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JOURNAL ON ENVIRONMENTAL LAW POLICY AND DEVELOPMENT

MESSAGE FROM THE PATRON-IN CHIEF

The regressive movement of the civilised societies has been from 'Water, Water everywhere, not a drop to drink' to living in an age of 'virtual water and water prints'.

Are we at a dangerous threshold?

The planet Earth's turbulent environment reality calls for prompt policy action and sustained follow-through action.

Quality is the peremptory norm of the Sixth Volume of Journal on Environmental Law, Policy and Development. The volume, by traversing through different nuances of civic environmentalism, community rights, climate change, cultural and historical wealth and Green Federalism, among others, succinctly attempts 'to spread the environmental culture'.

I congratulate the Coordinator and the members of the Editorial Board of JELPD 6 (2019) for their worth emulating stellar efforts.

Prof. (Dr.) R Venkata Rao
Vice Chancellor, NLSIU

MESSAGE FROM THE PATRON

BETWEEN US

It is with a heavy heart I write these lines. Dr.N.R. Madhava Menon, the 'Renaissance Man' of Indian Legal Education is no more. Dr.Menon was a teacher non-pareil, a great educational administrator, and builder of institutions of excellence, thinker, a visionary of legal education and much more. From single-handedly building NLSIU, Bengaluru, brick-by-brick , with little resource and support, except from a small group of dedicated teachers and office staff , to transforming legal education in India, what Prof.Menon did was nothing short of a Houdini act. The pre-eminent position that this Law School enjoys among its peers is due to the 'National Law School work culture' that he inculcated among all those associated with him. This culture persists even after over two decades since his retirement. This indeed is a testament to the enduring and everlasting value and contribution of this 'Living Legend of Law'.

The three Centres of Excellence on Environmental Law symbolise that spirit of innovation, pushing the frontiers of legal learning, research and extension. The Centres' focus on exploring new vistas of learning by raising their own resources and contributing to the overall development of the Institution. In such ventures of the Law School, the spirit and the core values that Prof. Menon stood for, remain alive. The forthcoming Training Programme for Law Teachers, starting from 7th June, 2019, is dedicated to the memory of this 'Colossus of Legal Education'. I am extremely happy that I, along with Prof. Sairam and the Team, will be able to offer my tributes and express gratitude to the Founder of the National Law School through this venture, and many more that would follow. Long Live Prof. Menon!

As always, along with the team led by Dr. Sairam Bhat, I take great pleasure in welcoming all to great learning through this issue of the Environmental Law Journal.

Dr. M K Ramesh
Professor of Law
NLSIU

EDITORIAL

The Centre for Environmental Law Education, Research and Advocacy is pleased to present the 6th volume of the Journal on Environmental Law, Policy and Development. Environmental Law is one of the core and crucial areas in which endeavours relating to research and education have been stressed upon by the National Law School of India University.

CEERA, at the National Law School of India University, over the past two decades, has been involved in a number of projects aimed at embellishing the development of environmental law. The Centre has been selected as the lead implementing agency by bodies such as the Ministry of Environment, Forest and Climate Change, UNDP, the Central Pollution Control Board, the Ministry of Law and Justice to execute Projects and provide training to its officials. Two of the major environmental projects that CEERA is currently executing are the UNDP-GEF (Global ABS project) and a two year Project on Chemical and Waste related Multi-Lateral Environmental Agreements by the Ministry of Environment, Forest and Climate Change, GoI. The Centre, through the 2019 edition of JELPD aims to continue its efforts in promoting legal and policy research in the field of Environmental Law.

The opening article for the current edition is a contribution from *Prof. Armin Rosencranz and Didon Misri* on Environmental Impact Assessment, with specific focus on the Public hearing process and democratic participation. The authors in this article state that the aim of regulatory framework of Environmental Impact Assessment is to improve decision-making and when the process of EIA is accompanied by efficacious public participation, it could provide a means to deepen democracy and ensure community participation. They claim in this paper that the law in operation is not in strict compliance with the provisions under the EIA Notification, which regulates new projects and expansion of existing projects that have potential environmental impacts. Such participation, according to the authors, seldom occurs in practice. The paper explains the existing legal framework for Environmental Impact Assessment in India and examines its efficacy through an analysis of the 2009 judgment of the Delhi High Court in *Utkarsh Mandal* v. *Union of India*. It begins with a brief summary of the judgment, where the court addresses issues relating to fair hearing, public participation, principles of administrative law and then proceeds to evaluate issues relating to public hearing and democratic participation, which is a cornerstone of the EIA Notification.

Dr. Geetanjoy Sahu and Bikash Kumar Sahoo in the next article discuss issues pertaining to the recognition of Community Forest Rights and its implications on livelihoods

with a specific case study of the Jamguda Village in Odisha. Jamguda, a village located in Kalahandi District of Odisha became the first village in Odisha and second in the country to get harvesting rights over minor forest produce under the Forest Rights Act in the year 2012. While there are more than a thousand villages in Odisha whose Community Forest Rights have been recognized over the last decade, the case of Jamguda is unique in many ways. In this paper, the authors discuss how and through which processes, the recognition of forest rights took place in this particular village. They also look into the impact of recognition of community forest rights on livelihood and governance of forest resources over a period of five years. The authors begin the article by discussing the legal and institutional arrangement for community rights over forest resources in Odisha, followed by a review of the literature on community forest resource rights and its potential for livelihood and empowerment of people. The third section of the paper gives an overview of the study area-Jamguda; its demographic characteristics, and major sources of livelihood. The process of community rights recognition under the Forest Rights Act and the key issues and challenges in the recognition process are discussed in the fourth section of the paper. The next section analyses the implication of community forest rights recognition on the socio-economic aspects of the community members in Jamguda. The authors then present the findings of their study and draw attention to the governance and livelihood challenges faced by Jamguda community members. They state that these issues require the urgent attention of civil society groups/facilitators and the government machinery so that the rights guaranteed under the FRA materialize.

The next article in this edition is of *Mukut Biswas* on the domestic legal framework for the protection of the Himalayan glaciers. The author in the first part of the paper explores the reason as to why the Himalayan glaciers are required to have a specific legislation and a *sui generis* system of protection. He then examines whether the existing Indian legal framework and policies are sufficient for glacier protection. The author then looks into the recent observations on glaciers by Indian courts and case studies relating to legislations on glaciers in countries like Chile, Argentina, Kyrgyzstan and Switzerland. This article suggests that India should also draft a specific legislation on glaciers which will guarantee water and food security of our people. This kind of security would help in preventing future regional conflicts over natural resources in the conflict-straddled region. The focus of this article is exclusively on Glaciers in the Indian part of the Himalayan range.

Atul Alexander and Yashpreet Singh in their article, analyse the role played by ICJ in the progressive development of the principle of sustainable development in light of the *Jus Cogens* norm. The paper focuses on the principle of *Jus Cogens* through

the interpretation of Article 53 of the Vienna Convention on the Law of Treaties (hereinafter referred to as 'VCLT') in suture with Articles 31 and 32 of VCLT. The authors also analyze the principle of sustainable development from the context of the international environmental scholarship. The principle of sustainable development is examined and the authors assert in their article that the principle is crystalized into a *Jus Cogens* norm. Reliance is placed on the opinions of the Judges of the International Court of Justice, which includes the opinions of Late Judge C.G. Weeramantry in the *Gabčikovo-Nagymaros case* and the opinions of Judge Cançado Trinidade. In order to prove the existence of the *Jus Cogens* norm the authors have focused on the opinion of Judge John Dugard, which was the first instance in the docket of the World Court where the principle of *Jus Cogens* in international law was comprehensively explored. The first part of this paper briefly touches upon the general or non-legal perspective of the recognition of sustainable development as a *Jus Cogens* norm. The next part extensively covers the legal perspective of the recognition of sustainable development as a *Jus Cogens* norm.

Apurva Verma in the following article looks into the concept of green federalism and the effects of climate change. The author states that the issue of climate change should be of prime importance to a developing country like India, as it tops the list of nations to be adversely effected by it. Climate change impacts agriculture productivity, as irregular and extreme weather conditions have a bearing on this sector. With the persisting incidence of poverty and the agricultural sector being effected by climate change, achieving food and nutritional security becomes a daunting task. The paper seeks to analyse how policies and laws can be evolved in a federal nation like India, wherein both central and state government can work cooperatively towards the issue of climate change and its impact on food security. It often happens in a federal context, that the impact of environmental degradation is borne by one entity, but the decision-making rests with another. Thus, a synergistic approach is a must to combat the issue. The concept of green federalism talks about striking a balance between both central and state government and working in a co-operative manner towards dealing with issues pertaining to environmental degradation. Consequently, a sound environmental policy and law is the need of the hour.

Atyotma Gupta in her article examines the issue of preservation of cultural and historical wealth and the impact of Economic Development on the same. She does so by focusing on the case of *K. Guruprasad Rao V/S State of Karnataka and Ors.* In recent times, competing claims with regard to the interpretation of the term "sustainable development" has resulted in continued intervention from the judiciary. The Apex Court's role in the preservation of historical and cultural heritage of India is

unparalleled in last one and a half decade. This article seeks to analyze and comment on the same. In *K. Guruprasad's case*, the Supreme Court has critically examined the adverse impact of mining operations on the Jambunatheswara temple and directed the government, by reposing its 'invaluable trust and confidence' in it, to comply with the recommendations of the court appointed committee while continuing the mining operations. The author in this article identifies and enlists various statutory protections advanced by the central and the state governments (as applicable in the present situation) to ensure the conservation of Indian culture and history for the future generations. The article also focuses on outlining the pertinent facts in the *K. Guruprasad case*. The judgment of the court has been examined in this paper and critical comments on the aptness of the opinion of the Apex Court have been expressed. The focal point of the paper is to study the interrelationship between environmental and cultural justice as well as the indispensable importance of achieving development in a sustainable manner, as highlighted by the Apex Court in this judgment.

Nikita Pattajoshi looks into the case of *Ridhima Pandey v. Union of India* in the next paper, tracing the history of climate change litigation in India. While much of public awareness on climate change has grown due to newspaper headlines, magazine cover stories or movies, one cannot help but accept that a part of it can be attributed to climate change advocates who are rigorously pursuing climate change matters before courts worldwide. Deliberations at the international level on climate change policy in the initial years focused on the global impacts of climate change such as rise in average global temperature, rise in average sea level etc. However, with growing instances of climate litigation, the focus has now shifted to more localized issues such as damage caused to a particular species or ecosystems and potential impacts of climate change on an industry. The most common form of climate change litigation that has been seen in the past is when a civil society or group of individuals has challenged the State's inaction or failure to meet its obligations under international instruments regulating climate change. The last two decades have seen a steep rise in the number of climate change lawsuits worldwide. Though we are still in the early days of global warming litigation, these lawsuits have made significant impact on the global legal and political climate. A study conducted by the United Nations Environment Program (UNEP) and Columbia University's Sabin Centre for Climate Change Law shows that the number of climate change cases has increased threefold since the 2014 and the maximum number of such lawsuits have been filed in the United States. However, these changes in the global policy scenario seem to have had little impact on the domestic policy. In the very first case of its kind in India, Ridhima Pandey, a 9-year-old girl had moved the National Green Tribunal alleging inaction on the part of the Government to take measures for climate change adoption and mitigation. This paper is an attempt to

assess the contribution of the case in laying down the foundation of climate change litigation in India.

Kavin Castro, in the last piece of the Journal, reviews the book *Water Law in India (An Introduction to Legal Instruments) (Second Edition 2017)*. The book is authored by Prof. (Dr.) Philippe Cullet, Professor of International and Environmental Law and Director of the Law, Environment and Development Centre at the University of London, School of Oriental & African Studies, UK and Sujith Koonan. In this publication, the authors seek to provide a fundamental understanding of the substance and enforcement of water law in India. The book contains eleven chapters covering practically all aspects related to water laws such as the international law and policy governing water, the basic concepts and principles related to water at the national level, the regulation of water: general instruments and issues, interstate river basins, water transfers, and dams, drinking water supply, environmental dimensions: protection, conservation, and sustainable use of water, irrigation, embankments, floods, protection and regulation of groundwater etc. The reviwer briefly charts out the scope and the prinicipal concepts covered in the chapters of the book. He then concludes the review by asserting the import and utility of the particlaur publication to researchers, academicians and practioners invloved or interested in the field of water law.

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Professor of Law
Coordinator
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CONTENTS

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PUBLIC HEARING AND DEMOCRATIC PARTICIPATION IN ENVIRONMENTAL IMPACT ASSESSMENT

Prof.(Dr.) Armin Rosencranz & Didon Misri*

INTRODUCTION

Environmental Impact Assessment ("EIA"), broadly, is an effort to *"anticipate, measure and weigh the socio-economic and biophysical changes that may result from a proposed project."*[1] It flows from the idea that the impact of (potential) environmentally harmful projects should be analyzed before authorization of the said project is granted. In addition to providing decision-makers with information on the environmental consequences of the proposed activities and their alternatives, EIA also enables affected persons to participate in the decision-making process.[2] It may propose measures to mitigate adverse environmental effects and/or suggest alternatives that are less harmful to the environment. Thus, the purpose of EIA is to anticipate the negative effects of large projects, to justify the enterprise from a socio-ecological perspective, and to tailor measures to minimize harm.[3]

* Armin Rosencranz is a Professor of Law at O.P. Jindal University, where Didon Misri is a law student. The author can be contacted at armin@stanford.edu.

1. Shyam Divan and Armin Roseneranz, *Environmental Law and Policy in India: Cases, Materials, and Statutes*, 417 (Oxford University Press, India, 2001).

2 Astrid Epiney, "Environmental Impact Assessment", in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopaedia of International Law*, (Oxford University Press, 2008).

3 *See* Stuart Bell, Donald McGillivray, *et al.*, *Environmental Law* (Oxford University Press, 8th edition, 2013).

Taking into account the growing concerns of citizens' towards environmental conservation, the Central Government introduced EIA in 1994 through a series of notifications under the Environment (Protection) Act, 1986 ("EP Act").[4] Pursuant to Section 3 of the EP Act, the Ministry of Environment and Forests ("MoEF"), which is the primary agency of the Central Government for the implementation of policies and programmes relating to conservation and protection of India's environment, has the power to take "all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing controlling and abating environmental pollution." The Central Government also has the power to notify *"areas in which any industries, operations, processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards."*[5]

The Notification of September 14, 2006[6] ("EIA Notification"), which regulates new projects and expansion of existing projects subject to potential environmental impacts, is the most recent notification passed under Section 3 of the EP Act, and is a key requirement in the process of gaining Environmental Clearance ("Clearance"). If any project is not approved in accordance with the procedure laid down in the EIA Notification, it is conceivable that the clearance granted to a company could be challenged.[7]

At its broadest level, EIA is a feature of good governance; a regulatory tool to improve decision-making and when accompanied by an efficacious public participation process, can also serve as a means to deepen democracy and ensure community participation. This is what the regulatory framework of EIA envisages. In operation, however, this is not the reality. EIA has remained a low obstacle for project proponents to overcome; at best, it has been "a dull instrument that helps mitigate

4 Notification, S.O. 85(E), January 29, 1992, available at http://www.ceeraindia.org/documents/lib_c3s2_. EIAnoti_160300.htm (Last visited on March 21, 2018); Notification, S.O. 60(E), January 27, 1994, available at http://www.envfor.nic.in/legis/eia/so-60(e).pdf (Last visited on March 21, 2018).

5 EP Act, s. 3(2)(v); Rule 5(3)(a), Environment (Protection) Rules, 1986; Shibani Ghosh, "Demystifying the Environmental Clearance Process in India", NUJS Law Review (2015), 442-452 ("Ghosh").

6 EIA Notification, S.O. 1533, September 14, 2006, available at http://www.moef.nic.in/legis/eia/so1533.pdf (Last visited on March 22, 2018).

7 *Access to Justice: Human Rights Abuses Involving Corporations – India*, International Commission of Jurists, 2011, pp. 43-44.

the worst environmental excesses through a mix of bureaucratic conditionalities and an unrealistic expectation of corporate compliance."[8] Due to the various corporate and industrial interests at play, strict compliance with conditions contained in the EIA Notification seldom occur in practice.

In this article, we underline several issues that one ought to consider with respect to EIAs, through an analysis of the 2009 judgment of the Delhi High Court in *Utkarsh Mandal* v. *Union of India*.[9] We begin with a brief summary of the judgment, where the court addressed issues relating to fair hearing, public participation, and principles of administrative law. We then provide excerpts from the judgment that reflect the summary. In our final section, we explain the existing legal framework for EIA and examine its efficacy through our analysis of the *Utkarsh Mandal* case. The thrust of our final section lies in an evaluation of issues relating to public hearing and democratic participation that are the cornerstone of the EIA Notification.

CASE STUDY – UTKARSH MANDAL V. UNION OF INDIA

In *Utkarsh Mandal* v. *Union of India*,[10] the Delhi High Court considered an appeal against the environmental clearance granted by the MoEF for the renewal of a mining lease in Goa. The Environmental Advisory Committee (Mines) ("EAC") evaluated and accepted the Respondent's proposal for environmental clearance and, subsequently, the Government of India granted the clearance. The Petitioners appealed against this decision to the now defunct National Environmental Appellate Authority ("NEAA"), arguing that there were irregularities in the approval given by the EAC. This appeal was dismissed. Thereupon, the Petitioners approached the Delhi High Court through a writ petition, challenging the grant of environmental clearance and the dismissal of their appeal by the NEAA.

Writing for the Court, Justice S. Muralidhar addressed three broad issues in his judgment. The first issue was whether there was a requirement to make the executive summary of the EIA available at least 30 days prior to the public hearing and, if not, whether failure to do so would vitiate the environmental clearance. The second issue was whether the fact that the Chairman of the EAC was also the Director of

8 Shyam Divan, "The Contours of EIA in India", in Ramaswamy R. Iyer (ed.), *Water and the Laws in India*, (Sage Publications, 2009), p.399.

9 W.P. (C) No. 9340/2009 ("*Utkarsh Mandal*").

10 W.P. (C) No. 9340/2009.

four mining companies, violated the principles of natural justice. The last issue was concerning procedural fairness and the requirement of the administrative decision-making body to furnish reasons for its decision. The Court considered whether failure to provide reasons for a particular decision would vitiate the decision in its entirety.

On the first issue, the Court noted that in order to ensure that the project-affected persons participate *meaningfully* in a public hearing; they must have complete knowledge of the pros and cons of the proposed project and its likely impact on the surrounding environment. Until the public hearing is conducted, the EIA report does not enter the public domain. The Court observed that *"Unless the EIA report is made available mandatorily, project-affected persons would have no knowledge of the environmental impact of a project."* The Court disagreed with the NEAA, which had held that there was no procedural infraction in making the Executive Summary available only nine days before the public hearing.[11] However, the Court held that despite the Executive Summary not being available 30 days before the public hearing, it was not necessary to conduct the hearing again, as it had been attended by a sufficient number of people and 67 objections had been recorded.[12]

On the second issue, the Court held that appointing a person who had a direct interest in the promotion of the mining industry as Chairperson of the EAC was an unhealthy practice that would call into question the credibility of the EAC, given that there is a clear conflict of interest.[13] The court also noted that the practice of granting several environmental clearances by the EAC on the same day was an "unsatisfactory state of affairs."[14] According to the Court, not more than five applications should be considered in a single meeting of the EAC. The Court commented on the unseemly rush to clear projects by the MoEF, noting that the granting of clearances for several mining projects in a single day should not be at the cost of environment itself, and that the spirit of the EAC must be respected.[15]

Furthermore, the Court observed that it would be undesirable that mining operations should be permitted to start without first requiring compliance with the EIA

11 *Utkarsh Mandal*, para. 34.
12 *Id.*, para. 35.
13 *Id.*, para. 44.
14 *Id.*, para. 45.
15 *Ibid.*

Notification. A per the Court, *"if for some reason, after one year of commencement of mining, it were to be discovered that many or all of the conditions had not been fulfilled, then the damage to the environment that would result till then would be irreversible."* [16] Bearing in mind the general (poor) level of compliance, the Court declared that it is essential that the MoEF review its practice of granting "conditional" clearances without specifying which conditions have to be mandatorily complied with before mining can commence.

On the third issue, the court noted that the EAC, before recommending that the project be cleared, did not provide any reasoning for how the objections raised at the public hearing were either addressed by the project proponent's response or were otherwise overruled by the EAC. While considering the Petitioner's appeal, the NEAA underlined the requirement of recording reasons in any administrative decision-making process. It concluded that the MoEF should advise its committees to record reasons for their recommendations. Despite this, the NEAA decided that the absence of reasoning in the present case did not vitiate the order granting environmental clearance.

The Court underlined the fact that the EAC was a delegate of the MoEF and the task of evaluation had been outsourced to it. Though the decision of the EAC was not binding on the MoEF, it performed a public law function and was therefore expected to function in accordance with the same standards that the law required of the MoEF. The EIA Notification required the EAC to undertake a detailed scrutiny of the objections raised at the public hearing and the response given to the objections by the project proponent.

According to the Court, *"the requirement of an administrative decision making body to give reasons is an essential concomitant of acting fairly. Given that such a decision is amenable to judicial review, the failure to make known the reasons for the decision makes it difficult for the judicial body entrusted with the power of reviewing such decision as to its reasonableness and fairness. The failure to give reasons would render the decision vulnerable to attack on the ground of being vitiated due to non-application of mind to relevant materials and therefore arbitrary."* [17] Thus, it is necessary that the decision of the EAC to recommend a project reflect its consideration of the merits of the

16 *Id.*, para. 47.
17 *Id.*, para. 37.

objections.[18]

The Court found several cumulative procedural improprieties in the approval process, including the fact that the Executive Summary of the EIA was not made available 30 days before the date of the public hearing; that the Chairperson of the EAC was himself a director of four mining companies and that his presence on the EAC impaired the fairness and credibility of its decision; and that the EAC did not fairly deal with the objections raised by 67 persons who attended the public hearing.

According to the Court, the NEAA's conclusion was incompatible with the *"spirit of the EIA Notification,"* and, *"if allowed to stand, would reduce every public hearing to a farce."*[19] The consequence would be that, notwithstanding numerous objections that may be raised, environmental clearances would nevertheless be granted. Hence, the Court set aside the order of the NEAA and directed the EAC to hear the matter afresh, consider all the objections raised and conduct a site visit itself or appoint a sub-committee to do so.

THE IMPORTANCE OF PUBLIC HEARINGS IN EIA

The MoEF plays a crucial regulatory role in guiding approvals of large infrastructure projects through various laws and policies. One such regulation refers to the procedures under the EIA Notification, which mandates that a step-by-step process be followed by industrial, mining and infrastructure-related operations to secure environmental clearance. This process includes preparation of EIA reports, interaction with project-affected persons through public hearings, and an appraisal of project documents by a group of experts.

Thus, EIA procedures are located at the intersection of advocacy surrounding development and environmental preservation. To understand the working of the EIA framework in India and the role of various actors involved, it is useful to observe the extent of citizens' participation in the process and the role of experts in decision-making. The *Utkarsh Mandal* case is unique in that it underlines several important issues that one needs to consider in relation to the administrative framework through which certain projects are required to proceed.

18 *Id.*, para. 40.
19 *Id.*, para. 42.

The Court in *Utkarsh Mandal* begins by addressing the issue of whether, pursuant to the EIA Notification,[20] the Executive Summary had to be made available 30 days prior to the public hearing. The purpose of the public hearing is to "ascertain the concerns of local affected persons and others who have a plausible stake in the environmental impacts of the project".[21] Among the numerous processes that must be fulfilled before, during and after the public hearing is conducted,[22] one clear requirement *before* the public hearing is that a minimum of 30 days' notice should be provided before commencement of the hearing.

The purpose of this requirement is to make the hearing a meaningful one, with full participation of all interested persons. As the court observes, *"This procedure is intended to render the decision fair and participative and not thrust from above on people who may be unaware of the implications of the decision."*[23] Public hearings bring project authorities, EIA consultants, regulatory agencies and affected communities together to interact in the same space.

The EIA process is the principal formal mechanism by which members of an affected community can voice their grievances. The EIA Notification clearly stresses the necessity of public hearing notices, public access to draft EIA reports and summaries of EIA reports (online and print versions), wide publicity for the hearing, attendance of members present, and the opportunity to raise concerns and to seek responses. These are compulsory conditions required to ensure a democratic hearing.

