricter time limits and approvals process of projects at the draft stage.

As indicated, land is considered as land needed for 'public purpose' through the historical development of the laws from the colonial period. This is significant as public purpose has a direct relationship with the doctrine of eminent domain, which enables the forcible acquisition of land. There is no provision for 'voluntary' pooling in any of the Indian town planning laws, and none of the laws uses the term 'pooling' except in the context of 'commonly pooled' land depicted on the layout map for the purposes of creating the Development Plan. There is thus ambiguity with respect to voluntarism as the use of 'public purpose' under the GTPUDA can lend itself to the application of the doctrine of 'eminent domain' and hence forcible land acquisition, despite avowals to the contrary.

In fact, there is remarkable underlying continuity in the key provisions of the colonial and postcolonial versions of the laws (see Table 2 below for a summary of key provisions under the BTPA 1915, the BTPA 1954 and the GTPUDA), that ignores entirely not just the contemporary context of conflicts over land and resources, but also the development of key postcolonial democratic legal provisions. These include the provisions of the Sixth Schedule of the Constitution, laws such as the 73rd and 74th Constitution (Amendment) Acts 1993 and 1994 respectively, the Panchayat (Extension to Scheduled Areas) Act 1976, or the more recent Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006. The lack of appropriate legislative development for town planning is made glaring by the fact that urbanization projects are essentially private sector-led projects. The conflict over land pooling in Gujarat's Dholera area appears as a reprise of the controversial forcible land acquisitions for Special Economic Zones not so long ago that catalyzed the making of the RTFCTLARRA.

Table 2: Summary Provisions of the BTPA 1915, BTPA 1954 and the GTPUDA 1976

Provisions	BTPA 1915	BTPA 1954	GTPUDA 1976
Land Consolidation Time	No fixed time period for the completion of the scheme	No fixed time period for the completion of the scheme.	Finalization of the scheme within 27 months.
Development Plan	No Development Plan	No Development Plan.	An overall Development Plan to be made and TPS to be based on the Plan.
Schemes	TPS divided into draft and final scheme	TPS divided into draft and final scheme.	TPS divided into draft, preliminary and final scheme
Financing of the scheme	Betterment charges levied on land owners.	Betterment charges levied on land owners.	Sale of reserved plots allowed to finance the scheme in addition to the betterment charges.
Compensation	On the basis of the original plot value	On the basis of the original plot value.	On the basis of the semi final plot value which is determined along with the final plot size.
Betterment charges	Not more than fifty per cent of the difference between final value and original value.	Not more than fiftyper cent of the difference between final value and original value.	Not more than fiftyper cent of the difference between final value and original value.
Public Participation	Three rounds of public input- draft TPS stage, final TPS stage and financial issues	Three rounds of public input- draft TPS stage, final TPS stage and finally on financial issues.	Seven rounds of public input- draft, preliminary and final stages of TPS and the Plan, and finally on financial issues.

Dissent	Opportunity to make a representation by a majority of landowners for the scheme to be withdrawn before the final scheme is sent to the state government by the TPO who may then invite objections to the representation and forward the details of the representation and objections if any, to the state government. After making an inquiry as it considers fit, the government may, by official notification, withdraw the scheme.	Opportunity to make a representation by a majority of landowners for the scheme to be withdrawn before the final scheme is sent to the state government by the TPO who may then invite objections to the representation and forward the details of the representation and objections if any, to the state government. After making an inquiry as it considers fit, the government may, by official notification, withdraw the scheme.	Opportunity to make a representation by a majority of land owners for the scheme to be withdrawn before the final scheme is sent to the state government by the TPO who may then invite objections to the representation and forward the details of the representation and objections if any, to the state government. After making an inquiry as it considers fit, the government may, by official notification, withdraw the scheme.

IV. The Jurisprudence on the GTPUDA

The jurisprudence around the land pooling mechanism in Gujarat has reflected this ambiguous nature of the law regarding land consolidation through pooling. Case law suggests that the local authorities have used the loopholes in the law to alter the purpose of pooling. The provisions for the revision of the development plans have constrained the space for the landowners to object to the constant change in land use. The high level of discretion used by the state government in dictating land use was successfully challenged in two important Supreme Court cases discussed below.

In the case of *Bhavnagar University v. Palitana Sugar Mill Pvt. Ltd.,*[17] the development authorities in Surat changed the purpose of pooling from residential housing to an educational complex during the preparation of the development plan. However, no steps were taken by any of the authorities to acquire the proposed land in the next ten years and the plan was again revised after ten years. The claim of the appellant in the Supreme Court involved the interpretation of Section 20 and 21 of the Act – whether the failure to acquire the land within the period would lead to lapse of the reservation even if the final development plan is revised. In its final judgment, the Court held that revision of the development plan as per Section 21 of the Act does not take away the substantial right of the owner. Therefore, the reservation of the land would be considered lapsed at the end of the specified period even in the event of issuance of a revised plan.

The reservation of the same land for purpose of an education complex was once again challenged in the Supreme Court in *Bhikubhai Vithalbhai Patel & Others v. the State of Gujarat.*[18] The appellant claimed that the land had been reserved for educational purposes though there was no material evidence before the State Government to make such a decision. In its judgment the Court held that the "formation of the opinion by the State Government should reflect intense application of mind with reference to the material available on record and ensure that it had become necessary to propose substantial modifications to the draft development plan." It further pointed out that the State Government did not have unlimited discretion to make modifications and should depend on recorded material and reasons to form an opinion. In the absence of evidence of such material, the Court allowed the appeals and the move of the State Government to designate the land for the educational use was declared void.

While the decisions of the authorities to wilfully change the purpose for pooling was challenged, and the substantial rights of the owner to land upheld, the involuntary nature of the reservation implicit in the challenges to the application of the law did not merit consideration in the arguments or judgment. The transfer of 'public purpose' was set aside on merely procedural counts, not

17 Bhavnagar University v. Palitana Sugar Mill Pvt. Ltd. & Ors, Civil Appeal No. 8003 of 2002 (Oral Order delivered on December 3, 2002).

18 Bhikhubhai Vithlabhai Patel & Ors v. State Of Gujarat & Anr., Civil Appeal No. 2000 of 2008 (Oral Order delivered on March 14, 2008).

unlike the treatment of public purpose in the jurisprudence pertaining to the land acquisition law. [19]

In *Prakash Amichand Shah v. State of Gujarat,*[20] the appellant challenged the constitutional validity of the Town Planning Scheme under the GTPUDA in the apex court of the country. The appellant had filed a petition against the reservation of his land by the Surat Municipal Corporation for a town planning scheme despite his objections and low rate of compensation by the authorities. In 1982, the two judge bench of the Supreme Court upheld the decision of the Town Planning Officer determining the amount of compensation in the appellant's case. Subsequently, in 1985, the Constitutional bench of the Supreme Court dismissed the constitutional appeal stating that law did not violate Articles 14, 19(1)(f) and 31 of the Constitution and upheld the validity of the GTPUDA law. While upholding the constitutionality of the Act it said that the inadequacy of the compensation was not justiciable under the Constitution. It also held that there was no scope for discrimination under law given the incapability to precisely determine the appropriate compensation amount for a property. Again, the involuntary nature of the land reservation did not have any bearing on the arguments regarding the use of the law.

The validity of the law and the compensation rates recently became a point of contention in *Gujarat Khedut Samaj & Others v. State of Gujarat.*[21] As mentioned earlier, the Public Interest Litigation was filed in 2014 in the Gujarat High Court by the state-wide farmers' body Gujarat Khedut Samaj and the residents of twenty-two villages of the Dholera region in Ahmedabad. The PIL challenged the notifications issued to the farmers under the SIR Act in 2009 for their land as unconstitutional. The petitioners further held that since the land was being acquired for industrial development, the government could not take away the land without due compensation to the landowners through due process. On December 10, 2015, the High Court ordered the maintenance of status quo till the disposal of the notification. By June 2016, no village land had been officially pooled for the Dholera smart city.

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19 Sampat, *supra* note 10.

20 Prakash Amichand Shah v. State Of Gujarat & Ors, Special Appeal No. 1597 of 1981 (Oral Order delivered on December 20, 1985).

21 Gujarat Khedut Samaj v. State of Gujarat, Writ Petitions 227 of 2014 and 57 of 2015. (Oral Order delivered on December 10, 2015).

V. Conclusion

As a measure for circumventing the procedures for establishing consent, social impact assessments and rehabilitation and resettlement under the RTFCTLARRA, land pooling under the GTPUDA falls far short of acceptable norms. Given how critical access to land and resources are for the large majority of people affected by such projects, and that the projects are instituted as public private partnerships (PPPs) between the state and central governments, and global and domestic private investors, developers and consultants, the political question of the right to land and resources also references the vexatious question of sovereignty, and where it flows from constitutionally. [22]

The RTFCTLARRA makes clear provisions for consent of landowners in PPP and other private projects. The omission of state-led projects from consent provisions under the RTFTLARRA, and the arbitrary stipulations of seventy percent consent for PPPs and eighty percent for private projects are indeed debatable. But the lack of any consent-based development under the GTPUDA is more regressive. A scrutiny of the historical treatment of pooling for public purpose under the GTPUDA, the salience of the doctrine of eminent domain in its framework, and the jurisprudence around the GTPUDA throw open fundamental questions over the voluntary nature of land pooling.

The compensation provisions under the GTPUDA further privilege large landowners over the peasantry.[23] They devalue existing agrarian relations and infrastructures and enable rentier profits from land by large landowners and developers.[24] It is little wonder that Dholera has met little success in consolidating land through 'voluntary' land pooling. Dissent in the twenty-two villages impacted by the project continues, and the unfolding dynamics around Dholera smart city will disclose the historical development of land pooling as a viable framework for contemporary land consolidation.

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22 Sampat, *supra* note 10.

23 *Supra* note 1for the explanation of the term 'peasant'.

24 Sampat, *supra* note 9; U. Ramanathan, *On Eminent Domain and Sovereignty,* 613, Seminar, 71-4 (2010).

The Sabarmati Riverfront Development Project: The Issue of Resettlement and Rehabilitation

Arjun Joshi & Namrata Maheshwari*

The paper is a critical analysis of the Sabarmati Riverfront Development project in Ahmedabad. It scrutinises the manner in which the judicial and administrative dimensions bolstering its implementation obliterated the fundamental and human rights of the families residing on the banks of the river. The paper highlights the abysmal resettlement provided to the informal settlers and the politics that fragmented the social relations of communities residing at the riverfront. Further, it emphasises on the need for an inclusive resettlement and rehabilitation framework that engages with the concerns of all stakeholders and prevents marginalisation of the urban poor in the process of infrastructural development. The paper concludes with a set of policy recommendations to make development an inclusive process that curbs the existing indifference towards developmental refugees.

I. Introduction

The presumption attached to the image of an emerging economy is one of a country riddled with inadequate infrastructure, growing social inequalities and urban poverty. Countries have challenged these notions by systematic neoliberal transformation of their developing cities. Following suit, the Indian government has sanctioned several urban renewal and development projects since the early 2000s. Prominent among these plans of urban beautification and gentrification is the Sabarmati Riverfront Development (SRFD) project in Ahmedabad, Gujarat. The SRFD project, touted to change the face of urban Ahmedabad, marginalised the interests of the urban poor and low-income groups that inhabited the banks of the Sabarmati River.

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This paper is a reflection on how the SRFD project was planned and executed and how it obliterated the fundamental and human rights of resident informal settlers. It is significant to note that informal settlers, as distinct from land owners, are not statutorily protected under the Land Acquisition, Rehabilitation and Resettlement Act, 2013 (LARR) or any other similar legislations.[1] The first section of the paper explains the origin and early days of the SRFD project. The second section scrutinises the order of the Gujarat High Court following the Public Interest Litigation (PIL) filed by the riverfront occupants. The third section is a detailed analysis of the impact on the lives of riverfront dwellers as a result of an abysmal R&R plan. The fourth section charts out the extent of the right to shelter under various international law covenants and the Indian Constitution. Finally, the last section explains the inadequacy of the LARR if extended to informal settlers and contains a set of recommendations for an effective R&R policy that can make development an inclusive process.

II. The SFRD Project – Background

The SRFD project by the Government of Gujarat is being executed in Ahmedabad, its financial capital. In 1997, a special purpose vehicle titled Sabarmati Riverfront Development Corporation Limited (SRFDCL) was constituted under the aegis of the Ahmedabad Municipal Corporation (AMC) to develop the city's riverfront. The project envisaged extensive land reclamation along a 9 kilometre stretch on the riverbanks claiming to offer public spaces with ample leisure activities, a real estate zone with unparalleled commercial infrastructure, transportation services, informal markets and cultural activities and R&R of riverfront slum households.[2]

The project proposal was jointly prepared by the AMC and the Environmental Planning Collaborative (EPC)[3] in 1998. It replaced Bernard

1 The Preamble of LARR restricts the applicability of the Act to cases where land is acquired or sought to be acquired. The Sabarmati Riverfront is a property owned by the Government. The absence of acquisition of land by the government for the SRFD project precludes the applicability of the LARR. In the final section of the paper, we shall explain why extending the application of the R&R provisions contained in the LARR to informal settlers would be improper.

2 Environmental Planning Committee, Sabarmati Riverfront Development Corporation Limited, Sabarmati Riverfront Development Proposal 1 (1998).

3 The EPC was involved primarily as a planning consultant.

Kohn's idea of development on the riverfront. For Kohn, the project was socially oriented – an ecological valley extending 400 kilometres from Dharoi dam to the Gulf of Cambay. The riverfront, as we see it today, was merely one part of this stretch. His plan envisioned the resettlement of all the Project Affected Families (PAF) in the valley itself.[4]

The key aspect that remained untouched in the proposal formulated by AMC and EPC in 1998 was that R&R of the urban poor residing on the riverfront would remain within the area reclaimed for the project.[5] The EPC found that the occupants residing along the riverbanks were employed in informal markets around their residences. Therefore, relocating these families to areas beyond 2-3 kilometres from their present accommodation would have an adverse impact on their livelihoods.[6] While such recommendations seem to suggest that the planning and implementation of the project was equitable, it was in fact exclusionary on multiple grounds.

The SRFD project prompted two kinds of criticism: one, by architects and urban planners engaging in a discourse about the culturalist transformation of the project; and the other by concerned citizens, scholars and activists condemning the marginalization of the urban poor and seeking to protect their right to the city.[7] Violent eviction drives and segregation had not only denied access to a minimum standard of living, but had also alienated the marginalised groups from the authorities governing them. In 2002, when the Venkatachaliah Commission was entrusted with the responsibility of recommending changes in the manner in which the Constitution responded to the changing needs of effective governance and the socio-economic development of the country, it observed:

> There is a fundamental breach of the constitutional faith on the part of Governments

4 Bernard Kohn, *A Living Pedagogy*, http://www.bernardkohn.org/en/teacher/indian-experience.html (last visited April 20, 2016).

5 Environmental Planning Committee, *supra* note 2, at 3.

6 Renu Desai, Municipal Politics, Court Sympathy and Housing Rights: A Post-Mortem of Displacement and Resettlement under the Sabarmati Riverfront Project, Ahmedabad 2 (CEPT Uni. & Centre for Urban Equity Working Paper, Paper No. 23, 2014), http://cept.ac.in/UserFiles/File/CUE/Working%20Papers/Revised%20New/23%20Municipal%20Politics,%20Court%20Sympathy%20and%20Housing%20Rights%20A%20Post-Mortem%20of.pdf (last visited April 22, 2016).

7 *Id.* at 5.

> and their method of governance lies in the neglect of the people who are the ultimate source of all political authority. Public servants and institutions are not alive to the basic imperative that they are servants of the people and meant to serve them. The dignity of the individual enshrined in the Constitution has remained an unredeemed pledge. There is, thus, a loss of faith in the governments and governance. Citizens see their governments besieged by uncontrollable events and are losing faith in institutions. Society is unable to cope with current events. [8]

The SRFD project is a case in point to illustrate this breach of constitutional faith. A good place to begin a descriptive analysis of the SRFD project is in 2002-03, when the EPC conducted a survey that placed approximately 10,000 families to be residing on the Sabarmati riverbank, a figure that was to increase in the coming years. It estimated that 4,400 families would be affected directly by the project plan.[9] While the issue of displacement received meagre attention from the project authorities, in 2003, Mr. Narendra Modi, the then Chief Minister of Gujarat hailed the project and directed the authorities to complete the project in 1000 days.[10] He entrusted the responsibility to the AMC and SRFDCL authorities to ensure that Ahmedabad is akin to mega-developed urban cities such as Tokyo and Singapore. Efforts to execute the plan according to the Chief Minister's directions intensified concerns among the informal settlers about displacement. It was the lack of engagement by the authorities that eventually depleted the faith of people in governing institutions.

III. Complicity of the Judiciary

With the passage of time, the goal of maximizing beautification and gentrification of the riverfront monopolised the focus of the authorities. AMC neglected the repeated claims of the urban poor residing on the river

8 Venkatachaliah Commission, Department of Legal Affairs, Report of the National Commission to Review the Working the Constitution 3 (2002).

9 Sabarmati Riverfront Development Corporation Limited, Sabarmati River Front Development 32 (2004).

10 Desai, *supra* note 6, at 9.

embankments that sought to highlight the dismal relocation policies. For instance, the residents received no official information about resettlement sites and the only sources of information were the local newspapers.[11] The minimal engagement of the authorities with local communities and the absence of inclusive development intensified the occupants' concerns about displacement. This led to the erosion of trust in governing authorities which eventually manifested in serious social problems. The State faced serious issues when these occupants mobilized to collaborate and collectively seek their rights. In this section, we will introduce the rise of collective movements that ultimately led to the first PIL being filed 7 years after the project commenced. We will analyse the PIL and the shortcomings of the orders passed by the High Court of Gujarat. We argue that the Court orders had loopholes which allowed the AMC and SRFDCL authorities to continue to exploit the marginalised communities residing on the riverbank.

By 2003, the project garnered attention from different sections of the society. Occupants, with the help of local organisations, united to form the Sabarmati Nagrik Adhikar Manch (SNAM). Through 2003 and 2004, SNAM members gathered several riverfront occupants to collectively approach AMC and SRFDCL with their concerns. Simultaneously, members of the opposition party, the Gujarat Congress, attempted to mobilise the riverfront occupants by forming the Ahmedabad Sheher ane Riverfront Jhupda Samiti.[12] With such political and administrative interventions, local communities including SNAM quickly became disillusioned.[13] Conflicts arose within the community when AMC co-opted local leaders to conduct surveys during the process of resettlement. There are various instances of these local leaders demanding money to include names in the survey list that was required to be prepared under Court orders.[14] SNAM then attempted to unify local rallies into a mass movement involving all occupants residing on the 9 kilometre stretch. Despite the fragmentation of the movement in light of political involvement, several

11 Desai, *supra* note 6, at 28.

12 Desai, *supra* note 6, at 14. Ahmedabad City and Riverfront Slum Union.

13 Renu Desai, *Governing the Urban Poor: Riverfront Development, Slum Resettlement and the Politics of Inclusion in Ahmedabad,* 47(2) ECONOMIC AND POLITICAL WEEKLY 49 (2012).

14 *Riverfront Project: 4,000 Families to be Rehabilitated in Vadaj Colony*, INDIAN EXPRESS, Dec. 22, 2011, at 4.

stakeholders collectively decided to file a PIL in the High Court of Gujarat in 2005 through advocate Girish Patel. [15]

For the riverbank occupants, the PIL served as a medium to communicate their concerns. The occupants had migrated from rural areas across Gujarat to earn a livelihood and belonged to the marginalized sections of society. They were denied access to public spaces for accommodation and given their socio-economic conditions, private housing was not affordable. Consequently, they became informal occupants of the riverfront, having set up households and means of livelihood in the area. Patel asserted that these occupants "form an important segment of the informal economy and contribute substantially to the growth, development and prosperity of the city." [16]

The PIL extensively articulated the rights of the riverfront dwellers, drawing upon the fundamental rights jurisprudence developed since the 1980s. It stated that the right to shelter is an integral part of the right to life guaranteed by Article 21 of the Indian Constitution. Given the nature of their economic activities, the PIL explained the inextricable link between the riverfront dwellers' right to life, right to shelter and right to work and earn a livelihood. It also brought to light the insecurity engendered on account of uninterrupted implementation of the project and lack of engagement between the authorities and affected families. Elucidating the public trust doctrine, the PIL also pointed out that the government is a public trustee of community resources and must therefore use them for the benefit of the whole society and not merely for beautification or to serve the interests of the privileged sections of society while side-lining the concerns of the poor. [17]

Having highlighted each contour of the web of their democratic, constitutional and human rights, the PIL made four appeals to the Court:

1. To involve the riverfront residents in the decision-making process of aspects of the project that affect them.
2. To keep them informed about the process of R&R.
3. To provide for resettlement in an area near the riverfront in order to minimise the negative impact on their livelihood.

15 Aliyarkhan v. Gujarat, S.C.A No. 6280/2005.

16 *HC Breather for Hawkers at Gurjari Market,* INDIAN EXPRESS, May 5, 2011, at 3.

17 Desai, *supra* note 13, at 11.

4. To restrict the state and local authorities from implementing the project until concrete steps are taken to fulfil the rights of riverfront residents.[18]

The order passed by the Gujarat High Court engaged with the broad assertion of the rights contained in the PIL but not with the essence of those rights. The Court issued a stay order, directing authorities to refrain from evicting families and to provide details of their plans for R&R. The stay order, therefore, put a hold only on eviction and not on the project as a whole.[19] It led to a situation where the residents had legal protection against eviction but were continued to be treated as collateral damage as the project was relentlessly implemented. Further, the order did not impose a time limit on authorities to submit their R&R policy. Consequently, construction of the SRFD project continued over the next three years, until the R&R policy was submitted in 2008.[20] Eviction of the occupants became inevitable in order to facilitate smooth construction as they 'obstructed' development and attempts to this effect were thus made repeatedly by AMC and SRFDCL. The SNAM was only successful in halting some of these attempts.

The Court order effectively delinked the framework and implementation of the SRFD project from the R&R policy for the families the project would affect. This led to a precarious situation wherein the urban poor were treated as second class citizens, with their lives, experiences and concerns eclipsed by the entrepreneurial politics of the urban mega-project and the goal of beautification and gentrification of the city's landscapes. In the absence of a mandate to provide resettlement in a nearby area, families were relocated to sites that were 6-15 kilometres away.[21] Predictably, this had a profoundly negative impact on their livelihood. The distance between the pleadings contained in the PIL in true recognition of their constitutional, democratic and human rights and the limited framing of the court's order is evidence of the evisceration of the riverfront residents' rights.

The judiciary and the government have so far been homologous in their approach towards developmental projects. Informal settlers are systemically and routinely marginalised by the judiciary as well as the legislature. 'Development'

18 Desai, *supra* note 13, at 12.
19 Desai, *supra* note 6, at 54.
20 Desai, *supra* note 6, at 55.
21 Desai, *supra* note 6, at 32.

is invoked repeatedly to justify the en-masse forcible evacuation of disempowered communities including agriculturalists, dam oustees, forest dwellers, and pavement dwellers.[22] There have been several instances like the SRFD project where the judiciary has failed to enforce the fundamental rights of informal settlers in the face of development induced displacement. A sitting judge, while hearing the PIL triggered by the SRFD project, remarked "Even I had to bear inconvenience and noise, when an extension was built or renovation was taking place in my house". The frivolousness with which the plight of the displaced riverfront occupants was treated is also apparent by the lack of timely injunctions and their improper enforcement leading to the continuation of forcible evacuation.

Repercussions of the Court Order and Abysmal R&R of the Displaced

With fragmented relocation programmes, the authorities dismantled the solidarity that the residents had built over the years. In *Identity & Violence,* Amartya Sen observed that a well-integrated community stands in solidarity only with those it identifies as its own and is hostile towards outsiders moving into their region.[23] Such hostility was visible among the riverfront dwellers when their existing neighbourhoods were uprooted. Moreover, facilities were as lacking as their sense of security as they were forced to endure abysmal living conditions. In this section, we focus on how AMC and SRFDCL retracted on their 1998 proposal and carved out a significantly different R&R policy in 2008 with several irregular amendments. These alterations almost challenged the very existence of the occupants.

In 2008, with the persistence of SNAM, AMC prepared a shabbily drafted R&R policy and submitted it to the Court. AMC recklessly rescinded a fundamental component of the 1998 policy that the resettlement sites will be on the riverfront itself.[24] By the time the Court sought production of the resettlement plans, it was too late as construction had already commenced. We argue that the Court, by opting not to injunct the execution of AMC and SRFDCL's amended resettlement policy, facilitated the internal politics of

22 Arundhati Roy, *The Greater Common Good,* FRIENDS OF RIVER NARMADA, http://www.narmada.org/gcg/gcg.html (last visited March 14, 2016).

