

# Fairness and International Environmental Law from Below: Social Movements and Legal Transformation in India

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## Abstract

This article considers fairness in international environmental law (IEL) in light of the convergence of two contemporary phenomena: the rise of social movements and the increasing power of large developing countries. These two trends will be determinative for the future of IEL. They have brought issues of fairness, equity, and justice to the forefront of contemporary IEL debates. Despite inability to adequately address issues of fairness at the international level, as demonstrated by negotiating gridlock at international summits, IEL can evolve in more equitable directions through the influence of subaltern experiences. This article examines domestic law-reform efforts of Indian social movements, focusing particularly on indigenous movements responding to extractive industries, with a view to determining international implications. The way states such as India address environment-related conflict, respond to demands for fairness, and evolve domestic understandings of inclusive and sustainable law and development will increasingly shape IEL.

## Key words

indigenous peoples; land rights; natural resources; post-colonial state; sustainable development law

## I. INTRODUCTION

This article considers fairness in international environmental law (IEL) in light of the convergence of two contemporary phenomena: the rise of social movements and the increasing economic and political power of large developing countries. These two trends will be determinative in the evolution of IEL. They have brought issues of fairness, equity, and justice to the forefront of contemporary IEL debates.<sup>1</sup> The

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1 The terms 'fairness', 'justice', and 'equity' are used interchangeably in this article. In uniformity with this symposium issue's introductory article, M. Prost and A. T. Camprubí, 'Against Fairness? International Environmental Law, Disciplinary Bias, and Pareto Justice', at footnote 3, we use the term 'fairness' as defined by T. Franck, *Fairness in International Law and Institutions* (1997), 7: 'the fairness of international law, as of any other legal system, will be judged, first by the degree to which the rules satisfy the participants' expectations of justifiable distribution of costs and benefits, and secondly by the extent to which the rules are made and applied in accordance with what the participants perceive as right process.'

2010 European Society of International Law's IEL Interest Group meeting on fairness was an apt response to the issue's disciplinary centrality. Addressing perceptions of injustice and inequity has always been at the heart of IEL, shaping legal principles such as common but differentiated responsibilities and concepts such as sustainable development.<sup>2</sup> That fairness remains the most contested issue in IEL and that debates over fairness have intensified in the past four decades and brought IEL regimes such as that for climate change to a standstill evidence the failure of past attempts to address fairness in this area of international law.

Despite inability to adequately address issues of fairness at the international level, as demonstrated by negotiating gridlock at international climate change summits in Copenhagen and Durban, IEL can evolve in more equitable directions through the influence of social movements and the increasing power of large developing countries. International law can be shaped from below through the gradual emergence of subaltern demands and ideas.<sup>3</sup> This article examines the domestic law-reform efforts of some Indian social movements with a view to determining international implications for fairness in IEL. The way states such as India respond to environment-related conflict, and address demands for fairness, equity, and justice through domestic law reform, will contribute to shaping IEL.

Through such an examination, we hope to overturn prevailing assumptions about the developing world's negative role in the development of IEL.<sup>4</sup> Stereotypes are particularly ubiquitous when it comes to so-called 'emerging' economies such as India and China: that they are disinterested and reluctant participants in sustainable development, they prioritize development as more urgent than environmental protection, and they drag their feet and lag behind progressive Western environmentalists. This was never the case in the developing world, with the approach of different developing countries being complex, nuanced, and variable.<sup>5</sup> The economic growth of states such as India and China will have consequences for IEL beyond rising consumption and waste. Voices from the global South, whether at the state, supranational, or sub-national level, will have increasing influence on IEL. As Prost and Camprubí observe in their introductory article, 'IEL script disregards [the] practice of local resistance to environmental threats either as something that does not exist or as a practice that is "inadequate" to tackle today's global environmental problems'.<sup>6</sup> To address seemingly intractable IEL problems, such as the intensifying perception of unfairness, creative solutions may be sought in places that international law does not traditionally look to for inspiration, such as local sites of contestation in the developing world.

2 Prost and Camprubí, *supra* note 1, at section 2.3.

3 See B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (2003).

4 Prost and Camprubí, *supra* note 1, at section 2.2: 'The South is either "against" the environment or using it dishonestly as a vehicle for its distributive demands. Very little of the density, the diversity, and the evolving attitudes of the South has entered IEL's disciplinary world-view.'

5 See K. Mickelson, 'South, North, International Environmental Law, and International Environmental Lawyers', (2000) 11 *YIEL* 52; A. Najam, 'Developing Countries and Global Environmental Governance: From Contestation to Participation to Engagement', (2005) 5 *International Environmental Agreements* 303.