CHALLENGES IN CONDUCTING PUBLIC HEARINGS

In many cases, affected communities have been physically prevented from participating in public hearings through the deployment of police.[24] Furthermore, the purpose of public hearings has been greatly undermined by delays in providing notice, an unwillingness to publish and share critical information and inaccurate communications

20 EIA Notification, Appendix IV, paras. 2.4, 3.

21 The Ministry of Environment & Forests, *Consideration of Projects under Clause 7(ii) of the EIA Notification, 2006 – Exemption of Public Hearing – Instructions Regarding (2009)*, June 3, 2009, available at http://moef.nic.in/divisions/iass/offc_memo_instruction.pdf (Last visited on March 24, 2018).

22 Ghosh, 446-450. Ghosh points out that the process of public hearing commences with the submission of a letter by the project proponent to the relevant SPCB requesting it to arrange a public hearing. The public hearing must be completed within 45 days of the date on which this letter is submitted.

23 *Utkarsh Mandal*, para. 31.

24 Shyam Divan, "The Contours of EIA in India", in Ramaswamy R. Iyer (ed.), *Water and the Laws in India*, (Sage Publications, 2009), p. 399.

to the MoEF of what transpired at hearings.[25] Civil society groups have frequently raised issues of free, fair and transparent hearings. They have questioned selection of sites and the timing of hearings, and have protested against the use of force, coercion and threats.[26]

In *Samarth Trust v. Union of India*,[27] the Delhi High Court considered the validity of a public hearing for a project in Uttarakhand. In its judgment, the Court observed that though a public hearing aims at hearing concerns of the "locally affected population," the EIA Notification does not bar those who do not live in proximity to the site from participating in proceedings and seeking responses from the project proponent.

The Court further observed that in cases where, despite disruptions, proceedings can continue and an adequate and reasonable opportunity is provided to affected persons to make their remarks, the hearing would be valid. Finally, with respect to the conduct and scope of a public hearing, the court stated that a meaningful public hearing requires adequate notice to be given and for relevant information regarding the project to be made accessible to affected persons. The court noted that such notices and relevant documents should be provided on the websites of the State Pollution Control Boards and the proponents before the hearing.

Conduct of public hearings in an improper manner has emerged as a ground for challenging environmental approvals. In *Adivasi Majdoor Kisan Ekta Sangathan and Another v. Ministry of Environment and Forest*,[28] the National Green Tribunal ("NGT") concluded that clearance was granted without a proper public hearing being conducted. As a result, the clearance had been vitiated. The tribunal viewed a video of the proceedings of the public hearing and expressed shock at the circumstances in which it took place. Mobs of people interrupted the proceedings by raising slogans and pelting stones, names and addresses of various complainants were not noted, and eventually, the police intervened and used force to clear people from the area. The NGT held that this public hearing was clearly a "farce" and would have to be conducted again.

25 *Ibid*.
26 *Ibid*.
27 Writ Petition (Civil) No. 9317/2009.
28 Appeal No. 3/2011 (T) (NEAA No. 26 of 2009), dated 20 April 2012.

In the *Utkarsh Mandal* case, notice was provided only nine days before the public hearing was scheduled. While the Court emphasized that the 30-day notice requirement is essential to secure maximum participation in the public hearing, it took into consideration the fact that the public hearing was attended by a large number of people and that 67 written objections were recorded. This, in the court's opinion, constituted sufficient public participation. Given that there is no quorum requirement for a public hearing,[29] a hearing can commence with only a few participants and the presiding panel.[30] The Court found that it was not necessary for the public hearing to be conducted again solely because the Executive Summary was not made available 30 days prior to the date of the public hearing.

Thus, the Court balanced the 30-day notice requirement with the fact that a substantive, meaningful and purposeful opportunity was given to the people affected by the project to put their views forth. According to the Court's reasoning, as long as many project affected persons participated in the hearing and the final decision considered the different positions on the project, the 30-day notice requirement was effectively waived.

The Court proceeded to highlight several issues relating to the quality of the hearing process itself and the role of experts in the EIA process. In numerous cases, questions have been raised regarding the composition of EACs and whether members apply their mind adequately before recommending that a project be approved. In the present case, the court considered the failure of the EAC to address the objections raised at the public hearing and the effect of this failure on the grant of clearance.

THE ROLE OF THE EAC IN THE PUBLIC HEARING PROCESS

The EAC is a quasi-judicial administrative body, and is therefore required to provide reasons for its decisions.[31] The court emphasized that given the EAC's obligation to undertake a 'detailed scrutiny' of the EIA document as well as the outcome of the public consultation, it is implied that the EAC must provide reasons.[32] In the words of the Court, *"the requirement of an administrative decision making body to give*

29 EIA Notification, as amended by Notification, S.O. 3067(E), Appendix IV, para. 6.2.

30 Ghosh, p. 449.

31 *M/s Kranti Associates Pvt. Ltd. v. Sh. Masood Ahmed Khan*, (2010) 9 SCC 496.

32 EIA Notification, para. 4.

reasons has been viewed as an essential concomitant of acting fairly."[33] Thus, the Court concluded that failure to provide reasons would vitiate the decision-making process and on that basis, the decision of the NEAA should be set aside.

In addition to the failure of the EAC to provide a reasoned decision, the court also took into consideration the fact that the Chairman of the EAC was himself a Director of four mining companies. Dismissing the Respondent's argument that the Chairman's stake in the mining sector should not matter since he was only one of the members of the EAC, and the decision of the majority would anyway prevail regardless, the court held that having a person who has a direct interest in the promotion of the mining industry as the Chairperson of the EAC was *"an unhealthy practice that would rob the EAC of its credibility."*[34]

At the end of its judgment, the court noted that as many as six public hearings were scheduled by the State Pollution Control Board on the same date and time and at the same venue. The court expressed concern over the fact that the requirement of public hearing under the EIA notification had been taken so lightly by the MoEF. Scheduling several public hearings on the same date and at the same venue within a short period of time would affect the quality of the hearing. This, in the court's opinion, would reduce the exercise to an *"empty formality."*[35]

Before concluding, the court emphasized that it would be undesirable that mining operations should be permitted to begin without first requiring compliance. If after one year of commencement of mining, it were discovered that certain conditions have not been fulfilled, the damage to the environment that would result till then would be irreversible. Thus, the court held that the MoEF should review its practice of granting such "conditional" clearances without specifying which of the conditions have to be mandatorily complied with before mining can commence.

In recent years, the NGT has clarified the importance of the public hearing process and set protocols for how EACs are to address concerns and objections raised by affected people. In *Samata & Anr v. Union of India*,[36] the NGT ordered the EAC to record their responses to all concerns raised during public hearings, before deciding whether to grant clearance. Despite this, existing studies that assess the efficacy of public hearings show that they have been reduced to a farce and that decision-making on a project takes little account of objections raised by project-affected persons.

33 *Utkarsh Mandal*, para. 34.
34 *Utkarsh Mandal*, para. 44.
35 *Utkarsh Mandal*, para. 43.
36 Appeal No. 9 of 2011 (NEAA No. 10 of 2010).

Project-affected persons who participate in public hearings often broach issues of cultural prejudices and insensitivity to their needs. They also demonstrate their inability to calculate compensations for the loss of traditional or indigenous lands, water and forest resources in a particular region. In areas such as Dibang in Arunachal Pradesh, communities have resisted public hearings altogether. For one project, public hearings had to be cancelled over a dozen times, and regulatory formalities took over six years to be completed.[37]

With respect to the practice of granting conditional clearances, Ashish Kothari, a leading environmentalist who served on the EAC for river valley and hydro-electric projects, has criticized the practice on the ground, stating that it results in most major projects receiving rubber-stamped approval, whether or not they pass muster on ecological considerations. [38] Kothari complained that there is not a single case of a violation of conditions where an environmental clearance was withdrawn or the concerned official prosecuted. In this regard, one of the key challenges to effective public participation is that public participation takes place far too late into the EIA process.

Industries are aware that the clearance process could stall proposed projects. In view of this, project proponents purchase private land or seek transfer of land well before the EIA process begins.[39] When impact assessments are scrutinized, the clearance process is seen as a deterrent to industrial and economic growth.

CONCLUSION

The process of environmental clearance has been a subject of numerous legal disputes and has been scrutinized by the Indian judiciary. In looking at the procedural aspects of EIAs, the courts have paid particular attention to the public hearing process, which is widely regarded as the cornerstone of the EIA process. What is clear from

37 Raju Mimi, "No Impact Assessment Study Done for Dibang Hydropower Project," India Water Portal, available at: http://www.indiawaterportal.org/articles/no-impact-assessment-study-done-dibang-hydropower-project (Last accessed 26 March, 2018).

38 Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India: Cases, Materials and Statutes*, 420 (Oxford University Press, India, 2012).

39 Manju Memon and Kanchi Kohli, "Environmental Regulation in India: The Need to Move Beyond Procedural Lacunae", India Water Portal, available at: http://www.indiawaterportal.org/articles/environmental-regulation-india-need-move-beyond-procedural-lacunae (Last accessed 26 March, 2018).

a perusal of these cases is that India has an extensive legal framework in place for evaluating projects and granting clearance.[40] The weakness in the current functioning of the clearance process is not so much in the design of the EIA Notification as in the failures of the people and institutions that are required to ensure compliance with it.

In the *Utkarsh Mandal* case, the Delhi High Court rebuked the EAC for failing to address the concerns raised by project-affected persons at the public hearing.[41] The Court noted that, being an administrative body performing delegated functions, the EAC was obligated to engage questions and issues raised at the public hearing.[42] The *Utkarsh Mandal* case, along with several others, is illustrative of the notion that EIA has remained a low obstacle for project proponents to overcome, and that government authorities have been lax in ensuring that conditions in the EIA Notification are satisfactorily complied with. Courts and the NGT have persistently issued directions requiring project proponents and government authorities to guarantee that the concerns of affected populations will be addressed through deliberations in the public hearing process.

As it is practiced today, the EIA process is disconnected from affected communities and from the social and environmental impacts it seeks to anticipate.[43] It is crucial that importance be placed on existing processes and forms of regulation and the manner in which they are carried out. These processes and regulations must be reevaluated to facilitate public participation and to make the EIA process effective, efficient and fair. Efforts to address problems relating to environmental compliance need to take into consideration certain factors such as adequacy and meaningfulness of public hearings, social exclusion, corruption, and the unsatisfactory administrative management, which have all led to an increase in non-compliance with the EIA process.

40 The Environment (Protection) Act, 1986, (implementing environmental protection measures discussed at the UN Conference on the Human Environment in Stockholm, 1972); The Water (Prevention and Control of Pollution) Act, 1974; The Air (Prevention and Control of Pollution) Act, 1981; The Forest (Conservation) Act, 1980 (prohibiting state governments from using forests for non-forestry purposes without prior government approval).

41 *Utkarsh Mandal*, para. 34.

42 *Id.,* para. 40.

43 Jeffery Spickett et al. "Health Impact Assessment: Improving Its Effectiveness in the Enhancement of Health and Well-Being", 12 International Journal of Environmental Research and Public Health 2018, pp. 3847–3852.

2

RECOGNITION OF COMMUNITY FOREST RIGHTS AND ITS LIVELIHOOD IMPLICATION: A STUDY OF JAMGUDA VILLAGE IN ODISHA

Geetanjoy Sahu & Bikash Kumar Sahoo[*]

COMMUNITY RIGHTS OVER FOREST RESOURCES: LEGAL AND INSTITUTIONAL FRAMEWORK

Community rights over forest resources in India in general, and in Odisha in particular can be discussed in two phases: Pre and the Post the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, also popularly known as Forest Rights Act (FRA). In the pre-Forest Rights Act phase, the government, both central and state, across India had enacted a number of laws and rules to determine the ownership, access, use and disposal of forest resources. The history of most of the prevalent legal systems for forest governance in India can be traced back to colonial period. Prior to the invasion of the Britishers, forest dwelling communities had access and user rights over forest resources as per their customary norms, regulations or as decided by the kings and rulers in different regions of India[1]. With the expansion of the British rule, a new forest regime was introduced to take control over all types of forest resources from communities. The primary objective

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1. Guha, Ramachandra (1983), Forestry in British and Post-British India: A Historical Analysis, 29th October, Economic and Political Weekly.

of the forest policy during the colonial period was revenue generation and meeting the demands of industries at home by providing raw material. Emphasis was given on timber production, and mono-cultural plantation was taken up in several parts of India in the mid nineteenth century. The laws and rules enacted during the colonial period were largely driven by the principles of extraction, exclusion and centralisation of the decision-making power over forest resources. Some of the most significant laws during this period included: the Indian Forest Acts passed in 1865, 1878 and 1927, which brought all forest resources under the direct control of the state.[2] These forest laws completely dismantled the prevalent customary norms and institutional arrangement that allowed communities to access and use forest resources and categorised all forests into three types: reserved forests, protected forests and village forests and thereby prohibiting the rights of forest dwelling communities in these areas[3].

Independent India retained most of the colonial forest laws and in fact, reinforced the same forest policy and philosophy by emphasising on production forestry and state control over all types of forest resources. For example, the focus of the National Forest Policy of 1952 remained on sustainable timber production, without much emphasis on multi-cultural plantation and management of non-commercial species and minor forest produce. The subject "Forest" was brought under the state list and thereby enabled state governments to evolve policies and programs to control and manage their respective forest resources. In addition to the above-mentioned colonial forest laws which the central government retained from the colonial period, a series of forest laws were enacted by the state governments across India between 1952-1980. However, the state forest laws also continued to follow the philosophy of the National Forest Policy, 1952 i.e. extraction of timber and exclusion of people from forest, which now continued through a strong political structure. There was no provision for forest dwelling communities' participation in the control and management of forest resources.

As in the case of other states across India, the state of Odisha also followed the National Forest Policy and the provisions under the Indian Forest Act of 1927 to control and

2 Kalpavriksha (2013), Forest Governance at the Interface of Laws Related to Forest, Wildlife & Biodiversity With a Specific Focus on Conflicts and Complementarities with Forest Rights Act, Pune.

3 For more details, see the Indian Forest Act 1927, Ministry of Environment, Forests and Climate Change, Government of India, New Delhi.

manage forest resources. Forest constitutes 37.34% of the total geographical area of Odisha and the state is very rich in floral and faunal diversity. The most significant law that was introduced by the state was the Orissa Forest Act in the year 1972. This Act consolidated the earlier laws that were prevalent in different regions of Odisha since the colonial era and gave the primary power to the state forest department for the management of forest resources[4]. However, a significant departure took place in the year 1985 with the introduction of the Orissa Village Forest Rules 1985 and Joint Forest Management Resolution of Government of India in 1988. These rules and guidelines accorded a formal recognition to the community's role in forest resource management.

Instances of community involvement in forest management were noticed during 1950s in the districts of Keonjhar and Mayurbhanj, but the formal recognition of the role of these communities was made through a government resolution passed on the 1st of August 1988, wherein for the first time in the country, the role and partnership of forest fringe villages were recognized. Subsequently, following West Bengal's Joint Forest Management (JFM) success story, the National Forest Policy of 1988, and the Centre's JFM guidelines in June 1990, the state government of Odisha modified its 1988 resolution (modified in the years 1993, 2008 and 2011), incorporating several relevant and appropriate features to joint forest management in the state. Though these initiatives remained as guidelines or policy outlines, their impact on promoting community forestry management was visible in many parts of Odisha. By the year 2004 around 11,020 Vana Samrakshan Samitis (VSSs) had been formed across Odisha, which were managing six lakhs hectares of forest[5]. Following the state-level JFM initiatives, several state and district-level informal community forest management groups and associations were created. These were formed at the civil society level to facilitate coordination between the local communities and the state administration for the management of forest resources. Some of these include: Odisha Jungle Manch, Kalahandi Jungle Suraksha Manch, Baripada Van Suraksha Samiti, Maa Maninag Jungle Parishad in Nayagarh, and many others in different districts of Odisha.

4 Orissa appeared as a separate province in pre-independent political map of India on 1st April, 1936 carved out of the then Bengal Presidency, Central Province, and Madras Presidency. Most of the forest laws of these provinces were applicable in different regions of Odisha.

5 For more details, see Odisha Forest Development Corporation, available at this site: https://www.odishafdc.com/orissaforest_ofdc.php.

However, the history of Joint Forest Management has been of non-transparency, arbitrariness, ill-management of finances and non-implementation of agreed terms and conditions between the forest department and communities across India.[6] This is also true in case of Odisha, where thousands of villages were deprived of benefits and their role in the protection and management of forests. The state forest department continues to hold exclusive power over forest resources and benefits are not shared with community members as promised during the formation of the committees. The state forest department has failed to recognise the level of dependence of forest dwelling communities over forest resources and also their crucial role in management of forests. Majority of tribal persons in Odisha live in or around forests and have a long history of community forest protection through their traditional norms and regulations. Around 40% of state's population depends on forests for their livelihood.[7] The Vasundhara report further emphasises that forest resource contributes around 25% to 52% to the household income of people living in and around forests in Odisha. However, the highly centralised rules and regulations over minor forest produce have deprived these forest dwelling communities the change to improve their socio-economic conditions. The poverty ratio of forest rich districts, which is 70% compared to the State's average of 52%, illustrates how forest dwelling communities struggle in Odisha due to centralised decision-making processes.[8]

In addition to state-controlled forest laws and regulations, hundreds of development and mining projects across Odisha have resulted in the deprivation and alienation of more than five lakh forest dwelling communities living in and around forest areas between the years 1951-1991.[9] Such kind of alienation of forest dwelling communities, due to development and mining projects is not exceptional to Odisha. Across India, millions of forest dwelling communities have been displaced in the name of larger public interest, of which majority were tribals. According to the Ministry of Tribal Affairs of Government of India (MoTA) nearly 85 lakh tribals were displaced until 1990 on account of mega developmental projects like dams,

6 Lele, Sharachchandra (2014), "What is Wrong With Joint Forest Management" in Lele & Ajit Menon et.al 'Democratizing Forest Governance in India', Oxford University Press: New Delhi.

7 Vasundhara (1997), Draft Orissa Forest Policy Strategic Framework, Bhubaneswar, Odisha.

8 *Id.*

9 Fernandes, Walter & Asif, Mohammed. (1997), Development-induced Displacement in Odisha 1951 to 1995: A Database on its Extent and Nature, New Delhi: Indian Social Institute.

mining, industries and conservation of forests etc. In the absence of recognised rights, only 2.1 million of the displaced indigenous people were rehabilitated and as many as 6.4 million were not[10].

Several tribal organisations and political groups raised objections and nation- wide protests emerged, where the exclusionary policies of the Indian state were challenged and the restoration of the rights of forest dwelling communities was demanded[11]. This finally led to the enactment of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (hereafter FRA). The FRA was enacted after a number of demands and struggles by the forest dwellers and tribal communities across the country who asserted their rights over the forestland over which they were traditionally dependent. This Act is crucial to the rights of millions of tribals and other forest dwellers in different parts of India, as it provides for the restitution of both individual rights to cultivated land in forestland and community rights over common property resources. The enactment of FRA was an appraising effort by the Government of India that brought about a paradigm shift in the history of forest governance. This act was an important turning point in the history of tribal empowerment in India, particularly with respect to the livelihood of tribal communities and security of tenure over forests lands.[12] Though the implementation of FRA varies from state to state[13], it has injected a new hope among forest dwelling communities, that they can access and use forest resources through their own principles and rules framed at the local level. The case of Jamguda village forest community members is one such example, where the local people framed their own rules and regulations under FRA to access forest resources, which they were deprived of for centuries.

10 Madhu Sarin, 'Indigenous Community Rights in India–A Critical Moment in History' (Sept. 10, 2013) <https://communitylandrights.org/madhu-sarin-indigenous-community-rights-in-india-a-critical-moment-in-history/.

11 Manshi Asher and Nidhi Agarwal (2006), Recognising the Historical Injustice: Campaign for the Forest Rights Act 2006, National Centre for Advocacy Studies, Pune.

12 Sahu, Geetanjoy (2018), Forest Rights and Tribals in Mineral Rich Areas of India: The Vedanta Case and Beyond, in Philippe Cullet et.al "Handbook on Environment, Law and Poverty", UK: Edward Elgar, (Forthcoming).

13 CFR-LA (2016), Promise and Performance: Ten Years of the Forest Rights Act in India, Citizens' Report of the Promise and Performance of The Scheduled Tribe and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, afte 10 years of its Enactment, December 2016, Produced as part of Community Forest Rights-Learning Advocacy Process (CFR-LA), India, 2006, www.fra.org.in.

METHODOLOGY OF THE STUDY

This article is the outcome of a specific case study regarding the recognition of the Community Forest Rights under the FRA and its impact on the community in Jamguda village in Odisha. The study is based on both primary and secondary data sources. Primary sources include: household surveys to understand the sources of livelihood of community members and more importantly, their level of dependency on forest resources. Discussions with Gram Sabha members and interviews with Forest Rights Committee (FRC) and Community Forest Resource Management Committee (CFRMC) was conducted to understand the nature and process of forest rights claim and the post-FRA management of forest resources in the village. We also interviewed state functionaries including forest, revenue and tribal welfare extension officers to capture both the pre-claim and post-claim processes. Interview with civil society members, who were involved in the process, was also conducted to identify the factors that contributed to the recognition of CFR and the challenges that lay ahead for the village of Jamguda. This study was conducted between September 2017-April 2018.

THEORETICAL FRAMEWORK

It is well recognized in common property resource literature that local communities are the cornerstone of efficient forest resources use and management.[14]In the context of decentralised forest governance and management, Elinor Ostrom (2000) emphasized the role of community driven laws in helping the forest dependent people to assert their rights and make more efficient use of the limited wealth they control. Vast literature and research on Community Forest Management (CFM) has shown the substantial contribution of locally designed principles and norms in forest sustainability and welfare of local people.[15] However, most of the empirical studies and policy analysis exercises on community forest management are context specific and caution the generalisation of resource governing principles in other socio-economic and political conditions. Various studies have found that the presence of heterogeneous groups, powerful local elites, quality of forest

14 Ostrom, Elinor (2000), Collective Action and the Evolution of Social Norms, Journal of Economic Perspective, Vol-14, No-3, PP: 137-58.

15 Ostrom, Elinor (1992) Community and endogenous solution of commons problems. Journal of Theoretical Politics 4(3): 343-52.

resources, variation in dependence among different social groups over resources, lack of support from local institutions, threats from both within and outside the community, lack of scientific knowledge and technical support, etc. can jeopardise decentralised community resource management.[16] Overall, it has been found through several empirical studies that community-based forest management does not appear to make a forest's condition worse and may even make it better.[17] It is also found that, community forest management recognised in the legal framework through devolution of power, has resulted in offering security of access to land and incentives to invest in forest lands which have been used for cultivation and other livelihood purposes.[18]

While there is much emphasis on the question of efficiency and sustainability of forest resources, very few studies exist that produce evidence on the economic benefits of community forest resource management. Research on community forestry enterprises in Latin American countries, especially in Mexico have found huge economic gains for local communities and its impact on other social welfare sectors.[19] The prima facie evidence in India, though limited to Vidarbha region in Maharashtra, also suggests similar economic gains for local communities.[20] Some communities do see improvements in incomes from forest products or forest-related activities compared to communities that aren't part of a community forest resource management. An important aspect of economic advantages of community forest resource management is how benefits are shared among community members and investments are made in creating assets both at the household and village level. Also, how economic benefits of community forest management are distributed across

16 Lele, Sharachchandra & Ajit Menon (2014), Democratizing Forest Governance in India, Oxford University Press: New Delhi.

17 Dasgupta, Shreya (2017), Does community-based forest management work in the tropics?, Mongabay Series: Conservation Effectiveness, 2 November.

18 Tata Institute of Social Sciences, (2017), A Rapid Assessment Study on Rights Recognition Process Under Forest Rights Act: Reasons of Rejection and Impact of Rights Recognised on Livelihood in Odisha, Jharkhand and Chhattisgarh, Tata Institute of Social Sciences, Mumbai.

19 Hodgdon, Benjamin D, Francisco Chapela and David B. Bray (2013), Mexican Community Forestry: Enterprises and Associations as a Response to Barriers, The Rights and Resources Initiative (RRI) and RECOFTC – The Center for People and Forests.

20 Sahu, Geetanjoy (2018), Forest Rights and Tribals in Mineral Rich Areas of India: The Vedanta Case and Beyond, in Philippe Cullet et.al "Handbook on Environment, Law and Poverty", UK: Edward Elgar, (Forthcoming).

different social groups at the village level is another aspect that is significant. Are they based on the principle of equality or on the contribution of the community members' in terms of labour and time given towards protection and conservation of forests and forest resources? These and other theoretical assumptions around community forest management are examined through a detailed empirical analysis of community forest management in Jamguda village of Odisha.