23 AMARTYA SEN, IDENTITY & VIOLENCE: THE ILLUSION OF DESTINY, 17 (2006).

24 OUR INCLUSIVE AHMEDABAD, BRIEF REPORT ON GANESHNAGAR: VISIT PERIOD JAN 9 TO JAN 18, 2012, 46 (2012).

driving the occupants away from the riverfront. This move applied the widely held misconception that indigenous people and societies are obstacles to development and the recognition of their rights would mean subverting the growth of the nation state.[25]

Another significant deviation in the 2008 policy was that the R&R of occupants would not be financed by the Gujarat government. AMC and SRFDCL opted to secure the resettlement process using the Central Government's Jawaharlal Nehru National Urban Renewal Mission (JNNURM), specifically under its Basic Services to the Urban Poor (BSUP).[26] Even though the State tied up with the Centre and arguably outsourced the resettlement programme with additional resources at hand, it failed miserably in two very important steps of the process. First, the quality of alternate accommodation remained dismal and far from the riverfront. Second, the State did not prioritise the need to successfully administer a simplified process to assist occupants and ensure that they are eligible for the alternate accommodation provided under the scheme. Neither did the authorities clarify the various documents that were required to prove the occupants' eligibility to seek houses under their schemes nor did they specify the resettlement sites and their distance from the former residences on the riverfront.[27]

Owing to large scale displacement[28] the Court recognized the need to link PAF and SRFDCL to sustain their social fabric and give them adequate representation. It directed the creation of an association of PAF to assist SRFDCL in the resettlement process. Subsequently SNAM finalised a panel of six members, who would assist the Buch Committee, responsible for R&R as per the SRFDCL policy. Two years later, in its first meeting, the Buch Committee authorised relocation over three terms from 2009.

After the three terms, AMC and SRFDCL conducted demolition drives on the Sabarmati embankments in 2011. AMC collated data based on a survey

25 JOHN KENNETH GALBRAITH, ECONOMIC DEVELOPMENT IN PERSPECTIVE, 43 (1962).

26 Desai, *supra* note 13, at 33.

27 Desai, *supra* note 6, at 50.

28 See Desai, *supra* note 6, at 44: AMC and SRFDCL after collaborating with the JNNURM scheme, sought the Court's permission to relocate 416 families situated in nine different localities on the riverbanks. Subsequently in 2009 and 2010, the authorities further sought permission to relocate 4001 and 1608 families respectively.

conducted by SNAM to relocate 4319 families residing across all the different localities.[29] Later, SNAM approached the High Court and claimed that 1433 families were not included in the relocation programme and hence were rendered homeless.[30] The Court ordered the AMC to complete the resettlement process, while simultaneously directing the Buch Committee to verify the eligibility of the remaining claimants for resettlement. The administrative procedures rendered many of the riverfront occupants unable to prove their eligibility because important documents such as ration cards and election cards had not been issued by the Government since 2007.[31] Numerous occupants were harassed on account of having insufficient documents for proof and insignificant issues such as incorrect spelling of their names. The AMC made forcible demolitions along the banks of the river and shifted the evictees to Ganeshnagar on the outskirts of Ahmedabad.[32] Relocation sites were located near garbage dumps and were devoid of reasonable space, concrete shelter and sanitation facilities. This arrangement could at best have been treated as temporary accommodation.

The evictees were provided with *pucca* houses with an area of 28 square metres, which had several problems.[33] To begin with, the majority of the resettlement sites were located far from the central city area and the riverfront dwellers' places of work. The increased distance meant more expense and time spent on travel, thereby significantly altering their mobility and standard of living. Furthermore, they had to travel long distances to avail healthcare and education on account of inadequate facilities near resettlement sites. Moreover, computerised allotment forced random groups of people, as opposed to the existing neighbourhoods, to live together which triggered social fragmentation and dissatisfaction. Relocated, scattered and afar, the social disruption robbed the resettled families of their investments in social capital, leaving them wanting of a sense of community and safety.[34] The minimum distance between an evicted family's previous riverbank home and resettlement site is five kilometres,

29 Desai, *supra* note 6, at 46.

30 Desai, *supra* note 6, at 47.

31 *Sabarmati Riverfront: Post HC Stay on Demolition, Civic Body Speeds up Resettlement Drive,* INDIAN EXPRESS, May 2011, at 5.

32 *Id.*

33 *Supra* note 31, at 6.

34 Desai, *supra* note 6, at 51.

the average distance is about nine km, and the furthest relocation is about 16 km, even though estates closer to eviction points were available.[35] Not only do these distances sever links between the families' work, food and nutrition security, education and health amenities, but they also break long-established community relationships and networks.[36] Given the communal and political climate in Ahmedabad, religious segregation and conflicts within the community became inevitable.

Many of the BSUP housing units have insufficient water, drainage and waste management. Water, including drinking water, is provided at most sites through bore-wells. The water is not potable and its poor quality has triggered widespread complaints about its adverse effects on the health of residents. For many who had larger houses and a better standard of living, the BSUP units were a degradation. As a result of these factors, a number of families have either sold or rented out their houses illegally.

The absence of amenities in resettlement sites was taking a toll on its occupants. When the winter set in, several elderly, sick and infants languished on the wastelands. Occupants spent whatever they could save from their earlier homes to buy plastic sheets and poles to build temporary sheds. With disproportionately few latrines, women feared the stench and others would defecate in the open spaces between the temporary sheds. Food was scarce and children were found plucking and consuming wild weeds which led to poisoning and deaths. [37]

Owing to the dismal resettlement provided by the Government, several families were forced to resort to their own coping mechanisms and were scattered across different parts of the city, making their inclusion even more difficult. They were compelled to take such steps as a desperate attempt to occupy any decent space they found for themselves in a city that had rapidly marginalized their interests. It is worthwhile to note Joseph Stiglitz's contention on this issue:

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35 Darshini Mahadevia, *Communal Space over Life Space: Saga of Increasing Vulnerability in Ahmedabad,* 47 ECONOMIC AND POLITICAL WEEKLY 4850 (2002).

36 Desai, *supra* note 6, at 65.

37 Desai, *supra* note 6, at 63.

> "[P]ower" – political power – matters so much. If economic power in a country becomes too unevenly distributed, political consequences are bound to follow. While we typically think of the rule of law as designed to protect the weak against the strong, and ordinary citizens against the privileged, those with wealth will use their political power to shape the rule of law to provide a framework within which they can exploit others. They will use their political power, too, to ensure the preservation of inequalities rather than the attainment of a more egalitarian and more just economy and society.[38]

The SRFD project exemplifies the manipulation of those in power to perpetuate the existing inequity in society. It shows how the rule of law falls prey to those who possess authority as opposed to rescuing the vulnerable sections of society. Many erstwhile riverfront occupants continue to reside in Ganeshnagar, waiting anxiously and endlessly, to be deemed eligible for BSUP housing.

Navdeep Mathur claims that the SRFD project was "deliberately obscure in order to deceive the people of the city"[39]. A careful appraisal of the project indicates that the costs outweigh the benefits, which eventually makes one sceptical of 'development'. A sound theory of needs locates a hierarchy of importance and urgency around three categories: needs of the first order, enhancement needs and luxury needs.[40] Authentic development does not exist when the first-order needs of the many are sacrificed in favour of the luxury needs of a few, or when enhancement needs are not widely met.

The government described the association between the Sabarmati and the occupants of its riverbank as unfit for preservation.[41] This insensitivity of the government towards the needs and experiences of informal settlers is also

38 *Joseph Stiglitz, Price of Inequality,* 191 (2012).

39 Navdeep Mathur, *On the Sabarmati Riverfront: Urban Planning as Totalitarian Governance in Ahmedabad,* 47 ECONOMIC AND POLITICAL WEEKLY 64 (2012).

40 Galbraith, *supra* note 25, at 61.

41 Desai, *supra* note 6, at 38.

reflected by the abysmal R&R facilities made available to the families displaced by the SRFD project. Moreover, the actions of the government are in direct breach of the state's obligation under the Indian Constitution as well as international law to protect its citizens' fundamental right to shelter.

IV. Right to Shelter and Article 21

Where does a poor man who has migrated to the city for work stay and fulfil his basic needs if all spaces in the city are either private, where he cannot enter, or public, where he cannot stay? The right to shelter is an essential component of the right to life guaranteed by Article 21 of the Indian Constitution. Without a space to live in and a roof overhead, it is impossible to fulfil one's right to live a life with dignity.

'Life' as expressed in Article 21[42] was interpreted in *Francis v. Administrator:*

> We think that the right to life includes the right to live with human dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about, mixing and commingling with fellow human beings, of course the magnitude and economic development of the country, but it must in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities to constitute the bare minimum necessities of the human self. [43]

Working in tandem with these broad parameters, it was in *Tellis v. Bombay* that the Supreme Court first considered the question of slum and pavement dwellers.[44] The case is lauded to have recognized that the right to shelter is inextricably linked to the right to livelihood which is an important element of the right to life. However, the judgment limited itself to the right of such residents to receive notice and be heard prior to eviction. It did not extend itself

42 Constitution Of India, January 26, 1950, Art. 21.

43 Francis v. Administrator, (1981) 2 SCR 516.

44 Tellis v. Bombay, (1985) 2 SCR 51.

to cover the true expanse of their right to shelter that imposes a corresponding duty on the State to ensure that they have adequate housing. Adequate housing encompasses more than just a roof overhead. It includes all that is essential for a person to lead a dignified and healthy life. Adequate housing helps a person fulfil his physical need to stay secure and protected from externalities, his psychological need for personal and private space and his social need to form and nurture important relationships. Sanitation facilities and access to healthcare and education are integral to the concept of adequate housing.

Through multiple cases following the *Francis* judgment, courts provided comprehensive insights into the right to life.[45] It observed that the right to life with human dignity encompasses within its fold some of the finer facets of human civilization which makes life worth living, and its expanded connotation would mean the tradition and cultural heritage of the persons concerned. In the context of the SRFD project, the riverfront occupants' right to life was severely compromised by a lack of regard towards their heritage comprising their social relations and activities. Their shared cultural experiences, including the celebration of festivals, and the social capital created thereof, are what contributed towards making their lives dignified. The social fragmentation triggered by the reckless resettlement process urged several occupants to compare the social bonds that they shared with other residents in the earlier settlement with the adversity they found themselves in at the alternate sites.

Extermination of the tradition that binds communities residing together is intrinsically related to the extensive displacement that is seen as less important than development. In such situations, it becomes all the more important for the Government to ensure that the uprooted societies continue to live in mutual harmony and are relocated in a manner that enables them to maintain their investments in social capital. However, feuds between occupants belonging to different religions from different localities on account of being forced to resettle together, demonstrate a failure on the part of the Government to preserve social bonds and sentiments. For instance, in Vatva, Hindus and Muslims share accommodation facilities whilst residing in adjoining sites.[46] The residents have

45 Ammini v. Union, AIR 1995 Ker 252.

46 Renu Desai, *Producing Uncertainty: A Study of the Politics of Slum Resettlement under the Sabarmati Riverfront Project* (Indian Institute of Management – Ahmedabad, Centre for Urban Governance, Paper No. 14, 2009).

termed the former as Hindustan and the latter as Pakistan. Such animosity is a result of the agitation stemming from being forced to abandon all that the occupants considered familiar and comfortable. Similarly, in several other resettlement zones, the resettled communities face severe hostility from existing residents, who blame these communities for the high crime and violence in the area. With such unfamiliar neighbourhoods, the erstwhile Sabarmati riverbank occupants, especially women, experience frequent harassment that contributes to their social exclusion.[47] The State's haphazard manner of allocating alternate accommodation has failed to uphold the heritage of these communities, which is at odds with the Courts' elucidation of the right to life.

Apart from domestic judicial precedents, the State also failed to function according to the international treaties that bind the country, as a signatory. India has ratified several international human right treaties that contain provisions recognizing an individual's right to adequate housing. One of the foremost documents is the Universal Declaration of Human Rights, wherein Article 25(1) declares:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[48]

Furthermore, Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) also makes an explicit assertion of this right. In a detailed General Comment regarding the right to adequate housing, the Committee on Economic, Social and Cultural Rights noted that adequate housing includes i) affordability ii) habitability iii) availability of facilities,

47 *Id.,* at 23.

48 Universal Declaration of Human Rights, Art. 25(1), Dec. 10, 1948.

49 International Covenant on Economic, Social and Cultural Rights, Art. 11(1), Dec. 16, 1966. See UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant),* 13 December 1991, E/1992/23, available at: http://www.refworld.org/docid/47a7079a1.html (last visited April 19, 2016).

services, materials and infrastructure iv) legal security of tenure v) accessibility to disadvantaged groups vi) location that allows access to education, medical services, employment options and other social facilities, and vii) cultural adequacy.[49]

International covenants guide the process of rehabilitation at every stage, but the AMC and SRFDCL, and even the legislature, were unable to draft an R&R policy within this framework. The lack of follow up by the legislature on the extended scope of Article 21 as elucidated by the judiciary allowed the State to conveniently circumvent its fundamental duty to ensure that its citizens can realise their right to life. The Constituent Assembly Debates laid down the standard that contemporary legislators and the judiciary are expected to uphold.

We contend that framers of the Indian Constitution envisaged multifarious liberties that an individual is entitled to, stemming from the fundamental rights. Dr. Ambedkar, in the Constituent Assembly Debates, maintained that the words "fundamental" and "directive" are necessary to understand the purpose of enacting Part III and Part IV of the Constitution. He asserted that these elements directed future legislatures and the executive with regard to the manner in which they ought to exercise their power. He added that:

> It is not the intention to introduce this part, these principles are mere pious declarations. It is the intention of this Assembly that in future both the legislature and the executive should not merely pay lip service to these principles enacted in this part, but that they should be made the basis of all executive and legislative action that may be taken hereafter in the matter of the governance of the country. [50]

The framers emphasized that the onus of realising the potential and meaningful expanse of the Constitution in the right context was on the people of India. Shri K Hanumanthaiya, while commenting on the draft Constitution observed, "It is my hope that the people of India and their representatives will

50 CONSTITUENT ASSEMBLY DEBATES, http://parliamentofindia.nic.in/ls/debates/vol11p4.htm (last visited Jan. 29, 2016).

be able to work this Constitution with all its disadvantages and drawbacks to the best interests of the country." [51]

The legislators of the Constitution entrusted the responsibility of identifying key issues that plagued the holistic development of the country to the future judicial and legislative bodies. In light of the recent experiences, it is rather imperative for the legislators to formulate a structured and nuanced resettlement process that is devoid of ambiguity and more importantly, is inclusive. Within this framework and the large-scale displacement that is induced by development, we put forth a set of policy recommendations that emanate from the Sabarmati Riverfront Project debacle.

V. R&R Policy Recommendations

Legal Vacuum [52]

Before we delve into the recommendations, it is pertinent to analyse the R&R provisions of previous policies and LARR, the only central legislation that comes close to a comprehensive R&R framework. In the past, States have attempted to formulate legislations to regulate R&R in their projects. For instance, a noteworthy R&R plan was drafted by the Orissa government in 2006. The plan involved families, on the verge of displacement, to partake in selecting the areas for resettlement. It further mandated that the resettlement sites be built prior to the displacement, which would ease the process of shifting. Most importantly, it accounted for the possible hostility between the host and resettled communities, and placed the onus of facilitating cordial social relations on the government.[53] Other States have responded by formulating case specific resettlement policies for people affected by instances of development, such as construction of highways, urban development, etc.[54]

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51 Constituent Assembly Debates, http://parliamentofindia.nic.in/ls/debates/vol7p9.htm (last visited Jan. 29, 2016).

52 Apart from the lack of a comprehensive legislation governing R&R of informal settlers, the legal vacuum is also demonstrated by the fact that laws governing urban development do not provide for R&R of affected informal settlers. Section 12 of the Gujarat Town Planning and Urban Development Act, 1976, enumerating the particulars that a Development Plan (DP) must contain, does not mandate the inclusion of an R&R procedure for informal settlers.

53 Orissa Resettlement and Rehabilitation Policy, 2006, Sec. 8(ix).

54 Hari Mohan Mathur, Displacement and Resettlement in India, 44 (2013).

In 2007, the Rehabilitation and Resettlement Bill was introduced in Lok Sabha.[55] The purpose of the Bill was to 'provide for R&R'. However, it contained no provision requiring that PAF be actually resettled. Further, clauses pertaining to minimising displacement, improving standard of living and protecting livelihood were not made mandatory. This inept attempt to streamline the regulation of R&R in India, failed to be enacted. Since then, the only other legislation that broadly stipulates the manner of conducting R&R is LARR. However, the LARR also has its own shortfalls. The biggest of these is that it does not extend to informal settlers, such as those residing on the riverfront. In this section, we argue that even if the application of the LARR is extended to informal settlers, such a move would be inadequate and improper. When the context is changed from land owners whose land is acquired to informal settlers on a land which is government owned, the set of considerations informing the applicable R&R policy changes significantly.

Legislators drafted the LARR to enable PAF, on privately owned land being acquired by the government, to partake in the process of rehabilitation, resettlement and compensation, to improve their post-acquisition social and economic status.[56] Consequently, a high threshold of responsibility is imposed on the government as the transactions primarily involve legal owners of land or other beneficiaries who are associated with the land.[57] Section 8 of the Act,[58] in furtherance of social impact assessment, requires a bona fide and legitimate purpose to undertake the acquisition. Identifying and applying similar levels of responsibility is unwarranted whilst dealing with informal settlers on government owned land, such as the riverfront. Extending the applicability of the LARR to cases like the SRFD project, would result in an unfair burden on

55 The Rehabilitation and Resettlement Bill, 2007 was introduced in the Lok Sabha on Dec. 6, 2007 and was referred to the Standing Committee on Rural Development.

56 The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, Preamble.

57 PAF, apart from owners of the land, benefit simply on account of being associated to the land that is owned by private individuals and not the government. For instance, the R&R process in LARR includes artisans and agricultural labourers who do not own the land. However, people of the same description on the riverfront were not given the same rights. The difference is merely that in one case the land is privately owned while in the other it is owned by the government and there is a policy governing R&R of landless PAF associated with the former and not the latter.

58 The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, Sec. 8.

the government when it is dealing with its own land in accordance with its statutory functions.[59] While R&R of informal settlers on government owned land must not be compromised, the government's accountability to convey legitimacy of a project, in similar cases, is comparatively lower.

Since the LARR was conceptualised in the context of land owners, the procedures it specifies for R&R are tailored to suit the needs of such owners. For matters such as social impact assessment, the LARR mandates consultation with the concerned governing bodies.[60] Legal land owners are adequately represented by municipal corporations or panchayats. However, this is not true for informal settlers who are beyond the ambit of LARR. In the context of the SRFD project, the municipal corporation itself is spearheading the execution. Developing the riverfront falls within the functions of AMC. Such involvement of the AMC negates the possibility of an unbiased approach towards the concerns of informal settlers. The procedure would thus have to be substantially altered to include organisations like SNAM as representative bodies for the purpose of consultation.

Another procedural aspect that needs greater deliberation in the context of informal settlers is that of demarcating the land occupied by affected families. The LARR prescribes that all particulars of the land of affected families must be recorded.[61] It does not lay down the procedure to conduct such surveys because data pertaining to land legally owned by individuals is available in government records. This is where there is a divide in the road. The land occupied by informal settlers is neither documented nor easy to demarcate. It is therefore imperative that a procedure with a nuanced and focused approach is established to appropriately measure the land and facilities that the informal settlers not only occupy but access for their livelihoods.

A significant difference in the nature of an R&R policy for land owners versus one for informal settlers is that the former has a significant focus on monetary compensation, as is evident in the LARR,[62] whereas the same is not

59 Gujarat Town Planning and Urban Development Act, 1976, Sec. 3-7.

60 The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, Sec. 4.

61 The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, Sec. 16(1) and Sec. 23(a).

62 The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, Sec. 28 and Sec. 29.

required in the latter. Over and above infrastructure facilities,[63] the LARR stipulates that the affected families be awarded monetary compensation as part of their R&R entitlements.[64] Monetary compensation is important in cases where the government is depriving legal owners of their assets as in the case of land owners envisaged in the LARR. However, informal settlers are not entitled to any such monetary compensation. The onus on the State is to enhance their standard of living and protect their fundamental right to life and shelter as elucidated in the previous section. In consonance with the build back better doctrine,[65] the duty of the State is to qualitatively improve the lives of informal settlers by providing them with better housing and maintaining or improving the job opportunities that they had prior to resettlement. Moreover, as in the case of the SRFD project, it is logistically impossible to determine the exact amount each affected family deserves in the absence of ownership of land or clear demarcation of the land that they use.

The LARR does contain certain noteworthy provisions on R&R. For instance, it recognizes the build back better doctrine and aims to improve the socio-economic condition of the displaced land owners.[66] Further, it lays down a fairly comprehensive procedure for conducting a social impact assessment.[67] However, applying the same threshold and procedures for R&R of informal settlers would mean neglecting their specific circumstances and needs. It is with this background, that we make recommendations for an R&R policy focused on the needs of informal settlers.

R&R Policy for Informal Settlers: Recommendations

A successful R&R policy that goes hand in hand with development projects is the fundamental responsibility of a state. No initiative that alienates

63 The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, Third Schedule.

64 The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, Sec. 30(2) read with the First Schedule.

65 Action Aid, *Building Back Better? The Caracol Industrial Park and post-earthquake aid to Haiti,* Action Aid USA (Jan. 2015), http://www.actionaid.org/sites/files/actionaid/ building_back_better_the_caracol_industrial_park_and_post-earthquake_aid_to_haiti.pdf (last visited April 22, 2016).

66 *Supra* note 50.

67 The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, Sec. 4-9.

the rights of marginalised sections of society can truly be termed as development. Ideally, the process of R&R should engender new rights that will enable people to become equal beneficiaries of the development project. The primary aim of an R&R policy is the empowerment of socially and economically marginalised sections of society. Just as displacement is not an unavoidable ramification of infrastructural development and must not be viewed as such, impoverishment should not be a necessary result of resettlement. Our recommendations are from the frame of reference of the SRFD project and are in consonance with the constitutional and international human rights standards on right to shelter as well as international practices.

1. Social Impact Assessment (SIA)

It is only fair that the balance of any project that drastically affects the rights of vulnerable communities, particularly with respect to land and livelihood, be tilted in their favour. The intention is not to deny the legitimacy of the State or the importance of national and regional developmental goals but to prevent exploitation. Decisions pertaining to development must be a result of a comprehensive and participatory process of social impact assessment.

The SIA we recommend is different from the SIA contained in the LARR primarily on two fronts. Firstly, it is oriented towards the challenges faced by a community as opposed to a family. Informal communities thrive on their shared experiences and social cohesions. It is far more important to preserve the social bonds and neighbourhoods of such occupants as that is the only asset they possess. Chapter II on SIA does not allude to assessment of social relations and the disruption that would follow after implementation of the project. In Section 31 of the LARR, each particular of the R&R award, determined post the SIA, focuses on a family as a unit and makes no reference to transposing existing neighbourhoods and communities to resettlement sites together.[68] Further, the focus of the LARR is on formal structures and it does not adequately recognise the needs of informal communities. Section 4 of the LARR states that the government must consult with the Panchayat, Municipality or Municipal Corporation while conducting the SIA.[69] Such a model would fail to deliver an

68 The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, Sec. 31.

69 The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, Sec. 4.

objective outcome in cases such as the SRFD project wherein they would be adequately represented by SNAM and not AMC. Secondly, it takes into account the impact of their surroundings on the nature of their jobs and consequently, their livelihood. LARR stipulates several factors that must be considered while conducting a SIA.[70] However, there is no allusion to the nature of the employment of the displaced and the impact of their surroundings on the same.[71] Informal settlers such as the ones on the riverfront depend almost entirely on their surroundings to develop skills that will earn them a livelihood. For instance, a significant number of occupants are either washermen/women or fishermen/women. It is thus imperative to assess the displaced persons' nature of employment so that resettlement can be carried out accordingly.

Broadly, the SIA must entail:

- An analysis of the project frameworkto examine whether the displacement of locals is absolutely inevitable. Is there scope for an alternative that does not necessitate extensive displacement or an alternative that allows for resettlement on the same land?
- An overall assessment of the social and ecological impacts. What will the costs of the consequences of the project be for the environment and various sections of society? In light of the various options available to fulfil the desired objectives, is the project planned so as to maximise the benefits and minimise the social costs? Is it in consonance with the goal of sustainable and equitable development?
- An estimation of the cumulative loss to the displaced community that appreciates their shared experiences, average standard of living, their surrounding environment and other factors that constitute their lives. Have measures been taken to preserve existing neighbourhoods and prevent social conflicts?
- An analysis of how the existing allocation, access and control of resources will be altered. Who will benefit from these changes? Will these changes be in harmony with principles of distributive justice and equity?

70 The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, Chapter II.

71 Section 4(5) states that the livelihood of affected families must be taken into account. However, livelihood is not the same as nature of employment.

- Determination of the magnitude of risk to indigenous communities and a detailed study on how risks such as loss of land, employment, access to common resources, health and education services and social and food security can be averted or minimised. This must be done in consultation with representatives of the local communities. Are job opportunities in consonance with their current nature of employment available in and around resettlement sites?

Timely completion of social impact assessment is of utmost importance. Further, once the report is prepared by the government, it should be made accessible in the public domain in the local language.

2. Process of Consultation

It is important for the authorities executing a developmental project to engage in a dialogue with local communities regarding all aspects of the project that affect them. Inclusion right from the stage of decision-making would result in a sense of security among those affected, thereby creating a solid foundation for an equitable implementation of the project. For instance, in Slovakia, the Environmental Impact Assessment Act mandates the formulation of a Consultation Information Centre for effective flow of information and interaction with the PAF.[72] Such State established mechanisms facilitating interaction with the PAF ensure that there is no civil unrest on account of misinformation.

Baseline studies to assess social and economic impacts should be undertaken in consultation with the locals. In the SRFD project, local representatives and groups such as SNAM should have been consulted. All the occupants likely to be displaced should have been divided into groups according to their existing neighbourhoods.[73] Each such group should have selected one representative to correspond with authorities and facilitate exchange of information that summarises the broad preferences and demography of that group.