6 Prost and Camprubí, *supra* note 1, at section 2.2.

Section 2 describes the global law and development context within which the Indian case is situated, considering first the rise of social movements and emerging economies and their potential role in legal transformation; second, the surge in demand for natural resources as a result of rapidly growing emerging economies; and, third, the particular impact on indigenous and tribal peoples who reside on the last remaining pockets of scarce natural resources. As social movements across the world protest unfair development practices, law is a common focal point. What role has law played in creating injustice? What are the law reforms that proffer hope for fair solutions? Section 3 addresses the first question in the Indian context, examining the legal heritage – simultaneously problematic and hopeful – from which India’s social movements have emerged. Section 4 addresses the second question, considering law reforms undertaken in India in recent years. Section 5 concludes by drawing out implications for fairness in IEL from such developments at the transnational, national, and sub-national levels.

## 2. BACKGROUND: INTERNATIONAL ENVIRONMENTAL LAW FROM BELOW

As we examine Indian law-reform efforts with a view to determining international implications, we begin by introducing certain international trends against which we situate the Indian experience. This section considers first the broader phenomenon of social mobilization in recent times. Second, social protest across states such as China, India, and Brazil has centred on fair use of natural resources because the development model of emerging economies has resulted in rapidly rising demand for such resources. Finally, we consider the special impact of this global development pattern for the world’s indigenous and tribal peoples. These three trends provide the background both for the Indian experience and for the dialogue between international, national, and local levels that allows for the possibility of an IEL from below.

### 2.1. Social movements in a multi-polar world

The year 2011 witnessed a dramatic rise of social movements, from anti-austerity agitation in Europe and anti-Wall Street protests in the United States, to anti-autocracy revolutionary movements across the Arab region, anti-corruption and natural-resource movements in India, and labour and pollution-related protests in China. The 2008 financial, food, and fuel crisis – or the ‘3F crisis’ – continued to resonate through 2011 social upheavals, indicating the depth, seriousness, and interrelatedness of existing global challenges. These include the continued fragility of global financial systems, record high prices in food and energy markets; threats and impacts of ecological change; and the ensuing grave consequences for social equity, fairness, and justice.

Contemporary social movements share in common a demand from vulnerable communities for social justice, through fairer benefit-sharing in development, and more economically and environmentally sustainable development. Natural-resource governance is of special importance for many such social movements

because natural resources form a central pillar of growth models and development policy. Civil-society demands for transparent, accountable, and participatory governance, economic reform, and action against corruption and human rights abuses are often closely related to natural resources and the environment. This is particularly evident in emerging economies where rapid growth brings to bear increasing pressures on the resource base and the communities that host them, with host communities often excluded from the benefits of growth despite historically high commodity prices and record corporate profits.

The convergence of continued uncertainty in the global economy with issues of social inequity and ecological change has provoked a rethinking of neo-liberal policies that have shaped global development in recent decades. As Sen envisaged, the growing challenges of:

inequality (especially that of grinding poverty in a world of unprecedented prosperity) and of public goods (that is, goods people share together, such as the environment) will almost certainly call for institutions that take us beyond the capitalist market economy.<sup>7</sup>

Social movements also call into question traditional orthodoxy on the role of the state in the political–economic order. Control over natural resources has been central to state legitimacy and power, shaping the nature of governance, and influencing how sovereignty and statecraft function. Contemporary protests provoke a rethinking of the developmental state, posing:

important questions about the allocation of wealth and power in society. To what ends and in whose interest do we regulate such resources? Who can own these resources and in what form? Can and should limits be placed on the use of resources to protect other social values? Such questions are rightly in the domain of international and municipal law.<sup>8</sup>

Unlike previous shifts in global development policy, current reconfigurations are taking place in a multi-polar world, with states such as Brazil, China, and India at the centre of global growth and shaping policy debates. The 2010 G20 Development Consensus for Shared Growth in Seoul foreshadowed a changing development paradigm, calling for a ‘reconstruction of the world economy in a form conducive to strong, sustainable, inclusive and resilient growth’ emphasizing the role of emerging economies to make a ‘transformative, game-changing impact on people’s lives, helping to narrow the development gap’.<sup>9</sup> The Seoul Consensus also emphasized the need to make room for different development world-views.<sup>10</sup> It signalled intent to leave behind the G7 Washington Consensus and its mantra of ‘privatize, deregulate, liberalize’ and move instead towards the goal of ‘sustainable, inclusive, resilient

7 A. Sen, *Development as Freedom* (1999), 267.

8 R. Barnes, *Property Rights and Natural Resources* (2009), 10.

9 *Seoul Development Consensus for Shared Growth* (G20 Seoul Summit, November 2010), available at [www.g20.utoronto.ca/2010/g20seoul-consensus.pdf](http://www.g20.utoronto.ca/2010/g20seoul-consensus.pdf).