JAMGUDA: AN OVERVIEW

Consisting of 73 households (Scheduled Tribe- 66 and Scheduled Caste-07) and with a population of 264, Jamguda village of Barabandh Panchayat of M Rampur Block is an interior village located in Kalahandi District of Odisha. The village lacks basic infrastructure like health facilities, sanitation, transportion and water. Out of 73 households, 54 households come under Below Poverty Line and 45 households have electricity connection and majority of people in the village have completed their primary and secondary education. Only two people have studied above 10th class[21].

Like many rural households in tribal areas of Odisha, the villagers in Jamguda are largely dependent on agriculture and forest resources for their livelihoods. In Jamguda, 23 households are dependent on agricultural activities, which include labour work in others' agricultural land as a major part of their livelihood (an average 242 days of work in a year). For the year 2016-17, the annual average income of each household from agriculture was Rs. 23717.39. There are 23 other households that are dependent on non-agricultural labour work, getting an average 254 days of work (2016-17). The annual average income from non-agricultural labour work is Rs. 27375.50 per household for the year 2016-17. Another 21 households are engaged in both agricultural and non-agricultural labour work, getting an average 188 days of work in the year 2016-17. The annual average income for each household is Rs. 16575.81. Apart from this, there are 3 people working in government sector and one household's earns its livelihood through operating a village grocery shop.

21 This information is based on our household survey in the village conducted in March-April 2018.

SOURCES OF LIVELIHOOD (2016-17)

Types of Work	No of households	Average number of work days per households	Average wage per day	Average annual income
Agriculture	23	242	98.57	23717.39
Wage Labour	23	254	105	27375.06
Agriculture and Wage Labour	21	188	96.74	16575.81
Government Job	3	360	378	136000
Business	1	360	67	48000
Agriculture & Business	1	195	60	5100
No Work	1	0	0	0

Source: Compilation of data by the authors based on household survey in the village

Another major source of livelihood for the villagers in Jamguda is income from the forest. A detailed discussion on this aspect is present in the latter part of the analysis section of the paper.

FOREST RIGHTS RECOGNITION PROCESS IN JAMGUDA

Section 3(1) and 3(2) of FRA recognises a number of rights of forest dwelling community members. Some of these rights include: individual forest rights (IFR), community forest rights (CFR), community forest resource rights (CFRR) and development rights (DR). While forest dwellers can claim up to 4 hectares (10 acres) of forest land under the individual or common occupation for habitation or for self-cultivation, there is no limitation to claim on community forest rights. The community forest rights and community forest resource rights are recognised based on the traditional and customary rights of people over forest resources.

Section 6 of FRA prescribes a detailed procedure for recognising and vesting forest rights. Over the years, one can observe four different types of interventions that have taken place in the recognition process of forest rights claims across India. These are: suo moto by Gram Sabha; NGO driven; collaborative efforts (NGO/community and sometime NGO/Tribal Department/District Administration), and the top-down approach-directed either by Governor's Office in case of PESA [(Provisions of

the Panchayats (Extension to Scheduled Areas) Act, 1996] areas or State level nodal agency department. Prior to the Forest Right Act, 2006, the forest area in Jamguda was managed and regulated by the forest department. People's access to minor forest produce was constrained due to regulation and conditions laid down by the forest department. People had only access to firewood and no other access and user rights. Very often people had to pay penalty to the forest department for using and taking forest resources[22].

A Joint Forest Management (JFM) Committee was formed in the village by the Forest Department in 2004 and an area of 123.5 acre was identified to be jointly protected and managed by the department and villagers. However, the villagers were not involved in planning or decision-making related to forest resource harvesting and management. The benefits from the joint management of forest were also not shared in a transparent way. The Forest Department representative who headed the Committee was managing the JFM account and there was no accountability and transparency in the overall process. The enactment of Forest Rights Act enabled the villagers to dissolve the JFM committee in 2012 and claim their community rights over the traditional and customary boundary of the village.

In Jamguda, the process for forest rights claim, both for individual and community rights under FRA started in the year 2008. As in many parts of India, the community forest rights recognition process in Jamguda was facilitated by forest rights groups and NGOs working on similar issues in different parts of Odisha. There were several groups and NGOs namely; Kalahandi Jungle Suraksha Manch[23], Seba Jagat, National Institute for Peoples' Development Investigation and Training (NIPDIT), Vasundhara and Foundation for Ecological Security, which played multiple roles at different levels in different capacities, both in the pre and post-FRA recognition phase. Kalahandi Jungle Suraksha Manch has been actively involved in advocating forest management through community involvement for more than fifteen years. It played a crucial role as far as the recognition of community forest rights of Jamguda

22 Discussion with villagers revealed that forest officers used to demand chicken, goat, money and different crops when they were caught by the officers while taking forest produce before FRA was enacted.

23 Kalahandi Jungle Suraksha Manch operates at the district level and closely works with Odisha Jungle Manch which was formed in 1999 to work towards strengthening community forest protection and management.

village is concerned. Seba Jagat also organised an orientation program for the people of Jamguda village about the importance of FRA. The FRA awareness program by National Institute for Peoples Development Investigation and Training (NIPDIT) also helped the villagers to assert their rights over traditional and customary forest boundary. The following table explains the chronological developments that led to the recognition and harvesting rights of Jamguda community members over their traditional and customary forest resources.

Major Chronological Developments to get community rights in Jamguda

Sl. No.	Date	Community Forest Rights Recognition Process
1	23/03/2008	• First Meeting of the Gram Sabha to discuss the Forest Rights Act. • The formation of Forest Rights Committee consisting of fifteen members to verify the claims of individuals and initiate the process of community forest rights claim
2	20/07/2008	• Gram Sabha notice to Revenue and Forest Department to verify the community forest rights claim application
3	21/07/2008	• Community Forest Rights Claim application was sent to Sub-Divisional Level Committee
4	15/12/2011	• Gram Sabha came to know about the approval and recognition of their CFR from Kalahandi Jungle Suraksha Manch
5	15/03/2012	• Formation of Community Forest Resource Management Committee
6	20/06/2012	• Gram Sabha harvested the first lot of bamboo from the recognised community forest area
7	23/06/2012	• First lot of bamboo was purchased by the local Congress leader Mr. Bhakta Charan Das
8	20/07/2012	• Gram Sabha sent a letter to the Chief Minister of Odisha to issue transit permit book to Jamguda Gram Sabha to sale their bamboo
9	05/12/2012	• Gram Sabha sent a letter to the State Scheduled Tribe and Scheduled Caste Department to issue a transit permit book to Jamguda Gram Sabha for the sale of their bamboo
10	28/12/2012	• A notice was issued by the government of Odisha to issue a transit permit book without any charge to any Gram Sabha under the Forest Rights Act 2006

11	17/02/2013	• Gram Sabha of Jamguda decided to prepare a management plan over the recognised community forest area
12	27/02/2013	• Rules and management plans were prepared to harvest bamboo in a sustainable manner
13	01/03/2013	• Gram Sabha received the transit permit book for the sale of their bamboo from the Forest Department
14	03/03/2013	• A meeting at the Gram Sabha was organised to celebrate the recognition of community forest rights in the village and formal handing over of the transit permit book by the Forest Department to the Gram Sabha members in the presence of Minister of Tribal Affairs and Panchayat Raj- Mr. V Kishore Chandra Deo, Rural Development Minister- Mr. Jairam Ramesh, State Revenue Minister- Mr.Suryanarayan Patro and local Member of Parliament- Mr. Bhakta Charan Dash.

Source: Information obtained during our discussion with Gram Sabha Members

KEY ISSUES AND CONCERNS IN THE IMPLEMENTATION PROCESS

Analysis of the procedure and current status of CFR implementation reveals that the community forest rights recognition process has not been without hurdles and challenges. Though the recognition of IFR and CFR title was made in 2012, we find that the quality of implementation has not been effective. In the following section, we highlight some of the key issues in the implementation of community forest rights in Jamguda.

GAP IN THE RECOGNISED AND CLAIMED FOREST AREA

No doubt, under the FRA, every community member of a village is permitted to access the customary boundary and traditional area of the village. The forest areas recognised under CFR should be based on the traditional forest areas accessed, as mentioned in several documents like the Nistar Patrak. However, it is found that the recognised CFR rights for the villagers in Jamguda was part of Joint Forest Management area and not based on their customary forest use and access area. The recognised area is mere 50 hectares approximately, whereas the traditional and customary forest area of the village would be around 1500 hectares. This is a clear

violation of FRA provisions and no effort has been made at the district level to recognise the traditional area of the village.

OVERLAPPING OF IFR AND CFR CLAIMED AND RECOGNISED AREA

In addition to non-recognition of customary boundaries of the village, all the existing 21 claims for IFR on forest lands are already a part of CFR area. The FRC committee members and revenue and forest officers had not demarcated IFR area within the recognised CFR area during submission of IFR claims. It is also not clear among the Gram Sabha members whether the recognised IFR area is within the recognised CFR area or outside the CFR area.

TITLE WITH CONDITIONS

The CFR title recognised for the village is based on 2007 FRA Rules with conditions and has not been amended as per the 2012 Rules. For example: the recognised CFR title of Jamguda specifies the means to transport the forest resources. In the CFR title for the Jamguda village, it is mentioned that villagers can take forest produce only by head-load and not by any appropriate means. This is in contradiction to the amended rule of 2012 which prescribes that transportation of minor forest produce within and outside forest shall be done through appropriate means of transport and not restricted to any particular means of transportation.

RECORD OF RIGHTS IS YET TO BE COMPLETED

As per section 8 (f) & (g) of FRA Rules, in the post-rights recognition phase, the District Level Committee (DLC) should issue directions for the incorporation of forest rights in the relevant government record including the Record of Rights (RoR). They are also required to ensure the publication of recognised forest rights. Similarly, as per section 12 (A) (9) of Forest Rights Rule (amended in 2012), the RoR correction of the issued title should be done within a maximum period of three months. However, not a single RoR of recognised IFR has been made or published so far and no process has been initiated for the remaining IFR and CFR titles.

NON-RECOGNITION OF OTFDS' TITLES

As in many parts of India, it was found in Jamguda that all the four IFR claims of Scheduled Castes had been rejected on the ground of lack of evidence and documents. Discussion with Sub-Divisional Level Committee (SDLC) and District Level Committee (DLC) members revealed that the complete understanding of the provisions among the officers was lacking. It is incorrect to say that the FRA requires occupation of the land for three generations prior to 13th December 2005 for one to qualify as an OTFD (Other Traditional Forest Dwellers) under the Act. The requirement under Section 2(O) is that the "member or community" should have "primarily resided in" forest land for at least three generations prior to December 13, 2005, and depend on the forest for their bona fide livelihood needs. There is a complete lack of understanding among the SDLC, DLC and ground level verification functionaries that for asserting the claims of OTFDs, it is not necessary that 75 years without interruption be proved. The MoTA has made it clear that it would be an extremely onerous burden of proof on a claimant, and that is not the intention of the law.

ADMINISTRATIVE APATHY

The way CFR titles were recognised in 2012 and lack of communication with Gram Sabha Members about the returned CFR claim from SDLC in August 2014, shows that the administration, including both SDLC and DLC, have been very apathetic to the claims filed by the villagers. First, the recognised CFR title was not based on the customary boundary of the villagers and second, when the Gram Sabha members wrote to forest and range officer to attend the verification of CFR boundary during the claim process, no officer turned up. Finally, the Gram Sabha has never been informed about the returned claim applications. Since 31st August 2014, the returned claims from SDLC have been pending at the desk of Welfare Extension Officer, Bhawanipatna, who did not think it important to inform the Gram Sabha about the same[24]. The administration claimed that there was no joint verification, sketch map and RoR copy in the revised claim under form B and C, which the Gram Sabha members have challenged. The members are of the view that several notices and meetings in person with the revenue and forest officer had

24 This information was obtained during TISS research team's visit to Additional Welfare Extension Office on Apr. 16th 2018.

taken place, but no officer had turned up for the verification of claims, boundary and evidences. Many civil society members and people who have closely followed the Forest Rights Act implementation in Odisha are of the opinion that the CFR recognition process in Odisha in general and Kalahandi in particular in 2012-13, was largely carried out due to the impact of tribals' protest in the Niyamgiri Hills and subsequent developments like visit of N C Saxena Committee and Supreme Court's landmark order of 18th April 2013 emphasising the rights of forest dwellers over their traditional and customary forest boundary[25]. This led to clearing of many pending claims in Kalahandi through a top-down approach, but also compromised the quality of title recognition process. An analysis of title distribution in Kalahandi also substantiates this view of civil society groups as the process of title recognition in post-2014 has been stagnant in Kalahandi.

LIVELIHOOD IMPACT OF COMMUNITY FOREST RIGHTS RECOGNITION

The enactment of Forest Rights Act in 2006 has raised hopes for millions of forest dwellers across the country, as the Act recognises and vests the ownership, access, use and disposal of minor forest produce rights in the hands of forest dwelling communities. Since the implementation of FRA, thousands of villages across the country have asserted their rights over minor forest produce and as a result of which, the household income of forest dwelling communities has increased significantly.[26]However, the nature and extent of livelihood enhancement through the implementation of FRA varies from state to state and also within the state. In the absence of time-series data to understand the difference in the pre and post FRA phase, we have relied upon the oral history and narratives of Gram Sabha members for analysing the impact of CFR on livelihoods of local people. We have also tried to assess the impact of recognition of IFR titles on livelihoods by interviewing the beneficiaries.

25 This view was widely shared by Forest Rights Groups and Activists in Odisha during our discussion.

26 Tata Institute of Social Sciences, (2017), A Rapid Assessment Study on Rights Recognition Process Under Forest Rights Act: Reasons of Rejection and Impact of Rights Recognised on Livelihood in Odisha, Jharkhand and Chhattisgarh, Tata Institute of Social Sciences, Mumbai.

As discussed earlier, the households in Jamguda were largely dependent on agricultural related activity in the pre-community forest rights recognition phase. The recognition of CFR made a significant impact on the livelihood of people in Jamguda. Access to forest resources enabled people to get more days of employment and use a variety of resources for household consumption. The following table, based on the analysis of household and village level data collected during field work, highlights the economic benefits of CFR by focusing on income from bamboo and wages paid for different activities, number of employment days generated after CFR got recognised and other economic gains both at the household and village level.

Details of Bamboo Harvesting, Labour Days and Income

Year	Number of Bamboo Harvested	Number of Harvesting Days	Total Number of Labour Engaged	Total Income from Bamboo	Total Wage Paid
2012-13	1726	15	81	28165	9388
2013-14	9122	51	332	150685	50228
2014-15	3492	19	142	114895	38298
2015-16	22084	33	370	189600	67268
2016-17	34146	40	783	866840	431420
Total	**70570**	**158**	**1708**	**1350185**	**596602**

Details of Total Labour Days and Wages for Forest Fire Management Work

	Forest Fire Line Work Details				Fire Protection Work Details			
Year	**Days**	**Labour Days**	**Wage Per Day**	**Total Wage**	**Days**	**Labour Days**	**Wage Per Day**	**Total Wage**
2012-13	0	0	0	0	0	0	0	0
2013-14	7	217	100	21700	3	26	100	2600
2014-15	2	36	100	3600	5	75	100	7500
2015-16	2	37	100	3700	2	16	100	1600
2016-17	0	0	0	0	2	33	100	3300
Total	**11**	**290**		**29000**	**12**	**150**		**15000**

Details of Other Forest Related Works and Wages Paid

	Bamboo Base Protection Details				Customary Boundary Demarcation			
Year	**Days**	**Labour Day**	**Wage per Day**	**Total Wage**	**Days**	**Labour Day**	**Wage per Day**	**Total Wage**
2012-13	0	0	0	0	0	0	0	0
2013-14	1	30	100	3000	0	0	0	0
2014-15	0	0	0	0	0	0	0	0
2015-16	0	0	0	0	0	0	0	0
2016-17	3	54	100	5400	3	33	100	3300
Total	**4**	**84**		**8400**	**3**	**33**		**3300**

The number of labour days related to all types of forest activity is more than the number of employment days under MNREGA from 2012-17. In Jamguda, the average number of employment days guaranteed under the Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA) is 23.2 and the total number of employment days from forest related activities is 116 (2012-2017.) In the financial year 2012-13, the number of employment days generated through MGNREGA was 47 which was the highest between 2012 to 2017 and the number of people employed was 81 in 2012. The nature of work includes road construction and land development. However, over the years, the employment days under this Act has come down significantly and the recognition of CFRs has helped, to a great extent, in generating employment days for the villagers. All types of forest related work generated 2265 days of work from 2012-17, whereas under MNREGA villagers have got 996 days of work from 2012-17. Similarly, the wages paid under MNREGA is also less than what villagers got from forest related work between 2012-17. The total wages paid so far to all the households from forest related work is Rs. 6,52,302 and under MNREGA the wages paid to households is Rs.1,22,114.

Year-Wise Details Employment Days under MNREGA and Wages

Financial Year	Number of Work days	Number of Job Card Holders	Total Number of working days	Per day wage	Total Wage
2012-13	47	81	432	126	54450
2013-14	21	27	140	126	17766
2014-15	1	6	164	164	654

2015-16	14	14	77	226	17402
2016-17	33	34	183	174	31842
Total	**116**	**162**	**996**		**122114**
Average	**23.2**	**32.4**	**199.2**	**163.2**	**24422.8**

The enhancement of household income from forest resources has contributed to other socio-economic development indicators. It has reduced migration to a great extent. People have started investing their income on education, health and agricultural activity. Earlier Community members were dependent on other villages and local landlords for loans, but over the last five years, the community members have stopped taking credit from middlemen[27].

The income generated from forest is also managed in a transparent way and the benefits from forest income are distributed in an equitable manner. Thousands of villages across India have managed their Gram Sabha funds, generated from forest, without any help from the administration. Unlike the JFM committee, there is no representation of any government officer in the Gram Sabha Account Management Committee under FRA. The Jamguda Gram Sabha opened an account in the name of the Gram Sabha in the year 2013 and authorised three people to manage the account in a transparent manner. 1/3 of the income generated from bamboo was given as wage to the labourers, another 1/3 was spent on protecting and safeguarding forests and the remaining amount was deposited in Gram Sabha Development Fund. This distribution has been unanimously decided by the Gram Sabha. The Gram Sabha Development Fund has been used for various village level socio-cultural programs and also funds have been given to the needy without any interest. The funds of Gram Sabha have been used to support education, health, marriage and other requirements of villagers as per the Gram Sabha's decision.

Gram Sabha Development Fund details

Year	**Miscellaneous Expenses**	**Loan Distribution**
2012-13	7900	0
2013-14	16000	26545
2014-15	40000	0

27 This information is shared by the Gram Sabha members during data collection period.

2015-16	76276	24500
2016-17	325500	0
Total	**465676**	**51045**

In addition to bamboo, the villagers have been accessing other non-timber forest produce (NTFP) after the recognition of community forest rights. The following tables give the details of forest produce that have been accessed by the villagers and the value of the forest produce as per the local market in the year 2016-17.

Details of NTFP Collected by the Villagers in 2016-2017

NTFP Name	Average Collection Day Per Household	Average Quantity Collected By each Household (In KG)	Price per Kg in Local Market (In INR)	Total Amount Per Household As Per Local Market (In INR)	Total Number of Households involved in collecting NTFP
Fuelwood	57	1732.86	1.33	2320	73
Mahula Flower	15	72.03	18	1296.54	51
Cahara	3	7.62	80	609.2	39
Kardi	10	7.25	100	725	55
Kanda	3	2.85	20	57	42
Mushroom	4	2.31	100	23	51
Saga	5	2.5	20	50	14
Mango	21	19.7	20	394	20
Amla, Bahada, Harida	4	5.26	25	131.4	21
Bamboo	4	47.95 Piece	50/piece	2397.5	45
Kendu	4	5.24	40	209.6	25

However, there has been no significant impact of individual forest rights on the livelihoods of people, except tenure security over their cultivation land. Unlike Maharashtra and Chhattisgarh, the Odisha Government's intervention in the post-FRA phase has been very limited. Following the increasing number of individual rights recognised across the country, several states have come up with a series of guidelines for effective implementation of convergence programmes for forest rights

holders under FRA, 2006. For example, in June 2014, the State Government of Maharashtra issued an order to form convergence committees in several districts of Vidarbha region and thereby directing the line departments to include IFR titled holders in the distribution of several government schemes. Subsequently, many other states in the country also followed the Maharashtra model and have been issuing guidelines from time to time.[28]

Rule 16 of Forest Rights Act reads, *"The state government shall ensure through its various departments, especially for the tribal and social welfare relevant to the upliftment of forest dwelling scheduled tribes and other traditional forest dwellers, that all government schemes including those relating to land development, land productivity, basic amenities and other livelihood measures are provided to such claimants and communities whose rights have been recognised and vested under the Act."* The Government of Odisha has issued a series of orders to integrate various schemes with forest rights, but the implementation of these schemes has been selective and not consistent. For example: a research study by the CSE published in Down to Earth pointed out that 63% of the convergence cases in Odisha (142,374 of the 226,304 cases) are pertaining to housing under Indira Awas Yojana[29]. In the study area Jamguda, the IFR title beneficiaries have not received any benefit from the government schemes of Odisha that aim to integrate line department programs with FRA title holders.

LIMITED IMPACT BEYOND JAMGUDA

Recognition of community forest rights claims in Jamguda, the first village in Odisha to access, use and dispose their minor forest produce through Gram Sabha has laid the foundation for other villages in Odisha to assert their rights over forest resources. However, the scale and scope of Jamguda's impact has not been as significant as in other states like Maharashtra. Even after five years of recognition of Jamguda Gram Sabha's right over NTFPs, thousands of villages in Odisha are struggling against the state administration to assert their rights over minor forest produce. Take for instance, the six villages (Khainsuguga, Jamugunda Bahal, Jamjharan, Kasturpadar,

28 Tata Institute of Social Sciences, (2017), A Rapid Assessment Study on Rights Recognition Process Under Forest Rights Act: Reasons of Rejection and Impact of Rights Recognised on Livelihood in Odisha, Jharkhand and Chhattisgarh, Tata Institute of Social Sciences, Mumbai.

29 Agarwal, Shruti and Sanghamitra Dubey (2016), Odisha issues guidelines for FRA convergence plan implementation, 15th April, Down to Earth.

Kanakpur and Kalipur) in Golamunda Block of Kalahandi. These villages tried to assert their right over trade of the tendu leaf and wanted to sell the leaves to a trader from Maharashtra, but the Forest Department did not allow them to go through with the sale last year. After several petitions, protests and media reports, the Forest Department of Odisha issued a notification on 17th November 2018 allowing the villages to sell tendu leaf as per their discretion. However, the notification is applicable only to these six villages and not across the state. The hurdles and regressive decisions by the Forest Department have been overlooked by the Odisha government and this has resulted in the denial of legal rights to more than thousand villages across Odisha over minor forest produce. Such an apathetic approach of the administration shows a lack of understanding among the government functionaries about the potential of FRA in empowering people and contributing to poverty reduction. The current state of implementation of FRA in Odisha has largely been driven by civil society groups, NGOs and activists, but the administration's suo motu interest in this process is very limited or driven by a few committed administrators.

Looking at the lack of support from the administration, it is encouraging to find that Jamguda Gram Sabha trained and facilitated the submission of claims of its neighbouring villages like Lamher, Tarkawali, Pipadi and Gundrupi. While Lamher and Tarkawali village have already got their CFR title, Pipadi and Gundrupi's claims are still pending.[30]

CONCLUSION

An analysis of the CFR recognition process and post-CFR governance and management experience of Jamguda reveals that the struggle to get community forest rights recognised and access minor forest produce has not come without hurdles. It is indeed disappointing that despite several policy guidelines and orders, both by the Ministry of Tribal Affairs and the Ministry of Environment and Forest, the implementing agencies are still reluctant to support the forest dwellers of Jamguda in asserting their rights. In the absence of state support, it is very encouraging to witness that the collective action of community members of Jamguda, with support from intervening NGOs and activists has resulted in producing tangible benefits to

30 This information is based on discussion with neighbouring villages of Jamguda during field work.

households across social groups. However, the case of Jamguda has its own limitations and cannot be replicated in other contexts. As discussed earlier, the success of collective action to assert rights and manage forest resources has been possible in Jamguda to a great extent due to the social history and homogeneous character of the village. Nevertheless, the collective action of local people with legal sanction as prescribed under the FRA will go a long way if the administration provides necessary support and guidance to community members.