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72 Leopoldo Jose Bartolome, *Displacement, Resettlement, Rehabilitation, Reparation, and Development,* WCD THEMATIC REV. (Nov. 2000), http://siteresources.worldbank.org/INTINVRES/Resources/DisplaceResettleRehabilitationReparationDevFinal13main.pdf (last visited April 22, 2016).

73 Robert Vachon, *Alternatives to Development* (Intercultural Institute of Montreal Working Paper Series, Paper No. 3, 1988).

In accordance with the ICESCR's elucidation of the right to adequate housing,[74] some examples of the kind of information that must be collected to ensure that the resettlement plan is effectuated to best suit everyone's needs are:

- For preservation of social networks and safety- Whether there are any unresolvable conflicts between communities that would hamper a sense of safety and security if they are made to be part of the same neighbourhood.
- To ensure availability of employment opportunities in resettlement area- What are the various occupations that the individuals in the group are involved in?
- To ensure ease of access for the elderly- Number of families in the group with elderly members so that they can be given housing that is easily accessible.
- To make adequate provision for livestock and cattle- How many occupants are engaged in cattle rearing so that facilities for their safekeeping can accordingly be made?

3. Inclusion with Information

When the riverfront occupants approached authorities with queries and concerns, the responses they received were opaque, vague or non-existent. Consequently, newspapers were the only source of information for the displaced communities.[75] To avoid such situations, the government can adopt a practice similar to a recommendation made to the Swedish Government. It suggested that a local person in each project affected area should be engaged with as an "act keeper"[76]. This person would be equipped with all the pertinent documents related to the project, laws and policies that regulate it which would subsequently enable the local communities to "watch, understand, defend and assess their losses, costs and rights". However, we contend that to avoid politicisation of such a post, members of the community and collectives such as SNAM should collaborate to recommend a representative.

74 *Supra* note 49.

75 Desai, *supra* note 6, at 28.

76 Lovgren, *Moratorium in Sweden: An Account of the Dams Debate,* 45 (European NGO Hearing, Paper No. 12, 2000).

Examples of the kind of information that should be offered in the public domain are:

- Areas that will be affected directly due to reclamation.
- Areas that will be partially affected due to reclamation.
- Laws and policies that govern the developmental plan.
- R&R policies of the project.
- Eligibility criteria and resettlement zones that are offered.
- Grievance redressal mechanisms in place.
- Documents and other eligibility proofs required to access such resettlement housing.
- Various governmental schemes that can compensate loss of livelihood, employment.
- Authorities and timeline for providing compensation.
- Details of the phasing of resettlement programmes.
- Details of the social impact assessment conducted.

4. Empowerment of Indigenous Organisations

It is imperative that provisions are made to make it possible for people affected negatively by a development project to participate in a meaningful manner. Legal and policy provisions would play the most important role in enabling this participatory process. However, another effective way to further this aim is for the project proponents along with the State to provide resources that would allow the affected people to keep themselves better informed. In the Great Whale component of the James Bay Project in Canada, the project proponent, Hydro Quebec, empowered the indigenous people to conduct their own studies regarding the impacts of the project by providing funds to their organisation, the Grand Council of Cree.[77] In case of the SRFD Project, the project proponent namely AMC should have been directed to empower the affected families in a similar manner via their organisation, SNAM. Strengthening SNAM and the communities it represents would have enabled the

77 *Id.,* at 47.

occupants to preserve their cultural and traditional heritage in consonance with their constitutional right to life.[78] A mandate of this nature would therefore effectuate a meaningful participatory process.

5. Awareness regarding Employment Opportunities and Introduction of Government Schemes for Employment of the Displaced

Since developmental projects tend to egregiously affect employment of the displaced occupants, the government must ensure implementation of awareness programmes to give the occupants an insight into employment opportunities available to them after resettlement. For example, since many of the riverfront dwellers were artisans and tailors, the authorities could have distributed brochures containing job opportunities in their preferred areas of work. Further, awareness programmes could have been conducted to inform them about various vocational training workshops and alternative job opportunities since not all forms of employment can be easily replicated after resettlement.

At the central level, the Prime Minister's Employment Generation Programme (PMEGP) is a credit linked subsidy programme that aims to augment employment opportunities by establishment of micro enterprises in urban as well as rural areas. To take employment security for the displaced a step further, a similar programme should be implemented by the State Government. Through establishment of micro enterprises with a special focus on employment of people displaced owing to government projects, a 'Chief Minister's Employment Generation Programme' (CMEGP) could potentially result in a significant reduction in the risk of loss of livelihood for the urban poor.

6. Consultation with other Ministries

Any project undertaken by the government has ramifications that impact several different dimensions of society. Normally, when one department of the government conceptualises a project in isolation, the project lacks an all-round analysis of its effects. At the planning stage, the government body floating the project must consult with other departments of the government. For instance, in case of the SRFD project, the AMC should have consulted the departments

78 *Supra* note 42. See the discussion in Francis, Tellis and Ammini.

of labour and employment, human resource development, health and family welfare, drinking water and sanitation and social and justice empowerment. Such engagement between the various departments of the government prior to execution of a project would ensure that each of their expertise is used to holistically analyse its impacts and solutions to potential problems.

VI. Conclusion

This paper has attempted to chronologically observe the course of events that took place on the Sabarmati riverbank from 1998 to 2012. The discourse and politics of neoliberal transformation are intrinsically linked to these observations of the exclusionary developmental model that caused large-scale displacement. Further, the paper has tried to highlight the dismal state of resettlement and rehabilitation policies in such projects that necessitates interventions by groups such as SNAM and activist-lawyers like Girish Patel. The primary aim of this paper is to emphasise the lack of an inclusive, consultative and transparent process that enables displaced communities to effectively engage with authorities and seek their fundamental rights. From autonomous, independent members of the informal markets that contribute to the economic growth of Ahmedabad, these displaced communities have been transformed into charity cases and welfare-seeking dependents.[79] Abysmal policies regulating rehabilitation programmes have led to a stigmatizing change in the lives of these citizens. With this background, the paper has attempted to formulate a set of policy recommendations that would eliminate the possibility of exclusionary development plans that adversely affects the fundamental rights of marginalised communities. We contend and hope that an institutionalized reform that is geared towards an inclusive, holistic and balanced rehabilitation policy will dispel the notion of the poor being obstacles to development.

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79 Mathur, *supra* note 39, at 69.

Revamping the Groundwater Legal Regime in India: Towards Ensuring Equity and Sustainability

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The evolution of a separate groundwater law in India is a relatively new development. This development marks a shift from the dated common law rule that recognises the uncontrolled right of landowners over groundwater, which perpetuated gross inequity in accessing groundwater by restricting access only to landowners. In this context, framing of new groundwater laws is seen as a key step towards addressing the aggravating problems of depletion and contamination of groundwater along with eliminating inequity in accessing groundwater. Access to groundwater is also directly related to the realisation of the right to water because groundwater is the most important source for drinking and other domestic purposes. Therefore, a legal framework ensuring sustainable use of, and equitable access to, groundwater will have tremendous impact and influence on the effective realisation of the right to water in the Indian context. In this background, this article examines the capacity of the existing and evolving groundwater law in India to ensure equity, sustainability and realisation of the right to water. This article also highlights the gaps in the existing legal framework in this regard and suggests basic principles, norms and approaches that should form the underlying elements of the groundwater legal regime to make it capable of ensuring sustainability, equity and human rights.

I. Introduction

Groundwater use in India has increased tremendously over the last few decades. It has become the most important source of freshwater for almost all

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uses. It has been estimated that around 60 per cent of the irrigated agriculture depends upon groundwater and more than 80 per cent of drinking water needs are met by groundwater.[1] In many parts of the country, particularly in rural areas, groundwater is the only source of drinking water.

Industries also depend upon groundwater to meet their water needs. Over-exploitation of groundwater by industries causes drinking water shortage and shortage of water for other purposes, including irrigation. This has already triggered conflicts on access to, and use of, groundwater. The ongoing litigation in the Supreme Court of India between Perumatty Grama Panchayat[2] and the Coca Cola Company in Plachimada in the State of Kerala is a well-known example of a conflict related to groundwater.[3]

The dramatic increase in groundwater use in the past couple of decades has resulted in deterioration of quality and quantity of groundwater across the country. Deepening of wells to ensure water availability for various purposes is common in various parts of the country. Contamination of groundwater is also a major problem. Highsalinity and presence of fluoride and arsenic above the prescribed limits are some of the key quality-related problems.[4]

This alarming situation necessitates legal intervention. The Central Government proposed a Model Groundwater Bill in 1970, which was revised

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1 H. Garduño *et al,* India Groundwater Governance: Case Study (World Bank, 2011); Planning Commission of India, Report of the Expert Group on "Ground Water Management and Ownership" (Planning Commission of India, 2007).

2 A gram panchayat is the democratically elected body at the lowest level in rural areas. Similarly a municipality or municipal corporation is the democratically elected local body in urban areas.

3 The Plachimada controversy refers to the alleged over-exploitation of groundwater by the Coca Cola Company and the consequent groundwater depletion, groundwater pollution and land pollution. It was alleged that the public health and economy in the locality had been ruined due to the functioning of the Coca Cola Company. Similar conflicts are ongoing in other parts of the country also, examples being Kala Dhera (State of Rajasthan) and Mehdiganj (State of Uttar Pradesh). For a critical analysis of legal issues related to the Plachimada controversy, *see,* Sujith Koonan, *Groundwater: Legal Aspects of the Plachimada Dispute, in* WATER GOVERNANCE IN MOTION: TOWARDS SOCIALLY AND ENVIRONMENTALLY SUSTAINABLE WATER LAWS 159 (Philippe Cullet *et al* eds. 2011); and Sujith Koonan, *Constitutionality of the Plachimada Tribunal Bill, 2011: An Assessment,* 7(2) LAW, ENVIRONMENT AND DEVELOPMENT JOURNAL 151 (2011).

4 Central Pollution Control Board, Status of Groundwater Quality in India (2007), *available at* http://cpcb.nic.in/upload/NewItems/NewItem_47_foreword.pdf.

three times with the latest version in 2005.[5] Following this, a number of states adopteda separate statute to regulate groundwater use.[6] A few other states are in the process of adopting new groundwater laws.[7] A separate groundwater law is apparently perceived and promoted as a way to address the constantly aggravating problems of depletion and contamination of groundwater.

The development of a legal framework relating to groundwater needs to be viewed in the light of the fact that groundwater is the most important source of drinking water. Therefore, access to groundwater is directly linked to the realisation of the fundamental right to water. Similarly, being a major source of irrigation, access to groundwater has a critical role in ensuring food security and livelihood of farmers. Inequitable and unsustainable use of groundwater will have tremendous impact on life, livelihood and economy. Equity and sustainability should be, thus, imperative goals of the legal framework relating to groundwater.

In this background, this article examines the existing and evolving groundwater law in India in the context of its capacity to ensure equity, sustainability and realisation of the fundamental right to water. Specifically, this paper provides a critique of the existing groundwater regime that recognises the uncontrolled right of landowners over groundwater. The critique is followed by an examination of the extent to which the existing legal system supports or rejects the land-based groundwater right. This paper also suggests some basic principles, norms and approaches that should form the underlying elements of a comprehensive groundwater law at the state level that can ensure sustainability, equity and realisation of the fundamental right to water.

II. Groundwater Laws: The Unchallenged Right of Landowners and Limited Regulation

The existing legal framework on groundwater in India mainly has two

5 *See,* the Model Bill to Regulate and Control the Development and Management of Ground Water (2005) *available at* http://www.ielrc.org/content/e0506.pdf. It is to be noted that as per the Constitution of India, the power to make laws relating to water is vested with the State Governments, *See,* the Constitution of India, 1950, Article 246 & Seventh Schedule.

6 *See, e.g.,* Kerala Ground Water (Regulation and Control) Act, 2002 and West Bengal Ground Water Resources (Management, Control and Regulation) Act, 2005.

7 *See, e.g.,* Chhattisgarh Groundwater (Regulation and Control of Development and Management) Bill, 2012 and Odisha Groundwater (Regulation, Development and Management) Bill, 2011.

features. First, the nature of groundwater right continues to be dominated by the traditional common law rule that treats groundwater as part of land rights and thereby limits access to groundwater only to landowners. Second, the adoption of separate groundwater laws by a number of states introduces a new trend where state governments assume power to regulate groundwater use by individuals.

Legal Status of Groundwater and Nature of Groundwater Right

The legal status of groundwater in India is that it is considered a part of the land. Groundwater does not seem to have a legal existence separate from the land. Right to groundwater is perceived as part of landowners' right to enjoy their property. Thus, right to groundwater refers to a right of landowners to extract as much groundwater from their land as they want or wish.[8]

The Indian Easements Act, 1882 is perhaps the only statute that recognises, although indirectly, the uncontrolled right of landowners over groundwater as a facet of the right to enjoy property. Thus, Section 7 recognises "the right of every owner of land to collect and dispose within his own limits of all water under the land which does not pass in a defined channel." The uncontrolled right of a landowner over groundwater is further affirmed by providing that a right to groundwater not passing in a defined channel cannot be acquired by prescription.[9]

Hence, the legal position in India is that landowners have an uncontrolled right to extract groundwater from their land. No legal action can be taken against a landowner for causing depletion of groundwater in a neighbour's well. The only remedy in such cases of depletion is to dig the well deeper.[10]

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8 Philippe Cullet, *Groundwater Law in India: Towards a Framework Ensuring Equitable Access and Aquifer Protection,* 26(1) JOURNAL OF ENVIRONMENTAL LAW 55 (2014); N.S. Soman, *Legal Regime of Underground Water Resources,* 32 COCHIN UNIVERSITY LAW REVIEW 147; CHHATRAPATI SINGH, WATER RIGHTS AND PRINCIPLES OF WATER RESOURCE MANAGEMENT (N.M. Tripathi, 1991).

9 Indian Easements Act, 1882, Section 17(d). While easements and prescriptive rights are not applicable in the case of groundwater not passing in a defined channel, customary rights are held to be permitted. It was held that right to extract water from a well can be a customary right. *See,* Maheshwari Prasad v. Munni Lal, Allahabad High Court, AIR 1981 All. 438.

10 B.B. KATIYAR (REVISED BY JUSTICE K. SHANMUKHAM), LAW OF EASEMENTS AND LICENSES 133 (Universal Publishing, 13th edn, 2010).

The legal status of groundwater right as a facet of the right to enjoy property was largely informed and shaped by early British cases. Thus, an English court in an 1843 case *(Acton v. Blundell)* held that groundwater below a land belongs to the landowner and he can extract it at his free will and pleasure. Even if such an exercise of his right causes depletion of groundwater in a nearby land, no legal action can be taken.[11] Similarly, the House of Lords in an 1859 case *(George Chasemore v. Henry Richards)* held that:

> The general rule is that the owner of a land has got a natural right to all the water that percolates or flows in undefined channels within his land and that even if his object in digging a well or a pond be to cause damage to his neighbour by abstracting water from his field or land it does not matter in the least because it is the act and not the motive which must be regarded. No action lies for the obstruction or diversion of percolating water even if the result of such abstraction be to diminish or take away the water from a neighbouring well in an adjoining land.[12]

It is to be noted that the standard legal position was that landowners have an uncontrolled right over groundwater flowing in an undefined channel. This implies, in principle, the rule that landowners cannot claim an uncontrolled right over groundwater flowing in a defined channel as such rights are subject to the similar rights of other landowners sharing the same source as in the case of surface water. The term "defined channel" means a known or a determined path through which water flows as in the case of a river or a canal.[13] This provision does not mean anything and is of little effect until and unless proper groundwater mapping is available. Therefore, in practice the uncontrolled right of landowners prevails.

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11 Acton v. Blundell, (1843) 12 Meeson and Welsby 324 (Court of Exchequer Chamber, 1 January 1843). For an account of the common law rule on groundwater, *see* E.A.L., *Landowners' Rights in Percolating Water,* 58(5) UNIVERSITY OF PENNSYLVANIA LAW REVIEW AND AMERICAN LAW REGISTER 303-306 (1910).

12 George Chasemore v. Henry Richards, (1859) VII House of Lords Cases 349 (House of Lords, 27 July 1859).

13 *See,* Vavaru Ambalam and Anr. v. President, Taluk Board of Ramnad, 1925 Mad. 620 and Kalanath Narottain Kurmi v. Wamanrao Yadorao Deshmukh, AIR 1937 Nag. 310.

This legal proposition is still in force in India owing to Article 372 of the Constitution of India, that keeps pre-constitution laws in force until they are changed or repealed through subsequent laws. Even though a number of states have adopted new groundwater laws, none of these laws seeks to change the traditionally followed common law rule. Instead, these laws restrict its scope to regulating the existing right, that is, the right of landowners to extract groundwater from their land wherever necessary. By doing so, the new groundwater laws have asserted, by implication, the legal position inherited from the common law tradition.

Judicial decisions also affirm the adherence to the centuries old common law rule. The High Court of Kerala, when faced with the question of the right of the Coca Cola Company to extract huge quantity of groundwater from its land in the Plachimada village in the State of Kerala, held that in the absence of a specific statute prohibiting the extraction of groundwater, a person has the right to extract groundwater from his land.[14] An expert group set up by the Planning Commission of India also took a similar view.[15] The expert group in its report asserted that "it is clear that while the right to use groundwater is to be governed by the ownership of the land above it, the extraction rights can and should be curbed by the State if the use of groundwater is considered "excessive."[16] The expert committee further made it clear that "no change in basic legal regime relating to groundwater seems necessary." [17]

As such there is no explicit law or custom altering the rule that gives uncontrolled right to landowners to extract groundwater from their land. However, there are certain exceptions to the common law rule. For instance,

14 *See,* Perumatty Grama Panchayat v. State of Kerala, High Court of Kerala, 2005 (2) Kerala Law Times 554, Para. 43. For a detailed critical analysis of this case, *See,* Sujith Koonan, *Groundwater: Legal Aspects of the Plachimada Dispute, supra* note 3.

15 The Planning Commission of India was a body of the Government of India set up by a Resolution of the Government of India in March 1950. Its key functions include assessment of the material, capital and human resources of the country, investigation of the possibilities of augmenting the resources and formulation of a Plan for the most effective and balanced utilisation of country's resources. On 1 January 2015, through a resolution by the Government of India, the Planning Commission of India was replaced by a new institution, namely the NITI Aayog (National Institution for Transforming India).

16 *See,* Planning Commission of India, *supra* note 1, at 41.

17 *Ibid.*

wells were forbidden within the command area of tanks under traditional tank irrigation systems in Tamil Nadu and Karnataka.[18]

A new wave of changes is being introduced by the ongoing water law reforms in India, which will have implications for groundwater rights. A few states have adopted laws to introduce a new concept called 'water entitlement'.[19] This term refers to a particular quantity of water an individual or entity is entitled to. In terms of groundwater, it refers to a particular quantity of groundwater one can extract or use. Apparently, the emerging concept of water entitlements would introduce a market-based water rights system because water entitlements, by nature, are usufructuary rights that can be traded.[20] This means, buying and selling of groundwater would become legally permitted or authorised. Thus, the new system of water entitlements is no less than a private property regime and it does not change the inherent nature of land-based groundwater right. Hence, it can be seen that the emerging concepts of water law also do not seem to be based on the principles of equity, sustainability and human rights.

Regulation of Groundwater Use

The adoption of a separate groundwater law by several states in the last decade constitutes the crux of groundwater law reforms in India so far.[21] More states are in the process of adopting a separate legal framework for

18 M.S. Vani, *Groundwater Law in India: A New Approach, in* WATER AND THE LAWS IN INDIA 448 (Ramaswamy Iyer ed., 2009).

19 *See, e.g.,* Maharashtra Water Resources Regulatory Authority (MWRRA) Act, 2005; Uttar Pradesh Water Management and Regulatory Commission Act, 2008 and Arunachal Pradesh Water Resources Regulatory Authority Act, 2006.

20 Prayas, *Independent Water Regulatory Authorities in India: Analysis and Interventions* 20 (Prayas, 2009).

21 *See, e.g.,* Kerala Groundwater (Control and Regulation) Act, 2002; Goa Groundwater Regulation Act, 2002 and Himachal Pradesh Groundwater (Regulation and Control of Development and Management) Act, 2005. For a comparative analysis of state groundwater laws, *see,* Sujith Koonan, *Legal Regime Governing Groundwater, in* WATER LAW FOR THE TWENTY-FIRST CENTURY: NATIONAL AND INTERNATIONAL ASPECTS OF WATER LAW REFORM IN INDIA 182 (P. Cullet et *aleds.,* Routledge, 2010) and Water Governance Facility (2013), Groundwater Governance in India: Stumbling Blocks for Law and Compliance, WGF Report No. 3 (SIWI, Stockholm). Legal instruments on groundwater in India can be accessed at http://www.ielrc.org/water/doc_gw.php.

groundwater.[22] Even though there are some differences between groundwater law adopted by different states, all of them are substantially similar.[23] This is not surprising because the genesis of these new statutes is the Model Groundwater Bill, 2005 drafted by the Central Government to encourage State Governments to adopt groundwater laws at the state level. The power of the Central Government to adopt a groundwater law is limited because State Governments are entrusted with the power to adopt groundwater law under the Constitution.[24] The effort of the Central Government has been a success as states have more or less reproduced *verbatim* the Model Groundwater Bill, 2005.

The evolving statutory framework mainly focuses on regulation of groundwater use. Before proceeding to the regulatory aspects, it needs to be noted that the new groundwater laws do not address the nature and scope of groundwater rights. The scope of new groundwater laws is, thus, limited to regulating groundwater use. Resultantly, access to groundwater remains a land-based right. The major reason for adhering to this traditional legal approach could be the fact that the 2005 version of the Model Bill itself is almost completely a copy of a much older version prepared in 1970.[25]

The new groundwater laws mainly envisage three regulatory tools. First, they follow a geographical classification method. This is generally done through notification of some areas in the state where the groundwater situation requires regulatory intervention.[26] Another prevailing method is to classify areas into different categories according to the extent of the groundwater problem. For instance, the groundwater law in Goa envisages classification of areas into scheduled, water-scarcity and over-exploited areas.[27] The purpose of this

22 *See, e.g.,* Uttar Pradesh Groundwater Conservation, Protection and Development (Management, Control and Regulation) Bill, 2010 and Karnataka Ground Water (Regulation and Control of Development and Management) Act, 2011.

23 *See,* Koonan, *supra* note 21, at 191-196.

24 *See,* the Constitution of India, 1950, Article 246 read with Seventh Schedule, List II, Entry 6, 14 & 17.

25 Philippe Cullet, *Water Law Reforms: An Analysis of Recent Developments,* 48 JOURNAL OF INDIAN LAW INSTITUTE 206 (2006).

26 *See,* Kerala Groundwater (Control and Regulation) Act, 2002, Section 6.

27 *See,* Goa Groundwater Regulation Act, 2002, Section 4. Different terminologies – over exploited, critical and semi-critical – but with similar regulatory implications have been used in Uttar Pradesh Groundwater Conservation, Protection and Development (Management, Control and Regulation) Bill, 2010, Section 2(g).

classification is to regulate groundwater use in such areas. The new groundwater laws do not seek to restrict groundwater use unless it is necessary to do so.

Second, the new groundwater laws follow a licensing system. Therefore, users in notified areas are required to seek permission from the groundwater authority constituted under the groundwater law. The use of groundwater is regulated through terms and conditions that may be imposed by the authority while granting a license. The terms and conditions in the license may be altered or cancelled if the groundwater situation demands so.

Third, registration of drilling agencies is another tool through which the new groundwater laws seek to exercise control over groundwater use. Drilling agencies are required to register their machinery. Further, drilling agencies are bound by the instructions issued by the groundwater authority.[28] Thus, the new groundwater laws seek to control and regulate groundwater use through a licensing system covering users as well as drilling agencies.[29]

In states where a separate groundwater law does not exist, the Central Ground Water Authority (CGWA) has the power to regulate groundwater use. The CGWA is an authority constituted under a central legislation - the Environment (Protection) Act, 1986 and therefore, it has, in principle, jurisdiction all over the country.

A major limitation of the existing groundwater legal regime is its exclusive focus on regulation thereby impliedly affirming the outdated land-based groundwater right. The regulatory approach also has several shortcomings. Most importantly, the notification process could negatively affect effective regulation. The groundwater authority will have to wait for the notification to be in force to take regulatory actions. The role of the groundwater authority in this regard is very limited because the power to notify areas is vested with the concerned State Governments. This could be a severe blow to the regulatory mechanism because it ties the hands of the regulatory authorities.[30]

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28 *See, e.g.,* Bihar Groundwater (Regulation and Control of Development and Management) Act, 2006, Section 8.

29 Ministry of Environment and Forests, Notification Constituting the Central Groundwater Authority, 14 January 1997 (as amended on 13 January 1998, 5 January 1999 and 6 November 2000). The list of notified areas is *available at* http://cgwa-noc.gov.in/LandingPage/Areatype/ListNotifed.pdf#ZOOM=150.

30 Source: personal communication with Dr S. Faizi, Member, Kerala Groundwater Authority.

Another major shortcoming is the compartmentalised approach of new groundwater laws. The new groundwater laws do not recognise or take into account the fact that groundwater is a part of the water ecosystem. Most importantly, the link between groundwater and surface water is not well recognised. This is of critical importance because of the mutual dependence of groundwater and surface water. Groundwater cannot be effectively protected in a system where surface water is not well protected.[31] Therefore, it would be highly artificial and a failure in terms of desired objectives to treat groundwater as a separate unit.