10 *Ibid.*: ‘We further believe there is no “one-size-fits-all” formula for development success and that developing countries must take the lead in designing and implementing development strategies tailored to their individual needs and circumstances.’

growth'. As such, it echoed the demands of social movements across developed and developing states since the onset of the global financial crisis in 2008.

International development policy has traditionally focused on the gaps between developed and developing countries. While this remains central for many issues such as agricultural subsidy reforms and development aid, sub-national social movements are also placing emphasis on the gaps between developed and developing regions within states and demanding inclusive development at the domestic level. Emerging economies have large and widening gaps between, on the one hand, an urban elite of state functionaries, industrialists, market speculators, and traders and, on the other hand, rural communities who sit on a treasure of natural assets but are excluded from benefit-sharing while suffering the greatest impacts of environmental crisis. This situation is exacerbated by increasing resource scarcity, commodity prices, and ecological change. Thus, for many people living in emerging economies, fairness in IEL is also going to be about fairness within countries.

While, in 1992, 90 per cent of the world's poor lived in least-developed countries (LDCs), the majority of the poor today reside in middle-income countries (MICs). MICs are the engine driving global growth and GDP, creating a massive surge in demand for natural resources, in turn prompting claims from natural-resource host communities for a greater role in decision-making and benefit-sharing. Addressing these claims will be a determining factor in achieving 'sustainable, inclusive and resilient growth'. Law-reform efforts are under way in many MICs in an attempt to reset the balance between economic efficiency, social fairness, and ecological sustainability. Legal issues that have arisen include the distinction between public and private ownership, the role of international and constitutional law in vesting sovereignty over natural resources, and claims by indigenous communities based on traditional use and social justice.<sup>11</sup> The way emerging economies approach these issues will define global efforts to combat social exclusion and ecological change.

All too often, communities excluded from the benefits of development have no access to justice, no recourse to redress from either international or domestic law. It is estimated that three out of four people live outside the rule of law.<sup>12</sup> While law can perpetuate injustice and inequity, it is also one of the only tools that can give redress to excluded communities. For society's most vulnerable, empowerment means not only increased income, consumption, and consumer choice, but also increased transparency, accountability, and participation in decision-making about development. Thus, many social movements around the world place their hope in law reform as a tool for justice and transformational change.

Social accountability is at the heart of this process, where rights and duties are established between people and responsive state institutions that have an impact on people's lives.<sup>13</sup> The role of social movements in instituting systems of accountability through transforming state policies and law has gained increasing

11 A. McHarg, B. Barton, A. Bradbrook, and L. Godden, *Property and the Law in Energy and Natural Resources* (2010), 6.

12 UNDP & Commission for the Legal Empowerment of the Poor, *Making the Law Work for Everyone*, Vol. 2 (2008), 2.

13 UNDP, *Fostering Social Accountability: From Principle to Practice* (2010), 8.

recognition in recent times.<sup>14</sup> Social groups have increasingly found common goals and forged strategic alliances across ideological and national boundaries. Local community actors have engaged in instituting fairer decision-making at the sub-national and local government levels, as described below in the case of India. Transnational and sub-national alliances for change offer an alternative space to respond to deficiencies in IEL and international-development discourse, which remain largely at the international level and can reinforce a political economy of exclusion.

## 2.2. Scarcity of natural resources

Emerging economies have followed the Western model of fuelling economic growth through consumption of natural resources. Thus, their economic rise poses challenges for communities that host such resources and has prompted growing numbers of resource-based protest movements. As noted by ICJ Justice Rosalyn Higgins, while resource disputes have always existed, what has changed in recent times is a shift in focus from 'disputes about concessions and control over natural resources to disputes about sustainability and the limits of resource use'.<sup>15</sup> As populations grow and consumption levels mount, pressures on natural resources are intensifying. Security will be affected by living in a resource-constrained world, with many fearing a 'peak-everything' scenario as demands for all commodities surge and ecological fragility increases.<sup>16</sup> As scarcity increases, access to natural resources and other so-called ecological services will determine economic success and resilience.<sup>17</sup>

Of the 1.4 billion people living in extreme poverty, more than two-thirds reside in rural areas and rely on natural resources for livelihoods. While they have urgent basic needs for food and water security, attention should also be given to the rich sub-soil assets over which many rural communities reside – a major source of potential income towards poverty reduction. Collier identifies equitable and sustainable use of minerals as the most crucial issue in the struggle to transform the poorest societies.<sup>18</sup> Sub-soil minerals such as oil, gas, copper, iron ore, gold, bauxite, and so on are essential ingredients for global growth and urban-industrial expansion, especially in emerging economies in which the pace of demand is furious. The exploitation of mineral wealth in the global economy is of more than just economic concern, as it carries with it serious social and moral consequences. As Smith describes:

[c]apitalism needs commodities and globalization is premised on increased commodification. Commodification focuses us on the instrumental value of the good for sale, leading us to undervalue or disregard its inherent worth. In the case of human beings and natural resources, this disregard is of moral concern.<sup>19</sup>

14 Rajagopal, *supra* note 3, at xiii.

15 R. Higgins, 'Natural Resources in the Case Law of the International Court', in A. Boyle and D. Freestone (eds.), *International Law and Sustainable Development* (1999), 140.

16 R. Heinberg, *Peak Everything: Waking Up to Centuries of Decline* (2007), 8.

17 Global Footprint Network, *2010 Ecological Footprint Atlas* (2010), 5.

18 P. Collier, *The Plundered Planet* (2010), 38.

19 N. Smith, 'Commodification in Law: Ideologies, Intractabilities and Hyperboles', (2009) 42 *Continental Philosophy Review* 1, at 4.

Minerals have been at the heart of international trade since ancient times – a main focus of ancient trade routes between Asia, the Middle East, and Africa. Control of natural wealth was also a driving factor of colonial-era expansion, as well as post-independence development. Many post-colonial states based development policy around asserting their Permanent Sovereignty over Natural Resources, a legal doctrine created in the 1960s.<sup>20</sup> Since then, some mineral-rich developing countries of Africa, the Americas, the Arab region, and Asia have made great strides in poverty reduction through the use of natural resources. However, the rural poor that host such resources have often suffered large opportunity costs, with the benefits of sub-soil assets frequently siphoned off by state corruption and private actors away from local development. In many countries, this has resulted in protracted conflict between local communities and public authorities.

The social compact in many countries has been, on the one hand, state control over natural capital and, on the other hand, state provision of social welfare benefits. However, too often, resource-based revenues have been squandered and opportunities lost for achieving sustainable and inclusive growth. While the challenge is to expand benefits of natural wealth to the poor, it is about more than wealth redistribution. It is about participation in development decision-making, and accountability and justice when sovereign resources are used in self-interested or unsustainable ways.

Contemporary social movements have brought issues of inequity and wealth-sharing to the centre of global attention at a time when commodity prices and export revenues are at a historic high, presenting an opportune moment for directing resource wealth towards poverty reduction and social empowerment. Can international and domestic law-reform efforts help to catalyse change? Can countries move from political–economic systems that allow, and at times generate, social exclusion and ecological degradation, to systems that proactively redress such issues? To achieve something more than palliative measures, window dressing, or incremental change, international and national law-reform efforts must overcome dominant power structures that prevent meaningful change.

Contemporary social movements evidence higher public expectations that states address inequality, resource scarcity, and ecological change both within and across national boundaries. Unless such expectations are met, the future of human security and development stands in jeopardy, as does natural capital for future generations. Thus, countries around the world are undertaking reforms of natural-resource laws to accommodate demands of new social movements. India is an interesting example; the series of reforms herein discussed include drafts for a new Mining Act and a new Land Acquisition Act, and passage of a new Tribal Rights Act alongside a new Green Tribunal Act. What we are seeing around the world is a shift away from strong private focus in resource governance and property law in favour of common interests to address social inclusion and ecological sustainability – ‘a paradigm shift with implications for fundamental legal values’.<sup>21</sup> The emergence of social movements

20 N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (1997), 5.

21 McHarg et al., *supra* note 11, at 79.



across the world can bring together government, business, and civil society to rethink the role of natural resources in achieving inclusive and sustainable growth before another commodity boom goes to waste.

### 2.3. Special impact on indigenous peoples

When considering equitable sharing of natural resources, the plight of indigenous communities deserves special attention.<sup>22</sup> They are amongst the most socially excluded communities in the world, while also hosting many of the planet's last remaining reserves of natural resources. Indigenous peoples are central to preservation of a plural and diverse world, from both ecological and cultural perspectives. As noted by the first UN report on the *State of the World's Indigenous Peoples*, there are an estimated 370 million indigenous peoples in the world, located across more than 90 countries and representing 15 per cent of the world's poor.<sup>23</sup> Increasing resource scarcity is creating pressures on already fragile ecosystems and escalating the strain on traditional communities that host scarce resources and their way of life.<sup>24</sup>

A central feature of indigenous history is the process of social exclusion they have suffered for centuries, often intimately connected to the process of exploiting the environment. Indigenous peoples have been affected by displacement, toxicity, and land and water degradation. In many instances, their relationship with and understanding of the natural environment meant that environmental degradation was accompanied by profound sociocultural loss and damage.<sup>25</sup> As Davis explains:

[m]ost indigenous peoples do not view land as a 'commodity' which can be bought or sold in impersonal markets, nor do they view the trees, plants, animals and fish which cohabit the land as 'natural resources' which produce profits or rents. On the contrary, the indigenous view is that land is a substance endowed with sacred meaning, embedded in social relations and fundamental to the definition of a people's existence and identity.<sup>26</sup>

Similarly, Elwin describes that, in some Indian forest tribes:

[i]t is striking to see how in many of the myths and legends [there lies a] deep sense of identity with the forest . . . From time immemorial until comparatively recently the

22 The most widely used definition of indigenous peoples was put forward in 1986 by UN Special Rapporteur on Discrimination against Indigenous Populations, Jose Martinez Cobo: 'Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their cultural patterns, social institutions and legal systems'; Jose Martinez Cobo, 'Conclusions, Proposals and Recommendations', in *Study of the Problem against Indigenous Populations Vol V*, UN Doc. E/CN.4/Sub.2, add 4 [379, 381] (1986/7); see also Paul Keal, *European Conquest and the Rights of Indigenous Peoples* (2003), 92.

23 UN Department of Economic and Social Affairs (UNDESA), *State of the World's Indigenous Peoples* (2009); L. Båge, 'Policies and Lessons for Reaching Indigenous Peoples in Development Programs', in *2020 Focus Brief on the World's Poor and Hungry People* (2007).

24 UNDP, *Human Development Report: Cultural Liberty in Today's Diverse World* (2004), 92.

25 Secretariat of the UN Permanent Forum on Indigenous Issues, 'Engaging Indigenous Peoples in Governance Processes: International Legal and Policy Frameworks for Engagement', International Conference on Engaging Communities, Brisbane, Australia, 2005.

26 S. H. Davis, *Indigenous Views of Land and the Environment* (1993), 3.



tribal people have enjoyed the freedom to use the forest and hunt its animals and this has given them a conviction, which remains even today in their hearts that the forest belongs to them.<sup>27</sup>

The process of legal transformation from traditional land and resource governance towards modern natural-resource control through the developmental state has been a seminal factor in the disempowerment and disenchantment of the world's indigenous peoples. The overarching civilization change experienced by indigenous peoples has occurred through structural shifts in development world-views and legal regimes. Yet, traditional communal land tenure systems used for centuries sometimes survive in parallel with formal land tenure systems focused on individual rights. As the 2004 Human Development Report describes:

[t]he right to own, occupy and use land collectively is inherent in the self-conception of indigenous people, and this right is generally vested not in the individual but in the local community, the tribe or the indigenous nation . . . Often the communal lands they use for productive purposes and maintain their historical and spiritual links with are not secure and so are being taken over for logging, mining, tourism and infrastructure. Multinational corporations have discovered its commercial potential, and the race is on to patent, privatize and appropriate.<sup>28</sup>

In recent years, indigenous social movements have made strides in putting forward their grievances and demands for equity and sustainability. Indigenous communities have forged transnational and global networks and sought to reshape law and development policy. As Brysk describes, '[i]n the spaces between power and hegemony, the tribal village builds relationships with the global village'.<sup>29</sup> An important step was the launch of the UN Permanent Forum on Indigenous Issues in 2000, the first global platform giving indigenous communities a formal voice at the international level. Through the forum, indigenous peoples called for recognition of indigenous customs and laws related to land and natural resources, and the need for free and informed consent prior to development activities on indigenous lands. In 2007, after 20 years of debate, the General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples. As stated by UN Secretary-General Kofi Annan, 'the product of many years of complex and at times contentious negotiations, the Declaration is an instrument of historic significance for the advancement of the rights and dignity of the world's indigenous peoples'.<sup>30</sup>

The declaration pronounces the collective and individual rights of indigenous peoples over their land, their cultural autonomy, and their unique paths to development.<sup>31</sup> The 2004 Human Development Report asserts that:

[i]ndigenous peoples have dynamic living cultures and seek their place in the modern world. They are not against development, but for too long they have been victims

27 V. Elwin, *A New Deal for Tribal India* (1963), 22.

28 UNDP, *supra* note 24, at 69.

29 A. Brysk, *From Tribal Village to Global Village: Indian Rights and International Relations in Latin America* (2000), 2.

30 K. Annan, 'Statement on the International Day of the World's Indigenous People', UN Secretariat, New York, August 2006.