3

SAFEGUARDING OUR WATER TOWERS: HAVING A SPECIFIC LEGISLATION FOR THE HIMALAYAN GLACIERS

Mukut Biswas*

INTRODUCTION

The Glaciers in the Himalayas and the Karakoram ranges form the largest body of ice outside the polar caps. Hence, they are also referred to as the Third Pole. These glaciers are the originating source of seven of Asia's greatest rivers, supporting more than 2.5 billion (one third population of the world) people. There are about 16,627 glaciers in the Indian Himalayas[1] which provides water for irrigation, hydropower, drinking, sanitation and manufacturing to India and surrounding nations. The Gangetic basin alone sustains 580 million people[2]. These Glaciers are one of our most precious resources and have sustained civilizations for thousands of years.

A recent report prepared by the Kathmandu-based, International Centre for Integrated Mountain Development (ICIMOD) states that the Hindu Kush-Himalayan (HKH) region has lost nearly 15% of its glaciers since the 1970s, and is

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1 Snow and Glaciers of the Himalayas 2011; Study Carried out under the joint project of Ministry of Environment and Forests and Department of Space, Government of India.

2 P. Wester, A. Mishra, A. Mukherji, A. B. Shrestha (eds) (2019) The Hindu Kush Himalaya Assessment—Mountains, Climate Change, Sustainability and People Springer Nature Switzerland AG, Cham.

most likely to lose another 15-20% by the year 2100[3]. Yet it is surprising to note that there is no legislation that explicitly regulates or protects these glaciers from climate change impacts and other anthropogenic activities.

WHY THERE MUST BE A SPECIFIC LEGISLATION FOR HIMALAYAN GLACIERS?

A. Himalayan Glaciers

Glaciers are slow flowing masses of perennial ice, fed by snowfall at the upper reaches that compensates melting in the lower parts. They act as a water tower; providing perennial source of water downstream. Glaciers can be classified into two general groups viz. Alpine glaciers and ice sheets. This article focuses exclusively on alpine glaciers which are found in the Himalayas and Karakoram ranges.

In the Indian Himalayas, there are approximately 16,627 glaciers which cover an area of 40,563 sq. km.[4] The snow and glacier melt runoff from the Himalayan region sustains the perennial flow of the rivers Indus, Ganga and the Brahmaputra. These river systems receive almost 30-50% of the annual flow from snow and glacier melt runoff[5].

While glaciers serve multiple purposes, this article focuses on the three major services they provide to the population. First, they serve as "water towers" that store the vast amount of the world's fresh water. Second, they hold intrinsic value in their contribution to the environment and as an essential part of the water cycle and ecology of the high Himalayas. Third, they hold economic value in terms of agricultural, industrial, energy, tourism and scientific development.

B. Threats to Glaciers

The greatest threat to Himalayan glaciers is 'Climate Change'. Climate change has resulted in an alarming rate of glacial melt around the world and the Himalayan glaciers are no exception. Glacier retreat in the Himalayas is a result of precipitation

3 *Id.*

4 Snow and Glaciers of the Himalayas 2011; Study Carried out under the joint project of Ministry of Environment and Forests and Department of Space, Government of India.

5 Snow and Glaciers of the Himalayas 2011; Study Carried out under the joint project of Ministry of Environment and Forests and Department of Space, Government of India.

decrease in combination with temperature increase. According to ICIMODs findings, if the global average temperature is indeed kept to a 1.5°C rise over pre-industrial levels (as agreed upon at the 2015 Paris Climate Conference); this will mean a 2.1°C rise in temperature in the HKH region due to elevation-dependent warming. In such a scenario, the region will lose 36% of its glaciers by 2100.

The second most immediate threat to glaciers is 'Black Carbon Pollution'. Black carbon, of which soot is one form, is produced by diesel engines and the burning of wood, peat and other solid fuels. It is the second most significant contributor to climate change with only CO2 having a greater human-induced warming effect on the atmosphere.[6] In the context of India, black carbon or soot that emanates from the Northern plains blows over to the Himalayan ranges where it gets deposited onto the glaciers. This causes the glaciers to absorb more solar radiation than they did earlier and accelerates the melting process.

Apart from these reasons, irresponsible, unplanned development (deforestation, mining, heavy tourism etc.) in ecologically sensitive areas such as the Himalayas also impacts the local environment.

C. Glacial Lake Outburst Floods (GLOFs)

The melting and receding of glaciers have resulted in the formation of numerous glacial lakes across the Hindu Kush-Himalayan region. Due to this Himalayan States and downstream areas are now facing the risk of Glacial Lake Outburst Floods ("GLOFs"). A glacial lake outburst flood (GLOF) is a type of outburst flood that occurs when the dam (moraine) containing a glacial lake fails. The dam can fail due to erosion, a build-up of pressure, an avalanche or any seismic activity etc.

The seriousness of glacier lake outburst floods (GLOF) in the Himalayas was noticed during the Kedarnath floods in 2013. The floods resulted from a multi-day cloud outburst over Kedarnath which caused an increase in the volume of water in the Chorabari glacial lake, thus resulting in its outburst. This caused devastating floods and landslides across Northern India. It was the country's worst natural disaster since the 2004 tsunami. Its nature and magnitude was such that it is often referred to as

6 'Black carbon' rated as second largest cause of global warming, Climate Home News (2013), https://www.climatechangenews.com/2013/01/15/black-carbon-second-largest-global-warming-source/ (last visited Feb 24, 2019).

the Himalayan Tsunami. More than 5,700 people died according to Government reports. A 2014 World Bank estimated the total economic loss resulting from the floods to be more than $3.8 billion. This entire calamity resulted from the outburst of a single glacial lake which is around 250 metres long, 150 metres wide with a depth of 15-20 metres. There are lakes which are double or triple the size of the Chorabari glacier. Hence the warning that the Kedarnath floods may be only a small precursor to mega floods cannot be called as mere apocalyptic admonitions.

The Nepal-based International Centre for Integrated Mountain Development (ICIMOD) shows that Hindu Kush-Himalayan region is surrounded by over 8,000 glacial lake and around 200 of them are potentially dangerous. In another study a total of 251 glacial lakes >0.01 km^2 were identified and mapped over the Indian Himalayas, of which 45 lakes were not classifiable due to missing high-resolution imagery in Google Earth. All other lakes were qualitatively classified according to their outburst probability and damage potential. Based on the remote-sensing analysis, 12 lakes were considered as critical, in requirement of in-depth field analysis and process modelling so as to evaluate their hazard situation in greater detail. Another 93 lakes were considered as potentially critical and 101 lakes were deemed to present no GLOF risk to downstream locations under present conditions.[7]

GLACIERS AND DROUGHTS AND FUTURE OF WATER AND FOOD SECURITY

As the glaciers melt away, their ability to be "water towers" also diminish. They are the perennial source of water for millions of people in the Himalayan region, the Northern plains and the Indian subcontinent as a whole. Glacial ice protects against extreme water shortages on seasonal and longer timescales, since the glacial melt supply can be sustained through droughts, while all other river-basin water inputs and stores decline. Hence, they act as a crucial buffer against droughts.

Decrease in the glacier volume and the disappearance of smaller glaciers would significantly hamper the ecological balance of at least 9-10 major river systems. Approximately 968 glaciers drain into the Ganga basin in Uttarakhand and over 4,660 glaciers feed the Indus, Shyok, Jhelum and Chenab river systems. The Ravi,

7 Worni R, et al, Glacial lakes in the Indian Himalayas — From an area-wide glacial lake inventory to on-site and modelling based risk assessment of critical glacial lakes, Sci Total Environ (2012).

Beas, Chenab and Sutlej river systems are fed by 1,375 glaciers and 611 glaciers drain into the Teesta and Brahmaputra basins[8].

Perennial rivers could be changed into seasonal streams giving rise to freshwater scarcity in the summer months, since melted water contributes the bulk of the water supply to the Himalayan Rivers. The region's agriculture and power generation are fully dependent on the freshwater supply fed by the discharges of the Himalayan glaciers. In the Ganga River, the loss of glacier melt water would reduce the July-September flows by two thirds, causing water shortage for about 500 million people and 37% of India's irrigated land. [9]

In places like Ladakh where 90 per cent of farmers depend on irrigation by snow and glacial water, the productivity of agriculture is impacted and it has been observed that the water level in the mountain streams are also dropping. The future of our water security is at stake and we are living on the capital of our next generation. Any change in the supply of glacial-melt water poses a serious threat to agriculture, and therefore to the economy and food security of our future generation.

GLACIERS AND THEIR LEGAL STATUS

With the growing threat to our water security, conflicts over water, whether national or international, will follow. As more droughts are expected, and as India's population continue to grow, several important questions need to be looked into. As glaciers retreat and their water storage capacity is used up, who will get priority over the existing water supply? What happens to the downstream riparian rights when the primary source disappears? Who has the right to glaciers? Whether they are *Res Nullius* or *Res Communis*? What happens to borders, provincial or international, when the glaciers that differentiate them melt? Who will be liable in the case of a GLOF?

As argued below, Indian laws do not contemplate the role of glaciers and currently cannot provide answers to many of these questions. India needs a dynamic legal regime to tackle these issues in order to prepare for the effects of glacier melting and Climate Change as a whole.

8 Soma Basu, Himalayan states also face risk of glacial lake outburst floods, Down To Earth, (Aug 17, 2015), https://www.downtoearth.org.in/news/himalayan-states-also-face-risk-of-glacial-lake-outburst-floods--41412.

9 WWF: Monitoring the glaciers of the Himalayas, (July 14, 2010), http://clonewwf.wwf-dev.org/who_we_are/wwf_offices/nepal/?uProjectID=NP0898.

SUI GENERIS NATURE OF THE GLACIERS

The above questions cannot be answered merely by mapping glaciers onto the current legal regime of environmental and water rights. To do so would be to ignore the unique realities of glaciers, both in terms of their geographical characteristics and their importance to the public. Instead, this article argues that glaciers are of a sui generis nature and require their own body of law. Glaciers support intricate eco-systems that regulate stream flow, provide a historical story of the earth, and contribute to the stable regulation of the environment.[10] There are no other geographical features in the world that share these same attributes. Simply mapping glaciers onto the current environmental law regime would fail to capture their complex role. This reality has become more obvious over time, and water scholars around the world have also called for the recognition of the sui generis nature of glaciers.[11] Moreover, there is precedence for recognizing different sources of freshwater as being sui generis. For example, in Canada, the courts have recognized groundwater's *sui generis* nature and have come up with a specific common law system related to it.[12]

In India, the Government in 1970 mooted the passing of a "Groundwater (Control & Regulation) Bill through the Ministry of Agriculture. This Bill was circulated to all States with an advice to enact the same into an Act with necessary modifications. Till date, only the State of Gujarat has enacted the law in the shape of Bombay Irrigation (Gujarat Amendment) Act 1976, which came into force in 1988. However even this Act is applicable to only some specific areas of Gujarat.

Icebergs are another example. Icebergs are large chunks of ice which have calved from Arctic or Antarctic glaciers and float in international and national waters until they melt. While there is little clarity on exactly what law applies to icebergs, there is consensus on the fact that icebergs do not fit within the current system of public international law.[13]

10 Johannes Oerlemans, Glaciers and Climate Change (Lisse, the Netherlands: A A Balkema Publishers, 2001).

11 Laurence Boisson de Chazournes, Fresh Water in International Law (Oxford: Oxford University Press, 2013) at 44-46 [De Chazournes]; Jorge Daniel Taillant, "The Human Right . . . to Glaciers?" (2013) 28 J Environ Law Litig 60 at 62 [Taillant].

12 G. V. La Frost, Water Law in Canada: The Atlantic Provinces, Information Canada, (1973).

13 Various approaches to icebergs have been proposed and rejected, such as recognizing them as res nullius, as shipwrecks, or of the common heritage of humankind. De Chazournes, supra note 29 at 39-44; Christopher C Joyner, "Ice-Covered Regions in International Law" (1991) 31 Nat Resour J 213 at 231-232.

With these examples in mind, the geographically unique features of glaciers give rise to the necessity of recognizing them as a *sui generis* area of law in need of specific protection.

GLACIERS AND RIGHT TO WATER

The UN Committee on Economic Social & Cultural Rights has specified that the 'Right to Water" is a fundamental Human Right stating that: *"The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival."*

In India, where the right to water is not enshrined as a fundamental right in the Constitution, courts at both state and national level have interpreted Article 21 of the Constitution, the Right to Life, as encompassing the right to safe and sufficient water and sanitation –"the entitlement of citizens to receive safe drinking water (potable water).."i.e. to say 'Right to Safe Drinking Water' impliedly falls under the Fundamental Right of Right to Life.

Right to Water under the Indian Constitution has been protected as a negative right- i.e. the right not to have water sources polluted. The term 'water source' is not very clear in the aspect of whether it include glaciers or not. In cases like *Attakoya Thangal v. Union of India and Perumatty Gram Panchayat v. State of Kerala,* we find 'ground water' as the subject matter of 'water source'. In this case, the Court has interpreted Article 21 and water rights in a wider sense, as the protection of the very water source (Ground water) from depletion was taken into account. Given the current threats to the Himalayan glaciers and their *sui generis* nature, these bodies require protection as the absence of the very source of water makes the right to water meaningless.

GLACIERS AND POTENTIAL INTERNATIONAL CONFLICTS

Given that India and the subcontinent will likely face water shortages sooner or later, and that the Himalayan glaciers are the originating source of some of the main rivers that run through India, China, Nepal, Bhutan, Bangladesh and Pakistan, it is only a matter of time till a conflict over glacial waters occurs.

In the short term, the glacial retreat could cause not just an overflow of rivers within the country, but more significantly, a cross border overflow into neighbouring countries.

Rivers such as the Indus, Jhelum, Ravi, Bias and Sutlej rivers, are shared between India and Pakistan (five wars since 1947) while melt-water from the Tibetan glaciers supply water to both India and China. Rivers such as the Ganges, Teesta and Brahmaputra are shared between India and Bangladesh. Both India and China are exploring opportunities to harness Himalayan waters for hydroelectric power projects, and while the initial melt promises to provide plenty of water to both sides, the loss of glaciers could lead to water shortages further in the future. The Brahmaputra basin for instance flows into China in the upstream, and is shared across South Asia in the downstream. This situation could lead to major security issues, between India and China particularly, as the water flow reduces and demands intensify.

INDIAN CASE STUDIES RELATING TO HIMALAYAN GLACIERS

Although the existing Indian environment legislations are silent about glaciers and we still lack a concrete policy regarding the same, some of the recent observations by judiciary in the Environmental PILs have shown an optimistic approach.

Durga Dutt Ors vs State Of Himachal Pradesh (6 February, 2014)

The Court in this case observed that "*Black Carbon is primarily unburnt fuel that travels from warmer to colder areas through air, settles on glaciers and makes them melt and is believed to be the biggest contributor to global warming after Carbon Dioxide. Study suggests that 40% of the glacial retreat could be attributed to Black Carbon impact and hence Black Carbon emission reduction can lead to near term impact on warming and thus reduce glacier melting."* The court also observed that considerable increase in vehicular traffic in Himachal Pradesh, particularly in the Rothang Pass area has resulted in blackening/browning of the snow cover in mountains, especially emissions of unburnt hydrocarbon and carbon soot. Accordingly, the Court recommended that the vehicular traffic has to be restricted as well as regulated. BS- IV compliant fuel should be provided. Preferably, CNG or electrical vehicles should be used for tourism purposes, at least at the initial stage. Only such vehicles should be plying on those roads and more particularly the vehicles going to the glacier for tourism or commercial purposes should be subjected to regular pollution checks. Free flow of traffic and over-loading of vehicles should be prohibited. The court also directed the government to execute various cleanliness and afforestation measures.

Tara Singh Rajput v. State of Uttarakhand & Ors. (Judgement Dtd: 07th November, 2016)

In this case the Court observed that "*there is a largescale degradation of environment/ ecology in the Himalayas. The glaciers are rapidly depleting/receding. The colour of glaciers has also turned to black. Glaciers are the source of mighty rivers including Ganges and Yamuna. The rapid depletion of glaciers may lead to drying up of rivers causing immense misery to the people in Uttarakhand and other States. It is the duty of all of us to protect the glaciers and to restore them to their pristine glory. The human activities around glaciers, the haphazard constructions and deforestation have played havoc with the environment and ecology of the area.*"

The court directed that no new permanent construction/buildings shall come up within the radius of twenty-five kilometres from the edges of all the glaciers throughout the State of Uttarakhand. Directions for banning the burning of fossil fuel within a radius of 10 kilometres from the edges of glaciers was also given. The Court suggested that it shall be open to the State Government to impose a reasonable cess/fee, by terming it Glacier Tax on the persons visiting areas near the glaciers. The amount realized by way of Glacier Tax shall be used only for the benefit of people visiting the area including the pilgrims. The Court also directed the Ministry of Environment and Forests to issue directions stating that all hill stations across the State of Uttarakhand and Glaciers be declared as eco-sensitive zones under the Environmental Protection Act.

Glaciers as living entities **:** In another landmark judgement the Uttarakhand High Court after declaring the rivers Ganga and Yamuna as 'living entities', also granted the status of legal entities to the glaciers from where the two rivers originate, Gangotri and Yamunotri respectively. Charged with the protection of the glaciers, the State Chief Secretary, Advocate General, Director of the Namami Gange Project and senior advocate MC Mehta were given in loco parentis responsibilities to protect the glaciers. The court stated that their responsibility was "to protect, conserve and preserve the glaciers".

Laws Relating To Glaciers And Case Studies Around The World

a) **Kyrgyzstan***: In 1992, the Kumtor Gold Company gained approval to start an open pit gold mine in the Tian Shan Mountains. This region, and specifically the*

mountain on which the open pit mine was operating, is covered with glaciers. For almost twenty years, Kumtor and its Canadian operator, Centerra, have successfully mined substantial amounts of gold, but at a high environmental cost. From 1994 to 2011, they removed over 39 million cubic metres of glacial ice and dumped waste on the glaciers that potentially caused long-term water pollution issues in the region. Due to the high alpine location of the mine's tailing ponds, concerns arose over the ponds' spill that had the capacity to pollute waters all over central Asia. Despite these environmental concerns, the project was extended beyond its original 2014 end date and will now continue until at least 2023.

In 2014, the Kyrgyz Parliament passed a Glacier Law. This law laid out the liability for glacier damage, prohibited development on glaciers, created an inventory for glaciers, and was clearly aimed at projects such as Kumtor.

b) **Chile***: In the early 2000's, Barrick Gold began a mining project, Pascua Lama, that took place high in the Andes Mountains, right along the Argentine border and in close proximity to three small glaciers. Shortly after the project surveying began, local and indigenous communities learned of Barrick Gold's plan to blast and remove parts of the small glaciers in order to access the gold underneath. The communities were outraged and set out to stop the development. In response to this public outcry, Barrick Gold changed its decision and decided not to remove any parts of any of the glaciers. This incident brought international media attention to the issue of the protection of Chilean glaciers. For the past several years there has been substantial international pressure on the country to put in place legal safeguards for their glaciers and in particular to protect them from mining and other such activities. However, due to the country's dependence on mining, the development of this law has been slow. Since 2013, several versions of the law have been proposed and rejected. In March 2015 the newest version of the legislation was proposed. The new law allows for automatic protection of any area defined as a "glacier," assigns different classifications to different glaciers, and prohibits any activity that damages a glacier.*[14] *This multi-layered approach provides extensive protection for glaciers within national parks (estimated to be 80-85% of Chile's glaciers), but only limited protection for all others. Under the proposed legislation, a Council of Ministers would make decisions regarding glaciers outside of national parks, potentially making these decisions vulnerable to extensive lobbying.*

14 No translated version of the law could be obtained. All information about the law has come from secondary source.

c) **Switzerland:** *Switzerland has a long history of glacial regulation. The law on the same is embedded in the Swiss Civil Code ("SCC") and focuses on balancing touristic development with protection of the scenic view of the glaciers that makes that tourism viable rather than on the protection of glaciers itself. The SCC defines glaciers as objects with no owner, as having soil unsuitable for cultivation, and as public property for common use.*[15] *This definition of glaciers also includes the land immediately around the glaciers, as well as the point at which the glacial water enters streams, rivers, and lakes. Laws over individual glaciers, however, vary from canton to canton. In some cantons, where land transfers occurred in the 19th or early 20th centuries, glaciers have been determined to be a part of privately-owned land. In contrast, courts in other cantons have ruled that glaciers have never been and could never be part of land transfers. The Swiss glacier laws are complex and more of a balancing scheme, with particular emphasis on economic development.*

d) **Argentina:** *The Argentine National Glacier Act is the first legislation in the world dedicated to the protection of glaciers. The legislature enacted the law in response to the situation in Chile and the law, as compared to Chile, came into effect without much incident. Although the first draft of the legislation was vetoed in 2008, the second version of the law was passed in 2010. This law takes three important steps in protecting glaciers: it recognizes glaciers as a public good, it has created a National Glacier Inventory, and prohibits development, specifically mining, to occur on glacial or periglacial regions. Scientific and touristic development, however, are allowed on glaciers, provided that they do no damage. Although the mining industry in Argentina fought the legislation, they were unsuccessful and the law has been well-received by the general public. The success of the Argentinian Glacier Protection Law should serve as an example for other countries to follow.*

THE WAY AHEAD

Glaciers are intricately connected to the state of climate and one cannot protect them without mitigating climate change. India is party to almost all major Multilateral Environmental Agreements (MEAs) that can be divided into four types: a. conservation of nature; b. handling, management and movement of hazardous substances; c. atmospheric emissions; and d. marine environment. There are over

15 Swiss Civil Code, Art. 664.

500 active agreements/MOUs etc. to which India is signatory, including the Kyoto Protocol and UNFCCC (United Nations Framework Convention on Climate Change). To give effect to the above-mentioned international agreements, the Indian Parliament can enact domestic legislations vide Article 253 of the Constitution of India. And when the Parliament passes a law, it is far more effective than any government policy and/or rules and regulations, because a statute creates rights and imposes obligations on the State to implement them. It is in the interest of water security and other issues discussed above that India should enact a legislation dedicated specifically for the protection and preservation of the Himalayan Glaciers- our water towers.

SOME RECOMMENDATIONS FOR FUTURE LEGISLATION ON THE GLACIERS

The legislation for the protection and preservation of the Himalayan glaciers and the Himalayan ecosystem as a whole must include the following provisions:

1. A 66% Forest cover should be consistently maintained in the Himalayas and this should be constantly monitored. (India's National Forest Policy, 1988)
2. The Economy of Himalayan states must be built on a viable and sustainable forest-based economy and promotion of local organic agriculture. No heavy industry or mining should be permitted in the region.
3. A comprehensive pan Himalayan sustainable tourism rules and regulations should be brought about.
4. Sustainable urbanisation rules and regulations for the region should also take effect.
5. The law should cover aspects such as renewable energy generation and waste management.
6. No further large-scale hydroelectricity projects should be permitted in the region.
7. There should be a ban and/or restriction on the number of vehicles in eco-sensitive areas and high altitudes.
8. Stringent air pollution provisions to check Black Carbon pollution or soot not only in the Himalayan region but also in the Northern Plains should be introduced.

CONCLUSION

This article seeks to argue that India should device a legislative framework that directly aims at protecting and preserving the Himalayan glaciers. This would be helpful in securing our right to water and food, in India and the South Asian region. In designing such a legislation, India should look to the issues and successes of the laws in South America, Europe, and Asia; and also take note of the recent observations by the Indian judiciary in Environmental PILs. A domestic legal framework for the same is necessary to implement our obligations under international climate change mitigation treaties and conventions that we are a party to.

4

THE RIGHT TO SUSTAINABLE DEVELOPMENT AS *JUS COGENS* NORM IN MODERN INTERNATIONAL LAW: VOICES FROM INTERNATIONAL COURT OF JUSTICE

Atul Alexander and Yashpreet Singh*

SUSTAINABLE DEVELOPMENT RECOGNIZED AS A *JUS COGENS* NORM BY THE INTERNATIONAL COMMUNITY OF STATES: THE NON-LEGAL PERSPECTIVE

THE EVOLUTION OF "SUSTAINABLE DEVELOPMENT" PRINCIPLE

The issue of sustainable development has been on the global agenda for more than forty years. It was first highlighted at the UN Conference on the Human Environment in Stockholm[1] in 1972, where it was precisely recognized that achieving economic development while protecting the environment would be the biggest challenge of the 21st century. In 1992, the world met again at the Rio Earth Summit and adopted two major multilateral environmental agreements, the UN Framework convention

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1 UNGA, United Nations Conference on the Human Environment, December 15 1972, A/RES/2994, available at: http://www.refworld.org/docid/3b00f1c840.html (Last visited on Aug. 30, 2018).

on Climate Change[2] and the Convention on Biological Diversity[3]. Two years later, the UN Convention to Combat Desertification was also adopted. The most contemporary one was the UN Conference on Sustainable Development[4], held in June 2012, also known as the Rio+20 Summit.