Further, the new groundwater laws do not incorporate some of the emerging legal developments that are very relevant in the groundwater context. Emerging environmental law principles such as the precautionary principle and the doctrine of public trust have not yet found explicit manifestation in groundwater laws.[32] Even though the fundamental right to water has been repeatedly recognised by the judiciary in India,[33] the new groundwater laws failed to incorporate this right. In a way this is understandable given the fact that state groundwater laws are copied from the Model Groundwater Bill that is too old to recognise and incorporate these legal developments. Therefore, groundwater laws are likely to remain dated until and unless these developments are incorporated into, and operationalised through, a statutory framework.

III. Legal Bases for Abolishing Land-Based Groundwater Right

While the need for challenging, and changing, the land-based groundwater right has been pending for long, there has not been any express legal initiative in this regard. This is particularly evident from the groundwater laws adopted by various state governments in the last decade where land-based groundwater

31 M. Dinesh Kumar, Managing Water in River Basins: Hydrology, Economics and Institutions Ch. 6 (Sage, 2010).

32 The precautionary principle and the public trust doctrine are part of environmental laws in India as per the interpretation of the Supreme Court of India in a number of cases. *See,* M.C. Mehta v. Kamal Nath, Supreme Court of India, (1997) 1 SCC 388 and Vellore Citizen's Welfare Forum v. Union of India, Supreme Court of India, (1996) 5 SCC 647.

33 Subhash Kumar v. State of Bihar, Supreme Court of India, AIR 1991 SC 420; NarmadaBachao Andolan v. Union of India, Supreme Court of India, AIR 2000 SC 375 and Vishala Kochi Kudivella Samrakshana Samithi v. State of Kerala, High Court of Kerala, 2006 (1) KLT 919).

right remains untouched. However, human rights and environmental law jurisprudence in India provide a legal basis to change the traditional land-based groundwater rights.

Expanding fundamental rights

The scope of the fundamental right to life as enshrined under Article 21 of the Constitution of India has expanded dramatically in the last couple of decades. Article 21 has been interpreted widely by the higher judiciary in India to include a number of new rights such as the right to livelihood, the right to food and the right to health.[34] This development is relevant in the context of groundwater rights also. The recognition of the fundamental right to water and the right to pollution-free environment are the two important developments in this context that are directly relevant to the groundwater legal regime. These human rights are particularly relevant in redefining the prevailing notion that right to groundwater is a part of land rights.

The fundamental right to water is a part of the fundamental right to life under Article 21 of the Constitution of India. Even though the Constitution does not explicitly recognise the fundamental right to water, there are a number of judicial pronouncements, which makes the fundamental right to water a part of the fundamental right to life. The Supreme Court of India, in the *Subhash Kumar* case, held that:

> The right to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has a right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life. [35]

Having been declared repeatedly by the higher judiciary,[36] the fundamental

34 *See, e.g.,* Consumer Education and Research Centre v. Union of India, Supreme Court of India (1995) 3 SCC 42 (right to health) and Narendra Kumar v. State of Haryana, Supreme Court of India, (1994) 4 SCC 460 (right to livelihood).

35 Subhash Kumar v. State of Bihar, Supreme Court of India, AIR 1991 SC 420, Para. 7.

36 Following are other cases where the higher judiciary followed similar legal construction -

right to water has become the law of the land and therefore, all other courts in the country are bound by it.[37]

The fundamental right to water requires the State to fulfil both negative and positive obligations. The State is required not to interfere with the enjoyment of the fundamental right to water. The State is also required to take affirmative actions to promote the progressive realisation of the fundamental right to water. The affirmative role of the State has been firmly established in the human rights jurisprudence. The United Nations Human Rights Committee in its General Comment No. 6 adopted in 1982 states that the expression "inherent right to life" cannot be properly understood in a restrictive manner, and the protection of this right requires that the state adopt positive measure. The positive duties of the State in this regard have been elaborated further in the General Comment No. 15 adopted by the Committee of Economic, Social and Cultural Rights.[38] Thus, the concept of fundamental right to water makes it a duty of the State to take all possible and appropriate measures towards realisation of the fundamental right to water, which necessarily includes adoption of legislative measures.[39]

In the light of the normative contents enshrined in the human rights jurisprudence, it could be argued that the inclusion of the fundamental right to

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Narmada Bachao Andolan v. Union of India, Supreme Court of India, AIR 2000 SC 375 and Vishala Kochi Kudivella Samrakshana Samithi v. State of Kerala, High Court of Kerala, 2006 (1) KLT 919). *See also,* Philippe Cullet, *Water Sector Reforms and Courts in India: Lessons from the Evolving Case Law,* 19(3) REVIEW OF EUROPEAN COMMUNITY AND INTERNATIONAL ENVIRONMENTAL LAW 328-38 (2010); and Philippe Cullet, *Realisation of the Fundamental Right to Water in Rural Areas: Implications of the Evolving Policy Framework for Drinking Water,* 46(12) ECONOMIC AND POLITICAL WEEKLY 56-62 (2011).

37 Article 141 of the Constitution states that: "The law declared by the Supreme Court shall be binding on all courts within the territory of India."

38 *See,* Committee of Economic, Social and Cultural Rights, General Comment No. 15 - The Right to Water, UN Doc. E/C.12/2002/11 (2002). The concept of the human right to water as articulated in different UN documents and UN sponsored work is criticised as a reflection of the hegemonic conception of human rights promoted by the west. For a debate on this issue, see, Madeline Baer & Andrea Gerlak, Implementing the Human Right to Water and Sanitation: A Study of Global and Local Discourses, 36(8) THIRD WORLD QUARTERLY 1527-1545 (2015).

39 *See,* CESCR, General Comment 3 - The Nature of States Parties Obligations (1990). *See also,* Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, adopted by the Human Rights Council in Fifteenth session, UN Doc. A/HRC/ 15/31, 29 June 2010.

water as part of water law is imperative. It is even more imperative in the case of groundwater law because it is the most important and largely used drinking water source in the country. Hence, deterioration of groundwater – both in terms of quality and quantity – by any individual or company may impede the realisation of the fundamental right to water of the present as well as future generations. Thus, the fundamental right to water mandates and requires the State to take measures to restrict over-exploitation and pollution of groundwater by private parties having land and money to invest.

Similarly, the right to pollution-free environment also restricts the right of landowners to extract groundwater from their land. The Supreme Court of India has declared the right to pollution-free environment a part of the fundamental right to life.[40] Hence, every individual is entitled to pollution-free environment that obviously includes pollution-free groundwater. The uncontrolled extraction of groundwater is likely to affect the quality of groundwater[41] and thereby results in a situation where enjoyment of the right to pollution-free environment would be difficult.

This means that there are potential restrictions emanating from these fundamental rights on landowners' property rights. Thus, owning a land does not imply uncontrolled right to extract groundwater or a right to enjoy that land in a manner resulting in environmental deterioration. The law in this regard is gradually being concretised. Thus, the Kerala High Court, in *Thilakan case,* elaborated this legal position and held that:

> The people...have the right to have a decent environment, which is part of their fundamental right under Article 21 of the Constitution of India. No one can be conceded any unfettered freedom to excavate and degrade the land owned by him. It will have repercussions on the neighbouring land and its owners and the eco-

40 Subhash Kumar v. State of Bihar, Supreme Court of India, AIR 1991 SC 420;Vellore Citizen's Welfare Forum v. Union of India, Supreme Court of India, (1996) 5 SCC 647 and Indian Council for Enviro-Legal Action and Ors. v. Union of India, Supreme Court of India, (1996) 3 SCC 212.

41 For example, over extraction of groundwater in the coastal areas could lead to sea-water intrusion. *See,* M. Dinesh Kumar and Tushaar Shah, Groundwater Pollution and Contamination In India: The Emerging Challenge (IWMI, 2006).

> system of the area in general. No man can claim absolute right to indulge in activities resulting in environmental degradation in the land owned by him.[42]

It can be argued, in the light of this evolving human rights jurisprudence, that it is a duty of the State to ensure, through legislative and executive actions or measures, that private individuals or companies do not obstruct the realisation of fundamental rights by their activities in their premises. It is also an imperative to impose a legal duty on landowners not to use natural resources including groundwater to the detriment of others' rights over such resources which includes rights of future generations also. Further, statutory or common law rights cannot become a justification for restricting or violating fundamental rights guaranteed under the Constitution. Thus, it is the duty of everyone not to indulge in activities in their premises or land that result in environmental degradation or human rights violations.[43]

Environmental law principles

The development of environmental law provides new legal bases to restrict landowners' right to exploit groundwater. The legal proposition that groundwater is part of the land beneath which it exists is no longer sustainable in the light of environmental law principles such as the public trust doctrine, the precautionary principle and the common heritage. These principles together

42 Thilakan v. Circle Inspector of Police, High Court of Kerala, AIR 2008 Ker 48, Para. 11. The National Green Tribunal has taken similar view in a few cases relating to pollution of groundwater by industries. *See, e.g.,* Janardan Kundalikrao Pharande & Ors v. Ministry of Environment and Forest & Ors, National Green Tribunal – Western Bench, Application No. 07(THC)/2014, Decided on 16 May 2014; and Shri Sant Dasganu Maharaj Shetkari v. The Indian Oil Corporation Ltd., National Green Tribunal – Western Bench, Application No. 42/2014(WZ), Decided on 10 November 2014.

43 There is also an argument that some fundamental rights under Part III of the Constitution are applicable against private parties as well. Under this argument, where rights are addressed to the state such as the obligation expressly vested on the state under Article 14, such rights can only be enforced against the state. Where rights are addressed to fellow citizens (Articles 17, 23 and 24), it should be read as horizontally applicable. This means, there will be a direct constitutional duty upon private parties also. In the case of provisions which are ambivalent about who they are addressed to, it could be applied to both citizens and the state. *See,* Sudhir Krishnaswamy, *Horizontal Application of Fundamental Rights and State Action in India,* in HUMAN RIGHTS, JUSTICE AND CONSTITUTIONAL EMPOWERMENT 47 (C. Raj Kumar and K. Chockalingam eds., Oxford University Press, 2008).

provide a strong legal basis to restrict the traditionally followed land-based groundwater right. These principles require the government to take measures to prevent arbitrary exploitation of groundwater or any action by landowners that may affect the quality and availability of groundwater.

The public trust doctrine offers a strong legal foundation by requiring the State to take legal measures to prevent over-exploitation and pollution of groundwater. As per the public trust doctrine, the state is the trustee of key natural resources and the government is duty bound to manage, use and develop such resources in the interest of the general public.[44] The underlying idea behind the public trust doctrine is that some parts of the natural world are gifts of nature so essential to human life that private interests cannot usurp them.[45]

Groundwater is the most important source of drinking water in India. In this background, there would hardly be any dispute regarding the public importance of groundwater and there is no reason why it should not be governed by the public trust doctrine. Given the fact that the public trust doctrine has been made applicable to surface water in the country, the non-application of the public trust doctrine to groundwater would be illogical and difficult to justify. While implementing the public trust doctrine, it must be ensured that this process does not result in consolidation of power with the Central Government or the state governments. Instead, it should lead to proper devolution of power to democratically elected bodies at the local level such as panchayats (rural) and municipalities (urban).[46] While the public trust doctrine redefines the rights and duties of the government *vis-à-vis* natural resources, it does not also approve private appropriation of vital natural resources to the detriment of public interest.[47]

While there is no statute explicitly applying the public trust doctrine to

44 *See,* M.C. Mehta v. Kamal Nath, Supreme Court of India, (1997) 1 SCC 388.

45 David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property,* 16 NEW YORK UNIVERSITY ENVIRONMENTAL LAW JOURNAL 711 (2008). For an account of historical evolution and expansion of the public trust doctrine, *see,* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 MICHIGAN LAW REVIEW 471, 475-8 (1970); and George Smith and Michael Sweeny, *Public Trust Doctrine and Natural Law: Emanations within a Penumbra,* 33 BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW 307 (2006).

46 *See* Cullet, *supra* note 8.

47 *See* Singh, *supra* note 8 at 76.

groundwater, there are case laws throwing light upon this issue. For instance, the Supreme Court in the *Kesoram case* endorsed that:

> Deep underground water belongs to the State in the sense that doctrine of public trust extends thereto. Holder of a land may have only a right of user and cannot ask any action or do any deeds as a result whereof the right of others is affected. Even the right of user is confined to the purpose for which the land is held by him and not for any other purpose.[48]

The precautionary principle also constitutes a legal basis for restricting land-based groundwater rights. The precautionary principle as defined by the Supreme Court of India in the *Vellore Citizen's Welfare Forum* case entrusts a duty upon the state to take measures to "…anticipate, prevent and attack the causes of environmental degradation."[49] Now it is hardly a disputed fact that over-exploitation of groundwater by one person or company may cause depletion as well as contamination of groundwater in other areas as well. In this context, the precautionary principle justifies, supports and mandates the government to take appropriate measures to prevent over-exploitation of groundwater by landowners.

There could very well be an argument that these abstract principles cannot as such restrict a legal right. In fact, this was the argument taken by the Coca Cola Company in the Plachimada case and the Division Bench of the Kerala High Court accepted this argument.[50] However, this argument needs to be revisited in the contemporary context. The land-based groundwater right as it stands now in India is borrowed from common law as developed by English courts in the 19th century when little was known about groundwater hydrology. Further, technology was not developed enough to extract groundwater in huge

48 State of West Bengal v. Kesoram Industries, Supreme Court of India, (2004) 10 SCC 201, Para. 387. Same view was taken by the Andhra Pradesh High Court in MP Rambabu v. District Forest Officer, AIR 2002 AP 256, Para 36.

49 Vellore Citizen's Welfare Forum v. Union of India, Supreme Court of India, (1996) 5 SCC 647, Para 11.

50 Perumatty Grama Panchayat v. State of Kerala, High Court of Kerala, 2005 (2) Kerala Law Times 554.

quantity in an unsustainable manner.[51] Hence, the legal proposition that the landowner can extract any quantity of groundwater with impunity was developed more as a matter of practical convenience and ignorance about groundwater hydrology rather than based on any legal reason or principles and scientific understanding of groundwater hydrology.

Another principle that may be useful in developing an equitable and sustainable groundwater law and water law in general is the concept of common heritage. The concept of common heritage of mankind finds its legal basis in international law.[52] Key aspects of this concept make it attractive to apply in water laws at the domestic level also. The most important aspect of the concept of common heritage is its strong equity dimension. In the natural resource context, the common heritage concept disregards the idea of individual control and appropriation. Instead, it promotes and requires the use and conservation of such resources for the benefit of all.[53]

Even though there may not be any precedent on the application of the common heritage concept in the domestic natural resource law context in India, an argument can be advanced to incorporate it into domestic water laws. In fact, the Government of India has already begun the thought process in this regard. The draft National Water Framework Act, 2011 prepared under the auspices of the Planning Commission of India recognises that "Water is a common natural heritage of humanity."[54] The draft Model Bill for the Conservation, Protection and Regulation of Groundwater, 2011 also recognises that "groundwater is the

51 Sanjiv Phansalkar and Vivek Kher, *A Decade of the Maharashtra Groundwater Legislation: Analysis of the Implementation Process,* 2(1) LAW, ENVIRONMENT AND DEVELOPMENT JOURNAL 67 (2006). *See also,* Soman, *supra* note 8.

52 *See,* United Nations Convention on Law of the Seas, 10 December 1982, Part XI, UN Doc. A/CONF.62/122, 1833 UNTS 3.

53 *See,* Cullet, *supra* note 77, at 188. The strength of this equity dimension owes significantly to the context in which this concept emerged at the international level. Developing countries advanced this concept at the international level since the late 1960s to prevent over-exploitation of sea-bed minerals by technologically advanced countries. Hence, the underlying objective was to assert equal rights of every nation over such resources and to ensure that such resources are not used by a few developed countries and instead, preserved and used for the benefit of all. *See* R.P. Anand, *Common Heritage of Mankind: Mutilation of an Ideal,* 37(1) INDIAN JOURNAL OF INTERNATIONAL LAW 1-18 (1997).

54 Government of India, Draft National Water Framework Act, 2011, *available at* http://www.planningcommission.nic.in/aboutus/committee/wrkgrp12/wr/wg_wtr_frame.pdf.

common heritage of the people of India held in trust…."[55] In the context of groundwater, this concept is extremely relevant because of its potential in redefining the power of the government as well as individuals. It is also relevant to address the severe inequity prevailing in accessing and using groundwater in India.[56] This is mainly because the strong equity basis of the concept of common heritage demands control of appropriation of the resource for the advantage of a few by depriving the benefit of such resources to the poor and the vulnerable. Applying this to the groundwater law context means providing a basis to change the legal status of groundwater as a part of the land. It further provides a basis to dilute and control the right of landowners to extract groundwater under their land and to impose duty upon the State to ensure the use of groundwater for the benefit of all irrespective of land ownership including the landless. In this regard, the concept of common heritage could be considered as a developed application of the idea of trusteeship.

The development of environmental jurisprudence in India has successfully managed to impose restrictions on the right to enjoy land or conduct business or commercial activities in one's premises to protect the environment. Moreover, the argument that legal rights (in this case the right of landowners) cannot be restricted on the basis of environmental law principles is unlikely to stand in the light of the adoption of the National Green Tribunal Act, 2010 ('NGT Act'). The NGT Act explicitly recognises the environmental principles such as the sustainable development, precautionary principle and the polluter pays principle. The National Green Tribunal is required to apply these principles while deciding cases.[57] In fact, the NGT has used these environmental law principles to resrict the activities of private parties in their premises, mostly

55 The draft version of the Model Bill for the Conservation, Protection and Regulation of Groundwater, 2011 is available at http://www.ielrc.org/content/e1118.pdf.

56 For a case study on inequity in access to groundwater, *see,* Veena Srinivasan and Seema Kulkarni, *Examining the Emerging Role of Groundwater in Water Inequity in India,* 39(2) WATER INTERNATIONAL 172 (2014). The issue of inequity is also exposed by the ongoing conflicts in different parts of India between soft drink manufacturing companies and local people. For a discussion on the conflict involving Coca Cola in Plachimada in Kerala, see, Sujith Koonan, *Groundwater: Legal Aspects of the Plachimada Dispute,* in WATER GOVERNANCE IN MOTION: TOWARDS SOCIALLY AND ENVIRONMENTALLY SUSTAINABLE WATER LAWS 159 (Philippe Cullet et al eds., Cambridge University Press, 2010).

57 The National Green Tribunal Act, 2010, Section 20, *available at* http://www.moef.nic.in/downloads/public-information/NGT-fin.pdf.

companies including public sector companies, to protect the environment including groundwater.[58]

The common law rule is dated and unable to address contemporary issues related to groundwater. It neglects the recent developments in law such as the recognition of the fundamental right to water and progressive principles of environmental law such as the precautionary principle and the public trust doctrine. The new groundwater laws enacted by various states have ignored these recent legal developments and thereby failed to use an opportunity to make the groundwater legal regime progressive and responsive to contemporary issues.

IV. Towards A Paradigm Shift in Groundwater Legal Regime

While abolishing the land-based nature of groundwater right is an important step towards ensuring equity and sustainability, the framework for regulation and conservation of groundwater is an equally important step. The existing framework for regulation and conservation of groundwater follows the outdated command and control approach that considers groundwater as a separate unit. Given the fact that the existing approach has proved to be ineffective from an equity and sustainability point of view, the groundwater legal regime requires a paradigm shift in its regulation and conservation approaches. This part highlights some of the key elements of this paradigm shift.

The Need for Decentralised Regulation

The existing groundwater regulatory framework in India follows a centralised command and control approach. For instance, groundwater laws adopted by states envisage groundwater regulation by a state level authority.[59] This centralisation trend is not surprising given the fact that most of the state groundwater laws have followed the Model Groundwater Bill, 2005. Wherever

58 *See, e.g.,* Raghunath v. Maharashtra Prevention of Water Pollution Board & Ors., National Green Tribunal – Western Bench, Application No. 11(THC)/2013, Decided on 24 September 2014 and Janardan Kundalikrao Pharande & Ors v. Ministry of Environment and Forest & Ors, National Green Tribunal – Western Bench, Application No. 07 (THC)/2014, Decided on 16 May 2014; and Shri Sant Dasganu Maharaj Shetkari v. The Indian Oil Corporation Ltd., National Green Tribunal – Western Bench, Application No. 42/2014(WZ), Decided on 10 November 2014.

59 *See, e.g.,* Kerala Groundwater (Control and Regulation) Act, 2002 and Himachal Pradesh Groundwater (Regulation and Control of Development and Management) Act, 2005.

such a state groundwater law does not exist, the Central Groundwater Authority has the power to regulate groundwater use.[60] This exposes an even more extreme level of centralisation because the Central Groundwater Authority is an authority constituted under a central legislation (Environment (Protection) Act, 1986) and therefore working under the Ministry of Environment, Forest and Climate Change of the Central Government.

The impropriety of this centralising trend of the existing and evolving legal framework for groundwater may be explained on various legal, ecological and pragmatic grounds.

First, the subsidiarity principle as envisaged under the Constitution needs to be considered in this context. The 73rd and 74th amendments to the Constitution promote devolution of powers to local governing bodies. As per the constitutional scheme, groundwater management and regulation are to be under the purview of local governing bodies such as village panchayats and municipalities.

In strict legal terms, the 73rd and 74th amendments do not make it mandatory for the state governments to devolve power and responsibility to local governing bodies. The constitutional provisions in this regard are not mandatory but discretionary and advisory in nature. The constitutional provision dealing with devolution of powers and responsibilities to panchayats (Article 243G) clearly conveys this position by saying that "legislature of a State may, by law, endow the panchayats with such powers and authority...." Similar expression is used in the provision dealing with devolution of powers and responsibilities to municipalities (Article 243W).

Given the fact that a number of states have adopted laws to implement the 73rd and 74th amendments, it could be assumed that the states have generally accepted the idea of decentralisation.[61] Having accepted the idea of decentralisation, it needs to be internalised and operationalised in all relevant

60 Ministry of Environment and Forests, Notification Constituting the Central Groundwater Authority, 14 January 1997 (as amended on 13 January 1998, 5 January 1999 and 6 November 2000).

61 *See, e.g.,* Arunachal Pradesh Panchayati Raj Act, 1997 and Bihar Panchayati Raj Act, 2006.

62 One notable exception in this regard is the West Bengal Ground Water Resources (Management, Control and Regulation), 2005 where a decentralised institutional framework has been envisaged.

regimes and sectors including groundwater law. Nevertheless, the general trend is that even the states that have adopted a law to implement decentralisation have failed to respect and operationalise the idea in groundwater law.[62] The state of Kerala is perhaps a classic example in this regard. Even though Kerala is generally known for effective implementation of decentralisation, the Kerala Ground Water (Regulation and Control) Act, 2002 has adopted the centralised command and control approach by envisaging a state level groundwater authority to regulate groundwater use.

Some of the recent legal changes, particularly the laws enacted with the object of promotion of development and investment, tend to disregard the decentralisation principle as envisaged under the Constitution. For instance, the Kerala State Single Window Clearance Boards and Industrial Township Area Development Act, 1999 expressly takes away the regulatory powers of local bodies vis-à-vis the designated industrial areas.[63] The issue of power of local bodies to regulate groundwater use in such industrial areas had been discussed by the Kerala High Court in the Pepsi case, where the power of the panchayat was not upheld in the light of the express statutory provision omitting the jurisdiction of village panchayats in industrial areas.[64]

Second, the centralisation trend of the groundwater regulatory framework is contradictory to the basic principles underlying the ongoing reforms in laws concerning surface water resources. The ongoing water law reforms recognise decentralisation and participation as basic principles.[65] Laws and policies adopted in the past decade testify to this aspect of water law reforms in India.[66]

63 *See,* Kerala State Single Window Clearance Boards and Industrial Township Area Development Act, 1999, Section 6.

64 Pepsico India Holdings v. State of Kerala, High Court of Kerala, 2008 (1) Kerala Law Journal 218.

65 *See Cullet, supra* note 25.

66 *See, e.g.,* Andhra Pradesh Farmers' Management of Irrigation Systems Act, 1997; Gujarat Water Users' Participatory Irrigation Management Act, 2007; Maharashtra Management of Irrigation Systems by the Farmers Act, 2005 and Tamil Nadu Farmers Management of Irrigation Systems Act, 2000. The way in which these laws operationalised the idea of decentralisation and participation has been criticised on various grounds such as exclusion of landless farmers and women from participation and inadequate or no role for local bodies such as gram sabha or gram panchayat. For a critical analysis of this aspect, *see,* Priya Sangameswaran and Roopa Madhav, *Institutional Reforms for Water,* in WATER LAW FOR THE 21ST CENTURY: NATIONAL AND INTERNATIONAL ASPECTS OF WATER LAW REFORMS IN INDIA (P. Cullet *et al* eds., Routledge, 2010); and Videh Upadhyay, *Canal Irrigation, Water*

Hence, the ongoing water law reforms as it stands now shows co-existence of centralisation and decentralisation. Such co-existence as such is not negative in nature and implications. However, it requires proper justification on scientific, legal and pragmatic grounds and such proper justifications do not seem to exist in the case of the centralised command and control approach followed by groundwater laws.