31 UN GA Res. 61/295 *Declaration on the Rights of Indigenous Peoples*, UN Doc. A/RES/61/295 (2007).

of development and now demand to be participants in – and to benefit from – a development that is sustainable.<sup>32</sup>

The emergence of a global indigenous movement is a strategy to counter historical exclusion, affirm right to self-determination, and demand redress for historic deprivation.<sup>33</sup> However, as indigenous communities attempt to apply this new global framework, they confront legal systems that have, for years, neglected concerns of equity and sustainability. At the base of systemic and structural challenges facing indigenous communities are the paradigms of development and progress on which the modern state has been constructed, including fundamental assumptions about the distinction between civilized and primitive cultures.

### 3. THE EVOLUTION OF LAW, DEVELOPMENT, AND SOCIAL MOVEMENTS IN INDIA

India is the world's largest democratic market economy. It also has the largest concentration of people living in extreme poverty and, in recent years, has experienced a surge of social movements voicing concerns about the balance between growth, social equity, and sustainability. As India marks 20 years since the launch of its economic liberalization policies, it attempts to combat dual challenges of social exclusion and resource scarcity – pressures that pose risks to its recent development gains and demand reform of development policy and law. This part considers aspects of Indian legal heritage that have shaped its response to contemporary challenges. First, we examine the colonial legacy in modern Indian law and development. Second, we examine Gandhian ideas of law and development that have been influential on many current social movements.

#### 3.1. Modern understandings of nature, law, and development

Many of the challenges facing communities today have important connections to legal regimes enacted during India's colonial era. Colonial-era legislation and development had a strong focus on the effective and efficient use of land and extraction of natural resources, with profound and enduring impacts on India's indigenous peoples, particularly tribal forest dwellers. A key feature of the mid-nineteenth century was the increased focus of many European colonial powers on the sustainability of extractive-sector activities, with new laws enacted to guide the use of land and natural resources. These included the system of nature reserves and national parks used as a means of sustaining timber production and extractive resources vital for imperial interests.<sup>34</sup>

The 1855 Charter of Indian Forests converted forests from communal property into state-managed public land. By 1860, the East India Company had gained control over all forests, which it managed as reserves to ensure sustainable timber stocks. Resource use by local communities was prohibited. Forest products such as teak

32 UNDP, *supra* note 24, at 69.

33 UNDESA, *supra* note 23.

34 G. Barton, *Empire, Forestry and the Origins of Environmentalism* (2002), 19.

were used by the British to construct various Indian infrastructure projects and for lucrative export markets. The 1865 Forest Act allowed imperial intervention for conservation and sustainable use of resources, allowing eviction of indigenous communities from their land.<sup>35</sup> New resource-governance regimes excluded indigenous communities from decision-making about land and resources that had been theirs for centuries. Local customary law was displaced.<sup>36</sup>

Colonial law was enacted under the veil of sustaining extractive development schemes and even claimed to address ecological concerns, including climate change, formalizing a ‘tripartite alliance between political reality, revenue enhancement, and climate theory’.<sup>37</sup> Ribbentrop, inspector general of forests in India (1884–99), stated ‘the wholesale destruction of forests had the most deteriorating effect on the climate of India’. His contemporary, Reverend Guilding, observed that ‘climate has been considerably affected by the continued industry of man and his daily encroachment on the primeval forest . . . so much has this change been felt, that laws have been passed to prevent the cutting down of timber’.<sup>38</sup> An imperial conservation ethic was articulated. Perhaps the best-known example is the result of interaction between Ribbentrop and Rudyard Kipling, who, in his *Jungle Book* stories, tells of the partnership between the tribal child Mowgli and imperial foresters, depicted as heroes reforesting the world for the salvation of the primitives.<sup>39</sup>

The paradigms of progress and legal concepts from the colonial era reverberate through contemporary Indian law and development policy. Modern Indian land law was born from the confrontation between imperial and indigenous interests and carries within it Enlightenment assumptions about law, development, and the place of indigenous peoples. These assumptions were based on essentially dualist understandings of the distinction between culture and nature, and between modern and primitive.<sup>40</sup> European Enlightenment philosophy lauded rationality and science as signifiers of high culture. Indigenous communities were seen as being driven by irrational myths and remaining in a primitive ‘state of nature’, in contrast with the modern nation-state as constructed by European culture.

The ability to efficiently exploit nature became the hallmark of European superiority. Buckle stated in his 1878 *History of Civilization in England*:

the primary cause of its [England’s] superiority over other parts of the world is the encroachment of the mind of man upon the organic and inorganic forces of nature. To this all other causes are subordinate . . . All around us the traces of this glorious and successful struggle.<sup>41</sup>

35 A. Behar (ed.), ‘Forest Land and Tribal Rights’, *Advocacy Internet Vol IX(2)*, National Centre for Advocacy Studies, Pune, March–April 2007; *ibid.*

36 S. Patnaik, ‘Can Tribals Continue to Depend on Forests?’, International Conference on Poverty Reduction and Forests: Tenure, Market and Policy Reforms, Bangkok, 3–7 September 2007.