At the Rio+20 summit, the progress made in the last 40 years of international environmentalism was scrutinized and a conclusion was reached that the diagnosis made back in 1972 was fundamentally accurate, but the measures adopted since then have barely produced any positive result. The challenge of combining economic growth with environmental sustainability is still looming and intensifying with every passing year. The population has twice expanded since 1972[5], the carbon dioxide concentration in the atmosphere has increased from 350 ppm (parts per million) to 400 ppm, and is rising by more than 2 ppm per year compared to 1 ppm per year in 1972.[6] The loss of biodiversity was hardly recognized back then, but now we are in the phase of the sixth great extinction.[7] The world leaders in turn resolved to adopt a new and dynamic approach titled "The Future We Want". They recognized the remarkable success that Millennium Development Goals[8] (hereinafter referred to as 'MDGs') had achieved and drawing an example from them, instituted the

2 UN General Assembly, United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly, January 20 1994, A/RES/48/189, available at: http://www.refworld.org/docid/3b00f2770.htm (Last visited on Aug. 30, 2018).

3 Convention on Biological Diversity: entered into force on Dec. 29, 1993, available at https://www.cbd.int/doc/legal/cbd-en.pdf (Last visited on 30-08-2018).

4 UN Conference on Sustainable Development, (June 22, 2012), ENV/DEV/1310, https://rio20.un.org/sites/rio20.un.org/files/a-conf.216l-1_english.pdf.pdf (Last visited on Aug. 30, 2018).

5 David Beillo, "Human Population Reaches 7 Billion--How Did This Happen and Can It Go On?", Scientific American, (October 28, 2011), https://www.scientificamerican.com/article/human-population-reaches-seven-billion/ (Last visited on Aug. 30, 2018).

6 Brian Kahn, "Earth's CO2 Passes the 400 PPM Threshold—Maybe Permanently", Scientific American, (Sept. 27, 2016), https://www.scientificamerican.com/article/earth-s-co2-passes-the-400-ppm-threshold-maybe-permanently/ (Last visited on Aug. 30, 2018).

7 Damian Carrington, "Earth's sixth mass extinction event under way, scientists warn", The Guardian, (July 10, 2017), https://www.theguardian.com/environment/2017/jul/10/earths-sixth-mass-extinction-event-already-underway-scientists-warn (Last visited on Aug. 30, 2018).

8 John McArthur and Krista Rasmussen, "How successful were the Millennium Development Goals?", Brookings, (January 11, 2017), https://www.brookings.edu/blog/future-development/2017/01/11/how-successful-were-the-millennium-development-goals/ (Last visited on Aug. 30, 2018).

Sustainable Development Goals (hereinafter referred to as 'SDGs') (UNGA 2012, 43).

THE SUSTAINABLE DEVELOPMENT GOALS (SDGS) AND THEIR EXPECTED OUTCOME

The member countries of the United Nations General Assembly (hereinafter referred to as 'UNGA') agreed upon seventeen sustainable development goals.[9] It includes economic development (including the end of extreme poverty), social inclusion, and environmental sustainability.[10] The SDGs aim to bring about collaboration amongst the world's governments, businesses and civil society, to effectively implement them.[11]

It was envisioned at the Rio+20 summit that the new approach of SDGs, much like MDGs, shall succeed because they shall be concise, limited, action-oriented, easily communicable and universally applicable.[12] The issues concerning sustainable development affect global health, education, agriculture, cities, energy systems, conservation of biological diversity, and more.[13] They would be strictly focused on priority areas for the achievement of sustainable development, being guided by the outcome document ["The Future We Want"]. These goals will have the potential to give a new impetus, new power, new social mobilization, new resources and new political will to the most important challenge of the 21st century.[14] Unlike the prior agreements, the SDGs will engage the whole world community, including not only the government but also businesses, scientists, leaders of civil society, NGOs and students. More importantly, the SDGs will be equally applicable to poor countries as well as rich countries.[15]

9 Jonathan Watts and Liz Ford, "Rio+20 Earth summit: pressure for deal – but will leaders hold their nerve?", The Guardian, (June 20, 2012), https://www.theguardian.com/environment/2012/jun/19/rio-earth-summit-sustainability-conference (Last visited on Aug. 30, 2018).

10 Jeffrey D. Sachs, The Age of Sustainable Development 485 (Columbia University Press, New York, 1st edn., 2015).

11 United Nations Development Programme, "Background of the Sustainable Development Goals", http://www.undp.org/content/undp/en/home/sustainable-development-goals/background/ (Last visited on Aug. 30, 2018).

12 *Supra* note 8 at 485.

13 *Ibid.*

14 *Supra* note 8 at 485.

15 *Supra* note 9.

WHAT IS NEEDED TO EFFECTIVELY ACHIEVE THE SDGS?

Goals are critical for social mobilization and help to orient the global effort in the right direction which otherwise is extremely hard to achieve in today's disparate and divided world. Stating goals help stake holders all around the world to agree on a common direction.[16] Since the whole process is accountable, the world leaders would be questioned on their actions and non-actions and the steps they are taking towards the achievement of SDGs. Thus pressure would be there among world leaders to implement the same[17] and also mobilize the epistemic communities (knowledge communities). Epistemic communities are communities of experts who have the specific knowledge to combat global problems such as hunger, diseases, etc. The stakeholder networks (Governments, Scientific communities, NGOs, Donor organizations, etc.) will also be mobilized. Such a multi stake-holder approach is recognized as extremely crucial for the success of sustainable development.[18]

But the most crucial part of the achievement of sustainable development is good governance. Governments and Businesses have to be accountable and avoid secrecy. The citizens', the market participants' and fellow human beings' intent on achieving sustainable development can only do so if they are aware of the actions of governments and large corporations.[19] Another key tenet is the participation of citizens of the world in decision making. Public discourse is an extremely crucial component that is required for the effectiveness of SDGs. The principles of "polluter pays" and corporate ethical responsibility are equally consequential.[20] The world needed a clear affirmative commitment to sustainable development and the leaders at Rio+20 summit unequivocally provided that.

A. Sustainable Development recognized as a *Jus Cogens* Norm by the International Community of States: The Legal Perspective

The identification of *Jus Cogens* norm in International Law has remained a point of controversy, considering the fact that there is no consensus with regard to the

16 *Supra* note 8 at 490.
17 *Supra* note 8 at 490.
18 *Supra* note 8 at 491.
19 *Supra* note 8 at 503.
20 *Supra* note 8 at 504.

meaning/definition of the same or any set of criteria to determine the same.[21] *Jus Cogens* as a norm is a limitation to State sovereignty, the norm is applicable to even those states which have not accepted the peremptory norm. [22]The doctrine redeemed and remerged after World War II and is codified under Article 53 of Vienna Convention of Law of Treaties[23] (hereinafter referred to as VCLT). But the scope of *Jus Cogens* is not yet fully established, although there is an agreement on the point of norm protecting the fundamental values of the International community.

The doctrine is important in the arena of International Environmental Law, as this issue mostly concerns the impairment of global community. Elaborating a set of criteria for *Jus Cogens*, scholars argue that it would create a scenario wherein the states can avoid the labyrinth of treaty obligation. The author argues that there are four criteria which are required for a norm to belong to *Jus Cogens*. The criteria are: firstly, a norm should have a moral foundation; secondly, the norm must be absolute in nature; thirdly, a vast majority of states must agree on the nature of the norm; and lastly, object of the norm must be to safeguard the interest of the state. [24]

The first element, 'moral foundation', is built on the understanding of Kant's definition of a moral norm. The norm should be complied by the state not because of coercion, but because of duty alone. Many scholars and state representatives of VCLT underscored the importance of moral foundation.

The second element is the 'absolute character of the norm'; the only way to decide on the absolute character is indicated through non-derogable nature of the norm.

The third criteria and the most important of all is that a 'majority of states are following the norm', consent of a large majority of states reflects this, and the norm also extends to those states who are persistent objectors. Peremptory norm is nothing

21 Mathew Saul, 'Identifying *Jus Cogens* Norms: The Interaction of Scholars and International Judges', Asian Journal of International Law, volume 5 issue 1, pp.26-54 (Jan. 2015).

22 *Ibid.*

23 Art. 53 States: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

24 Eva M.Kornicker Uhlmann, State Community Interest, *Jus Cogens* and Protection of Global Environment: Developing Criteria for Peremptory Norm, 11 Geo. Int'l Envtl. L. Rev. 101 (1998-1999).

but a stronger form of custom, there is no necessity of consent to the process of formation of *Jus Cogens*.

The final criterion for the formation of *Jus Cogens* is that the 'object of the norm is to protect the common interest or state community interest'. There are several norms in International law which have seemingly been expressing this. e.g. the principle of common heritage of mankind.[25] This is what many term as the "doctrine of mutual dependency", which is in contrast with state sovereignty. State community interest is not based on reciprocity, but a non-reciprocal interest. The hegemony of state is replaced by humankind and individuals. This is, for instance is seen in the Convention on Biological Diversity, the preamble of which states that biological diversity is the "common concern of humankind"[26].

Now, the core of this paper is to examine the nature of sustainable development as *Jus Cogens* norm. For starter, scholars argue that a principle would never attain the status of *Jus Cogens,* unlike rules in International Law. Unlike rules, principles do not impose or set out the legal consequences when the stated conditions are not met. The author argues, albeit that sustainable development is a principle in International Environmental Law and has still attained the status of *Jus Cogens*. To establish so, the analysis of opinions of International Court of Justice (hereinafter referred to as ICJ or World Court)has been undertaken in the paper. Before proceeding to those opinions, the authors also submit the fact that Environmental Law is inextricably a species of Human Rights, and the same is emphasized through various provisions like Principle 1 of the Rio Declaration[27], but the sad reality is there is not one International Human Rights instrument that specifically deals with the Right to Healthy Environment.

OPINIONS OF THE WORLD COURT

The separate opinion of Ad Hoc Judge Duggard in the *Democratic Republic of Congo (hereinafter referred to as DRC) v. Rwanda* on May 28 2002[28] (hereinafter referred to

25 *Ibid.*

26 Refer Paragraph 3 of the preamble on Convention on Biological Diversity, 1992.

27 Principle 1 of the 'Rio Declaration on Environment and Development, 1992 states: "Human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."

28 International Court of Justice available at https://www.icj-cij.org/en/case/117, (Last visited on Aug. 21, 2018).

as 'DRC' case) is the first occasion in which the court has expressly acknowledged the existence of a peremptory norm of *Jus Cogens* in international law. The separate opinion examines two vital aspects, firstly, the role of *Jus Cogens* in international litigation and the limits placed upon it and secondly that, a dispute must first be shown to be not capable of being settled by negotiation. In the DRC case, the DRC failed to establish that the court lacked jurisdiction to hear the present application, either in terms of a compromissory clause or the fact that several treaties were being violated by Rwanda. Violation of *Jus Cogens* cannot invoke reservation, and in the said case, the court has emphasized that its jurisdiction is based on consent and no peremptory norm requires state's consent to jurisdiction, where compliance with a peremptory norm is the issue before the court.

In a sense, it's a gross delay on the part of the world court as such a long time has been taken to reach a point where deliberations on the issue of *Jus Cogens* have taken place. However, the courts have recognized the principle of *Erga Omnes* obligation in the 1970 Barcelona Traction Case.[29] Despite numerous opportunities, the court as pointed out by Judge Duggard, has 'deliberately' avoided endorsing the notion of *Jus Cogens*. Despite this position, the world court in a catena of cases has endorsed *Jus Cogens* in parts. In the North Sea Continental Shelf Case,[30] the ILCS found that the prohibition on the use of force has the character of *Jus Cogens*. Further in the popular Arrest Warrant Case[31], the Court places greater emphasis on immunity over crimes against humanity. Going back to the 1960s, in terms of various separate and dissenting opinions, the court has discussed the principle of *Jus Cogens*. In 1960, in a dissenting opinion in the Right to Passage case, the Ad Hoc Judge Judge Fernandes referred to the rules of *Jus Cogens* and stated that no special practice could prevail over the rules.[32] In 1966, in the South West Africa cases, Judge Tanaka[33] declared: "*if jus dispositivum is capable of being changed by way of agreement between states, surely the law concerning the protection of human rights may be considered to belong to the Jus Cogens*".[34] The failure on the part of the world court to endorse *Jus Cogens* has not

29 Belgium v. Spain second phase judgment, ICJ Reports 1970, p. 32.

30 (Federal Republic of Germany/Denmark ICJ Report 1969, p. 42.

31 Democratic Republic of the Congo v. Belgium, Judgment I.C.J Reports, 2002.

32 Merits, I.C.J. Reports 1960, p. 135.

33 International Court of Justice, available at https://www.icj-cij.org/files/case-related/47/047-19660718-JUD-01-06-EN.pdf, (Last visited on Aug. 25, 2018).

34 International Court of Justice available at https://www.icj-cij.org/files/case-related/47/047-19660718-JUD-01-06-EN.pdf (Visited on Sept 2, 2018).

gone unnoticed amongst the International Tribunal. In one of the cases, *Al Adsani v. United Kingdom*[35], the International Tribunal have invoked the term *Jus Cogens* to portray higher norms of International Law. The acknowledgement of the present judgment is welcomed, however, the judgment stresses that the scope of *Jus Cogens* is not unlimited and the concept is not to be used as an instrument to overthrow accepted doctrines of international law. It is very well acknowledged that a treaty will be void if at the time of its conclusion, it conflicts with a peremptory norm of general international law (Art.53 of the Vienna convention on the Law of Treaties of 1969)[36] and that the states deny recognition to a situation created by serious breach of a peremptory norm (Arts.40 and 41 of the Draft Articles on the Responsibility of the States for Internationally Wrongful Acts).[37]

In the separate opinion of Ad Hoc Judge, Sir Elihu Lauterpacht, in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia Serbia and Montenegro*),[38] Sir Lauterpacht states that *Jus Cogens* has a less speculative role to play in the judicial process and consists of principles and policies. Principal and policies include the higher principles of international law e.g. aggression, torture, slavery, right to self-determination etc., while the latter encompasses goals of the international community at large. *Jus Cogens* advances both principle and policies. They must inevitably play a dominant role in the process of judicial choice. The Judgment of the World Court in *Ethiopia v. South Africa; Liberia v. South Africa*,[39] was yet another opportunity to deliberate on *Jus Cogens*, which was missed by the courts. The court was faced with the choice between the principle that a state must demonstrate a special national interest to enjoy legal standing or the principle of sacred trust obligation. The court chose the former. Moreover, the probe into some of the landmark cases such as *East Timor, Arrest Warrant Case, Phosphate Lands Case etc.*, the World Court placed

35 Derecho Internacional Público, Case of Al-Adsani v the United Kingdom- European Court of Human Rights, https://www.dipublico.org/1571/case-of-al-adsani-v-the-united-kingdom-european-court-of-human-rights/

36 *Supra*, footnote no. 3.

37 Draft Articles on State Responsibility For Internationally Wrongful Acts, with Commentaries 2001, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (Last visited on Sept. 4, 2019).

38 Provisional Measures, Sept. 13, 1993, p.440 para. 100.

39 Refworld, http://www.refworld.org/cases,ICJ,4023a9414.html (Last visited on Sept. 4, 2019).

emphasis on *Erga Omnes* obligation i.e. the principle of self-determination rather than *Jus Cogens*. In the *Arrest warrant case concerning Democratic Republic of Congo v. Belgium,* [40] the dissenting opinion of Judge Al-Khasawneh and Ad Hoc Judge Van den Wyngaert advocated the choice of *Jus Cogens* norm of the prohibition of crimes against humanity over the unsettled rule of immunity. Coming to the present case, the World Court is confronted with a very different situation and has a choice to overthrow the existing established 'Principles'. The issue is the court's jurisdiction as found in Article 36 of the statute, which is based on consent. The principle of 'judicial choice', between settled doctrines and the peremptory norm is underscored through the fact that the World Court gives utmost priority to the principle of consent over *Jus Cogens*. This basically typifies the fact that the World Court entails in molecular lawmaking than molar lawmaking.

The separate opinion of late ICJ vice-president C.G Weeramantry in the *Gabcikovo-Nagymaros* case[41]raises important concerns over environmental legal issues, especially with regard to the jurisprudence of sustainable development. The learned Judge, in this case points out that the principle of sustainable development has a normative value, and it was the maiden occasion in which this particular issue has garnered the attention in the docket of the court. The two important issues raised in the case were that of the right to development and the right of environmental protection, which are addressed in the separate opinions. Due consideration is to be paid to both these principles, which was agreed to by both the parties in the case i.e. Hungary and Slovakia, and was also emphasized on in the Brundtland Commission Report, the Rio declaration and Agenda 21.[42] According to the Judge, both the principles of development and sustainable development (obligation in International Environmental Law) have to be reconciled and studied; moreover these two principles have also attained the status of human right.

Now, the authors state that essential human rights or basic human rights are a reflection of *Jus Cogens* and *Erga Omnes* obligations, which possess universal

40 Judgment, I.C.J Reports 2002, p.3.

41 Separate Opinion of late Sri Lankan Judge of ICJ C.G Weeramantry available at https://www.icj-cij.org/files/case-related/92/092-19970925-JUD-01-03-EN.pdf (Last visited on Sept. 7, 2019).

42 Sustainable Development Knowledge Platform, https://sustainabledevelopment.un.org/outcomedocuments/agenda21 (Last visited on Sept. 8, 2019).

application irrespective of jurisdiction. The crystallization of *Erga Omnes* obligation is infused under Article 55 and 56 of the Charter.[43] It having established the fact that environmental obligation is a product of human rights, it is imperative to show that human rights have been elevated to the pedestal of *Jus Cogens*. Further, since sustainable development is yet to be codified under any of the human rights instruments, it is to be interpreted in the light of Right to life and health, which are primarily non-derogable rights,[44] which thereby attract higher liability.

In the vistas of International Environmental Law, there are certain tests to be passed before a principle achieves the status of *Jus Cogens*. The first test as stated earlier is that of moral judgment. Sustainable Development is not merely a principle of modern International Law but is an antique idea of human heritage and civilization, as the ethical conception of a principle cannot be downgraded if the principle has existed over a long period of time. The second and third character of the norm, the authors have clubbed together and enumerated through the opinion of C.G Weeramantry, i.e. the opinion of the judge with regard to the norm followed by majority of the state is unique, since it dwells into most of the ancient civilization of Africa, Europe, Asia etc. to insurmountably underscore the fact that sustainable development is not a novel phenomenon, but a sacrosanct obligation propagated as a traditional principle of law. Therefore, the time-factor required for a norm to be elevated is fulfilled. Sustainable Development was practiced in ancient irrigation-based civilizations a and numerous surveys and studies have been carried out on the social and environmental effects of a large dam.[45] The principle also finds articulation in the teachings of Buddhism; the sermons in Buddhism contain the principles of trusteeship. Further, in the Sonjo and Chagga, the Tanzanian tribes, it was considered sacred to ensure that each generation keeps the resources in good repair.[46] In a sense, the opinion of C.G Weeramantry adds a fresh lease of life in painting a universal character to the principle of *Jus Cogens*, which is central to the formation of *Jus Cogens* as advocated in Article 53 of VCLT.

43 United Nations, http://www.un.org/en/charter-united-nations/ (Last visited on Sept. 8, 2019).

44 Legislationline, https://www.legislationline.org/documents/id/7775 (Last visited on Sept. 12, 2019).

45 *Supra*, footnote no.21.

46 *Supra*, footnote no. 21.

The final requirement for fulfilling the *Jus Cogens* criteria is community interest; this could be witnessed through a list of legal instrument which has formalized the principle. The opinion of C.G Weeramantry traces the same, from the Founex report of expert in Switzerland 1971, the environment and development conference in Canberra 1971 to the United Nations General Assembly Resolution 2849.[47] But it was not until the Principle 11 of the Stockholm Declaration[48]and other principles in the same document that the need for sustainable development as a basic principle in environmental jurisprudence was vocalized. A number of multilateral treaties, declarations and financial institutions have also incorporated environmental principles in their agenda, for instance, the World Bank in 1993 convened a conference pertaining to Environmentally and Socially Sustainable Development (ESSD). Thus, one can observe that the principle of sustainable development is not merely adopted by the developing nations, but has also gained worldwide acceptance.

Another separate opinion on the topic is that of Judge Cancado Trinidade, in the *Pulp Mills Case.*[49] According to the opinion, a human being is at the fulcrum of sustainable development. The stress on human rights through the 1993 Vienna Declaration and Programme of Action[50] and Agenda 21 of the Rio Declaration is more tilted towards improving socio-economic conditions of the population and importantly vulnerable groups. It is also relevant to view the preamble of UNCED, wherein the importance of global partnership for sustainable development is stated as a move towards community interest, which is one of the criteria for *Jus Cogens*. Further, in 1997, UNESCO's "Declaration on the Responsibility of the present Generations towards Future Generations" also eloquently puts forth the nexus between humanity, inter-generational solidarity and the environment.

47 1971 Resolution is Titled "Development and Environment", https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/328/65/IMG/NR032865.pdf?OpenElement (Last visited on Sept. 14, 2019)

48 Principle 11 of the Stockholm Declaration 1972 states: The environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all, and appropriate steps should be taken by States and international organizations with a view to reaching agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures.

49 Pulp Mills Case, Argentina v Uruguay, available at https://www.icj-cij.org/en/case/135 (Last visited on Sept. 18, 2019).

50 United Nations Human Rights, office of the High Commissioner, https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx (Last visited on Sept. 14, 2019).

SOVEREIGNTY AS IMPEDIMENT TO ENVIRONMENTAL OBLIGATION

Sovereignty has a different meaning depending on the branch of study in which it has been referred to. It may be one in Jurisprudence, some other in political science, philosophy or history. It could be a political authority or legitimacy. Sovereignty was a result and reaction to the imperial movement of Holy Roman Empire. The UN Charter was crafted for the sovereign nation-state and in the earliest case of Permanent Court of International Justice, SS Lotus viewed that sovereignty of state cannot be presumed; the failure of the league of nation buttresses the fact that sovereignty has to be limited. The UN Charter apparently does not define the term sovereignty or its scope, interestingly the preamble of the charter induces the term "We the peoples of United Nations", indicates the fact that people are the ultimate sovereign. The will of the people is fourfold i.e. Prevention of war, protection of human rights, rule of law, higher standards and development of all. Of all these, our concern is the protection of human right, and one such human right is environmental protection, which includes the concept of sustainable development. The institution of United Nations cannot push for more authority than the will of the sovereign states. In the international legal system there is a perennial conflict between concerns and obligations on one hand and sovereignty and political independence on the other. The only way out for international obligations to sustain and survive is through the interpretation of Article 1 of the UN Charter i.e. limitation to the sovereignty, more specifically Article 1(2) and 1(3),[51] which says that states are obliged to respect the charter value. These provisions are important since good faith is based on non-reciprocal obligation and could apply to any principle in international law including sustainable development.

CONCLUSION

The history of International Law gives limited guidance on the existence and interpretation of a norm of *Jus Cogens.* However, attempts have been made to identify the same through several cases. *Jus Cogens* identification has occurred mostly post the V.C.L.T 1969. The ICJ does no better than to provide a somewhat ambiguous reference to the customary law as the justification. More understanding of *Jus Cogens*

51 *Supra*, footnote no.23.

gives a sense that scholars and judges have undertaken a justificatory approach to identify *Jus Cogens* rather than focusing on streamlining a methodology to interpret the same. The justificatory approach includes natural law, public order theory, and customary law. Despite the massive proliferation of theories, a methodology for identifying and interpreting *Jus Cogens* has still not been developed. Scores of national judicial bodies have also undertaken the task of identification of *Jus Cogens* along with influencing the creation of the same. The International Law Commission (ILC) has suggested that the prudent option would be to work upon state practice and jurisprudence of international tribunals rather than looking into the definition of the principle. The willingness of the states to endorse *Jus Cogens* but not to explain the same has forced scholars and judges to make the concept workable. None of the theories; natural law, public order theory and customary international law, provides for self-evidentiary coherent accounts of *Jus Cogens* for determining which norm has the particular status.