Third, owing to the decentralised nature of water availability and use coupled with the culturally and ethnically plural nature of the Indian society, local knowledge, rules, practices and institutions have been in existence for long. The internalisation and incorporation of such time-tested local knowledge, rules, practices and institutions need to be at the core of groundwater management and the related legal framework. The ongoing tendency to harmonise regulatory techniques and tools and centralise institutional mechanisms without respecting the customs, practices and knowledge evolved over time, is likely to yield more failures than successes.[67]

Fourth, the centralisation trend does not respect the decentralised nature of water availability in India. The water ecosystem in India predominantly depends on rainfall, which is highly temporal and decentralised in nature. A centralised regulatory mechanism cannot accommodate these diversities and therefore, such a legal framework is unlikely to produce the desired results.[68] Management of millions of groundwater users by a state level agency is practically very difficult and perhaps not economically feasible also because of the high scale of human resource and money required.

Therefore, any attempt to reform the groundwater legal regime in India should be based on the subsidiarity principle. Such a step would amount to respecting the decentralisation principle as envisaged under the Constitution. It also gives ample opportunity to take into consideration the local needs, perspectives, customs and knowledge.

User Associations and Law in India: Emerging Trends in Rights Based Perspective, in WATER GOVERNANCE IN MOTION: TOWARDS SOCIALLY AND ENVIRONMENTALLY SUSTAINABLE WATER LAWS (P. Cullet *et al* eds., Cambridge University Press, 2010).

67 M.S. Vani, *Community Engagement in Water Governance,* in WATER AND THE LAWS IN INDIA (Ramaswamy Iyer ed., Sage, 2009).

68 *Ibid.*

Participatory Approach in Regulation and Management

Participation is an important principle followed by the ongoing water sector reforms in India.[69] The idea has been floated over the last several years and the central government has framed a number of policies to promote participatory water resource management. The National Water Policy, 2002 encouraged "involvement and participation of beneficiaries and other stakeholders."[70] The National Water Policy, 2012 emphasises that "stakeholder participation in land-soil-water management with scientific inputs from local research and academic institutions for evolving different agricultural strategies, reducing soil erosion and improving soil fertility should be promoted."[71] Meaningful intensive participation, transparency and accountability should guide decision making and regulation of water resources. The Ministry of Water Resources of the Central Government has been specifically promoting the need for a legal framework for participatory irrigation management.[72] Gradually, the idea of community participation is transgressing into the area of regulation and management of groundwater. For instance, the National Water Mission document explicitly identifies community participation in regulation and management of groundwater as a preferred strategy for ensuring sustainability of groundwater resources.[73] The broad objective behind the idea of participatory management of water resources is to limit the role of the State to that of a facilitator and to vest regulatory and management powers and responsibilities in users and local bodies. [74]

It is in this context that water laws in India have undergone dramatic changes to implement participatory water resource management. Notable legal changes took place in the irrigation sector where several states have adopted

69 *See,* Cullet, *supra* note 25.

70 National Water Policy, 2002, Para 6.8, *available at* http://www.ielrc.org/content/e0210.pdf.

71 National Water Policy, 2012, Para 4.4, *available at* http://www.ielrc.org/content/e1207.pdf.

72 Ministry of Water Resources, Report of the Working Group on Water Resources for the XI Five Year Plan 2007-2012 (New Delhi: Ministry of Water Resources, 2006), *available at* http://planningcommission.nic.in/aboutus/committee/wrkgrp11/wg11_wr.pdf.

73 Government of India, National Water Mission - Comprehensive Mission Document, Volume-I, April 2011, p. 17.

74 Videh Upadhyay, *Legal Dimensions of Water Resource Management in India: A Review of Legal Instruments Controlling Extractions to Sustainable Limits, in* REFORMING INSTITUTIONS IN WATER RESOURCE MANAGEMENT: POLICY AND PERFORMANCE FOR SUSTAINABLE DEVELOPMENT 131 (L. Crase and V.P. Gandhi eds., Earthscan, 2009).

participatory irrigation management laws.[75] The objective was to constitute Water User Associations (WUAs) to take care of irrigation systems. While this is the major legal change, similar changes have been implemented in the drinking water sector through policy instruments. For instance, *Swajaldhara,* a rural drinking water scheme introduced by the Central Government, sought to implement community participation in the management of rural drinking-water supply.[76]

While participation has been a cornerstone of water law reforms in India at least since the late 1990s, the idea has been almost completely ignored when it came to groundwater laws. Groundwater laws, as adopted by several states in the last decade, seem to have ignored this key development by following the traditional command and control approach. Given the specific decentralised nature of groundwater, the probability of failure of such a legal system is very high.

It is in this background that the idea of participation becomes relevant and necessary in the groundwater law context. On the one hand, it is a matter of maintaining consistency in water law in general in terms of basic principles or approaches and on the other hand, it is an unavoidable necessity for making groundwater law equitable and sustainable.[77] Groundwater regulation is unlikely to work in the absence of effective involvement of individuals and communities. Likewise, management and conservation efforts are also unlikely to yield desired results in the absence of participation.[78] For instance, concerns of the poor and landless are unlikely to be addressed if they are not given adequate opportunity to participate in the norm-making and implementation process.

While incorporating and implementing the idea of participation in groundwater law, adequate precautions must be taken. This is because participation can have different meaning and scope in different contexts. Most importantly, participation as understood in the ongoing water law reforms

75 *See, e.g.,* Andhra Pradesh Farmers Management of Irrigation Systems Act, 1997; Rajasthan Farmers' Participation in Management of Irrigation Systems Act, 2000 and Maharashtra Management of Irrigation Systems by Farmers Act, 2005.

76 Government of India, *Swajaldhara* Guidelines, 2002, *available at* http://www.ielrc.org/content/e0212.pdf.

77 *See,* Himanshu Kulkarni *et al, Shaping the Contours of Groundwater Governance in India,* JOURNAL OF HYDROLOGY: REGIONAL STUDIES (2015), *available at* http://dx.doi.org/10.1016/j.ejrh.2014.11.004.

78 *Id.*

ignores democratically elected bodies at the local level. Further, the implementation of participatory irrigation management laws resulted in accumulation of power in the hands of members of higher castes.[79] Representation of women in Water User Associations was minimal and the scope of participation was limited to landholders.[80] Similarly, implementation of the Swajaldhara drinking water scheme also exposed that the scope of participation was limited to participation of local elites and the poor and vulnerable were excluded.[81]

Therefore, adequate care and attention must be taken while incorporating the idea of participation in groundwater law. One way to address this issue is to expressly declare the link between groundwater law and the constitutional principle of non-discrimination. The underlying idea is to eliminate all forms of discrimination particularly discrimination on the basis of grounds such as caste and gender. Implications of relying on the constitutional principle of non-discrimination are mainly two. First, it prohibits the practice of exclusion as a matter of policy, and second, it mandates and supports special consideration for poor and vulnerable. Further, the idea of participation should not be restricted to participation of users or community. Instead, it should give key role to the democratically elected local bodies such as panchayats and municipalities as well as representative bodies such as gram sabhas.[82] This is very crucial to ensure equity and sustainability.

Aquifer based regulation and conservation

The piecemeal approach of the present groundwater legal regime in India has proved ineffective in curbing groundwater depletion and contamination. One of the major shortcomings of the legal framework was the absence of a holistic approach by taking aquifer as the unit. As a result, the legal regulation

79 V.R. Reddy and P.P. Reddy, *How Participatory is Participatory Irrigation Management? Water Users' Association in Andhra Pradesh,* 40(53) ECONOMIC AND POLITICAL WEEKLY 5587 (2005).

80 PHILIPPE CULLET, WATER LAW, POVERTY AND DEVELOPMENT – WATER SECTOR REFORMS IN INDIA 115 (Oxford University Press, 2009).

81 Preeti Sampat, *'Swa'-jal-dhara or 'Pay'-jal-dhara — Sector Reform and the Right to Drinking Water in Rajasthan and Maharashtra,* 3(2) LAW, ENVIRONMENT AND DEVELOPMENT JOURNAL 101 (2007).

82 Gram Sabha is a body consisting of persons registered as voters in the electoral roll of a village comprised within the area of the Panchayat at the village level. *See, e.g.,* Haryana Panchayati Raj Act, 1994, Section 2.

almost exclusively has focused on groundwater abstraction units such as wells and tube wells and paid little attention to the protection of aquifers including their recharge and discharge areas.[83] In fact, the "right unit" for regulation and protection should be the natural unit within which groundwater occurs, that is aquifers.[84] The aquifer-based approach has the advantage of treating groundwater as a common resource as opposed to the present approach where groundwater is available for uncontrolled extraction at the individual level. In fact, an aquifer-based approach is a starting point to abolish the existing land-based groundwater right. Further, it will ensure efficient protection and conservation of groundwater because it focuses on aquifer (including recharge and discharge areas) as a unit and therefore has the advantage of having norms and institutions based on hydrological units.

Even though a number of states have adopted groundwater laws, none of them has followed an aquifer-based approach. Given the fact that the existing model of regulation based on abstraction units is unsustainable, groundwater legal regime in India requires significant revamping to incorporate a paradigm shift towards aquifer-based legal and institutional mechanisms to regulate and protect groundwater.

Model Groundwater Bill, 2011: a progressive model

While states continue to follow the dated model of groundwater management and regulation, the need for revamping the groundwater legal regime has been recognised by the Central Government by publishing the draft Model Bill for the Conservation, Protection and Regulation of Groundwater, 2011 ("the Bill").[85] The Bill seeks to modify the existing legal regime by replacing dated rules and principles with contemporary rules addressing sustainability and equity concerns.

The Bill recognises groundwater as "common heritage of the people of India held in trust" and makes it clear that "it is not amenable to ownership by

83 *See,* Cullet, *supra* note 8.

84 Himanshu Kulkarni and P.S. Vijay Shankar, *Groundwater: Towards an Aquifer Management Framework,* 44(6) ECONOMIC AND POLITICAL WEEKLY 13, 14 (2009).

85 The draft version of the Model Bill for the Conservation, Protection and Regulation of Groundwater, 2011 is *available at* http://www.ielrc.org/content/e1118.pdf. For a detailed account of the Model Groundwater Bill 2011, *see,* Philippe Cullet, *The Groundwater Model Bill: Rethinking Regulation for the Primary Source of Water,* 47(45) ECONOMIC AND POLITICAL WEEKLY 40 (2012).

the State, communities or persons." It also explicitly endorses the fundamental right to water as recognised by the Supreme Court of India. Thus, the Bill seeks to introduce revolutionary changes by replacing the dated common law rule with modern principles of public trust and the fundamental right to water.

The Bill envisages management and regulation of groundwater at the local level and thus respects the decentralisation principle as envisaged under the 73rd and 74th amendments to the Constitution. The subsidiarity principle has been envisaged to be operationalised through groundwater committees at various levels but key regulatory and management powers vest with groundwater committees at the lowest possible level. For example, the Gram Panchayat Groundwater Committee is entrusted with the power to prepare the groundwater security plan, which shall "provide for groundwater conservation and augmentation measures, socially equitable use and regulation of groundwater, and priorities for conjunctive use of surface and groundwater." [86]

The precautionary principle has also been operationalised under the Bill. For example, it provides for demarcation of groundwater protection zones. Critical natural recharge areas of an aquifer and those areas that require special attention with regard to the artificial recharge of groundwater have been put on high priority and extraction or use of groundwater, apart from use as basic water, is not allowed in such areas. Thus, the Bill marks a revolutionary change by following an aquifer-based, decentralised and participatory approach towards regulation and protection of groundwater. The actual impact of the Model Groundwater Bill, 2011 is yet to be seen and it depends upon the extent to which different State Governments are willing to revamp the groundwater legal regime by following the Model Groundwater Bill, 2011.

At the same time, the Bill poses enormous challenges for the State Governments. Given the fundamental changes proposed in the Bill, State Governments need to pass a new law to replace the existing law. Setting up of the institutional framework envisaged in the Bill is another key challenge as it requires a lot of effort to set up different groundwater committees at different levels from local to the state level. The co-operation and coordination between different groundwater committees at different levels is crucial to make this

86 Model Bill for the Conservation, Protection and Regulation of Groundwater, 2011, section 15, *available at* http://www.ielrc.org/content/e1118.pdf.

model effective. Further, the idea of decentralisation and participation as envisaged in the Bill might face scepticism from the existing bureaucracy, most importantly on the ability of the local level institutions to regulate and protect groundwater. Therefore, the success of the ideas and approaches envisaged in the Bill depends upon how, and to what extent, the State Governments overcome these challenges.

V. Conclusion

The adoption of a separate legal framework for groundwater by different states in the last decade testifies the growing importance of the need for legal regulation and management of groundwater. This development introduced a significant legal change by empowering the state governments to control groundwater use by private parties as well as government agencies. However, the new groundwater laws fall short of changing the land-based nature of groundwater right.

The system of land-based groundwater right is untenable from an equity and human rights point of view as it denies access to groundwater to the landless and poor. Further, the scenario that a natural resource critical for sustaining life, livelihood and economy is under the control of a privileged few is not acceptable. The equity and human rights dimensions are going to be even more crucial given the way groundwater resources are being relentlessly depleted and contaminated.

The existing legal system in India provides ample opportunity and guidance in terms of principles and approaches to transform the groundwater legal regime to ensure equity, sustainability and human rights. At the more substantive level, one obvious way is to change the land-based groundwater right to internalise and operationalise the concept of the fundamental right to water. The fundamental right to water is, in principle, a part of the fundamental right to life. Therefore, it is necessary to give effect to the fundamental right to water through groundwater laws. The concept of thefundamental right to water, together with principles of environmental law such as the public trust doctrine and the precautionary principle, give ample legal bases to change the outdated land-based groundwater rights. Having not given effect to these recent legal developments relevant to groundwater, an opportunity was missed to replace an antiquated legal proposition evolved out of sheer practical convenience and

scientific ignorance with a progressive legal framework respecting equity and human rights.

Procedural and institutional concerns are also equally important. Even though decentralisation and participation are generally accepted as preferred ways to manage and regulate natural resources, the existing legal framework on groundwater follows the centralised command and control approach. At the practical level, centralisation is unlikely to work in the case of groundwater, and at a conceptual level, it disregards established constitutional norms. Hence, decentralisation and participation could be key contributing factors towards a comprehensive and progressive legal framework for groundwater. While incorporating and implementing the idea of decentralisation and participation, adequate care must be taken to ensure that it is not exclusionary in nature. This is particularly relevant in the context of the experience in water law reforms in India where decentralisation was implemented by excluding or limiting the role of elected bodies at the local level and participation was limited to a privileged few. Such an exclusionary approach would be contrary to the constitutional goals of non-discrimination and decentralisation.

The Model Groundwater Bill, 2011 represents an advanced model for the State Governments. While the Model Groundwater Bill, 2011 seeks to modernise the legal regime governing groundwater in India, its actual impact depends upon whether, and to what extent, state governments are ready to accept and implement it. While state governments are seemingly supportive of enacting groundwater laws, it is yet to be seen if they are willing to accept the challenge of a complete revamping of the existing legal regime.

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Changing Terrain of Environmental Citizenship in India's Forests

Arpitha Kodiveri*

The paper traces the concept of environmental citizenship in India's forests through the existing legal framework which is influenced by the movement for forest rights. I argue that the notion of environmental citizenship is contested given the presence of multiple actors and interests over natural resources in our forests. This contestation I present is heightened by the emerging idea of corporate citizenship where corporations assume the role of arbiters of citizenship rights in the absence of the state. It is within this frame of environmental citizenship and its inter-relationship with corporate citizenship that I analyze the changes proposed by the present government to our environmental laws. I conclude that the existing notion of environmental citizenship is fundamentally altered by these proposed changes primarily by the decreased participation of forest dwelling communities in decision making which is being positioned as a hurdle in the exploitation of resources, which in turn impacts the relationship between the environment, the citizen and democracy in India's forests.

I. Introduction

Girish Kasaravalli's movie 'Dweepa' or 'the Island' showcases the narrative of a family that refuses to leave an island despite the construction of a dam. In a scene, the protagonist is seen negotiating for compensation for the loss of the sacred temple that his family has been serving in for generations. The compensation officer dismisses the claim on the basis that the family does not have documentation of ownership and the protagonist is seen walking away in

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anger where he says that the forest, the village and the temples are theirs – what then is this this skewed idea that the state is the owner of public property. This scene illustrates the ongoing struggle within India for the rights over resources, particularly in forest areas. This conflict with the officer is a conflict over the competing meanings of ownership, control and property rights over nature. This conflict is at the heart of environmental justice movements in forest areas where local communities are seen struggling for their rights over *jal, jangal* and *zameen* (water, forest and land).

In this paper I will locate the notion of environmental citizenship derived from a schematic study of the struggles by forest dwelling communities in India's forests. I contrast this meaning of environmental citizenship with the understanding of environmental citizenship from literature in the global south where similar struggles have occurred. In the present section I also draw on the relationship between environmental citizenship and law in India. While exploring this relationship between environmental citizenship and law, I speak about the process where the tenets of environmental citizenship derived from forest rights struggles have been infused into law. I then contrast this notion of environmental citizenship with corporate citizenship to highlight the relationship between corporations, the environment and democracy. In doing so I set the frame through which I examine three changes to the existing environmental legal framework proposed by the present government where it has reduced the participation of forest dwelling communities in the decision making whilst increasing the power of corporations to self-regulate. I conclude with an analysis of these changes on the environmental citizenship of forest dwelling communities. This paper is an attempt to explore environmental citizenship as a normative concept that has seeped into law through the discourse that has emerged from environmental movements. As a normative concept it guides democratizes decision-making around the environment and it is the movement away from this form of environmental citizenship that is being proposed by the recent changes to environmental laws that this paper highlights. Environmental citizenship and its tenets elaborated below act as an aspirational standard for guiding environmental law amendments and jurisprudence. The paper also aims to provide a schematic discussion of how citizenship becomes the terrain on which rights and control over natural resources is being contested. This builds on the existing work by eminent scholars like Ramchandra Guha and

others who address these contestations but this paper seeks to incorporate the legal dimension to how these contestations play out.

Environmental justice movements in India have followed the paradigm of ecological concerns merging with questions of equity. Ramchandra Guha in his seminal work titled *Radical American Environmentalism and Wilderness Preservation-A Third World Critique* critiqued the deep ecology movement in the global north which alludes to the need for pristine areas without human interference and raised the question of the plight of resource dependent communities.[1] This came to be known as the environmentalism of the poor, where the concerns of ecology and conservation needed to be examined through the lens of social justice considerations. The history of environmental justice movements in forest areas is rife with the contestations over resources and their prospective use. Political ecology informed these movements that if rights to forest dwelling communities were granted then ecological questions would also be addressed. In the same vein Ramchandra Guha further speaks about how environmental justice movements are driven by the idea of alternative sustainable use of nature in contrast to more destructive practices.[2] This fight for control over resources is also one of historical injustice. Historical injustice here refers to the systematic loss of control over resources that forest dwelling communities have been subjected to since the colonial encounter. A brief examination of forest laws shows that independent India inherited the colonial framework of exclusionary conservation and prohibited resource use in protected areas. This legal framework criminalized the resource use of forest dwelling communities who have been living in these areas and using these resources for generations. This dimension of the conflict where the law delegitimized the biocultural linkages of the local communities to their resources was viewed by these communities as a process of state appropriation. Eminent domain is a principle where the State is the eventual owner or arbiter for the use of resources reasserted state control over resources.

In this milieu, the relationship of forest dwelling communities with the state was shaped by resistance movements to gain control over resources in most

1 Ramchandra Guha, *Radical American Environmentalism: A Third World Critique,* 11 ENVIRONMENTAL ETHICS 71-83 (1989).

2 *Id.*

parts. In other forest areas impacted by the Naxal movement,[3] this relationship was also fraught with questions of illegal arrests of adivasis on false charges. The relationship of forest dwelling communities with the state is a complex one riddled with questions of oppression, subjugation and resistance. For the purposes of this paper I am keen on unpacking this relationship to the extent that it deals with the legal constructs of ownership, control and rights over resources. In this context the relationship between forest dwelling communities and the state[4] is determined by many competing legal constructs for ownership, control and rights over resources in forest areas. The dominant constructs that configure this relationship are the doctrine of eminent domain[5] as articulated in the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013; public trust doctrine[6] as understood in *M.C Mehta v. Kamal Nath;* [7] Schedule V areas; The Wildlife Protection Act, 1972; Forest Conservation Act, 1980; and the passing of the Forest Rights Act, 2006 (FRA). In the table below I provide a simplistic breakdown of these laws and how they shape the notions of ownership, control and rights in forest areas.

LAW or DOCTRINE	STATE CONTROL	RIGHTS OF FOREST DWELLING COMMUNITIES
Doctrine of Eminent Domain	State has the power to divert forest land for public purpose.	Rights of communities are restricted to compensation and rehabilitation.
Public Trust Doctrine	State holds the resources in trust and thus has the duty to protect these resources.	Communities have the right to public enjoyment and common heritage to these resources.

3 An armed left-wing movement that began in 1967.

4 In this context I am not referring to the State as an abstraction of the particularities of the center, state and local governments.

5 Referring to the power of the state to acquire land for public purpose as defined under Section 2 (1) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.

6 Public trust doctrine is understood as the responsibility of the state to conserve resources which they hold in trust on behalf of the citizens.

7 M.C Mehta v. Kamal Nath, (1997) 1 SCC 388 (Supreme Court of India).

Scheduled Areas	State surrenders ownership and control to scheduled tribes. These areas include forests.	Scheduled tribe communities have complete ownership, control and rights over resources though this is limited to surface rights and does not extend to rights to minerals below.
Wildlife Protection Act, 1972	State has the ability to declare forest areas as protected areas ranging national parks, sanctuaries to tiger reserves.	Communities have restricted rights of access and use of forest resources.
Forest Conservation Act, 1980	The center grants clearance or permission for the use of forest land for a non -forest purpose.	Community consent is not a part of this process.
Forest Rights Act,2006	State control over forest areas is restricted by shifting ownership and control to forest dwelling communities.	Community control over forest areas is enshrined through forest rights recognized within the FRA.

As seen in the table above, the contestation over natural resources is also represented within the legal framework with some laws reasserting the power of the state and other laws calling for a radical shift of control to local communities.

Another dimension of this conflict is the expression of private corporate interests over natural resources which compromise interests of local communities. The State is the arbiter of negotiating these interests through the legal constructs mentioned earlier as well as the environment impact assessment process which is a part of the Environment Protection Act, 1986. The environment impact assessment ('EIA') process requires that the project proponent divulge the environmental impact of the proposed development project and in the case of site-specific projects like mining, it is mandatory for the project proponent to undertake site-specific clearances. An element where

local communities articulate their interests is in the public hearing process which is a part of the larger EIA process. What is important to note is that in this process the local communities are consulted but their consent need not be obtained.[8] There was a shift from the language of consultation to consent with the passing of the FRA where the consent of the gram sabha was to be taken for development projects within forest areas. It is this relationship between the state, the forest dwelling communities and private and public corporations that I intend to explore through the framework of environmental citizenship which is an emerging concept in social sciences. In the next section I will elaborate on the notion of environmental citizenship and the role of environmental law in shaping its contours in India.

II. Environmental Citizenship and Law in India

Environmental citizenship as a concept is yet to be explicitly explored in India though most scholarship around environmental justice issues implicitly alludes to contestations over nature as one of citizenship. Environmental citizenship is seen as an extension of the broader discourse around citizenship in western philosophy. A number of writers have noted three dimensions of citizenship, although they characterize them in slightly different terms. The first, which we call the legal dimension, centers on the formal status of the citizen, defined by civil, social, and political rights, and considers the scope of personal autonomy and freedom of expression, as well as other freedoms that the law accords the individual. The second, the procedural dimension, addresses the formulation of the law and other political institutions and considers the role of the citizen in shaping them, particularly through direct participation and through representative democracy in different forms and at different scales. The third, the identity dimension, examines the sense of membership in the collectivity itself; it addresses questions of citizenship as identity and the struggle for the incorporation within the collectivity.[9] The three dimensions of citizenship mentioned can be reduced to the relationship between the state and its citizens through rights, direct participation and inclusion. These are the tenets and the

8 Kanchi Kohli & Manju Menon, Eleven Years Of The Environment Impact Assessment Notification, 1994- How Effective Has It Been? (May 2005).

9 Ben *Orloveet al., Contemporary Debates on Ecology, Society, and Culture in Latin America,* 46 Latin American Research Review, 115-140 (2011).

language used in the desire of forest dwelling communities to be a part of decision making around natural resources. I chose to use the frame of environmental citizenship in articulating the complex changes in our environmental laws because it enables us to link the politics of nature with the question of democracy and justice. I also view citizenship as a terrain on which rights are negotiated and revised through the different institutional structures. Environmental citizenship is a way to incorporate environmental considerations within the discourse of citizenship claims. It reshapes the discourse in a way that is more acutely political and more integrally ecological.[10]

Environmental citizenship when examined through the lens of environmental justice movements in India is one driven by the values of decentralization of ownership and control, and democratization and participation of forest dwelling communities in the decision-making processes. These values found their way into law through the Forest Rights Act, 2006. The FRA enshrines forest dwelling communities with rights over forest land and the right to manage and control community forest areas, this assures decentralized control of resources and active participation of local communities in conservation efforts. However, the link between the environment and citizenship is not restricted to forest dwelling communities but extends to private corporations, urban middle class and other stakeholders.