37 Barton, *supra* note 34, at 163.

38 *Ibid.*, at 31–3.

39 R. Kipling, *The Jungle Book* (1894) and *The Second Jungle Book* (1895).

40 Parts of this section are adapted from K. Khoday and U. Natarajan, ‘Sustainable Development as Freedom: On the Nature of International Law and Human Development’, (2010) *Global Community Yearbook of International Law and Jurisprudence*.

41 H. T. Buckle, *History of Civilization in England*, Vol. 1 (1878), 153.

Similarly, Tylor observed in his 1874 *Primitive Culture*:

acquaintance with the physical laws of the world, and the accompanying power of unlocking the secrets of nature and adapting nature to man's own ends, are on the whole, lowest among savages, mean among barbarians, and highest among modern educated nations.<sup>42</sup>

Such statements were not mere observations, but part of an imperial project of transformation. The non-European was placed into an evolutionary spectrum and made to undertake the linear march from a 'state of nature' to the modern nation-state: the origins of the modern discipline of development. Particular emphasis was placed on the evolution of modes of subsistence from hunting and pastoralism, through to agriculture, and finally to industry, with legal and social systems deemed more developed as they learnt to increasingly control nature.<sup>43</sup> Progress and development were based on an understanding of the environment as a domain of utility, to be brought under humanity's control, compelled to satisfy human needs and administer to human happiness. Thus, 'nature was devoid of a spirit, and was a standing reserve of resources for man to serve development'.<sup>44</sup>

Those who opposed this agenda of progress were seen as primitive and underdeveloped. Conquest of nature and growth of industry were seen as the destiny of all societies because they were the best way to meet the greatest variety of human needs: 'either they will become civilized or they will be destroyed. Nothing can hold out against civilization and the powers of industry. The only animal species to survive will be those that industry multiplies.'<sup>45</sup> Law, especially property and land law, was a central mechanism for civilizing the non-European world, as it was an essential element in allowing industry to efficiently multiply. In the nineteenth century, the concept of land as property became embedded in constitutions across Europe as a sacred and fundamental element of society.<sup>46</sup> Law allowed civilized societies to triumph over external nature as well as human nature. Thus, Locke observed that the absence of transformation of the environment accounted for the lack of reason itself.<sup>47</sup> This was the basis for the right of the state to expropriate land and resources for the public good, now recognized as part of customary international law, and articulated in many post-colonial constitutions as well.

The philosophy of the Enlightenment not only discredited indigenous laws and customs as primitive, but also sought to transform such cultures as part of a civilizing mission. Overturning ignorant native understandings gave the empire a noble purpose: to universalize its scientific modern truths. Fitzpatrick describes how modern law obfuscates its own mythic foundations through defining itself as scientific and in opposition to the mythological beliefs of primitive law:

42 E. B. Tylor, *Primitive Culture* (1874), 26.

43 P. Stein, *Legal Evolution: The Story of an Idea* (1980), 19.

44 V. Argyrou, *Logic of Environmentalism: Anthropology, Ecology and Post-Coloniality* (2005), vii.

45 J. B. Say, *Cours complet d'économie politique* (1828, 1843 ed.), 74.

46 McHarg et al., *supra* note 11, at 63.

47 P. Hulme, 'The Spontaneous Hand of Nature: Savagery, Colonialism and the Enlightenment', in P. Hulme and L. Jordanova (eds.), *The Enlightenment and Its Shadows* (1990), 30.

Modern law was founded in the very denial of the mythic realm which had so deluded the pre-moderns . . . such a denial typifies a renewed and now modern mythology . . . The very idea of myth typifies the ‘Other’ – ‘savages’ and ancestors left behind. In the infinite arrogance of modernity, myth is made to correspond with the static and closed, while modernity is equated with progress and openness. Yet the origins and identity of modern law are still described in mythic terms, in terms of the division between us and them, culture and nature, and so on.<sup>48</sup>

Law was founded:

in terms of a negative teleology, taking identity in the rejection of transcendence and the primitive, emerging in a negative exaltation, as universal as opposed to the particular, as unified in opposition to the diverse, as controlling what has to be controlled.<sup>49</sup>

Thus, what resulted from the encounter with indigenous communities was not reduction in the power of myth in modern law, but the incorporation of modern myths into an all-encompassing law that could be universalized through the colonial encounter.