There is a persistent and prominent reluctance of the ICJ to engage in a proactive debate on principles of *Jus Cogens*. The contemporary outlook on *Jus Cogens* is that it is a law based on intuition rather than satisfying rigorous scientific methods. As the workload of international courts and their impact on the discretion of states has increased, the legitimacy of an international court is increasingly being questioned. The World Court largely remains a repository of state consent. It could be rightly said that the *Jus Cogens* principle can result in a more rigid curtailment of the discretion of states.

5

GREEN FEDERALISM AND CLIMATE CHANGE: CHALLENGES AND OPTIONS-AN INDIAN PERSPECTIVE

Prof.(Dr.) Rajiv Khare & Apurva Verma*

INTRODUCTION

The term "climate change" refers to an average rise in the global temperature over an area due to concentration of atmospheric greenhouse gases. Atmospheric greenhouse gases are a layer of gases that trap the heat from sun as it is reflected back from the earth. But large emissions of these gases have a negative impact as they trap heat within the atmosphere, which causes rise in, surface temperature on earth. The primary cause of climate change is the wide-ranging anthropogenic activities which have led to an increase in the emission of greenhouse gases into the atmosphere.

Since the onset of industrial revolution, there has been a transitional shift from agrarian economy to industrial one, resulting in increased anthropogenic activities. Climate experts prognosis is quite clear in this regard and have stated that anthropogenic emissions in this century have been the highest so far in human history.[1] There is a broader consensus that immediate steps need to be taken to reduce these emissions or else the situation will worsen and become irreversible.[2]

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1 AR5 synthesis report (Rep.). (n.d.)

2 Hunter, D., Salzman, J., & Zaelke, D. International environmental law and policy. St. Paul, MN: Foundation Press, p. 608 (2015).

There are meetings, discussions and debates being held at international and regional levels to address this menace. But often, these deliberations lack consensus, or result in shifting the responsibility on other nations. The whole climate change discourse right now is revolving around on a tussle between developed and the developing world.[3]

It may be pertinent to note that with limited financial capacity to address the issue of climate change, developing nations are the most vulnerable. As often, these countries lack adaptation and mitigating measures to combat the menace of climate change. Particularly developing economies like India and China, where major emphasis is on development and growth which often leaves the initiatives on climate change in the backdrop.

However, for a developing country like India, the issue is of prime importance, as it tops the list of nations to be adversely impacted by the ill-effects of climate change. Climate change adversely affects agriculture productivity, as irregular and extreme weather conditions have had a deep impact on this sector. Poverty is a persistent menace in the country, as a huge percentage of Indian population lives below the poverty line. Thereby, achieving food and nutritional security under these conditions becomes a daunting task as the nation has to strike a balance between the twin goals of growth and the goal of protecting environment.

This paper seeks to analyse how the policies and laws on climate change can be evolved in a federal country like India, wherein both central and state government can work cooperatively towards resolving the issue. It often happens in a federal context that the impact of environmental degradation is borne by one entity, but the decision-making rests with another. Thus, a synergistic approach is a must to combat the issue of climate change. The concept of green federalism talks about striking a balance between the functioning of both central and state governments and working in a co-operative manner towards dealing with issues relating to environmental degradation. Consequently, a sound environmental policy and law is the need of the hour.

CHALLENGES POSED BY CLIMATE CHANGE: AN INDIAN PERSPECTIVE

There are various challenges that India faces with respect to Climate Change viz; irregular monsoon, droughts, floods, storms, cyclones, rise in temperature, and rise

3 Walkout of USA over Paris accord is a glaring example of this, resulting in global backlash.

in sea levels etc. The Indian economy is basically dependent on agriculture. In such a scenario irregular monsoons will adversely affect agriculture as well as the people who are dependent on it, resulting in decreased agricultural productivity. With its huge population, majority of which depends on agriculture, this sector particularly is the most vulnerable to the growing threat of climate change. Climate change is creating erratic extremes in all the areas and India needs to prepare for such extremities.[4]

Water Scarcity is another challenge posed by climate change. Due to the rapid population rise in India, the demand and consumption of water has also spiralled. Global warming has effected seasonal flow of rivers and reduced water availability. Over exploitation of water resources has also contributed to the substantial depletion of the resource. Global warming has also led to the rise of the sea level due to the melting of Himalayan glaciers and this rise poses a grave threat to the coastal areas in our country, as they have the potential of being submerged, thereby damaging coastal infrastructure and properties.[5] The effects of climate change have also led to the loss of biodiversity and adverse impact on ecosystems. Many species are either already extinct or on the verge of extinction. Thus one can see that climate change and is impacts pose a huge threat to the survival of mankind itself. If the growing emphasis on development without keeping sustainability in mind continues, it would lead to a serious depletion of natural resources and environmental degradation.[6]

LEGAL REGULATION OF CLIMATE CHANGE IN INDIA

Indian Constitution & Climate Change

The Constitution of India, being the supreme law of the country, lays down the overall framework of the structure, power, and duties of government institutions[7]. The Constitution did not originally include any specific provision regarding environment and conservation. By the Constitution (42nd Amendment) Act, 1976

4 Nilima Chandiramani, Environmental Federalism: An Indian View Point and Ministry of Environment, Forest and Climate Change (MoEF), Government of India, 2009.

5 The Energy and Resources Institute Report, 2007. (Teri study included the costs of air pollution, which is significant cause of mortality and morbidity in the economical weaker sections of rural and urban India).

6 Srikanta K. Panigrahi, Climate Change and Development in Indian context, unfccc.int/cop8/se/kiosk/cd4.pdf

7 M. V. Pylee, Constitutional government in India: (1960).

some provisions related to environment were added. Under Article 48-A (added by 42nd Amendment Act 1976) , the State's responsibility with regard to environmental protection has been laid down[8]. The Constitution under Part IVA Article 51A (g) also casts a duty on Indian citizens to protect the environment[9]. Apart from the above specific provisions, a number of cases on Article 21 "Right to life"[10] were broadly interpreted by the courts to include within its ambit, the right to clean and pollution free environment.[11]

Indian Federalism in the context of Climate Change

Article 1 of the Constitution of India declares India to be a Union of States. Part XI of the Constitution demarcates the legislative, executive and financial powers between the union and the constituent states. In this paper, an attempt has been made to analyse the manner in which the Indian federal structure, specifically legislative federalism, tackles the menace of climate change under the broad constitutional framework of Indian Federalism.

Protection of ecology and environment in federal countries is a distributed responsibility of federal, provincial and local governments. Most of the constitutions of earlier federal nations did not have provisions regarding environment.[12] Therefore, environmental legislations had to be introduced either through the process of constitutional amendments, or judicial review or exercise of residual power of the federal governments. Federal laws introducing regulations on use of natural resources like water, forests, minerals etc. and stringent standards to control air, water and soil pollution have put enormous responsibilities on the provincial and local governments.

8 "The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country".

9 Art. 51-A(g) of our Constitution which reads as follows: "It shall be the duty of every citizen of *India* to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures". Added by 42nd Amendment Act, 1976

10 No person shall be deprived of his life or personal liberty except according to procedure established by law.

11 Rural Litigation and Entitlement Kendra Vs. State of U.P (AIR 1986 2 SCC 431); M.C Mehta vs. Union of India (1998(6) SCC 60); Subhash Kumar vs. State of Bihar (1991) SC 420 PIL; A.P Pollution Control Board (II) vs Prof. M V Nayudu (2001) 2 SCC 62; Narmada Bachao Andolan vs. Union of India (2000) 10 SCC 664; Indian Council for Enviro Legal Action vs. Union of India WRIT PETITION (C) No.967 OF 1989; Vellore Citizens Welfare Forum v. UOI, AIR (1996), SC 2718.

12 G Dhar Chakrabarty, P & Srivastava, Nidhi. (2015). GREEN FEDERALISM: EXPERIENCES AND PRACTICES.

But these bodies do not always have the financial and technical means and capacities to enforce the regulations.[13]

These have not only created tensions between the federal and provincial governments but also resulted in difference in the enforcement and implementation of laws, thereby creating dissatisfaction amongst various stakeholders.[14] Various financial, administrative and other methods have been adopted by different federal countries for resolving these issues with a co-operative framework which has had varying degrees of successes and limitations.

Indian Legislative Federalism

Article 246 read with Schedule 7 of Constitution of India demarcates subject-wise legislative power between Union and States. Environment and climate change as such do not find mention in any of the three lists as a distinct item[15]. Most of the entries are indirectly covering the ambit of environment[16].

The 42nd Amendment, 1976 tried to bring about significant changes in the area of environment in the Constitution of India. "Forests" and "protection of wild animals and birds" were deleted from the State List[17] and included in the Concurrent List.[18] This implied that both the union and the state governments could enact laws on the subject. In case of a conflict between the State laws and the Central laws, the latter would prevail[19].

All the natural resources-land, water, forests and mineral resources were assigned to the States[20]. Thus, the ambit of Union government was restricted to only two areas in

13 *Ibid.*

14 The Energy and Research Institute, Integrating Environment, ecology and climate change concerns in the Indian fiscal federalism framework, Prepared for thirteenth finance commission report, Government of India, 2009.

15 V. N. Shukla & Mahendra Pal Singh, V.N. Shuklas Constitution of India (2007).

16 Residuary powers (those not mentioned in either of the lists.) Article 248 read with Entry 97 List I. Other examples are Atomic Energy, Mineral Resources necessary for its production, Inter-State Rivers and River Valleys, Ports, Regulations and development of oilfields, mineral oil resources, petroleum, petroleum products etc.

17 S. Shanthakumar's Introduction to Environmental Law, 2nd edition, Nagpur, Wadhwa and Company, Reprint 2009, p. 75

18 Entry 17A and 17B of the Concurrent List.

19 Constitution of India, article 241.

20 The Seventh Schedule of the Constitution allocated to the states the subjects of land (entry 18), water (entry 17), forests (entry 19), wild animals and birds (entry 20), and mines (entry 23).

the resource management side viz, regulation of mines and mineral development[21], and regulation and development of interstate rivers and river valleys.[22]

India's approach so far has been on policy making as an executive endeavour rather than an all-encompassing climate change legislation. As climate change is not mentioned as a distinct item in either of the three lists, thus issues associated with it are addressed through other indirect routes viz, Parliaments invocation of the residuary clause under Constitution of India that vests the residuary power to enact laws with the Centre[23]. Another route is via Article 253[24]. It is the enabling provision through which Central government could make any law for whole or any part of the country to implement any treaty or convention with any country or any decision made in any international conference.[25]

POLICY FRAMEWORK

Indian climate change policies are framed taking into account international negotiations and agreements under consideration. There are two considerations taken into account in these policies i.e. tackling the issue of climate change and development.[26] There are various factors influencing domestic climate policy viz; international environmental agreements, experiences of other countries and certain internationally recognized principles.

21 Entry 54 of the Union List.

22 Entry 56 of the Union List.

23 Article 248 read with Entry 97 List I.

24 Article 253 Constitution of India- "*Legislation for giving effect to international agreements*. —Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

25 EPA 1986 was enacted via Art. 253. Other examples are Stockholm conference 1972—Air (Prevention and Control of Pollution) Act, 1981, Environment Protection Act, 1986, Wildlife Protection Act, 1972. Rio Conference, 1992 gave rose to Public Liability Insurance Act, 1991, National Environmental Tribunal Act, 1995. Convention on Biological Diversity, 1992 gave rise to The Biological Diversity Act, 2002. Convention of International Trade in Endangered Species of Wild Fauna and Flora, 1973 gave rise to Wildlife Protection (Amendment) Act, 2002.

26 Atteridge, A., Shrivastava, M. K., Pahuja, N., & Upadhyay, H. (2012). Climate Policy in India: What Shapes International, National and State Policy? Ambio, 41(S1), 68-77. doi:10.1007/s13280-011-0242-.

The Ministry of Environment, Forests and Climate Change (MOEFCC) is India's nodal agency for climate change co-operation and global negotiations. The Ministry is responsible for planning, promoting, coordinating and overseeing the implementation of environmental programs in the country.

National Environmental Policy 2006

This Policy of 2006 does not dilute the points laid down by earlier policies. It lays down emphasis on sustainable development as a model of growth, along with the way to conserve environmental resources and to involve various stakeholders under the ambit. It further emphasizes on the judicious manner of utilizing these resources so as to protect the interest of future generations, as proper management of resource allocation is a pre-requisite for sustainability. The policy takes into account the importance of numerous stakeholders and partnership amongst them to uphold the above objective.

Draft National Forest Policy 2018[27]

The Draft National Forest Policy 2018 works towards the objective of sustainable management of forests, by applying a strict approach towards non-utilization of forest land for commercial purposes. The policy aims at strengthening the efforts for participatory forest management thereby involving various stakeholders into its ambit. The draft takes into consideration the looming impact of climate change and the threat it poses towards the forest cover.

National Action Plan on Climate Change

National Action Plan on Climate Change was launched by the Government of India in 2008 under the aegis of Ministry of Environment, Forests and Climate Change.[28] It is India's national strategy to adapt to climate change and to attain sustainable development. The National Action Plan on Climate Change is guided by the principle of national growth but at the same time enhancing ecological sustainability. The missions under NAPCC are reviewed by the Executive Committee on Climate change under the chairmanship of Principal Secretary to the PM. Thus, PMO and

27 In Mar. 2018, MOEFCC put forth the Draft National Forest Policy 2018. It has kept it in public domain for the suggestions, and opinions of public.

28 National Action Plan on Climate Change (NAPCC) Report, Government of India, 2009.

MoEFCC are the key players in determining climate change policy. It encompasses 8 missions under its ambit. These missions are long-term integrated strategies to combat climate change.[29] These missions undertake both mitigation and adaptation strategies to combat the challenge of climate change.

State Action Plan on Climate Change

These are plans framed by respective State governments taking into account the local needs and aspirations. The significance of State Action Plans can't be undermined. India is a vast country and the impact of climate change varies as per geographical area and locations. Thus SAPCC gives emphasis to the aspect of specificity to address the issue. Often the national aspirations do not get translated into state priorities; the effort through these State Action Plans is to merge the national aspiration and local ones.

With State Action Plans, the major focus is on decentralizing National level action plans. The issue of decentralization becomes all the more important since the impact of climate changes is not the same across all regions and some areas will be worst hit as compared to the rest. For instance, Uttarakhand which falls in the Indian Himalayan Region is most vulnerable to climate change impacts, as compared to other areas. Thus, specificity in planning is of paramount significance. At the same time there should be adequate budget provisions for states in order to implement State Action Plans, as often financial constraints pose a bigger challenge than any other issue. [30]

CONTRIBUTION OF COURTS AND TRIBUNALS

After glancing through the various pronouncements of the apex court, it can be observed that the hon'ble apex court has played proactive role in protecting the

29 Ministry of Environment, Forest and Climate Change, Government of India. (www.moef.nic.in). Those Eight Missions are National Solar Mission, National Mission for Enhanced Energy Efficiency, National Mission on Sustainable Habitat, National Water Mission, National Mission for Sustaining the Himalayan Ecosystem, National mission for a Green India, National Mission for Sustainable Agriculture, National Mission on Strategic Knowledge for Climate Change.

30 Rangnath Ojha, INRM - Preparation of State Action Plan on Climate Change (SAPCC) for Uttar Pradesh, Arunachal Pradesh and Haryana, http://inrm.co.in/sapccuah.html (last visited May 8, 2018).

environment and improvement of seashores, air, water, land and coastal areas of wildlife. It has declared the Right to pollution free environment as a fundamental right under Article 21.[31] Public Interest Litigation has been used as a potent tool for protecting the environment by the courts in India. In the case of Indian Council for Enviro-legal action vs Union of India,[32] the Supreme Court held the"Polluter Pay Principle" to be a sound principle. Thus, through this principle, the court emphasized the commonly accepted principle that the party responsible for producing pollution must pay the damage done to the natural environment.

Similarly in M.C Mehta vs Union of India,[33] the apex court emphasized upon the fact that there needs to be a balance between economic development and environmental protection and thus brought to the forefront, the concept of sustainable development. It ordered for the closure of various industries emitting coke and coal which were polluting the air and having a damaging effect on Taj. Thus, there was a reaffirmation of the "Precautionary principle" and "Polluter Pay principle", as laid down in *Vellore Citizen Welfare forum vs Union of India*.[34]

The court was of the view that both the principles are a part of the law of land. The Supreme Court in this case relied on the report of Central Pollution Control Board and asked Uttar Pradesh Control Pollution Board to conduct a survey of the area and to list out industries that were polluting the area. Thus, the apex court played a proactive role in protection of a national heritage such as Taj Mahal from deterioration and damage due to atmospheric and environmental pollution.

In the T.N Godavarman case[35], the Supreme Court secured community rights over local resources. It was a landmark forest case. The backdrop of the case lies on the fact that there was a disproportionate demarcation of responsibilities between Central and State governments which resulted in the Central government exercising increasingly greater powers of control over forest diversion. This has come at the expense of acknowledging the diversity of local conditions and the effective utilization of the knowledge of authorities on the ground. This centralization was prompted in part

31 Ratlam Municipality Vs. Vardhichand (AIR 1980 SC 1622).
32 1996 AIR 1446 (Taj Trapezium Case).
33 (1997) 2 SCC 353.
34 AIR 1996 SC 2715.
35 T.N Godavarman Thirumulpad vs Union of India, (1996) 9. S.C.R. 982.

by recognition of the fact that the developmental interests of state governments may clash with forest conservation objectives. Sufficiently unambiguous duties on state authorities were imposed to ensure compliance with the Forest Conservation Act.[36] The many violations of the Forest Conservation Act described in detail in the 2013 Report of the Comptroller and Auditor General on Compensatory Afforestation in India ('the CAG Report') bear testimony to this Centre-state conflict.

Apart from the above, National Green Tribunal has in its various judgments tried to conserve the environment at times by making compliance stronger through sending notices to the concerned authority or by imposing compensation on the defaulter.

In *Chandra Bhal Singh vs Union of India*[37] the petitioner sought the implementation of provisions of Biological Diversity Act, 2002 and Biological Diversity Rules, 2004. In his petition, he alleged that the states and union territories failed to give attention to the biodiversity of their region. The petitioner also sought, setting up of Biodiversity Management Committees (BMCs) at the local level in every State under Section 41 of Biological Diversity Act, 2002. Pursuant to this, a bench headed by NGT Chairperson Justice Satwanter Kumar issued notices to MoEF (Ministry of Environment & Forest), National Biodiversity Authority and State Biodiversity Boards and asked them to lay down the amount of work that had been done in this area.

The Uttarakhand High Court's recent judgement in the *Divya Pharmacy vs Union of India*[38] case deserves special mention here, as the particular pharmacy was directed by the High court to share its profit with local communities in the region as prescribed under the Biological Diversity Act 2002. The court took a very liberal interpretation of the abovementioned act, by emphasizing upon the fact that it is welfare legislation that is in furtherance to India's obligations under international conventions such as the Nagoya Protocol. It also answered in affirmative on the question of whether State Biodiversity Boards could impose Fair and Equitable Benefit Sharing on companies that are registered in India, by implying that as far as the concept of benefit sharing goes, there is no distinction between foreign and India companies.

36 Forest Conservation Act, 1980, No. 69, Acts of Parliament, 1980 (India).
37 Original Application No.347 of 2016 decided on 08-08-2018.
38 2018 SCC OnLine, Utt 1035.

Another case that deserves special mention as far as fair and equitable benefit sharing concept is concerned is the *Goa Foundation vs M/S Sesa Sterlite Ltd & Ors*[39] in which the apex court cancelled the second renewal of the mining lease of Sterlite Ltd. in the state, and asked the state government to apply their mind while allocating the resource. The decision was in the backdrop of the hasty allocation of mines by the authorities, without keeping in mind sustainable development and environmental clearances. The court comprehensively laid down principles to be taken in consideration while allocating natural resources.

In *Ridhima Pandey vs Union of India*[40], a Public Interest Litigation was filed by a 9 year old girl before National Green tribunal[41] in which she stated the need of an assessment of the climate change initiatives being taken by the government so far, along with the data to be made available about the percentage of green-house gas emissions and the records of every forest resource diverted for commercial purpose. The major emphasis was laid to fix the accountability of Ministry of Environment, Forest and Climate Change and the Central Pollution Control Board before National Green Tribunal. The case was recently decided by a bench of Justice Adarsh Kumar Goel, in which it was made clear that climate change is covered under the ambit of Environment Protection Act, 1986, specifically the concept of Environment Impact Assessment backed by the above Act.

INDIA AND GLOBAL CLIMATE SCENARIO

Development has not been uniform all over the world and certain countries have moved ahead with regard to the same while others are still progressing. History bears testimony to the fact that the countries that progressed in the past did so while compromising on environment i.e. at the cost of massive environmental degradation. These developed countries were responsible for the bulk of the emissions in the past leading to climate change and they currently have the highest per capita emissions. Under this scenario, developing countries are left with limited choices. As they

39 (2018) 4 SCC 218.

40 Original Application No. 187 of 2017 (National Green Tribunal) (Principal Bench, New Delhi). Decided 2019.

41 There are seven specified laws on which NGT has jurisdiction. Schedule 1 of the National Green Tribunal Act lists down 7 acts where it has the power to hear civil cases relating to environmental issues and questions pertaining to implementation of these laws.

also have the "Right to Grow" and pursue economic development. Thus, climate negotiations revolve around this dichotomy of development and environmental protection.

It is a harsh reality that climate change is the biggest challenge facing humanity today and thus under these circumstances all the nations need to rise above the considerations discussed above and combat it unitedly.

Developed countries' inadequate response, even after clear proof of their own historical mistakes, is a matter of grave concern. Developing countries even though not responsible for causing the problem are willing to be the part of solution. The position of developing countries is very critical as they not only have to bear the burden of reducing emissions but also have to look for alternative cleaner mode of resources to attain the goal of development and to improve its Human Development Index.

India has a real stake in all these climate negotiations, as it is most susceptible to its adverse impacts[42]. India's climate change negotiations are embedded in its foreign policy. On the issue of emission reduction obligations, it has maintained its consistent position on common but differentiated responsibility. India has not taken any obligation of capping its emission reduction, but emphasized the financial responsibility of developed countries for the same. As mentioned earlier in a developing country like India, social and economic development is the topmost priority and thus any binding emission reductions obligations will have to be in equity with that objective[43].

With the coming times, climate change and its impacts are going to be more widespread and it is high time for all the countries to take this issue seriously. The tussle between developing and developed nations on emission reductions obligations are quite apparent. The walkout of USA over the legally binding emission targets under Kyoto Protocol is an alarming situation. In COP23, the issue of compensating developing and low-island nations was vehemently stressed upon[44]. Year by year

42 Atteridge, A., Shrivastava, M. K., Pahuja, N., & Upadhyay, H. (2012). Climate Policy in India: What Shapes International, National and State Policy? *Ambio, 41*(S1), 68-77. doi:10.1007/s13280-011-0242-.

43 *Ibid.*

44 COP23 /UNFCCC/ 2017.

countries are participating in international emission reductions conferences but they often lack accountability and implementation. It is high time that some major steps should be taken rather than the usual blame game. The dialogue needs to be co-operative and solution- oriented.

In this given backdrop, India is attempting to follow a cleaner path of development. The goal is to achieve economic growth while also reducing emissions. This will require employment of newer technologies and aiming for low carbon impact. India has been an active participant in most of the climate negotiations taking place at international level.

If we look at the per capita emission of our country, it is lower than most of the other countries. India ratified UNFCCC (United Nation Framework on Climate Change) in 1993. Since then, it has been a part of various multilateral negotiations taking place under its framework. Due to its low GHG emissions, it is not bound by any GHG mitigation commitments.

India has reiterated its emphasis on principle of equity and common but differentiated responsibilities and respective capabilities. In December 2015, an international climate agreement was adopted by countries at the UNFCCC, Conference of Parties (COP21) in Paris known as the Paris Agreement. India too ratified the agreement[45]. The agreement mandates countries to undertake binding commitments to curb emissions and to maintain average temperature globally at 1.5 degree centigrade as pre-industrial years. Thus, the agreement puts forth an ambitious new course in the climate negotiations globally.

Nationally Determined Contributions (NDC's) is one of the major aspects of Paris Agreement. Article 4, Para 2 of Paris Agreement requires all the parties to agreement to prepare their countries respective climate actions in the form of NDC.