What then is the notion or tenets of environmental citizenship when seen through the different dimensions of citizenship as laid down by Beland and Hansen[11] as the legal, procedural and identity based dimensions? In the legal dimension it refers to the formal status of citizenship through what I describe as environmental rights and obligations. The procedural dimension refers to direct participation in environmental decision making and identity, which is a contentious aspect of environmental citizenship in India. In the table below I have elaborated on the three dimensions of citizenship as derived from the laws which were products of the environmental justice movements in India.

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10 Alex Latta & Hannah Wittman, *Environment and Citizen in Latin America A New Paradigm for Theory and Practice,* 89 EUROPEAN REVIEW OF LATIN AMERICAN AND CARIBBEAN STUDIES 107-116 (October 2010).

11 D. Béland and R. Hansen, *Reforming the French welfare state: solidarity, social exclusion and the three crises of citizenship,* 23(1) WEST EUROPEAN POLITICS, 47–64 (2000).

DIMENSIONS OF CITIZENSHIP	FOREST DWELLING COMMUNITIES
LEGAL	Forest dwelling communities have rights of use, ownership of forest land and control over the management of forest areas under the FRA. These rights are subject to the responsibility to conserve the environment. These are rights beyond the basic rights of freedom of expression and other fundamental rights.
PROCEDURAL	Consent of forest dwelling communities needs to be obtained for any development activity that is to take place within forest areas. They directly participate in the decision making around the strategies to conserve the forests.
IDENTITY	Scheduled tribes are granted these rights by virtue of being scheduled while other forest dwelling communities namely Dalit forest dwellers and pastoral community members are required to provide evidence of having inhabited forest areas for 75 years This aspect of environmental citizenship of forest dwelling communities is yet to be developed and addressed.

These neat boxes are not an exhaustive understanding of environmental citizenship of forest dwelling communities, nor are they watertight. The three dimensions work collaboratively to enable the realization of environmental citizenship of forest dwelling communities. As noticed, there is a strong legal discourse around environmental rights to forest dwelling communities, direct participation and identity based inclusion and exclusion to these rights. Environmental citizenship is dynamic and can be viewed as a site of struggle where its different dimensions are negotiated. The legislative process is

intercepted by inclusion of movements in the drafting of laws like the FRA while at the same time direct participation is prevented through negligent implementation of public hearing processes. Holston speaks of the transformative potential of citizen movements from below. His concept of 'insurgent citizens' speaks to the agency of popular movements to impact decision making in the environment sphere.[12] Extending this idea of the insurgent citizen, environmental citizenship in India is unique in that exercises of citizen insurgency have transformed legislative intent and jurisprudence. Environmental citizenship in India's forests has been moved forward from insurgent practices of protests for ownership, control and rights over forest areas. This can be seen particularly with the passing of the FRA where the movement for rights in forest areas resulted in the passage of the law. Another instance is the broad interpretation of the scheduled area provisions in the constitution in the *Samatha* judgment.[13] The legislature and the judiciary have, at critical junctures, been receptive to the insurgent citizenship practices of forest dwelling communities through different public interest litigation cases filed before the courts and requests for amending existing laws. Environmental movements have used law as a tool of resistance, this has been in the form of filing cases before the courts to campaigning for legislative action. An example that illustrates the ability of insurgent citizenship practices that have resulted in change is the Vedanta judgement[14] passed by the Supreme Court. This landmark judgement extended the powers of the gram sabha within the FRA to require consent for the development project. This judgement came in the backdrop of ongoing protests by Dongria Kondh community members claiming their rights over their sacred space. This legal claim of assertion of rights over the Niyamgiri Hill as a sacred site produced jurisprudence where such a right came to be recognised and protected. The insurgent citizenship practice of inserting a legal claim within the social movement has resulted in responses from the judiciary and legislature. However, there are several instances where the law has failed to respond to the legal claims being made by insurgent citizenship practices of protest and legal activism. An instance of that is the Supreme Court's response

12 James Holston, INSURGENT CITIZENSHIP: DISJUNCTIONS OF DEMOCRACY AND MODERNITY IN BRAZIL (2008).

13 Samatha v. State Of Andhra Pradesh, Appeal (civil) 4601-02 of 1997 (Supreme Court of India).

14 Orissa Mining Corporation v. Union of India, 2013 (6) SCALE 57 (Supreme Court of India).

to the cases filed against the construction of dams within the Narmada Valley Project. The Supreme Court when interpreting the precautionary principle stated the following:

> In present case, we are not concerned with polluting industry...what is being constructed is a large dam. The dam is neither a nuclear establishment nor a polluting industry. The construction of a dam undoubtedly would result in the change of environment but it will not be correct to presume that the construction of a large dam like SardarSarovar will result in ecological disaster. ....The experience does not show that construction of a dam ... leads to ecological or environmental degradation

The relationship between assertion of environmental citizenship and the law is fraught with recognition of rights claimed by communities adversely impacted by development projects or the complete denial of such rights. Thus insurgent citizenship has transformed environmental jurisprudence whilst also at times restricting the interpretation of such rights claims.

In a song inspired by Bhagwan Maaji leader of the Adivasi struggle against bauxite mining called 'We will not leave our village' elaborates on the resistance based citizenship claims made by forest dwelling communities. It begins with the following lines

> We will not leave our village,
> We will not leave our forests,
> We will not leave our mother-earth,
> We will not stop our struggle.[15]

This is a narrative of environmental citizenship where the claim for ownership and control is based on the stewardship of the earth. It is distrust of the state as the trustee of resources as forest dwelling communities have witnessed the loss of land and forest to commercial interests and seek to act as trustees of the forest resources. This transforms the notion of the public trust

15 Kaustav De, *Gaonchodabnahi (we will not leave out village),* YOUTUBE (March 28, 2009) https://www.youtube.com/watch?v=8M5aeMpzOLU.

doctrine where the state has a fiduciary duty to protect natural resources, as in the context of forests the FRA calls for a shift of the responsibility to conserve on local forest dwellers. This shift goes beyond the conventional discourse on citizenship where forest dwelling communities now share the responsibility to protect the environment with the state. This collaborative sharing of responsibilities creates a more dynamic relationship between the environment, citizen and the state. It also transforms the doctrine of eminent domain where forest dwelling communities have ownership rights to forest land which was previously considered as public property belonging to the state and requires the consent of forest dwelling communities for any development project. The insurgency of forest dwelling communities has fundamentally transformed governance and management of forest areas. These rights are not absolute and are limited by use of resources for national interest which come within the ambit of eminent domain.

This transformation through insurgent citizenship from below has permeated into legislative intent as seen in the making of the FRA which was a legislation drafted by the Campaign for Survival and Dignity which was an umbrella campaign speaking to the interests of forest dwelling communities.[16] There has thus been a shift from a mere lobby for a new law to enforceable legal rights. This is an interesting process and has shaped environmental citizenship in particular ways where legal processes relating to the environment are transformed from citizen movements from below. Environmental jurisprudence in India has been developed mainly after the procedural innovation of public interest litigation where the expansion of locus standi allows any citizen to bring a case before the court in public interest. Public interest litigation became the dominant tool used by civil society organizations and interested citizens in enabling judicial intervention in the regulation of the environment, so much so that at times they were accused of judicial overreach. The Supreme Court was responsible for the progressive interpretation of Article 21 to include the right to a healthy environment within the ambit of the right to life.[17] The reading in of environmental considerations within the fundamental rights was also supported by the incorporation of the public trust doctrine and polluter pays

16 M Rajshekhar, The Act that Disagreed with its Preamble: The Drafting of the "Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, (2012) (unpublished paper) (on file with author).

17 Subhash Kumar v. State of Bihar, AIR 1991 SC 420.

principle as seen in the Vellore Citizens Welfare Forum[18] case into environmental jurisprudence in India. Citizen engagement with environmental law occurred through these methods of public interest litigation and indirect participation in the legislative process.

In conclusion, environmental citizenship as derived from the understanding of environmentalism of the poor, refers to three primary values: localized ownership and control of natural resources, participation in decision-making around these resources through free, prior and informed consent and active participation in the conservation efforts of these resources. These values can be traced back to the environmental justice movements led by forest dwelling communities across India which have been discussed earlier. It is these values that are fundamentally altered by the changes proposed by the present Modi government to the existing environmental laws. The present government in its efforts to simplify environmental laws and the environmental clearance process in particular has appropriated the space previously guaranteed to citizens in decision making by shaving away legal provisions that required public participation. This simplification process is reasserting the paradigm of state control of resources which takes away from the decentralized model that environmental struggles have achieved.

III. Corporate Citizenship and the Environment

Environmental citizenship thus far as a frame has been explored in the context of forest dwelling communities. I would now like to introduce the notion of corporate citizenship which is a term used to describe the relationship between the corporation and society. Corporate citizenship (CC) has emerged as a prominent term in the management literature dealing with the social role of business.[19] This lineage has, most notably, been dominated by the notion of corporate social responsibility (CSR). Carroll[20] widely cited CSR model conceptualizes four types of responsibilities for the corporation: (1) the economic responsibility to be profitable; (2) the legal responsibility to abide by the laws of society; (3) the ethical responsibility to do what is right, just, and fair; and (4) the philanthropic responsibility to contribute to various kinds of social,

18 Vellore Citizens Welfare Forum v. Union of India and others, AIR 1996 SC 2715 (Supreme Court of India).

19 Dirk Matten & Andrew Crane, *Corporate Citizenship: Toward an Extended Theoretical Conceptualization,* 30(1) The Academy Of Management Review, 166-179 (Jan., 2005).

educational, recreational, or cultural purposes. This model has increasingly been incorporating environmental considerations.[21] A quick survey of some of the leading extractive companies who operate in India showcases that environmental considerations are emphatically addressed in their statements. Here is a sample of claims of environmental consciousness made by Vedanta as seen through the lens of corporate citizenship.

> Vedanta Limited (VL) is a socially responsible corporate that aspires to transform the lives of people surrounding its plant site. VL firmly believes in making the local people a participant in the growth process of the organisation and works as a facilitator of socio-economic transformation of rural parts of Orissa. In accordance with the firm's social objectives, VL has launched several projects for sustained socio-economic and cultural development of local communities adjoining the plant site. It has launched several projects for sustained socio-economic and cultural development of local communities adjoining the plant site. Mid-day meals for school going children, establishment of Anganwadicentres (pre-schools) and health camps among others have recorded growing success.[22]

Corporations are recognized as legal persons or having artificial legal personality where they can acquire property and enter into transactions in the market. A frame that I will use to understand the environmental citizenship of corporations is the rights corporations assert over resources in forest areas and their responsibility or obligations to protect the environment. I derive these rights and responsibilities from the existing environmental legal framework.

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20 Archie B. Carroll, *A Three-dimensional conceptual model of corporate performance,* 4(4) THE ACADEMY OF MANAGEMENT REVIEW, 497-505 (October, 1979).

21 Şükrü Özen & Fatma Küskü, *Corporate Environmental Citizenship Variation in Developing Countries: An Institutional Framework,* 89(2) JOURNAL OF BUSINESS ETHICS, 297-313 (Oct., 2009).

22 *Aim & Vision,* VEDANTA, www.vedantaaluminium.com/csr-aim.htm(last visited July 10, 2016).

RIGHTS	RESPONSIBILITIES
Rights to use and harness resources for developmental purposes after gaining environmental clearance from the state.	Responsible to ensure that environmental standards as mentioned within the air pollution, water pollution act and the environment protection act are complied with.
Right to lease forest land for mining purposes	Mine closure plan

What one notices is a gradation in the right to use and the responsibility to conserve. The nature of use and the corresponding standard of conservation vary. In the context of forest dwelling communities what we notice is that sustainable use of forest resources is allowed for collection of firewood, minor forest produce and grazing with the power to determine the working plan of the forest area. In the case of corporations they are vested with the right to exploit resources with the duty to rectify pollution caused by such activities. Prior to earning the right to exploit resources there is a requirement of gaining environmental clearance from the state but most clearances that are granted are conditional. Forest land which are akin to public lands in which the state has the authority to contract natural resources – but the state continues to hold management powers over the area. This of course is now subject to the powers vested with the forest dwelling communities to manage the forest areas under the FRA. Forest land can either be leased for mining purposes or licensed for timber operations else they can be diverted entirely for what has come to be known as non-forest purposes. In the context of corporations entering the forest area in the case of leasing of forest land it can be viewed as a situation where the powers of management are shared with the state as changes to the forest work plan occur with the coming in of such activities. Yet even in the situation of forests being diverted for non-forest purposes, corporations hold considerable power in the management and use of resources. It is this collaborative decision making between corporations and state or regulatory authorities in the management and use of forest resources that creates the framework for the exclusion of forest dwelling communities. This framework of exclusion is where decision making of natural resources is devoid of public participation but is based on the nexus between states and corporations to maximize the capital from the exploitation of resources.

There has been a conscientious attempt to transition from corporate social responsibility to corporate citizenship. It is somewhat hard to make sense

of something like "corporate citizenship" from the perspective of rights entitlement, particularly since social and political rights cannot be regarded as an entitlement for a corporation.[23] However, Matten and Crane suggest that corporations enter the picture not because they have an entitlement to certain rights, as an individual citizen would, but, rather, as powerful public actors that have a responsibility to respect individual citizen's rights. In an article by Matten and Crane[24] they argue that corporations enter the arena of citizenship in circumstances where traditional governmental actors fail to be the "counterpart" of citizenship. As one element of the group of actors most central to globalization, and indeed one of its principal drivers,[25] corporations have tended to partly take over (or are expected to take over) certain functions with regard to the protection, facilitation, and enabling of citizens' rights formerly an expectation placed solely on governments. We thus contend that "corporations" and "citizenship" come together in modern society at the point where the state ceases to be the only guarantor of citizenship.[26] Thus the link between corporations and citizenship is one where the corporation fulfills the vacuum created by the absence of the state or becomes a collaborative guarantor of citizenship rights along with the state. This is a tenuous concept in the context of rights over resources and displacement of local communities. The process of leasing out resources for mining and other extractive activities are seen not only as surrendering resources to private interests but in the absence of independent state actors checking corporate behavior and by corporations acting as collaborative guarantors of citizen rights, it reduces the democratic spaces available to counter corporate interests over resources through state institutions.

Corporate citizenship when described in relation to environmental commitments, takes on two forms which is the voluntary dimension and the obligatory or regulatory dimension. The voluntary dimension is where the corporation exercises its responsibility to set environmental standards for its functioning. This can range from its assurance to reduce adverse impacts from its activities to supporting other environmental initiatives. The obligatory or regulatory dimension refers to the aspect where legal standards set either

23 D.J. Wood & J.M. Logsdon, *Theorising business citizenship,* in PERSPECTIVES ON CORPORATE CITIZENSHIP: 83-103 (J. Andriof & M. Mclntosh eds., 2001).

24 Matten & Crane, *supra* note 19.

25 J.A. Scholte, GLOBALIZATION; A CRITICAL INTRODUCTION (2000).

26 Matten & Crane, *supra* note 19.

through statutory legislation or regulatory agencies are mandatory to comply with.[27] It is pertinent to make this distinction between the voluntary and obligatory dimension as it sets the foundation for describing the relationship between states and corporations in relation to natural resources. There is an emerging concept that merges the two notions of corporate and environmental citizenship called corporate environmental citizenship. This has been described as "all of the precautions and policies corporations need to take in order to reduce the hazard they give to the environment."[28] This only explains one dimension of what may be referred to corporate environmental citizenship, the other is an aspect peculiar to forest land where they collaboratively manage the resources with the state.

Corporate citizenship, particularly the voluntary dimension, is used to generate an assumption that firms can be trusted to address by themselves any harm their operations cause to the environment. This voluntariness can occur for two reasons – to avoid regulatory scrutiny and as a way of regulatory preemption. Corporations use voluntary standards as a method to showcase the efforts being taken to meet environmental standards which at times are beyond the regulatory requirements. This enthusiasm to move beyond regulatory requirements is seen as a method to justify self-regulation and reduce interference by the state through regulatory scrutiny. The other purpose this voluntary commitment serves is to preempt regulatory or legislative action. To elaborate, this is where corporations struggle to maintain environmental standards in the realm of voluntary commitments rather than allowing it to enter the formal legal requirements, it is the struggle to assert self-regulation of activities as opposed to state interference or interference by forest dwelling communities. Though this motivation of corporate citizenship is grounded on the role of the state as a policeman as Gramsci describes. If the state is seen as the enforcer of regulatory standards then the relationship between the state and corporations will be antagonistic. This however is not the case as states often collude with corporations to maximize the benefits from the exploitation of natural resources. Steve Tombs in his paper[29] on state-corporate symbiosis speaks about the state as a capitalist state where state decision-making is to

27 Özen & Küskü, *supra* note 21.

28 Özen & Küskü, *supra* note 21.

29 Steve Tombs, *State-Corporate Symbiosis in the production of Crime and Harm,* 1(2) STATE CRIME JOURNAL 170-195 (Autumn 2012).

create favourable conditions for the reproduction of capital within its boundaries. While this is a simplistic expression of the nuances of capitalist state, it acts as a window to understand the basis for the nexus between corporations and state bodies. In the same paper Tombs describes corporations as institutions that are created for the mobilization, utilization and protection of capital. Corporations, Tombs explains, are a recent historical phenomenon as wholly artificial entities whose very existence is provided for, and maintained through the state via legal institutions and instruments. It is almost as if the existence of the state is a necessary condition but not a sufficient one, as corporate citizenship is being seen as a manner in which corporations can act as guarantors of citizen rights to individuals.[30]

The relationship between corporations and states in forest areas is one of nexus where the capitalist state works with the corporate enterprise to maximize profits from harnessing natural resources. The role of the state as a policeman through regulatory agencies is only realized when forest dwelling communities bring these violations and nexuses to the attention of the judiciary or through protest. It is this functional role that forest dwelling communities have played since the colonial era in protecting India's forests. This nexus between corporations and states in forest areas are realized through state failure to put in place effective legal regimes, enforce existing laws adequately or respond effectively to violations. This state failure around law and regulation has been checked by forest dwelling communities when viewed historically through the environmental justice movements. Thus corporations in some ways exist both inside and outside the state and at times take over state function of either regulation or legislation through voluntary environmental commitments. An idea that captures this nexus has come to be known as 'state-corporate crime' which has been described as illegal or socially injurious actions that occur when one or more institutions of political governance pursues a goal in direct co-operation with one or more institutions of economic production and distribution. This understanding puts forth that the state in its efforts to realize its capitalistic requirements should not collude with corporations in the absence of adequate representation of other interests. Tombs in his article states that the role of the state as regulating contradictory class practices to maintain and restore equilibrium is needed.[31] The state becomes the site of negotiation

30 *Id.*

31 Tombs, *supra* note 29.

between these diverse and multiple interests but the prioritization of corporate interests is what makes this nexus problematic. The provisions within the existing environmental law framework that allow for avenues to challenge this nexus are the ones that are being subverted by the proposed changes that the present government is putting forth. What we are witnessing is a transition from the state as a regulator to self-regulation by corporations through the notion of corporate citizenship.

This departure from environmental citizenship to corporate citizenship was done to highlight the relationship between corporations, citizenship and the environment. When environmental considerations are brought into this milieu what one sees is the articulation of corporate responsibility to voluntary environmental objectives and the mandatory compliance with existing environmental laws.

Recent reports suggest that despite the stringent environmental standards imposed by existing laws, non-compliance by industries remains an issue in different sectors. This occurs because there is a lack of enforcement by the state agencies to protect natural resources. Further, corporations are only held accountable, and mostly by civil society organisations, for non-compliance after damage have occurred. The time-consuming court system also increases the adverse impact on the environment.[32] Tombs concludes his article on a critical note about this nexus where he declares that corporations engage in illegality at the prompting of or with the approval of the state authorities or they fail to respond to such illegalities. In the changes proposed in the TSR Subramanian committee report where corporations will gain their environmental clearance through a self-certification process by disclosing the project plan and its ability to pollute, it straddles this path between voluntary and formal legal commitments. The corporations are trusted to reveal the impact of their project and suggest solutions which can be viewed as voluntary and they receive formal legal recognition upon the granting of clearance. This poses a peculiar scenario where the state as opposed to being the regulator and standard setter accepts the standards offered by the corporations.

32 Environmental Compliance and Enforcement in India: Rapid Assessment, *available at* https://www.oecd.org/env/outreach/37838061.pdf (last visited April 20, 2016).

IV. Inter-Relationship Between Environmental Citizenship and Corporate Citizenship

As discussed above while environmental citizenship aims to assert the powers of local communities over resources, corporate citizenship attempts to exploit natural resources with the support of the state machinery. The inter-relationship between these two forms of citizenship which are being asserted simultaneously is one of struggle expressed through legal and political challenges. The present environmental legal framework allows for such a challenge as it allows for corporate citizenship's control over natural resources to be challenged by local communities using provisions of the FRA and EIA processes. This challenge results in the prioritization of one form of citizenship over the other. Going back to the Vedanta judgement where the gram sabhas were asked to provide consent for the entrance of the bauxite mine, it was the prioritization of local communities rights over resources in relation to the corporate claims over it. While in the case of Chattisgarh, Jharkhand and Karnataka illegal mining continues despite it being legally challenged, these are instances where corporate citizenship and control over resources eliminates the tenets of environmental citizenship. This prioritization is based on the different environmental politics prevailing yet there is increased suppression of environmental citizenship claims to resources and the strengthening of corporate citizenship with the support of the state machinery.

The recent changes proposed to the environmental laws by the present government eliminate any legal avenue for corporate citizenship to be challenged. It does so by shaving away rights of local communities over their resources and public participation in the decision-making of around these resources. In the section below I discuss the proposed changes and their impact on the tenets of environmental citizenship as derived from the environmental justice movements in India.

V. Changes in the Environmental Legal Framework

There has been a drastic shift in the environmental legal framework since the coming in of the present government. The changes have been at different levels but the particular changes that I would like to focus on are:

1. The idea of utmost good faith as proposed in the TSR Subramaniam report;

2. The land acquisition ordinance with focus on the changes in the consent provisions;
3. Dilutions of the FRA since late 2014; and
4. The crack down on environmental organizations and the arrest of Priya Pillai, a senior campaigner with Greenpeace.

I chose to focus on these particular changes because they illustrate how the tenets of environmental citizenship of forest dwelling communities are being altered. The tenets of environmental citizenship that I would like to focus on are participation in environmental decision making and control over the use and management of forest resources.

Principle of Utmost Good Faith in the TSR Subramanian Report

The TSR Subramanian committee was set up on August 2014 with the mandate to amend five key environmental statutes namely the Environment (Protection) Act, 1986 , Forest (Conservation) Act, 1980, Wildlife (Protection) Act, 1972, Air (Prevention and Control of Pollution) Act, 1974 and the Water (Prevention and Control of Pollution) Act, 1981. The committee submitted its report on November, 2014. The committee went on to make a host of recommendations but the particular recommendation that I would like to examine is the principle of utmost good faith borrowed from Insurance law. In Chapter 8 of the report by the High Level Committee they propose a new legislation called the Environmental Laws (Management) Act. The objective of the proposed new law is to act as an umbrella law which will also provide the legal architecture for a 'single window' environmental clearance process. In the summary of the legal mechanisms of the proposed new law the report reads as follows:

> Drawing inspiration from this concept under the insurance law and to meet the desirability of a 'single window', the committee being alive to the legal position that the lacunae noted could not be addressed through executive orders, has decided to recommend the following course of action:
>
> (i) Parliament to enact a law that would constitute 'National Environment Management Authority' (NEMA) at the Centre and 'State Environment

Management Authority' (SEMA) in states – both comprising experts in the different fields – which will deal with applications for clearances and permissions under environment related laws at the Central and State level respectively – thus a single window.

(ii) The new law – Environmental Laws (Management) Act (ELMA) would oblige an applicant to disclose everything about his proposed project, especially its possible potential to pollute and the proposed solution thereto– in short all that would be relevant to making a decision on granting or refusing the clearance applied for. The proponent and the experts who support his case will be required by law to certify that 'the facts stated are true and that no informationthat would be relevant to the clearance has been concealed or suppressed'.

(iii) On the basis of this application and certifications, the matter will be examined either by the Central authority NEMA or the state level authority SEMA – depending on the category of the project as notified. The inspector, as a rule, has limited role to play in the proposed clearance process – in any given case the option of site inspection at any time is always reserved to the authorities. In respect of recommendations of NEMA for grant of clearance or rejection, the final decision will be by the Central Government.

(iv) Introducing the concept of 'utmost goodfaith', if at any time after the application is received – even after the project takes off – it is discovered that the proponent had in fact concealed some vital information or had given wrong information or that the certificates issued by the experts suffer from similar defects, severe

> consequences will follow under the new Act ELMA; and they include heavy fine, penalties including imprisonment and revocation of the clearance, – and in serious cases arrest of the polluter. [33]

As seen in the four part process proposed for granting environmental clearance there is increased reliance on the information to be provided by the project proponent about the potential environmental impact of the project. This process of placing the information before the state and national environmental management authorities to make the decision does not mention the element of consent or consideration of the project affected communities. The only check and balance of whether the information provided by the proponent is authentic is the principle of utmost good faith. There is initial trust that the project proponent will be transparent in the declaration of the information. However, in the event of wrong information or an act of concealing information, he will subject to fines and penalties. The principle of utmost good faith only extends to the question of environmental impact, the question of communities to be impacted by the project is completely sidelined. The public hearing process does not feature in the decision making process of granting environmental clearance. The forest dwelling communities more vulnerable to the impacts from industrial projects do not feature in the proposed decision making process for granting environmental clearances. Though the recommendations of the High Level Committee went on to be rejected by the parliamentary standing committee, the Ministry of Environment, Forests and Climate Change introduced the Environmental Laws (Amendment) Bill in August, 2015 to amend the Environment Protection Act, 1986. It was open for public comment in October, 2015. The amendments continue to push for a bureaucratization of environmental governance and include elements of the principle of utmost good faith where companies are penalized for non-compliance of environmental standards set at the time of granting the clearance.

33 Report by the High Level Committee to Review Various Acts Administered by Ministry of Environment, Forest & Climate Change, Government of India (November 2014) *available at* http://envfor.nic.in/sites/default/files/press-releases/Final_Report_of_HLC.pdf (last visited April 20, 2016).

Introduction of the Land Ordinance and its Impact on the Consent Provision

The new government introduced amendments to the existing Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 ('LARR') through an ordinance in 2014. Since the earlier act was protested as being restrictive by industrial bodies; the ordinance was seen as a means to bring about some flexibility into the procedure. The particular aspects of the procedure which were viewed as hurdles was Sec 2(2)(b)(1) and (2) of the Act which requires consent of at least 80% of the affected families for private companies and about 70% in the case of public-private partnerships. The ordinance excludes a range of more projects whether in the public or private sector from the condition of getting consent from affected families. Projects to be excluded include all those relating to defence production, power projects and other projects for rural infrastructure, housing for poor, industrial corridors and PPP projects. Since most of land acquisition has been for such power and irrigation related projects, the exemption given from getting the consent will be disastrous for the farmers.[34]

This exclusion of consent can be seen as an effort to reinforce the powers that flow to the State from the doctrine of eminent domain. This is similar to the efforts being made to dilute the public hearing aspect of the environmental clearance process. Though in August, 2015 the ordinance was allowed to lapse after protests spread across the country in opposition to the ordinance. Given than decisions relating to land acquisition is a state subject, different states are now leading the effort to amend provisions of the LARR. Tamil Nadu, for instance, has amended the Act proposed by the Center by inserting a new Section 105 where land acquisition for industrial purposes and highways will be exempt from the provisions of the Act. The LARR had taken a progressive step of incorporating provisions which required gram sabha consent for land acquisition which should have remained as it protected the rights of communities impacted by such acquisition.

34 Based on the amendments proposed in The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Ordinance, 2015 *available at* http://www.prsindia.org/uploads/media/Land%20and%20R%20and%20R/larr%202nd%20ordinance.pdf (last visited July 12, 2016).

Dilution of the FRA, 2006

The FRA was a landmark legislation that aimed at correcting the historical injustice experienced by forest dwelling communities. The Act was a product of a unique political struggle under the banner of the Campaign for Survival and Dignity. The Act identifies thirteen rights under Section 3 which guarantee the forest dwelling communities with ownership of forest land as well as rights to use and control the resources within the forest areas. The Ministry of Environment and Forests in 2009 made it mandatory that the consent of the gram sabha be obtained for industrial projects before applying for permission to the Ministry of Environment and Forests. The then UPA government tried to withdraw this order but the Supreme Court's interpretation of the FRA in the Niyamgiri judgement where the consent of the 12 gram Sabha's was required before the beginning of the mining operations made it difficult.[35] The FRA in many ways became a law that fundamentally challenged the authority of the state in forest areas by legally reinstating the historical right of ownership and control of forest dwelling communities. This law was notoriously categorized as a hurdle for development as forest rights of forest dwelling communities had to be settled before any clearance process could begin and further the consent of the forest dwelling communities was needed.

The present government in its desire to relax the procedure for private companies and governments to gain access to resources has been attempting to dilute the FRA. This became evident when the Maharashtra forest department issued the Maharashtra Village Forest Rules, 2014 where the forest department has regained control of trade in forest resources and management despite the FRA which rests these rights in the local community. This was seen as an attempt by the forest department to regain control in the decision-making around forest areas. The Ministry of Tribal Affairs under Jual Oram challenged the interpretation of the FRA that the forest department continued to have rights of management and control over trade of forest produce but under pressure from the Ministry of Environment and Ministry of Transport he was asked to withdraw this directive.[36]

35 Orissa Mining Corporation Ltd. vs Ministry Of Environment & Forest, WRIT PETITION (CIVIL) NO. 180 of 2011 (Supreme Court of India).

36 Shruti Agarwal, *Tribal Affairs Ministry Gives into Pressure and 'okays' village forest rules* (January, 2016) *available at* http://www.downtoearth.org.in/news/tribal-affairs-ministry-gives-in-to-pressure-okays-village-forest-rules-52402 (last visited April 18, 2016).

This comes against the backdrop of the challenge to consent provisions in late 2014. The Business Standard reported that the different ministries including environment, tribal affairs and law met under the directive of the Prime Minister's Office to systematically do away with the consent requirement and replace it with a requirement of mere consultation with forest dwelling communities.[37] In an unprecedented move the Government of Chhattisgarh in 2016 cancelled the rights of forest dwelling communities in parts of Surguja district to facilitate a coal mining project.[38] This is another instance where consent provisions were viewed as a hurdle to development, rather than a democratic means for discussion.

Cracking down on Environmental Organizations and Activists

On January 11, 2015 Priya Pillai a senior campaigner from Greenpeace was prevented from flying to London where she was to present before British legislators the human rights violations experienced by local communities in Mahan, Madhya Pradesh.[39] This restriction was because she among many other environmental activists were placed on a look out notice and were being labelled as disrupting India's economic activities. This incident was immediately followed by freezing Greenpeace's accounts on the grounds that they were violating the Foreign Contributions Regulatory Act, 2010 (FCRA).[40] The Delhi High Court in January, 2015 ruled in favour of Greenpeace, allowing the usage of foreign funds since they were not indulging in any 'anti-national' activity. Despite this victory the FCRA has been used as a political tool to shut down many civil society organizations, particularly those working on environmental issues. This particular use of the FCRA needs to be read with the other changes that have

37 Nitin Sethi, *Taking away forests: Tribal consent regulations to be diluted,* BUSINESS STANDARD (October 2014) *available at* http://www.business-standard.com/article/economy-policy/taking-away-forests-tribal-consent-regulations-to-be-diluted-114103100022_1.html (last visited April 22, 2016).

38 Nitin Sethi, *Chhattisgarh government cancels tribal rights over forest lands,* BUSINESS STANDARD (February, 2016) *available at* http://www.business-standard.com/article/current-affairs/chhattisgarh-govt-cancels-tribal-rights-over-forest-lands-116021601327_1.html (last visited April 22, 2016).

39 Meena Menon, *Greenpeace campaigner Priya Pillai offloaded at airport,* THE HINDU (January 11, 2015) *available at* http://www.thehindu.com/news/national/greenpeace-campaigner-priya-pillai-offloaded-at-airport/article6777773.ece (last visited April 22, 2016).

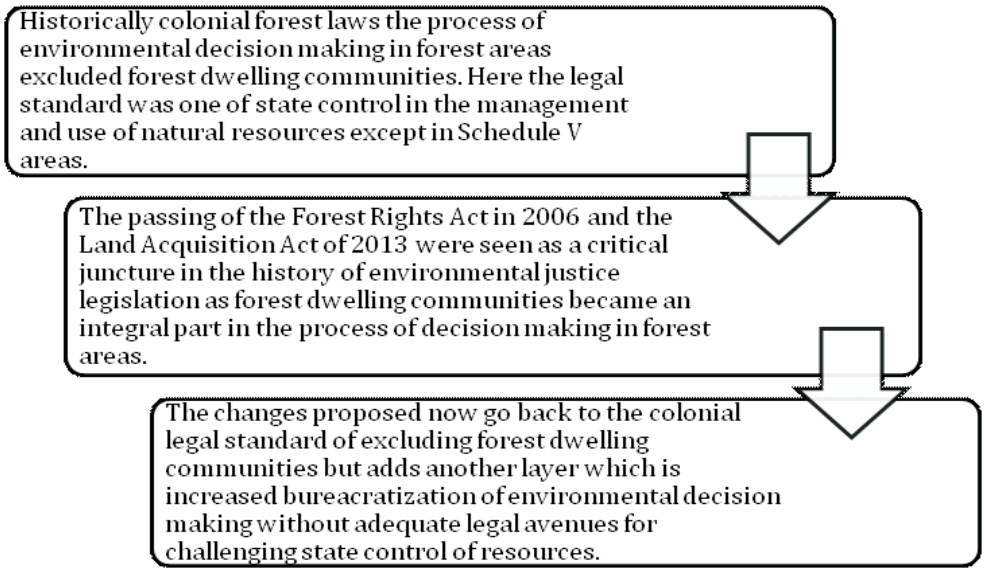
40 Jason Burke, *Greenpeace bank accounts frozen by the Indian Government* (April, 2015) *available at* http://www.theguardian.com/world/2015/apr/10/greenpeace-bank-accounts-frozen-by-indian-government (last visited April 18, 2016).

been highlighted in the paper. Civil society organizations are an essential layer in the assertion of environmental citizenship where they hold governments and corporations accountable to human rights and environmental violations through on the ground campaigns to legal activism. To reduce them to mere anti-national elements is another instance of the shrinking democratic space in environmental politics in India.

VI. Analysis of These Changes and its Impact on Environmental Citizenship in India

Transitioning back to Colonial Standards of Forest Management

These changes can be seen as creating a shift in the legal standards for decision-making around environmental issues. It can also be viewed as a process of degenerating the rights of forest dwelling communities by bureaucratizing environmental governance. In the figure below I elaborate on the shift in legal standards which will lay the foundation of the impact of these changes on environmental citizenship.



In the figure above the shift in the legal standard is regressive which undoes the steps taken with the passing of the FRA in 2006. The greater impact though is in the sensibility of environmental citizenship that has come to be embedded in the struggles of forest dwelling communities after the passing of the FRA where the claims being made by the movement had gained the shelter of law. This process of rights degeneration and delegitimization of their participation in the management and control of forest areas places them in a precarious position which existed prior to the FRA. This process of rights degeneration also results in reinforcing the historical injustice faced by forest dwelling communities. This only strains the relationship between forest dwelling communities and the state authorities as their recognized rights of free, prior and informed consent are not respected. The insurgent citizenship which was an essential element which opened up spaces within environmental law for forest dwelling communities to actively participate is now transitioning back to the colonial standard of exclusionary conservation. Through the denial of the right to participation in environmental decision making within forest areas the nexus between state authorities and corporations will remain unchallenged through legal processes. It will delegitimize the rights of management and control vested with forest dwelling communities to reinstating the forest department as state agency responsible for governing the forests. This is problematic in many ways but fundamentally this exclusionary form of conservation will risk the opening up of India's forests to large scale mining.

Conflict and Environmental Citizenship

Environmental citizenship in India is a product of conflict between competing interests over natural resources. The forest areas where such conflicts have played out through history have shown that it has a transformative influence over the law and state functions in these areas. The conflicts over ownership, control and management over forestland resulted in the political struggle which eventually led to the passing of the FRA. The current changes proposed seek to avoid conflict by quelling participation and dissent through shrinking the legal avenues where forest dwelling communities could represent their interests. It can be argued that law is both a maker of hegemony and a means of resistance. The ability of environmental law to accommodate resistance is reduced and instead resistance to the use of forest resources has to operate outside the realm of law. This inability of environmental law to accommodate multiple interests has rendered the law primarily as an instrument

of hegemony where the decisions of state and private enterprises are prioritized and legitimized. Environmental law is being pushed to enable the expropriation of resources and resistance is being managed as issues of maintenance of 'law and order'.[41] The framework of environmental law in India – where resistance was allowed to be expressed in the decision making through provisions seeking consent of the impacted community within the FRA and the LARR are now seen as unnecessary and burdensome. The language configures the motivation for the amendments to which is to streamline or make the process simpler to comply. This exercise of simplification is seeing the development of a process where local consent is not undertaken as it makes the process more complex and prolonged. In an effort to streamline the decision making around forest areas I believe that we are seeing the rise of what I refer to as an environmentalism of convenience. An environmentalism of convenience is where compliance to environmental laws is made easy and simple. Where ease of compliance is prioritized over addressing the difficult questions of consent and impact on local populations.

Amita Baviskar in her article about the cultural politics of nature, highlights that absence of conflict does not necessarily indicate harmony but 'symbolic violence' when relations of domination are transfigured into affective relations which begin to operate.[42] The role of law in creating the façade of harmony is achieved by reducing legally recognized conflicts or conflicts that have a basis in a legal claim as seen here by degenerating the rights of forest dwelling communities. This will only result in the making of social relations that gain power and legitimacy through this convenient legal arrangement. Conflict accommodated within the contours of law will ensure that rights over resources are adequately negotiated. This de-recognition of the conflict that emerges from forest dwelling communities within the law will only push for resistance being seen as communities taking law into their own hands. This resistance then is seen by the law in multiple forms either as sedition or disrupting public order. This environmentalism of convenience has rendered the participation of forest dwelling communities and their rights over forest areas as inconvenient and cumbersome.

41 Nandini Sundar, *Laws, Policies and Practices in Jharkhand,* 40(41) ECONOMIC AND POLITICAL WEEKLY 4459-4462 (Oct. 8-14, 2005).

42 Amita Baviskar, *For a Cultural Politics of Natural Resources,* 38(48) ECONOMIC AND POLITICAL WEEKLY 5051-5055 (Nov. 29 - Dec. 5, 2003).

VII. Corporate Citizenship Being Strengthened

Corporate citizenship as described earlier as a notion gets strengthened through the concept of utmost good faith. The state vests complete trust in the corporation to reveal the damage that its activities will cause to the environment. This is a push towards the voluntary dimension of corporate citizenship where the corporations begin to self-regulate. The state intervenes only when there is misinformation or omission about the potential environmental damage. This is a peculiar system where the state lets go of its role as a regulator but only interferes with the clearance process at the time of certification. This reduced role of the state and increased trust in corporations to self-regulate only reaffirms the understanding of corporate citizenship. The reduced role of the state also paves the way for corporations to fill in the pockets where the state is absentee for instance in the granting of citizenship rights to individuals. It increases the power of corporations to manage natural resources provided they reveal the nature and extent of the damage that will be caused. This will protect them from regulatory scrutiny and they begin to duplicate the functions of state authorities around resources.

The state-corporation nexus as discussed earlier will be strengthened as the role of the state from a regulatory state to a capitalist state is enabled through the increased trust for corporations to manage environmental standards. In some instances self-regulation is seen as way to address red-tapism yet whether this may result in lower environmental standards is yet to be seen. The level of decision-making around forest resources is restricted to the state and corporate entity. This frame coupled with reduced participation has drastically changed the nature of environmental citizenship. Beyond the power to self-regulate corporate citizenship has strengthened with the idea of compensatory afforestation making its way back into the forest management strategies. Compensatory afforestation calls for afforestation in exchange for the damage done to the forest resources. This method only enables corporations to take control of forests and replace it with another area allocated for afforestation where forest dwelling communities do not have claims to forest resources. These factors are strengthening the notion of corporate citizenship in India's forests.

VIII. Increasing the Burden on the Judiciary

The coming together of reduced participation of forest dwelling communities in the governance process as well as increased self-regulation capacity of the corporations results in courts and the National Green Tribunal (NGT) as an avenue for negotiating environmental conflicts. Public interest litigation will be seen as an active tool in addressing grievances of forest dwelling communities. This only pushes conflict from the arena of local governance structures to the judiciary. This will increase the burden on the courts and the NGT in resolving environmental disputes. The power in incorporating these grievances within the decision-making around the use of forestland was to ensure that communities articulated their decisions without having to go through the tedious process of filing cases. This will adversely impact the forest dwelling communities in accessing justice as approaching courts and the NGT are both cost intensive and time consuming. The advantage of incorporating the grievances in the decision making early on is that it impacts the ongoing decision about the diversion of forest land whereas in the case of courts it may take longer and considerable environmental and human rights violations may have already taken place.

The judiciary and the NGT have already having played an important role in the shaping of environmental jurisprudence and our understanding of environmental citizenship through landmark cases. Yet this increased reliance on courts by reducing other legal avenues can be tricky as local communities impacted by a development project will invest all their resources in courts without a guarantee of a potential win though such cases may stall the projects continuation.

IX. Conclusion

The shift in environmental citizenship has occurred within the law though not extending to the language of resistance which will now be forced to function outside the blanket of law. India had positioned itself in a unique space where environmental justice claims were explicitly part of the legal framework, this shift can be seen as the creation of the inconvenient environmental citizen who will always be outside the ambit of the law. The model of environmental citizenship highlighted earlier now sees a change where they do not form an

integral part of the decision making process around environmental issues but begin to be viewed as a hurdle in the realization of different economic activities. In the movie 'Dweepa' the protagonist who refuses to leave his village is seen drowning in his traditional clothes at the altar of the sacred temple. Whether this process of rights degeneration will result in violent and tragic consequences for forest dwelling communities is yet to be seen as these legal amendments fundamentally change the legal environmental citizen to an inconvenient hurdle.

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Law and Ecological Conflicts: The Case of the Sacred Cow in India

Aurélien Bouayad*

The status of the cow in India has not only been the object of academic debates, but also of fierce and impassionate legislative and judicial battles. These disputes have notably crystalized over the admissibility of ritual sacrifice of cows by Muslim practitioners for the holiday of Bakr-Id, with the issue reaching the courts on several occasions. This paper explores the terms of this legal debate, and the solutions that have been progressively adopted by the legislative and judicial institutions after the independence. Particular attention will be paid to the processes involved in the apprehension of the religious justification of this practice by the judiciary. Eventually, the Indian legal system has failed at acknowledging the importance and the complexity of the Muslim minority's ecological beliefs and traditions in this long-standing dispute.

I. Introduction

If the veneration of the cow in Hindu culture constitutes almost a *cliché* of the diversity of human-animal relations throughout the world, there is another religious tradition concerning this animal that has attracted relatively less attention outside the borders of India: their ritual sacrifice by Muslims for Bakr-Id. These two traditions have logically been the source of important tensions between the two main religious communities of the country. Yet, deciding this conflict has proved a delicate task for the legislative and judicial institutions of India after independence. Should the practice be accommodated in the name of the protection of religious freedom and cultural identity? Or should the peculiar protection afforded to the animal by the Hindu majority prevail?

For the purpose of this discussion, I propose to consider these traditions as *ecological*. The term should not be understood in its political sense, where it refers to a political ideology that aims at creating an ecologically sustainable society; nor should it be understood in its scientific sense, where it refers to the

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study of the interactions among organisms and their environment. Rather, the use of the notion of ecology in this context refers to the specific ways in which a given group interacts with, and exploits its environment, including domesticated resources - and in turn creates the distinction between different ecologies in a given context.[1] Viewing this conflict not merely as a clash between religious groups, but as a conflict over each groups' practical and symbolic relationships with its environment, adds an interesting dimension to the debate.

This case constitutes a perfect entry point into the challenges of the legal management of ecological conflicts. Firstly, because it presents two radically opposed (and easily identifiable) sets of beliefs and practices relating to a specific animal —*i.e.* one particular element of the environment shared by the two communities. Secondly, because the legal debate has revolved mainly around religious and cultural arguments; considerations about health issues or animal rights, that are usually central in ecological conflicts in Western liberal democracies, are at best peripheral in this case. And thirdly, because of the rich, numerous and observable traces produced by judicial and legislative institutions of how the law has been struggling to decide this conflict, which enable the identification and the discussion of the concrete processes involved in the legal apprehension and management of religious diversity.

This paper thus aims at critically investigating the ways in which the Indian legal system has addressed this conflict.[2] In Part 2, I discuss the nature and the origin of these two opposing ecological rationalities, and I try to place the contemporary legal dispute in its complex historical and political dimensions. In Parts 3 and 4, I explore the legislative and judicial responses that have been

1 This particular use of the notion of *ecology* has recently emerged in environmental studies in order to avoid concepts such as "nature" or "environment" that are considered too narrow and culturally situated. *See* for instance BRUNO LATOUR, POLITICS OF NATURE (Harvard University Press, 2004), and PHILIPPE DESCOLA, BEYOND NATURE AND CULTURE (University of Chicago Press, 2013).

2 For the purpose of this article, I will concentrate solely on practices of ritual sacrifice. It should be noted here that cattle protection laws have engendered other legal conflicts with Muslim communities in India, especially concerning commercial slaughtering, and sale and export of cattle meat and products (which have however relied almost uniquely on economic rather than religious or cultural arguments). For cases relating to these questions, *see* for instance Mohammed Faruk v. State of Madhya Pradesh, AIR 1970 SC 93 and State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat, AIR 2006 SC 212.

progressively adopted after independence, in order to discuss the legal rationale behind these decisions in Part 5.

II. The Origin of Two Conflicting Ecologies

The sacred cow, a complex heritage

The veneration of the cow in Hindu culture remains a complex, evolving, and somewhat equivocal ecological tradition. Although there is ample evidence that the cow has been a symbol of wealth in India since ancient times, it appears that they may not have always been as revered and protected as they are today. Still, many writers have consistently pointed to old religious scriptures to argue that the sanctity of *gaumata* ("mother cow") constitutes a foundational belief of Hinduism.[3] Additionally, several legends in the Indian folklore tend to support the view that the cow has for long enjoyed a particular status in India.[4]

However, recent researches have contributed to raise doubts about the origin and the continuity of this tradition. Authors like Dwijendra Narayan Jha[5] have argued that the "holiness" of the cow is ultimately a myth to which fundamentalist Hindu organizations have clung. Indeed, historical evidence as well as various accounts in the *Vedas* seem to indicate that practices of cow sacrifice and beef eating were part of many important ceremonial occasions.[6] Others have argued that the prohibition of cow sacrifices and beef eating in Hindu culture has been significantly influenced by Buddhism and Jainism.[7] Still others, like Marvin Harris, have argued that the origin of this belief was to be found in economic rather than religious motivations, pointing at the heavy reliance of the Hindu population on the cow for dairy products and for tilling

3 Authors generally refer to verses from the Rig Veda, which, apart from containing various prayers and hymns in praise of the cow, have also at places equated it with God. The cow is sometimes referred to as *Aghnya,* meaning one not to be killed. Additionally, the sanctity of the cow is also often associated with the cult of Krishna.

4 For instance, a legend tells the story of the Chola King Manu Needhi Cholan, who sentenced his own son Veedhividangan to death after he heard that the calf of a cow had been killed under the wheels of his son's chariot.

5 Dwijendra Narayan Jha, The Myth Of The Holy Cow (Verso, 2002). The book triggered a violent controversy in India. *See also* Marvin Harris, *India's Sacred Cow,* 34 Cultural Anthropology 201 (1989).

6 S.M. Batra, Cows and Cow-slaughter in India: Religious, Political and Social Aspects (1981).

7 Ram Punyani, *Beef eating: Strangulating History,* The Hindu, August 14, 2001.

the fields, and on cow dung as a source of fuel and fertilizer.[8] In any case, it appears that the commonly held belief that the cow has always been inviolable and sacred in Hindu culture remains a controversial issue.

To understand this debate, it is further necessary to place it in its complex historical and political dimensions. Indeed, the status of the cow has on several occasions served as the support of political mobilisations in Modern India, especially during the colonial period, as the practices of cow slaughter and beef eating significantly intensified with the arrival of the British in the eighteenth century. The first slaughterhouse in India was hence built in Calcutta in 1760 by Robert Clive, the then Governor of Bengal.[9] The insensitivity of the colonial rulers to the cow thus resulted in obvious tension with the Hindu population, a situation which triggered violent uprisings on several occasions, and later helped structure the independence movement.

The reverence for the cow notably played an important role in the Indian Revolt of 1857 against the East India Company, as rumors spread that the paper cartridges used by Hindu and Muslim sepoys were greased with cow and pig fat. While loading the gun, the soldiers had to bite the cartridge open to release the powder. Knowledge of the origins of the grease caused many "Native" soldiers to feel that the British were forcing them to break edicts of their religion.[10] The rebellion, which lasted for more than a year, resulted in the end of the East India Company's rule in India. In August, by the Government of India Act, 1858, the company was formally dissolved and its ruling powers over India were transferred to the British Crown.

In the period that followed, the veneration of the cow continued to serve as a critical means of political mobilization against the British rulers. In the 1870s, cow protection movements, which first appeared in Punjab, started to spread rapidly all over North India and to Bengal, Bombay and other central provinces. The organizations rescued wandering cows, created *gaushalas* (cow refuges), and demanded a ban on cow-slaughter. The issue was then relayed by

8 Marvin Harris, *The Cultural Ecology of India's Sacred Cattle,* 7(1) CURRENT ANTHROPOLOGY 51 (1966).

9 BARBARA D. METCALF & THOMAS R METCALF, A CONCISE HISTORY OF MODERN INDIA 83 (Cambridge University Press, 2006).

10 KIM A. WAGNER, THE GREAT FEAR OF 1857: RUMOURS, CONSPIRACIES AND THE MAKING OF THE INDIAN MUTINY 28-29 (Oxford University Press, 2010).

many leaders of the independence movement, including Gandhi, in order to mobilize the public to participate actively in the freedom movement.[11] However, although these movements were primarily targeting the colonial power, they also contributed to escalating tensions between Hindu and Muslim communities, resulting in numerous violent riots throughout this period. In 1893, during the peak of the cow protection movement and immediately after an order from a British magistrate who asked Muslims who wanted to sacrifice to register, riots between Hindus and Muslims in Azamgarh district caused at least a hundred casualties.[12] Post-independence, the issue has continued to occupy a significant place in regional and national political life, as Hindu nationalist parties such as the BJP have unremittingly pushed cow protection as an integral part of their political agenda.[13]

At this point, it is crucial to note that the tensions between the two communities have significantly crystalized over the ritual slaughter of cows by Muslims on the occasion of Bakr-Id.[14] I shall therefore explore the origins of this tradition.