India in its NDC has committed to reduce the emission intensity of its GDP by 33 to 35% by 2030 from 2005 level[46]. Thus, the thrust is upon reduction of emission overall and it is not sector specific. India has also emphasized that this is subject to an unequivocal support by developed countries in terms of financial help, technology

45 Oct. 2, 2016.

46 India's INDC UNFCCC. (n.d.). Retrieved from https://www4.unfccc.int/sites/NDCStaging/pages/All.aspx.

transfer to say the least[47]. Recently, the Climate Change Performance Index 2018 has ranked India 14th on overall performance index[48].

Thus, India is trying to reconcile development with environmental protection with emphasis on sustainable growth. In a democratic country of ours, development is the major goal; there is a legitimate imperative for economic growth, urbanization, industrialization, under these challenges it has to plan out a balanced approach ahead which is inclusive and sustainable. Mitigation strategies encompass reliance over clean energy sources like solar energy and wind energy. On the other hand, it stresses upon efficient use of energy sources. There are various programs and missions adopted by the government to ensure the above[49]. In the area of waste-management, the flagship "Swachh Bharat Mission "(Clean India Mission) is garnering a lot of attention. There are various other solid waste management programs run by the government.

The transport sector as well accounts for huge carbon emissions. Efficient use of fuel is must in this area. Thus, government is investing on low carbon infrastructure with DFCs (Dedicated Freight Corridors) to encourage people to use railways as for most of their transportation requirements. Often the plans made by central and state government ignore the science on climate change. To keep these aspects under consideration, INCAA (Indian Network on Climate Change Assessment), a new initiative of government of India, has been launched to dwell into the science of climate change in India

WAY FORWARD

As we have witnessed, in most of the major climate change conferences so far, countries have not kept their promise to slash their greenhouse carbon emissions. In such a scenario, there is a need for a Universal Framework on Climate Change, which is made to be binding on all the nations who are party to such framework. This framework should be equitable and balanced, keeping into account Mitigation, Adaptation & Capacity Building.

47 D., R., & P. (2009). Climate Change: India's Options (Vol. 44, pp. 34-42, Publication No. 31). Economic and political weekly.

48 Climate Change Performance Index 2018. (Dec. 7, 2018). Retrieved from https://www.climate-change-performance-index.org/climate-change-performance-index-2018.

49 National Solar Mission under NAPCC, Green Energy Corridor, National Mission for Enhanced Energy Efficiency

There is a need for a collaborative approach of developed and developing world to combat it. If India was to emerge as a key actor in climate negotiations, it should strongly put forward its development priorities at the forefront. To blindly cap its emission would lead to no substantial results for a country like ours which has other developmental considerations to take into account[50]. Thus, it would be unwise for it to yield to international pressure, without putting the conditions of facilitative technology transfer, financial aid and exchange of knowledge on climate science from the developed world.

Domestically, there should be better implementation of existing Policies. In absence of law, the issue of climate change is dealt with various administrative policies. But these administrative policies are often not sound and properly implemented and as a result they suffer from major lacunae. We struggle with implementing effective climate change policies because it often requires disputed policy changes in many sectors at all levels of government. Our policies imbibing mitigation and adaptation measures should follow a bottom–up regime, laying emphasis on domestic priorities, thereby making it an effective, equitable policy.

Often State Action Plans suffer from plethora of conceptual and procedural limitations too. Research group or think tanks activity assist states formulate better plans, so that better lessons on climate change policies could be exchanged, and proper mechanisms could be discussed about monitoring and evaluation. Critical sectors must be identified to make the plans more specific in their reach. An elaborate discussion should be carried out to include all the stakeholders in the formulation of these plans. There should be integration of scattered knowledge on climate change available on one common platform, as rethinking of earlier developmental pathways is crucial to make them more innovative.

Lastly and majorly, India should enact a comprehensive law on climate change. An all-encompassing umbrella legislation is the need of the hour to incorporate emission targets for various sectors. India has time and again indicated in its policies, the time bound steps to mitigate carbon emission amongst various sectors like power, transport, energy and industry. It will be cumbersome if there will be plethora of laws covering all the sectors under different ministries separately. It is better to have

50 *Ibid*, at 11.

one sound comprehensive law. Administrative policies as such, lack legal backing or sanction, which comes only through the enactment of a law. An issue as complex as climate change must be properly tackled in evolving a set of climate policies and laws in India. Thus, Indian Parliament could enact a comprehensive law on climate change by invoking Article 253, in the same manner Environmental Protection Act, 1986 and Air Act 1981 were enacted.

CONCLUSION

Morally, we are responsible to hand over to our future generations, a healthy place to live in. Sustainability should be at the crux of all the negotiations, so that short-term advantages won't hamper the real commitments. India will save additional money on reducing its percentage of importing fuels, if it moves to a greener mode of subsistence and not rely on unsustainable developmental pathways. The country has to show some serious commitments and accept climate challenge as a real challenge to India's progress. As climate change is a complex and multidimensional issue, there should be an effective legislation to tackle the menace of climate change in India which emphasizes on the need for a more collaborative and multidimensional approach involving all tiers of the government.

6

CULTURAL AND HISTORICAL WEALTH VS. ECONOMIC DEVELOPMENT- SUPREME COURT ADOPTS A SYMMETRICAL APPROACH: AN ANALYSIS OF THE K. GURUPRASAD RAO V. STATE OF KARNATAKA AND ORS. CASE

Atyotma Gupta*

INTRODUCTION – TEMPLES: INDIAN "PRIDE"

Urbanization and industrialization are unavoidable in the 21st century. We are living in a time where a nations economic wealth and its national income are the prime determinants of its global standing. However, the insurmountable growth and development (economic wealth) of any country cannot be achieved at the cost of its cultural and historic wealth. Consequently, checks and balances are required to be maintained by the Authorities at proper and frequent intervals to ensure the symmetry between cultural wealth and economic wealth[1].

The Supreme Court has intervened in development operations, such as mining, at varied instances[2] to prevent adverse effects on historical monuments and cultural heritage. This judgment is one of such instances wherein due to the unfettered mining operations by one Private operator, a temple in Karnataka faced destruction.

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1 The Hindu, Sustainable development fundamental right of people: SC, (Apr. 19, 2013), (last visited on June 15, 2016).

2 Samaj Parivartana Samudaya and Ors. vs. State of Karnataka and Ors., (2013) 8 SCC 154 (Indian Supreme Court).

The author seeks to identify and enlist various statutory protections advanced by the central and the state governments (as applicable in the present situation) to ensure the conservation of Indian culture and history for the future generations in the same or at least similar state as it exists today. Concomitantly, the article will focus on outlining the pertinent facts in the given case. This will be followed by the stance adopted by both parties and the considerations of the court.

Lastly, the author seeks to analyze the judgment of the court and comment on the aptness of the opinion expressed by the Apex Court. The focal point will be the inter-relation of environmental and cultural justice as expressed in the given case as well as the indispensable importance of achieving development in a sustainable manner as highlighted by the Apex Court in this judgment.

STATUTORY MEASURES TO ENSURE PRESERVATION OF "INDIAN CULTURE"

The government in India has been aware for quite some time of the probable harm that could be caused to the cultural heritage and historical monuments of India by the gradual process of industrialization and economic development. Therefore, since the 18th century, Governments of Bengal, Hyderabad, Madras and Mysore have enacted regulations for the same for their jurisdictions.[3] Subsequently, the responsibility of taking adequate measures for the preservation of monuments and relics of antiquity was adopted by the British Government and the appropriate law was enacted (1904 Act)[4]. Moreover, the Government of India Act, 1935 placed the protection of historical monument in the Federal List[5].

The Constitution of India consequently included the subject of protection of ancient monuments and archaeological sites in all the three lists of the Seventh Schedule[6]. Additionally, Article 49 ensures that adequate measures are adopted by the State for

3 Bengal Regulation XIX of 1810, Hyderabad Ancient Monuments Preservation Act VIII of 1337 Fasli, Madras Regulation VII of 1817 & Mysore Ancient Monuments Preservation Act, 1925.

4 Ancient Monuments Preservation Act, 1904, No. 7, Acts of Parliament, 1904 (India).

5 Government of India Act, 1935, Federal List, Entry 15.

6 Constitution of India, Entry 67 (Union List), Entry 12 (State List) and Entry 40 (Concurrent List), Schedule VII.

protecting the monuments of national importance[7]. In order to align the previously existing laws with this division in the Constitution, the Ancient Monuments and Archaeological Sites and Remains Act, 1958 was enacted[8] and the corresponding rules were passed[9]. The State of Karnataka also passed the corresponding Act[10] and the Rules[11].

CRUCIAL FACTS

Jambunatha Temple, was notified as a "Protected Monument" by the Government of Karnataka and as a result the area surrounding the temple was declared a "Protected Area" under the Karnataka Act. Another notification by the State Government declared the periphery and precincts of the temple as "Safe Zone" where no mining operations could be undertaken.

Shri R. Gangadharappa, obtained a mining lease, under the MM(RD)Act , 1957, for extracting iron ore, for 30 years in the periphery of the temple. This lease was also approved under the Forest (Conservation) Act, 1980. On one of the statutorily mandated inspections of the temple, it was revealed that the aforesaid mining operations are causing a huge damage to the structure of the temple. Consequently, a notice was issued to the private entities to immediately stop the mining operations. However, the Ministry of Environment and Forests accorded the permission to the respondents to increase the mining operations.

The appellant consequently filed a writ petition in public interest in the Karnataka High Court for ceasing the mining operations. The High Court directed the respondents to submit a report as to whether the operations were being undertaken in the prohibited areas. The High Court accepted this report and dismissed the writ petition without addressing the issues raised by the appellants.

7 The Constitution of India, art. 49.

8 As the 1904 Act covered all types of monuments and burdened the Central Government with all sites (whether falling under State List, Union List or Concurrent List), a separate legislation was needed.

9 Ancient Monuments and Archaeological Sites and Remains Rules, 1959.

10 The Karnataka Ancient and Historical Monuments and Archaeological Sites and Remains Act, 1961, No. 7, Acts of Karnataka Legislative Assembly, 1962.

11 Karnataka Ancient and Historical Monuments and Archaeological Sites and Remains Rules, 1966.

Thereafter a special leave petition was filed by the Appellants in the Supreme Court. The Supreme Court appointed a neutral committee to conduct investigations on site and suggest recommendations for preventing any damage to the temple while continuing the mining operations.

OBSERVATIONS BY THE HON'BLE APEX COURT

The appellants argued that the recommendations of the committee would be immediately implemented. However, the respondents contested the admission of the committee's recommendations as it would have been against the public interest and ultra vires the MM(RD)A, 1957. The court observed that as per the Central as well as the State's Act and Rules, specific permissions were required to be taken before starting any operations in the "prohibited areas" or the "regulated areas" as specified by the "appropriate government". The courts stated that the mining leases and licenses taken under the Mines and Minerals (Regulation and Development) Act, 1957 (MM(RD)Act, 1957) were not sufficient if the operations were being undertaken in any of those specified areas.

Refusing to accept the violation of public interest averment of the respondents, the court held that it is a price to be paid for striking a balance between preserving the cultural and historical monuments and economic development. The court also referred to the *Taj Trapezium Matter*[12] and *Taj Trapezium Pollution*[13] cases to accord an overriding effect to cultural heritage.

The court critically examined the irreparable loss caused to the temple due to blasts carried out by the mining operators within the 200 m radius of the temple. It accepted the recommendations of the committee and held that they are not in conflict with the 1957 Act. The court allowed the appeal and held that the mining operations shall not be carried on within the areas as specified in the report of the Committee.

AUTHOR'S ANALYSIS AND COMMENTS

It is absolutely clear from the above judgment that the right to sustainable development has been deeply ingrained in our legal system and the Indian judiciary

12 M.C. Mehta (Taj Trapezium Matter) v. Union of India, (1997) 2 SCC 353 (India).

13 M.C. Mehta (Taj Trapezium Pollution) v. Union of India, (2001) 9 SCC 235 (India).

has recognized this as a fundamental right at various instances[14]. The approach of the court in admitting Public Interest Litigations (PILs) on matters concerning the violation of this fundamental right can be clearly depicted from the context of a liberal understanding to enforce rule of law, fundamental rights of the citizens and constitutional propriety aimed at the protection and improvement of cultural heritage[15].

In this backdrop, it is imperative to analyze the scope of the Right to Development. The right to development is not to be construed in a restricted sense to mean economic betterment[16]. The concept of right to development has been globally considered to be inclusive of a variety of rights, right to cultural heritage being one of them[17]. This interpretation has been authenticated by the Indian judiciary as well[18]. In this case as well, the court rejected the contention of the respondents that stopping the mining operations would result in a loss of revenue for the state and hence would be adverse to public interest. The court held that in the light of savings made for the future generations, it is not a heavy price to be paid for some individuals and the state.

Environmental and Cultural Justice-A crucial tool in preserving cultural heritage

The right to enjoy the cultural heritage is one of the basic and fundamental rights of the citizens and they should have the access to it by all means. This applies to the future generations as well. These properties are ultra-valuable[19] in the economic sense and priceless on a broader aesthetic and cultural level[20]. They bind a group or a community and are the foundation stones of the community. The marriage of *social justice* and *cultural justice* is another interesting facet of this judgment. Social justice ensures the implementation of the best possible alternative as an effort to

14 Dr. Meenakshi Bharath v. State of Karnataka, 2012 (4) KarLJ 248.

15 S.P. Sathe, Judicial Activism in India: Transgressing Borders and Enforcing Limits, 2002, page 224.

16 N.D. Jayal and Ors. vs. Union of India (UOI) and Ors., (2004) 9 SCC 362 (India).

17 Derek Fincham, *The Distinctiveness of Property and Heritage*, 115 Penn. St. L. Rev. 641 (2011).

18 *See* Protection of Forest Environment v. Union of India, 2017 (2) UC 1094 and Aruna Roy and Ors. v. Union of India and Ors, A.I.R. 2002 SC 3176.

19 World Heritage Convention art. 1.

20 John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 Phil. & Pub. Aff. 223 (1985).

bring a more just order in the society (whereas the needs of people are fully met)[21]. This judgment gains significance as it lays down the parameters to be considered for comparing the two alternatives and deciding as to what leads to the needs of the people being more fully met. The Supreme Court conceded that if the mining operations come to a halt, it will have an impeding effect on the economy of the country as well as the leaseholders will face huge losses. This might, in turn, lead to an increase in the price of the goods derived out of such mining. However, analyzing and commenting on the long-term gains achieved by adoption of the Committee's report, the Supreme Court allowed the appeal.

Therefore, the Supreme Court's judgment is a landmark precedent on the issue of striking a balance between the equitable access to cultural and historical properties and creation of economic wealth. Illegal mining is pre-dominantly carried on in many mining areas in the country and the Bellary district of Karnataka is the most apt example for this proposition. In developed jurisdictions, all regulatory mining and environmental legislations enacted to reduce the effect of mining are strictly implemented. Attaining an appropriate symmetry between supply and demand for goods and services, environmental management, economic and cultural stability and intra-generational and inter-generational equity is a challenge that India faces today.

21 Robert E. Rodes, Jr., *Social Justice and Liberation*, 71 Notre Dame L. Rev. 619 (1996).

7

RIDHIMA PANDEY v. UNION OF INDIA: THE ONSET OF CLIMATE CHANGE LITIGATION IN INDIA

Nikita Pattajoshi*

INTRODUCTION

While much of public awareness on climate change has grown due to newspaper headlines, magazine cover stories or movies like The Inconvenient Truth, one cannot help but accept that a part of it can be attributed to climate change advocates who are rigorously pursuing climate change matters before courts worldwide.

Deliberations at international level on climate change policy, in initial years, focused on the global impact of climate change such as the rise in average global temperature and sea level etc. However, with the growing instances of climate litigation, the focus has now shifted to more localized issues attributable to climate change. This may span from injury to a particular species, to potential impact of climate change on a particular industry. The most common form of climate change litigation that has been seen in the past is when the civil society or group of individuals has challenged the State's inaction or failure to meet its obligations under international instruments regulating climate change. [1] The last two decades have seen a steep rise in the number

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1 See Urgenda Foundation v. The State of the Netherlands, C/09/456689/HA ZA 13-1396 (24 June, 2015) (Hague District Court) [District Court in the Hague ordered the Dutch Government to limit national greenhouse gas emissions by at least 25% by 2020 compared to the level emitted in 1990]; see also Client Earth, R (on the application of) v. Secretary of State for the Environment, Food and Rural Affairs [2015] UKSC 28 (29 April, 2015) [UK Supreme Court ordered the UK Government to comply with the nitrogen dioxide limits

of climate change lawsuits worldwide. Though we are still in the early days of global warming litigation, these lawsuits have made significant impact on legal and political climate of some nations. A study conducted by the United Nations Environment Program (UNEP) and Columbia University's Sabin Center for Climate Change Law shows that the number of climate change cases have tripled since the year 2014 and the maximum number of such lawsuits have been filed in the United States[2]. However, this seems to have had little or no impact on India.

In the very first case of its kind in India, Ridhima Pandey, a 9-year-old girl has moved the National Green Tribunal alleging inaction on the part of the Government to take measures for climate change adoption and mitigation[3]. This paper is an attempt to assess the contribution of the case in laying down the foundation of climate change litigation in India.

DEFINING CLIMATE CHANGE LITIGATION

It is a daunting task to define or classify a certain set of cases as climate change cases. Scholars have attempted to define climate change litigation in the past. Professor David Markell and J.B. Ruhl, for instance, define climate litigation as "*any litigation in which either the claimant or the litigation forum raises and discusses an issue of fact or law which is directly and closely related to climate change causes, impact and policy.*"[4] Climate change litigation, in simpler terms implies bringing action for damages, or climate change mitigation or adaptation, before Courts of law, mostly against the Government and sometimes against a private bodies like a company, accounting for their failure to match their developmental aspirations with climate change obligations. However, it remains a real challenge to bracket a set of cases as climate change litigation, because it is an all-pervasive form of litigation and does

provided for in the EU Air Quality Directive]; Ashgar Leghari v. Federation of Pakistan (W.P. No. 25501/2015) [Lahore High Court mandated the government to implement its climate adaptation plan].

2 United Nations Environment Programme (UNEP), The Status of Climate Change Litigation: A Global Review, (May 2017) available at http://columbiaclimatelaw.com/files/2017/05/Burger-Gundlach-2017-05-UN-Envt-CC-Litigation.pdf (last visited 12th April, 2019).

3 Ridhima Pandey v. Union of India and Ors. (OA No. 187/2017).

4 David Markell and J.B. Ruhl, An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual, 64 Florida Law Review 15, at 27 (2012).

not have a specific form or ground in itself. As David Hunter notes, climate change is nothing but a manifestation of an action for common law nuisance or violation of a human right to environment or damage to cultural property[5]. Following are some considerations that highlight the potential challenges that any attempt to define climate change litigation may face.

Causes of climate change are varied in number and aspect

The question of climate change involves scientific complexities of a scale that is new to the Courts and thus climate change is seen as a multi-scalar problem[6]. Considering the fact that climate change as a problem can be attributed to a myriad of natural and man-made activities, domestic or industrial, any litigation that brings such activity under scanner of the Courts can be tagged as 'climate change litigation'. However, this would mean taking a very broad and generalized approach to define climate change litigation. Thus, what has to be scrutinized is litigation that has a more direct nexus with climate change as against litigation that merely discusses climate change as an evil but does not directly impinge upon mitigation measures. The approach taken in UK exemplifies this. In the UK, climate challenge litigation means a culmination of public law challenges in various policy areas wherein the litigant might seek relief for some harm, but the case shares an interface with climate change policy.[7]

The difference between both the types of litigation can be better appreciated by referring to some prominent cases of climate change litigation. The first climate change case dates back to the year 2007 and happens to be the most prominent example of climate change litigation[8]. In this momentous case, twelve states and several cities of United States brought a suit against the federal Environmental Protection Agency (EPA), mandating it to regulate Green House Gas (GHG) emissions under the Clean Air Act, the federal statute on control of air pollution.

5 David B. Hunter, The Implications of Climate Change Litigation: Litigation for International Environmental Law Making, in Adjudicating Climate Change: State, National and International Approaches (Hari Osofsky and William Burns ed.) (Cambridge University Press, 2009), 358.

6 Hari M. Osofsky, Adjudicating Climate Change: State, National and International Approaches (Cambridge University Press, 2009), 130.

7 Kim Bouwer, Climate Change and the individual in UK, in Climate Change Litigation: A Comparative Approach (Mbengue and Sindico ed.), (Springer, 2019).

8 Massachusetts v. Environmental Protection Agency 549 US 497 (2007) (US Supreme Court).

The US Supreme Court reprimanded the EPA and mandated them to regulate the emissions or required them to formulate a strong rationale to avoid regulation[9]. Now this was a litigation that underlines the strong causal connection between GHG emissions and climate change.

Ambiguity over the term 'litigation'

The second challenge in defining climate change litigation is the ambiguity over the term 'litigation' and the multiple connotations it has. While 'litigation' on one hand may be used to mean a formal dispute-resolution carried out by a judicial body like a Court of law or a quasi-judicial body like a Tribunal, on the other hand it may mean a more informal justice delivery mechanism before an independent decision maker[10]. It may also mean to cover cases that have commenced before an adjudicating body but has not reached its final stage or has been settled before the final adjudication[11]. What also remains significant here is the forum one chooses to approach for a climate lawsuit. Though the forum one chooses might not be significant to the process of classification, but it helps us move towards a better demarcation.

However, since the reason behind studying climate change litigation cases is to understand its impact on climate change law and policy making, it is imperative to assess such cases on their substance (the motive behind such litigation, the outcome, the impact etc.) and not the form of the litigation (which forum was used, which law was invoked etc.).

Objective behind the litigation is multifarious

The motivation behind a litigant who brings a climate lawsuit is also a key determinant in identification of climate change litigation. Climate lawsuits may primarily be classified into 'proactive litigation', wherein the litigant seeks to promote regulation of climate change or 'anti-regulatory litigation' wherein the litigant opposes or challenges the existing regulatory measures[12].

9 *Ibid.*

10 Chris Hilson, Climate Change Litigation in the UK: An Explanatory Approach in, Climate Change: La Ripostadel Diritto (F. Fracchia and M. Occhiena eds.), Editoriale Scientifica, 421 (2010).

11 *Ibid.*

12 Jacqueline Peel and Hari M. Osofsky, Climate Change Litigation: Regulatory Pathways to Cleaner Energy (Cambridge University Press, 2015), 5.

A pertinent example in this context is from the Canadian jurisdiction where Friends of the Earth, an international network of environmental organisations sought a declaration from the Court (Supreme Court of Canada) that the Canadian government had failed to meet the legal requirements of the Kyoto Protocol by missing deadlines and failing to publish regulations.[13] Such litigation reflects a very direct link to climate change wherein the immediate objective of the litigant is to promote climate change mitigation measures. Subsequently, in Canada there was a failed attempt made to implement a Kyoto Protocol Implementation Act[14].

What also matters in this context, is the grounds invoked in case of a lawsuit. The motive behind a climate change litigation is often understood from the basis of the legal claim made in the suit. For instance, a lawsuit or litigation that challenges establishment of a project in a particular place on grounds that it would have negative impact on the air quality or the ground water index, in a stricter sense might not be tagged as a climate change lawsuit. While the outcome of this case will have some impact on climate change and may influence climate change policy decisions, the issue of including such cases under the ambit of climate change cases would be of equating all environmental law cases with climate change cases. This would defy the whole objective of analysing climate change cases and their impact independently of all other suits brought under various environmental laws. For instance, if we were to take a broader view, then even the Plachimada struggle in Kerala could be conveniently considered to be a climate change case.

Lastly, there comes a need to classify all climate lawsuits on the basis of who does one hold accountable for the climate change in the suit, thereby bringing afore a broad categorization of such lawsuits into public climate change litigation and private climate change litigation. Public climate change litigation is where the claimant is holding the Government or its agencies accountable for climate change adaptation measures. Private climate litigation to the contrary, is where the claimant holds the private entities accountable for climate change damages[15]. The focus of this paper

13 Friends of the Earth v. Governor in Council et.al. (2008) [2008] FC 1183; [2009] 3 F.C.R. 201 (Federal Court, Canada).

14 Theodore Okonkwo1, Protecting the Environment and People from Climate Change through Climate Change Litigation, 10(5), Journal of Politics and Law, 66-72 (2017).