The ritual slaughter of the cow in Muslim culture

Bakr-Id (also known as Eid al-Adha, "Festival of the Sacrifice") is considered the most important Muslim holiday. It honours the willingness of Ibrahim (Abraham) to sacrifice his son Ismail at Mina, near Mecca, as an act of submission to God's command, before God intervened, through his angel Jibra'il (Gabriel) and informed him that his sacrifice had already been accepted.[15] In remembrance of this episode, Muslims who can afford it have to sacrifice an animal (a cow, a camel, a goat, a sheep, or a ram - depending on the region) as a symbol of Ibrahim's willingness to sacrifice his son.

Since the Quran is silent on the specifics of the sacrifice, the question of whether the cow is specifically recommended for sacrifice, or is only among the

11 PETER VAN DER VEER, RELIGIOUS NATIONALISM. HINDUS AND MUSLIMS IN INDIA 86-95 (University of California Press, 1994).

12 *Id.,* at 92-3.

13 Manoj Joshi, *Hindutva Politics and the Holy Cow,* THE DAILY MAIL, February 4, 2012.

14 Hence, in 1916, Hindu protesters endeavoured to prevent a cow sacrifice in Patna, resulting in a riot that took the life of several Muslims, in spite of the presence of armed police.

15 Contrary to the account of the episode in the Bible, there is no explicit mention in the Quran of an animal replacing Ibrahim's son; rather, he is replaced with a "great sacrifice" (QURAN, 37: 100-111).

permitted animals, has been the subject of great discussion.[16] And this debate has indeed been central in the different court cases where the legality of the ritual has been under review. Since the Quran is silent on this, the most important written source that explicitly discusses the ritual is the Hedaya, a commentary on Islamic law, which states "the sacrifice established for one person is a goat and that for seven a cow or a camel".[17] Additionally, some hadiths from the Shahi Bhukari mention slaughter or sacrifice of cows.[18]

Although it is generally assumed that cow sacrifice appeared and became widespread in India when the territory was invaded by various Islamic rulers of Arab and Central Asian origin after 1000 AD, it should be noted that most Mughal emperors have tended to prohibit, or at least limit the practice during their reign.[19] Hence, in his testament to his son and successor Humayun, the Mughal emperor Babur wrote:

> The realm of Hindustan is full of diverse creeds. Praise be to God, the Righteous, the Glorious, the Highest, that He had granted unto you the Empire of it. It is but proper that you, with heart cleansed of all religious bigotry, should dispense justice according to the tenets of each community. And in particular refrain from the sacrifice of cow, for that way lies the conquest of the hearts of the people of Hindustan; and the subjects of the realm will, through royal favour, be devoted to you. [20]

Nevertheless, the ritual of sacrificing a cow for Bakr-Id has persisted in most parts of South Asia until today. Despite this relative lack of scriptural references, it appears that the tradition has developed and been maintained

16 *See* for instance MURRAY T. TITUS, ISLAM IN INDIA AND PAKISTAN: A RELIGIOUS HISTORY OF ISLAM IN INDIA AND PAKISTAN 154 (2005) (hereinafter *Titus*).

17 CHARLES HAMILTON, THE HEDAYA, OR GUIDE: A COMMENTARY ON THE MUSSULMAN LAWS (1791). *See* Section V(2) of this article for further discussion on the translation of the Hedaya.

18 Hadiths are reports describing the sayings, actions, and habits of Muhammad; The Shahi Bhukari is considered to be one of the most important sources of law after the Quran for Sunni Muslims.

19 S.M. JAFFAR, THE MUGHAL EMPIRE FROM BABUR TO AURANGZEB (1936).

20 *Id.,* at 89.

mostly as an alternative to individual sacrifices, allowing the impoverished members of Muslim communities to take part in the celebration. Indeed, by allowing the sacrifice of a single animal for the benefit of seven persons, the tradition has proved central in "democratizing" the holiday in South Asia.[21] In India, the practice is especially present in states with large Muslim communities such as Assam, West Bengal, and Kerala, where Muslims respectively account for 34%, 27%, and 26% of the population.[22] Consequently, it has remained a source of antagonism between the two most important religious communities of the country – an antagonism that has been not only the subject of academic debates, but also of fierce and impassionate political and judicial battles.

As noted above, the current tensions surrounding this practice are in a large part the result of historical and political dynamics that developed during the colonial period. At the time of independence, which resulted in terrible communal violence, regulation on this issue was central. Yet, as we will see in the next part, the Constituent Assembly was not able to push for the adoption of a uniform legislation at the central level on this issue.

III. Cow-Sacrifice and the Law

Despite several attempts to include a total ban on cow-slaughter in the Constitution, the prohibition was eventually adopted as a non-justiciable provision under Article 48. Individual States were thus eventually entrusted to regulate on the issue by adopting laws governing cattle slaughter, which consequently vary slightly from State to State. And as the Central Government remained silent on the issue of the ritual sacrifice of cow on Bakr-Id, it was ultimately the responsibility of States to decide whether or not the practice should be accommodated locally.

Constitutional provisions

In 1940, seven years before Independence, a proposition for a complete prohibition of cow-slaughter was first issued by one of the Special Committees of the Indian National Congress. An amendment for the inclusion of an article seeking to "prohibit the slaughter of cow and other useful cattle" was then

21 *Titus,* at 154-7.

22 Government of India, Census of India (2011). Islam constitutes a minority religion in India, with 14% of the country's population (i.e. approximately 172 million people) identifying as adherents.

moved before the Constituent Assembly. The demand, which revolved mainly around economic rather than religious arguments, aimed at incorporating the clause in the Fundamental Rights chapter of the Constitution – thus preventing individual States from opting out of the ban.[23]

However, the proposition faced considerable opposition in the Assembly, with arguments ranging from the usefulness of cattle products for exportation, to undue discrimination against the non-Hindu population – although, here again, the issue of ritual sacrifices for Bakr-Id was ignored in the discussions. The amendment was hence debated, and eventually adopted as a Directive Principle[24] under Article 48 of the Constitution. Entitled "Organisation of agriculture and animal husbandry", it reads as follows:

> The state shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

'Preservation, Protection and Improvement of Stock' was consequently placed under the State List of the Constitution,[26] thus empowering individual states to legislate on the matter. Their freedom to manoeuvre appeared at first limited, as the instruction resulting from Article 48 was seemingly straightforward in enjoining State Governments to adopt laws prohibiting cow-slaughter. Yet, only a few months after the promulgation of the Constitution, the Central Government sent a letter to State Governments directing them to refrain from adopting a total ban, arguing:

> Hides from slaughtered cattle are much superior to hides from the fallen cattle and fetch a higher price. In the absence of slaughter, the best type

23 MINISTRY OF AGRICULTURE, GOVERNMENT OF INDIA, REPORT OF THE NATIONAL COMMISSION ON CATTLE (2002) (hereinafter *Ministry*).

24 In India, the "Directive Principles of State Policy" constitute fundamental guidelines for the State governments to be applied in the process of law and policy-making. These provisions, contained in Part IV of the Constitution, are however not enforceable by courts.

25 INDIA CONST. art. 48.

26 Entry 15 of List II of the Seventh Schedule of the Constitution.

> of hide, which fetches good price in the export market, will no longer be available. A total ban on slaughter is thus detrimental to the export trade and works against the interest of the Tanning industry in the country. [27]

These contradictory directives, resulting from a clash between secularist and religious agendas, coupled with antagonist economic rationales, can certainly explain the current discrepancies amongst State legislations governing the slaughter of cattle. The Hindu right-wing parties have since then repeatedly highlighted the government's unwillingness to lay down an absolute prohibition as an affront to the sentiments of the majority Hindu community, and another example of appeasement of minorities.[28]

State Laws

Soon after the Constitution came into force, most States progressively started to enact laws regulating cow-slaughter. Till date, only Kerala, Sikkim, Arunachal Pradesh, Meghalaya, Mizoram and Nagaland have not adopted such legislations. However, the nature and the scope of these regulations vary significantly from State to State, notably on whether the prohibition is absolute or relative.

For instance, States like Assam, Tamil Nadu, and West Bengal can issue "fit-for-slaughter" certificates allowing for the slaughter of cows in certain conditions, while others like Andhra Pradesh, Bihar, and Gujarat have adopted a complete ban on cow-slaughter.[29] Offenders generally face up to six months in jail, but some States are considerably more severe. In Gujarat for instance, the sentence can go up to seven years in jail, while other States like Madhya Pradesh and Rajasthan have adopted policies that fix mandatory minimum terms of imprisonment.

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27 *Ministry,* Chapter 1, at 64.

28 Numerous attempts to address the issue through a central legislation have been made since the adoption of the Constitution, although none have been successful in obtaining a complete nationwide ban on cow slaughter. In 1966, a violent riot broke out outside the Parliament in Delhi during a demonstration supporting a demand by several Hindu organizations for a country-wide ban on cow slaughter.

29 Moreover, sale of beef is also selectively prohibited in many States, some allowing only beef imported from other States to be sold, while others like Haryana, Himachal and Madhya Pradesh banning it completely.

Interestingly for our discussion, at least two States —namely West Bengal and Assam— have included specific exemptions based on religious considerations, to the prohibition, although these exemption regimes vary in their degree of specificity. Hence, Section 12 of the West Bengal Animal Slaughter Control Act, 1950, provides that the State Government may exempt from the operation of the Act, the slaughter of cattle for any religious, medicinal or research purposes —but without referring specifically to Bakr-Id rituals. Section 13 of the Assam Cattle Preservation Act, 1950, includes a similar provision, but crucially adds:

> Provided that the operation of the Act will not be applicable to the slaughter of any cattle on the occasion of Id-uz-Zuha festival on such conditions as the State Government may specify regarding privacy.

Despite these two examples, most States have ultimately remained silent on the question, once again ignoring its importance. As a consequence, courts have on several occasions been called upon to decide the underlying clash in these regulations between the veneration for the cow in Hindu culture and the ritual sacrifice of cows by Muslims on Bakr-Id.

IV. Judicial Encounters with Practices of Ritual Sacrifice

The inability of the legislative power to resolve this ecological conflict has logically paved the way for judicial disputes. Notably, the courts have had to decide (1) whether State legislations banning slaughtering – and thus ritual sacrifices – of cows violate the rights to religious freedom of practitioners of Islam, as protected by the Constitution, and (2) whether the ritual sacrifice of cows on Bakr-Id could be protected by State regulations allowing for the exemption of slaughtering performed for religious purposes.

Quareshi

The first significant case to reach the Supreme Court was decided in 1958. In the case *M.H. Quareshi v. State of Bihar,*[30] the constitutional validity of three legislative enactments banning the slaughter of cattle passed by the States of Bihar, Uttar Pradesh and Madhya Pradesh, were challenged on the grounds that

30 Mohammed Hanif Quareshi v. State of Bihar, AIR 1958 SC 731 (hereinafter *Quareshi*).

these acts violated the fundamental rights guaranteed to the Muslim petitioners under Articles 14, 19 and 25 of the Indian Constitution.[31] The Supreme Court held that a total ban on the slaughter of useless cattle could not be supported as reasonable in the interest of the general public, and therefore was invalid. However, a total ban on the slaughter of milch cattle, breeding bulls and working bullocks, which were considered essential to the nation's economy for milk, working power and also manure, was held to be valid and reasonable, as being in the interest of the general public. Moreover, the Court upheld a total ban on the slaughter of cows of all ages, and calves of cows as being in consonance with the directive principles laid down in Article 48 of the Constitution.

More importantly for our discussion, the Supreme Court endeavoured to inquire in detail the claim that sacrifice of a cow on Bakr-Id constitutes a religious requirement for Muslims, and should hence invalidate legislative provisions preventing it. However, the Court considered that the materials presented to support this claim were "extremely meagre", and was surprised that the allegations in the petitions were "so vague."[32] The Court notably regrets that the claim was not supported by an affidavit by any academic expert or religious leader explaining in greater depth, the nature and the significance of the practice, or more prosaically the implications of the religious scriptures adduced as evidence.[33] As a consequence, the Court ultimately relied on the translation of the Hedaya to conclude that it was not established that the sacrifice of a cow on Bakr-Id was an obligatory overt act for a Muslim to exhibit his religious beliefs and ideas. The practice being judged optional, it was not entitled to constitutional protection under Article 25.

This first decision thus closed the door of a general protection of the practice under the religious rights enshrined in the Constitution and individual States were held free to prohibit it. The only avenue left for accommodation was thus the adoption of specific exemptions within State legislations banning cow slaughtering. But as we will see below, the scope of the exemption regime must be precisely defined in order to accommodate the practice.

31 Article 14 ensures equality before the law, Article 19 affirms the right to practice any profession, and Article 25 affirms the right to freedom of religion.

32 *Quareshi,* at 19.

33 *Id.,* at 20.

Lahiri

Hence, when the issue reached the Supreme Court again in 1995, it was the State power to grant an exemption accommodating ritual sacrifices of cows for Bakr-Id, rather than the general prohibition of this practice, that was challenged.[34] Indeed, the dispute started when several plaintiffs filed a writ petition before the Calcutta High Court, contending that the State of West Bengal had wrongly invoked Section 12 of the West Bengal Animal Slaughter Control Act, 1950, when it exempted from the operation of the Act, the slaughter of healthy cows on the occasion of Bakr-Id.

On August 20, 1982, the Division Bench of the Calcutta High Court, after hearing the contesting parties, took the view that such slaughter of cows by members of the Muslim community on Bakr-Id did not constitute a religious requirement and, therefore, such exemption was outside the scope of Section 12 of the Act. Consequently, the State of West Bengal appealed the decision before the Supreme Court. As in *Quareshi,* the Court relied once again on the provisions of the Hedaya to hold that slaughtering of cows was not the only way of carrying out the ritual sacrifice, and that it was therefore not an essential religious purpose, but an optional one.[35] Then, considering that the State could only exercise the exemption power under Section 12 if it can be shown that such exemption is necessary for serving an essential religious, medicinal or research purpose,[36] the Court concluded that such was not the case of cow sacrifice for Bakr-Id, and therefore rejected the appeal.

The reasoning of the Court in this case appears problematic insofar as it adopted a highly restrictive interpretation of the exemption regime under Section 12 of the West Bengal Act. Although the provision refers to "any religious purpose[37]," the Court construed it as restricted to *essential* religious practices, and consequently considered that it could not serve as a basis for exempting sacrificial practices for Bakr-Id from the application of the Act. Such an interpretation arguably gutters the religious exemption under Section 12: what religious practice could indeed be eligible for exemption under this provision?

34 State of West Bengal v. Ashutosh Lahiri, AIR 1995 SC 464.

35 *Id.,* at 8.

36 *Id.,* at 9.

37 Sec. 12, West Bengal Animal Slaughter Control Act, 1950.

Read together, these two Supreme Court decisions – which have been consistently reaffirmed by lower courts in other instances[38] – appear to almost completely shut the door to the accommodation of the ritual sacrifice of cows for Bakr-Id, except when States have not adopted any legislation prohibiting the slaughtering of cattle (as in the case of Kerala), or when they have enacted specific provisions which explicitly exempt this practice from the application of anti-slaughter regulations (as in the case of Assam). Indeed, the Supreme Court made it clear in *Lahiri* that mechanisms of exemptions which refer to religious concerns in general and unspecified terms (as in the case of West Bengal) could not protect a practice that was deemed only "optional".

It should be noted here that courts have tended to adopt a similar approach in other cases dealing with ritual practices of animal sacrifice performed by devotees of Hindu sects. For instance, in 2002, the Andhra Pradesh High Court directed several actions to prevent large-scale sacrifices of animals for the fair of Sri Lingamanthula Swamy in Nalgonda District.[39] Similar decisions were reached in Uttarakhand[40], Gujarat[41], and Karnataka[42], with the courts consistently holding that rights to religious freedom could not exempt these practices from the application of laws preventing animal sacrifices.[43]

It remains that the legal reasoning that resulted in the rejection, of this claim for religious freedom, by the judicial system has to be questioned. What were the legal reasoning, the evidence, and the methods of appreciation, which led to the consideration that these ritual practices did not constitute an essential part of the Muslim faith? The ways in which the courts have dealt with this ecological practice need to be thoroughly explored and interrogated. This is what I shall attempt to do in the last part.

38 *See* for instance Shaikh Zahid Mukhtar v. Commissioner of Police, (2007) 109 BOM LR 1201; see also the decisions of the Calcutta High Court in the matters of Abhijit Das v. State of West Bengal (2010); Enamul Haque v. State of West Bengal (2010); and Rajesh Yadav v. State of West Bengal (2011).

39 Jasraj Shri Shrimal And Ors. v. Govt. Of A.P., 2002 ALT 656 (Andhra Pradesh High Court).

40 Gauri Maulekhi v. State of Uttarakhand (19 December, 2011) (Uttarakhand High Court).

41 Vadodara City District Samasth v. State Of Gujarat, 2001 CriLJ 184 (Gujarat High Court).

42 Alevoor Premraj Kini v. The Deputy Commissioner (20 March, 2015) (Karnataka High Court).

43 In these cases, either the Prevention of Cruelty to Animals Act, 1960, or State laws prohibiting animal sacrifices, such as the Gujarat Animals & Birds Sacrifices (Prevention) Act, 1972, or the Karnataka Prevention of Animal Sacrifices Act, 1959.

V. Religious Interpretation and Colonial Legacy

In order to analyse the way in which the Supreme Court interpreted the religious significance of ritual sacrifice of cows for Muslims, it is necessary to briefly recall the historical dynamics that led to the construction of the judicial interpretation of Islamic traditions in India. They have indeed profoundly structured the way in which Indian judges now interpret religious traditions and beliefs.

The limits of scripturalism

In particular, it is crucial to note that, in their effort at systematising this body of law over many decades, colonial jurists turned almost exclusively to a limited number of textual sources.[44] This approach had profound effects on judicial processes beyond the colonial period, as it led the courts to endorse highly orthodox forms of Islamic law.

The British efforts at codifying "native" laws can be traced back to the Warren Hastings' Plan of 1772, and were primarily based on translations of ancient scriptural texts.[45] Hence, classical religious-legal texts, whatever their genuine relevance, were taken as the key to understanding colonised cultures and societies, even though the positions articulated in the scriptures could often be far removed from the actual prevalent practices in the given religious communities.

Of course, focusing on textual sources facilitated the administrators' task of ascertaining general legal rules quickly, but it fundamentally misunderstood the role of these religious texts in the life of most South Asian Muslims – especially beyond specific urban and gentry groups. The legalist ideology of colonial judges erred on the side of applying clear rules in a consistent manner, regardless of whether people genuinely treated them as binding.

Lost in translation

Given the assumed preference for a strict scriptural approach, colonial legal administrators were eager to have Islamic texts translated into English so

44 *See* Michael R. Anderson, *Islamic Law and the Colonial Encounter in British India,* in David Arnold and Peter Robb (eds.), Institutions and Ideologies: A SOAS South Asia Reader 65 (Curzon Press, 1993) (hereinafter *Anderson*).

45 J. Duncan M. Derrett, *The Administration of Hindu Law by the British,* 4(1) Comparative Studies In Society And History, 10 (1961).

that indigenous laws could be applied directly by British judges. Looking for a unified Islamic law, British administrators hence endeavoured to identify classical Islamic texts and to treat them as binding legal codes. They focused their study on Hedaya (*al-Hidaya*[46]), a twelfth-century text of Central Asian origin that was taken as the central legal source for the Hanafi school, although it is generally agreed that it does not consistently provide the underlying logic or reasoning for the rules of the school [47].

At the insistence of Hastings, Hedaya was translated into English in 1791 by Charles Hamilton – a British Orientalist who died a few months after the publication. British judges were content to rely on Charles Hamilton's translation of Hedaya, although Hamilton did not translate directly from the original Arabic text. Instead, three Muslim clerics were commissioned to translate the Arabic text into Persian, which Hamilton then translated into English.[48] This translated legal treatise hence provided the British with a textual foundation to understand and apply Islamic law, although a considerable number of translating errors and omissions were later discovered.[49]

Moreover, Hamilton's original translated text comprised four volumes. Yet, as a large and voluminous work was often not easily available by the late nineteenth century, the translated Hedaya proved very costly for students at the Inns of Court in Britain who wanted to practise law in India and needed to purchase the text to qualify themselves for the English Bar. Consequently, in 1870, the editor of the second edition of the Hedaya decided to remove whole sections of Hamilton's translation.[50]

Ultimately, the colonial administration ended up adopting a reductive approach to Islamic law. Firstly, because this approach failed at recognizing that, although scriptural sources provided an authoritative foundation for juristic analysis and interpretation, they did not, by themselves, constitute a legal system. The Quran, and even more specifically legal texts such as Hedaya, had never

46 AL-MARGHINANI, AL-HIDAYA: SHARH BIDAYAT AL-MUBTADI' (1197).

47 The Hanafi tradition, one of the four Sunni legal schools (madhahib), is predominant in South Asia. *See* STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (Harvard University Press, 1980).

48 Anderson, at 98.

49 Anver M. Emon, *Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation,* 87 THE CANADIAN BAR REVIEW 391 (2008).

50 *Id.,* at 403.

been directly applied as sources of legal precept. Their legal relevance had always derived from a properly authoritative religious leader *(qadi)* whose moral probity and knowledge of local arrangements could translate precept into practice. And secondly, because the selection of the legal texts that were to become the source of Islamic law for British judges was both highly reductive and flawed with omissions and translation mistakes.

It can be argued that this approach of the judicial treatment of religious traditions has continued after independence.[51] From the 1950s, the principle that it was the courts' task to ascertain what constituted religious doctrine and practice was firmly established. Indeed, in the two Supreme Court's decisions discussed previously, judges limited themselves to a mere scriptural interpretation of the sacrifice tradition at issue, based solely on excerpts from Hamilton's translation of Hedaya.

Hence, the Court's appreciation that the practice is only "secondary" and not "essential" for Muslim practitioners appears highly problematic for two reasons. Firstly, because it raises the fundamental question of whether, and to what extent, judges can interpret religious traditions. In deciding that the practice was only secondary, the Supreme Court indeed took a strong stance on the definition of the content of the Islamic faith, a position that many jurisdictions consider as problematic.[52] And secondly, because the approach appears too restrictive. What if relevant developments had been lost in the successive translations and re-edition of the Hedaya? What if other religious sources had been overlooked? Moreover, it is regretful that no expertise, either academic or religious, was adduced to give context to the practice.[53] In any case, these shortcomings certainly cast doubts on the validity of the religious interpretation reached by the Court in this complex ecological conflict.

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51 *See* ROBERT D. BAIRD (ED.), RELIGION AND LAW IN INDEPENDENT INDIA (2005).

52 In many legal systems, judges indeed only undertake to assess whether a practice or a belief can be considered as "sincerely-held" by a claimant; *see* for instance, in the case of Canada, Syndicat Northcrest v. Amselem, 2004 SCC 47 (Supreme Court of Canada).

53 The recourse to cultural expertise has indeed become central in this kind of conflicts in many other jurisdictions. *See* for instance Alison Dundes Renteln, *The Cultural Defense: Challenging the Monocultural Paradigm,* in MARIE-CLAIRE FOBLETS ET AL. (EDS.), CULTURAL DIVERSITY AND THE LAW: STATE RESPONSES FROM AROUND THE WORLD (2010). Yet, this reluctance of the Indian legal system to rely on such experts seems to echo the growing dismissal of religious experts by British judges during the colonial period. *See* Anderson, at 112.

VI. Conclusion

Ecological conflicts evidently constitute challenging cases for legal systems. And this is even truer when the contentious traditions are very emblematic and fiercely defended, as is the case for the status of the cow in India. In this paper, I have briefly presented the consecutive legal decisions that have led to almost completely outlawing the practice of sacrificing cows for Bakr-Id in India (except in States with no legislations banning cow-slaughter, and in States which adopted specific exemptions for that practice).

Read in conjunction with similar decisions reached in cases dealing with animal sacrifices performed by certain Hindu sects, this attitude of the Indian legal system seems to demonstrate a failure at acknowledging the importance of ecological beliefs and traditions of minority groups – and hence, at accommodating them. Considering the amount of research in environmental studies that have been, since the 1970s, increasingly highlighting the complexity and the significance of these traditions,[54] I argue that these conflicts should be approached in a more cautious and rigorous manner by legislative and judiciary institutions.

Nevertheless, the concrete consequences of these decisions remain to be assessed on the ground. Indeed, the repeated legal actions introduced before the West Bengal courts seem to indicate that the practice has not disappeared in this State – most probably thanks to an implicit policy of selective non-enforcement by the local executive authorities. Hence, the question of whether this ecological practice will eventually cease to be part of the identity of Indian Muslim communities remains to be thoroughly explored.

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54 *See* for instance John B. Callicott, Earth's Insights: A Multicultural Survey of Ecological Ethics from the Mediterranean Basin to the Australian Outback (University of California Press, 1994); Philippe Descola, The Ecology of Others (Prickly University Press, 2013).