15 Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, If at First You Don't Succeed: Suing Corporations for Climate Change, 38(4) Oxford Journal of Legal Studies 841, 842 (2018).

is the prospect of public climate change litigation in India in the aftermath of the *Ridhima Pandey* case.

Sufficient clarity on the three aspects discussed above, will guide one to understand the truest meaning of climate change litigation. However, difficulty arises with respect to classification of cases that dwell in a grey area. For instance, the practice of hydraulic fracturing or fracking is a commonly used practice in the United States to extract natural gas. This practice has been considered to be a more environmentally benign way of extracting gas, than involvement of fossil fuel. However, it has been found that fracking can pose various environmental risks such as pollution of groundwater, air and land and increased seismic activity, and has a greater environmental footprint than conventional gas extraction[16]. Thus, in the Indian context, fracking can be challenged on grounds of violation of right to water under Article 21 of the Constitution of India or under existing ground water regulations[17]. Further, there has been litigation on impact of fracking on water resource and wildlife[18]. Sadly, the practice of fracking has never been contested on climate change forums. It is in such a scenario that one faces the complex question as to whether the existing litigations against fracking be considered climate change litigation or not.

At this stage, it is imperative to understand that the underlying objective behind analysing climate change cases is to understand its cumulative impact on climate change law and policy making. Thus, adopting a very broad or a very narrow approach to define such cases or litigation would lead to faulty results. It is thus next to impossible to formulate a check list for classification of cases as climate change lawsuit. However, for the purpose of this paper, climate change litigation may be defined as any litigation before the Courts of law or competent Tribunal wherein the claimant 'directly' brings into issue (including relief against damages or inaction of Government) an obligation of the Government towards climate change, irrespective of whether it exists under any specific legislation or under any international legal instrument or arises out of generally accepted principle of international law.

16 Dr. Armin Rosencranz and Shubham Janghu, Socio-Political and Environmental Impact of Fracking, 5 Journal of Environmental Law, Policy and Development 1, 6 (2018).

17 *Ibid,* at 12.

18 See, e.g., Fullerton Cove Residents Action Group Incorporated v. Dart Energy Ltd. (No. 2) (2013) NSWLEC 38. (Land and Environment Court, New South Wales).

UNDERSTANDING *RIDHIMA PANDEY V. UNION OF INDIA AND ORS.*[19]

The instant case is in the form of an application before the National Green Tribunal seeking intervention of the Tribunal in climate change mitigation in India. The prayer sought in this case is a direction from the Tribunal to the Respondents (Ministry of Environment, Forest and Climate Change and Central Pollution Control Board) mandating them to take 'effective measures' for climate change mitigation.

FACTS

The application has been moved by a 9-year-old girl who is a resident of the State of Uttarakhand, represented by her legal guardian. The standing has been justified by stating that children of today's time are at a higher and disproportionate risk of getting affected by climate change. The petition has been filed under Section 14 of the National Green Tribunal Act, 2010.

ARGUMENTS

The legal basis for the claim put forth by the applicant is two-fold;

- Firstly, non -implementation of various environmental laws in India which has resulted in worsening the climate change scenario.
- Secondly, inaction on the part of the Government to take 'science-based' climate change mitigation measures.

  The basis for this is the public trust doctrine under which the State and its machinery holds the resources in trust for the future generation. Such inaction on part of the Ministry also stands against India's binding obligations under the Paris Agreement, 2015. The Paris Agreement recognizes the role of the Government in addressing climate change concerns by means of various municipal legislations and policy decisions.

ANOTHER CASE OF JUDICIAL REVIEW OR CLIMATE CHANGE LITIGATION?

Being the very first case of this kind in India, the decision has opened floodgates of speculation and warrants discussion. The question that arises at this juncture is

19 *Supra* at 4.

whether the instant case is just another case of judicial review of an administrative action or does it indeed qualify to be a climate change litigation.

The move by the petitioner in this case against the Government is not unparalleled. Similar lawsuits have come up in many other jurisdictions, around the same time frame. The petitioner in the instant case seems to have drawn inspiration from the recent case *Juliana, et.al.* v. *United States*, filed in 2015 before the U.S. District Court for the District of Oregon by a group of 21 young petitioners against the Government of US[20]. The primary contention of the petitioners in the case was violation of their constitutional rights by the Government by causing dangerous carbon dioxide emissions. Not just that, like in the instant case, even in the case of *Juliana* v. *United States*, the petitioners invoked the public trust doctrine to highlight the inaction on the part of the Government. The petition has kick-started a chain of extended litigation in the US. It is not just India, even another 7-year-old child in Pakistan has tried to replicate attempt by the 21 young petitioners in the Juliana case, on substantially same grounds[21].

The case of *Ridhima Pandey* v. *Union of India and Ors.*, together with the above-mentioned cases, leaves a very important question open for the Tribunal i.e. what should be the legally binding effect of the UN Climate Change regime. This question has been at the core of all climate change negotiation carried out under the aegis of UN.

It is found that the Paris Agreement of 2015, in specific does not create legally binding obligations in terms of State Parties' Nationally Determined Contributions (NDCs) nor does it create any substantive obligations pertaining to climate change mitigation measures[22]. However, with respect to the procedural obligations, all of them are made legally binding on the State Parties[23]. However, the Conference of Parties (COP) has been given the power to adopt legally binding rules. This is clear

20 Cascadia Rose Juliana v. United States (Case Docket No. 18-36082) (2015) (District Court of Oregon).

21 Rabab Ali v. Federation of Pakistan and Anr. (Petition dated 6th Apr., 2016) (Supreme Court of Pakistan).

22 Paris Agreement, 2015 (UNFCCC), art. 3 (2015); see Daniel Bodansky and Lavanya Rajamani, The Issues that Never Die, 3 Carbon and Climate Law Review 184, 185 (2018).

23 For e.g., Provisions regarding transparency, reporting and accountability is binding; See Article 13, Paris Agreement.

from the fact that various provisions read that the Parties 'shall' act in accordance with relevant guidelines issued by the COP[24]. Further, it is to be noted that the Paris Agreement 'prescribes' preparation and maintenance of the Nationally Determined Contributions, but does not prescribe the contents of such Contributions, thereby providing with leeway for discretion at the national level[25].

India is a party to the United Nations Framework Convention on Climate Change (UNFCCC) and the resultant protocol and has vehemently opposed legally binding targets for GHG emission reduction[26]. However, lack of a specific legislation implementing obligations under the climate change treaties should not be a ground for the Courts to evade their responsibility. In this respect, the Indian scenario resembles the Canadian scenario and thus Indian Supreme Court should draw inspiration from the Canadian Supreme Court. Canada, like India lacks a comprehensive legislation that translates international climate change obligations into legally binding obligations. However, this has not stopped the Canadian Supreme Court from enforcing climate change actions brought by claimants[27].

Similarly, in the noted *Urgenda Foundation* v. *State of Netherlands* case[28], 900 citizens proceeded against the Dutch Government highlighting inaction on the part of the Government in arresting its emission of Green House Gases (GHG), the Hague District Court held that the Dutch Government was under a legally binding obligation to reduce its emission level by 25% by 2020, from its 1990 level. It is to be noted that while arriving at the decision, the Court placed reliance on the 'harm principle' of public international law.

Drawing inspiration from the *Urgenda case* or the *Friends of the Earth case,* the National Green Tribunal must also not rely on lack of specific legislation as a ground

24 Paris Agreement, 2015 (UNFCCC), art. 4(8) and art. 13(13).

25 Lavanya Rajamani and Jutte Brunee, The Legality of Downgrading Nationally Determined Contributions under the Paris Agreement: Lessons from the US Disengagement, 29 Journal of Environmental Law 537, at 540 (2017).

26 Ministry of Environment and Forests, Government of India, Climate Change Negotiations: India's Submissions to the UNFCCC, (Aug. 2009), http://moef.nic.in/modules/about-the-ministry/CCD/, (last visited 10th Apr., 2019).

27 See, Friends of the Earth v. Governor in Council et.al. (2008) [2008] FC 1183; [2009] 3 F.C.R. 201. (Federal Court, Canada).

28 Urgenda Foundation v. The State of the Netherlands, C/09/456689/HA ZA 13-1396 (24 June, 2015) (Hague District Court).

to evade responsibility. The Tribunal must then break open the limited contours of judicial review and issue directions against the Government and the MoEFCC as per the prayer of the petitioner. If the Tribunal is successful in adequately honouring the claims of the petitioner in this case, then indeed the *Ridhima Pandey v. Union of India* case will be considered to be the first successful case of climate change litigation in India.

ROLE OF NATIONAL GREEN TRIBUNAL (NGT) IN CLIMATE CHANGE LITIGATION

In the Indian context, climate change claims have not been the sole basis of any litigation before Courts, so far. All cases that have surfaced before the Supreme Court or the High Courts so far, have either a passing reference to climate change in the arguments of litigants (who often use climate change concern to corroborate their claims) or are mentioned by the judges in their discussion of environmental issues or in the *obiter*[29]. For instance, the Supreme Court in the *Narmada Bachao Andolan* v. *Union of India* case, acknowledged the importance of hydro-electric power projects in reducing climate change effect and thus recognized this as one of the grounds for allowing the hydro-electric power project to operate[30].

While the success of a climate change lawsuit depends entirely on the willingness of the judiciary to hold the government accountable for environmental degradation, often procedural bottlenecks like maintainability, *locus standi*, causation, burden of proof etc. affect the litigation.

CHALLENGES

The first prominent challenge that the National Green Tribunal will face in any climate change litigation is the jurisdictional challenge. The mandate of the National Green Tribunal is restricted by the National Green Tribunal Act, 2010 as per which the Tribunal can entertain all civil cases regarding a 'substantial question relating to environment' under one of the 7 Acts listed in the Schedule of the Act[31]. Since the

29 Lavanya Rajamani, Rights Based Climate Litigation in the Indian Courts: Potential, Prospects & Potential Problems, CPR Climate Initiative: Working Paper 2013/1 (May), http://www.cprindia.org/sites/default/files/working_papers/Working%20paper%202013_LRajamani_Climate%20Litigation_5.pdf, (last visited 10th April, 2019).

30 AIR 2000 SC 3751.

31 National Green Tribunal Act, 2010, sec. 14.

Indian Government's obligation to take mitigation and adaptation measures against climate change does not arise from any of the 7 environmental legislations listed in the National Green Tribunal Act, 2010, it is often argued that the Tribunal does not have jurisdiction to entertain climate-based claims.

An example of this approach is the Government's reservation with the order of the Tribunal in the *Gaurav Kumar Bansal v. Union of India and Ors.* case[32]. In this case, the petitioner invoked the duty of the Tribunal to hold the State and Central Government accountable for implementing the National Action Plan on Climate Change[33]. However, in the affidavit filed by the Ministry of Environment, Forests and Climate Change (MoEFCC), it raised objection regarding the exercise of jurisdiction by the NGT in this matter on grounds that the issue raised in the petition does not squarely fall under any of the 7 enlisted laws in the NGT Act, 2010. The NGT in its order however directed the States which had not yet drafted their action plan to do so on a priority basis, without directly addressing the concern raised by the MoEFCC). However, MoEFCC always has the liberty to challenge NGT's jurisdiction in this matter before the Apex Court and then the response of the Apex Court will determine the scope for further climate change issues being brought before the NGT.

In this context it is to be understood that the NGT is a creature of a Statute and does not derive powers from the Constitution. Thus, any decision of the Tribunal cannot base itself on the fundamental right to environment and other rights that spring out of it, and has to be within ambit of rights arising out of the listed legislations. However, such a narrow understanding of NGT's jurisdiction will hinder growth of climate change litigations in the country.

Another important challenge that exists at a broader level is the separation of power narrative. It is argued that climate change needs certain policy prescriptions and policy concerns like these should be placed outside the domain of the undemocratic judiciary[34]. The judiciary does not have the requisite 'wisdom' to judge the

32 Gaurav Kumar Bansal v Union of India & Others (Order dated 23 July 2015), (http://greentribunal.gov.in/Writereaddata/Downloads/498-2014(PB-I)OA23-7-2015.pdf, (last visited on 19th Apr., 2019).

33 Gaurav Kumar Bansal v. Union of India and Ors. (Original Application No. 498 of 2014).

34 Derived from Frankfurter J's opinion in Morey v. Dovd, See BALCO Employees' Union v. Union of India (2002) 2 SCC 333; Manohar Lal Sharma v. Union of India (2013) 6 SCC 616; Union of India v. Dinesh Eng. Corpn. (2001) 8 SCC 491] K. Garg v. Union of India (1981) 4 SCC 675 [Courts have their limitations — because these issues rest with the policy

effectiveness of a policy measure, let alone a climate change policy, which involves climate science, economics etc. Therefore, if the judiciary ventures into climate policy and governance, it would amount to blatant violation of separation of powers. An example of this separation of power narrative also exists in the United States where the US Courts, instead of exercising their own judgement, display extreme deference to judgment of the expert administrative agency regarding climate change policies and actions and their effectiveness[35].

Even in the Indian context, more often than not, the NGT has exercised greater caution before intervening with policy decisions of the Government as is evident from the decision of the NGT in the case of *Indian Council for Enviro-legal Action v. MoEFCC and Ors case*[36]. The instant case was a petition before the NGT seeking its order to certain group of industries to stop manufacturing HFC-23, a gas categorized as a Green House Gas under the Kyoto Protocol. The MoEFCC here contended that HFC-23, though a recognized GHG under the Kyoto Protocol, is not prohibited or discouraged as a 'pollutant' under any of the environmental legislations of the country and thus NGT cannot sit in judgement over the issue. In response to this, the Tribunal concluded that regulation of emission of HFC- 23 as a GHG under Kyoto Protocol is a part of 'policy decision' of the Government of India and thus it is inappropriate for the Tribunal to intervene.

CONCLUSION

Climate change lawsuits throughout the world have successfully influenced climate change regulation and policy in those countries either directly (by means of a mandate) or indirectly by influencing societal norms and corporate behavior[37]. Hence, such climate change cases are indeed epitomes of constitutionalism in

makers for the nation. No direction can be given or is expected from the courts unless while implementing such policies, there is violation or infringement of any of the constitutional or statutory provision].

35 Tracy Hester, Private Claims for a Global Climate: U.S. And Indian Litigation Approaches to Climate Change and Environmental Harm, 1 International Journal of the National Green Tribunal (2014).

36 Indian Council for Enviro-legal Action v MoEFCC and Others, (10 Dec., 2015), http://www.greentribunal.gov.in/Writereaddata/Downloads/170-2014(PB-I-Judg)OA-10-12-015.pdf, (last visited on 13th Apr., 2019).

37 *Supra* 13, at 2

the face of climate change. However, while the success of such lawsuit depends entirely on the willingness of the judiciary to hold the government accountable for environmental degradation, often procedural bottlenecks like *locus standi*, causation, burden of proof etc. affect the litigation. Despite all the difficulties and challenges, owing to lack of political will on part of States to respond to climate change, climate change cases have been predicted to rise exponentially in the year 2018[38].

But this is not the case in India. India has been identified as a promising and robust venue for climate change lawsuits due to a combination of various factors like an activist judiciary and the public interest jurisprudence developed by them coupled with the fact that India remains a potentially serious 'victim' of climate change and the third largest emitter of GHGs[39]. The National Green Tribunal has been believed to be a potential forum for successful climate change litigation in India as the Tribunal has accepted that Government has a duty to combat climate change and has not involved in technical issues like causality, when dealing with climate change[40].

In the Indian context, however, it is a sorry state of affairs that environmental governance in general has remained largely weak, even for matters covered by specific Parliamentary legislations. This is where the judiciary has played a key activist role in strengthening environmental governance in the country. The Supreme Court has played an activist role in recognizing a set of unremunerated environmental rights and significantly influencing environmental policy making. The problem however aggravates in case of climate change since India does not have one single parliamentary legislation that specifically deals with climate change and its effects. Aggressive litigation efforts by environmental advocates like M.C. Mehta, Ritwick Dutta etc. have mostly been rights-based litigation, harping on the constitutional right to life jurisprudence or principle like public trust doctrine.

38 The Hindu Business Line, Climate change cases predicted to make a legal splash in 2018, (Jan. 9, 2018) available at https://www.thehindubusinessline.com/news/world/climate-change-cases-predicted-to-make-a-legal-splash-in-2018/article10004063.ece, (last visited on 23rd Apr., 2019)

39 Michael B. Gerrard & Gregory E. Wannier, Climate Change Liability: Transnational Law and Practice (Richard Lord et al. eds.), 48 (2012).

40 Shibani Ghosh, Climate Change Litigation in India: Gaining Traction, (Jan. 15, 2016), https://cprclimateinitiative.wordpress.com/2016/01/15/climate-litigation-in-india/, (last visited 10th April, 2019).

Success stories across various jurisdictions have suggested that citizens can and should use Courts of law as a forum to force climate change adaptation measures in a country. The outcome of the *Riddhima Pandey* case will determine the journey of climate change litigation in India.

From the instances cited throughout this paper, it can be concluded that the climate change discourse has made its way to Indian judicial process, and there is an increasing consciousness among the citizenry about climate change. However, what is missing in India is the Urgenda level commitment among its citizenry[41]. But to look at the greener side of the grass, India has an unparalleled culture of public interest litigation which will help climate change litigation flourish[42]. Further, the National Green Tribunal, which has displayed higher standards of judicial activism, will be the best available forum for such climate-based litigation to flourish. All of this leaves open the scope for greater judicial engagement with climate change claims.

41 Referring to the efforts made by the citizenry in Urgenda Foundation v. The State of the Netherlands case.

42 *Supra* at 30.

8

BOOK REVIEW

WATER LAW IN INDIA (AN INTRODUCTION TO LEGAL INSTRUMENTS) (SECOND EDITION 2017): EDITED BY PHILIPPE CULLET AND SUJITH KOONAN

Kavin Castro*

The book 'Water Law in India'[1] authored by Dr. Philippe Cullet and Sujith Koonan seeks to provide a fundamental understanding of the substance and enforcement of water law in India. The book contains eleven chapters covering practically all aspects related to water laws such as the international law and policy governing water, the basic concepts and principles related to water at the national level, the regulation of water: general instruments and issues, interstate river basins, water transfers, and dams, drinking water supply, environmental dimensions: protection, conservation, and sustainable use of water, irrigation, embankments, floods, protection and regulation of groundwater etc.

The authors start off with an overview and background information regarding water laws and the evolution of water related policy in India. They state that the regulations on water have shifted from 'use of water' to 'water conservation and protection', especially of drinking water. Regulations on this issue are now strongly trring to ensure the sustainability of human use of water. The regulation of water is

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1 Philippe Cullet & Sujith Koonan, Water law in India: An Introduction to Legal Instruments(2018).

decentralised, and there is division of powers between union and state with regard to the same. In the Constitutional perspective, the 73rd and 74th amendments have given powers and responsibilities to the local bodies, but this devolution is yet to be fully implemented in certain parts of the country. The lack of legislation lets the executive devise a series of policy frameworks that act in effect as the regulatory framework for drinking water, which has led to a dominant role for the executive while mapping water laws.

The authors in the book state that when rights are discussed, the aspect of assertion of control over water also comes up. In this regard, when the State claims direct ownership over water resources, it is challenged by bringing up the public-trust doctrine. The issue of the development of private/ individual rights over control of water, evolved from land rights which is a part of property rights, is also covered in the first chapter of the publication. Even before the right to water became the subject of interest at the international level, the higher judiciary read the right to water within the right to life under Art. 21 of the Constitution *(Subhash Kumar v. State of Bihar,1991)*.[2] Some courts have also derived the right to water from Art. 47 of the Constitution *(Hamid Khan v. State of Madhya Pradesh, 1996)*[3]. The first chapter also discusses the challenge of regulating water in the context of increasing water use and global environmental change. The claim is that this area of law should be on par with the realization of decentralisation and effective democratic legislative process, where the priorities of the majority of the people are considered as well as informed.

In the next chapter, the authors give us an international perspective of water laws and its governance. The impact of legally binding and non-binding (soft law) instruments and their persuasive tendency in shaping the domestic policy. In this chapter, some sections of the human rights treaties which have mentioned the right to water have been covered. In the Stockholm declaration, which considers water as an essential part of the environment, special focus has been given to the role of women in the management and safeguarding of water and recognition of water as an economic good for its economic value. This gives us the inference that the author perceivers water-related affairs as a tool for eradicating gender inequality and paving the way for economisation of water. In the latter part of the chapter, it is stated that in the

2 *Subhash Kumar vs State of Bihar and Ors*, 1991 AIR 420.
3 *Hamid Khan vs State of M.P. and Ors.,* AIR 1997 MP 191

absence of a particular legal framework at the international level, the vacuum is filled by bilateral and regional initiatives. In this regard the Indus Water Treaty, 1960 is also discussed in this chapter.

Next, the authors analyse the fundamental right to water in India and extracts of cases related are discussed while analysing the same. Cullet and Koonam states that the conflict in this regard is as to whom is entitled to the right; whether the beneficiaries of the project or the oustees as in the case of *(Narmada Bachao Andolan v. Union of India and Others).*[4] Then comes the jurisdiction over water relating to the Constitution of India. Water is a state subject, however, the Union government is vested with powers to make laws relating to interstate rivers. Here the interesting aspect is that, if two or more states pass a resolution, the Union can legislate laws on the state subject, which will be applicable only to those states. Another interesting aspect is that of the decentralisation of powers to the third tier, which empowers the Panchayats and Municipalities to issues relating to social justice and economic development concerning associated with any water-related matter. The authors when discussing the principles of water law bring up the topic of prohibition of ownership and the public trust doctrine. Indian history indicates that flowing water was not generally to be owned as private property. The Supreme Court discusses the principle of "public trust", where it makes the claim that water should be preserved and used judiciously. The above aspect has been applied to running waters and the court is yet to give a final say regarding the application of the same to groundwater.

Further, the authors discuss the general instruments and regulation of water. Water laws have a sectoral approach, and hence there is lack of a comprehensive method to regulate water. Constitutional provisions play a crucial role in the regulation. Water is a state subject, and this makes the task tedious for the Union government for adopting a framework water law. This chapter discusses provions of the Draft National Water Framework Bill, 2016. Another issue which is covered in this chapter is the lack of inter-sectoral (reallocation of water to a different use) allocation of water. Later some state governments have adopted measures to address this issue but only on ad hoc basis.

4 *Narmada Bachao Andolan v. Union of India and Ors,* [2000] 10 S.C.C.

The following chapter is a topic of increasing importance in the contemporary scenario. The first section focuses on interstate river regulation and dispute resolution. This continues to be a central concern of lawyers in the water sector for decades. Consequently river basin management is discussed and the idea of alleviation of water scarcity through inter-basin water transfers has been discussed The concept of 'use' is central, and 'conservation' is proposed as a vision, but the reviewer considers conservation to be of primary importance. The third section deals with the dam projects. Considering the economic potential of rivers, dams become a central part of water policy.

The next chapter covers with drinking water supply. Being a primary concern for the government, drinking water and human survival are directly linked to each other. Discussing the regulation and other aspects of drinking water supply, importance is given by authors to the regulations with respect to rural areas. Unlike many researchers who merely focus on the urban community, here the authors have given consistent importance to the rural community and their water requirements and usage related issues.

In chapter seven, the authors address the different aspects of conservation and use of water from an environmental perspective. The problem here is that water law remains underdeveloped in its conservation dimension when compared with the environmental law dimension. Having failed to integrate with environmental law, many aspects of water regulation are mostly addressed through environmental law. The very central role that water plays in everyone's life and as an essential element sustaining the environment makes it a crucial issues. In the latter part of the chapter, water pollution and water quality are discussed and are considered to be a part of the broader corpus of environmental law. It also refers to the watershed, sand mining and catchment protection. The issue of sand mining which is one of the human-made disasters had led to the development of new regulatory measures for sand mining.

For any researcher on water laws in India, this book provides almost all the case laws and legal instruments on water regulation and law and is an important addition to the environmental legal literature. To the readers, this book will provide valuable insights on how the regulation of water has evolved along with the other associated issues. The legal instruments covered in the book is bound to reduce the burden of any researcher.

The author's understanding of water and related laws to a large extent is influenced by his keen understanding of the existing political and social scenario in India. His efforts to understand the social, political and historical aspects of water-related issues is laudatory and his approach has not just focussed on water as a resource, but also touches so many aspects to which water is either directly or indirectly related.

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I, Dr. R Venkata Rao, on behalf of National Law School of India University, Bangalore, hereby declare that the particulars given above are true to the best of my knowledge and belief.

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