Imperial assumptions about what it means to be modern were not overturned upon Indian independence, but consolidated. Post-colonial societies could only enjoy sovereign independence through adopting the political form of the modern nation-state, which brings with it many of these assumptions. Additionally, post-colonial Indian leaders chose to pursue an economic path of industrialization as mapped out by European ideas of development. As being modern, developed, and cultured was tied to efficient exploitation of the natural environment, either legal concepts and systems that allow for this were maintained from colonial times or new laws were instituted. As such, modern Indian law has to some extent been complicit in creating the inequity and ecological decay in which communities find themselves today and against which social movements seek change. Thus, indigenous communities that survived the imperial encounter continue to hold a deep distrust of state intervention, perceiving the state as pursuing a neo-colonial agenda.

### 3.2. Sustainability as justice

Enlightenment understandings of law and development were not wholeheartedly accepted by Indians, some of whom responded with qualified acceptance, others with strong intellectual opposition. Some independence leaders saw independence as an opportunity to pause and reflect on whether there was anything more to do than to ‘take the plunge forward and end up in a matter of decades on the other side of time’ in a modern industrial civilization.<sup>50</sup> The best known of these was the father of modern India, lawyer and social advocate Mohandas Karamchand Gandhi, also known as the Mahatma. For Gandhi, the state’s increasing mastery over nature should not be the benchmark for measuring progress and civilization. He called for a broader concept of human well-being, with equity and justice being necessary public goals.

48 P. Fitzpatrick, *The Mythology of Modern Law* (1992), ix, at 44–5.

49 *Ibid.*, at 10.

50 Argyrou, *supra* note 44, at 33.

In 1947, Nehru presented India's first development plan, which was based on Western development principles and had the support of Indian industrialists and communists. Gandhi opposed this plan and wanted instead an economic system based on self-sufficiency and justice or, as he called it, *swadeshi*, meaning interiority or endogenous traits, and *sarvodaya*, meaning improvement of everyone's living conditions. He advocated for a governance system that worked from the bottom up, focusing first on the individual, then on the family, then on the village, then on the region, and then on the nation. Each level was to attempt the greatest possible degree of self-sufficiency, only having recourse to the levels above it in order to acquire what it cannot produce itself. Such a system was only to tolerate an industry if it was publicly owned and did not reduce the range of job opportunities. It aimed to minimize bureaucracy, prioritizing initiatives from the grass roots over those imposed from above. Dependency on foreign trade was minimized, as such trade was to be reserved only for indispensable goods that could not be produced nationally.<sup>51</sup>

Gandhi's was a populist strategy, giving as much power as possible to the lower levels to ensure they were not subject to domination, and it was non-exploitative, where everyone works for the common good without seeking to accumulate more than they need.<sup>52</sup> Gandhian economics was, and still is, usually seen as an attempt to return India to preindustrial times. Indeed, the Western development paradigm, with its commitment to a linear one-way trajectory of endless growth, could not see Gandhian economics in any other way. But Gandhi did not want to resurrect old economic structures. Rather, he was attempting to articulate a genuine alternative to dominant Western economic paradigms. The Gandhian vision was not about accepting the basic idea of progress inherent in the modernist vision and adding India's own cultural traditions. It was about a full reinvention 'as an act of self-awareness of the nation'.<sup>53</sup>

Gandhi refrained from taking a position in Indian government and his ideas were never put into practice at the state level. After much debate among leaders over India's development paradigm, in the words of India's first prime minister Jawaharlal Nehru, India decided to 'catch up as far as we can with the Industrial Revolution that occurred long ago in Western countries'.<sup>54</sup> An understanding of development as freedom from nature became formalized through legal regimes in independent India in the 1940s. The UN encouraged this understanding, stating in the 1950s that 'progress occurs only when people believe that man can, by conscious effort, master nature'.<sup>55</sup> As with most other post-colonial states, India adhered to utilitarian legal concepts for natural-resource use, including sovereign powers for acquisition of land through the principle of eminent domain. India's rural and tribal

51 M. K. Gandhi, *Sarvodaya* (1908). On Sarvodaya's enduring influence, see S. Narayanasamy, *The Sarvodaya Movement: Gandhian Approach to Peace and Non-Violence* (2003).

52 See B. Hettne and G. Tamm, 'The Development Strategy of Gandhian Economics', (1976) 6 *Journal of the Indian Anthropological Society* 51; D. Kantowsky, 'Gandhi: Coming Back from West to East', (1984) 39 *IFDA Dossier* 3.

53 Argyrou, *supra* note 44, at 22.

54 R. Simon, 'For Richer or Poorer', *Time Magazine*, 12 November 2007, 25.

55 Argyrou, *supra* note 44, at 27.

communities continued to derive little benefit from the vast resources they had hosted for centuries.<sup>56</sup>

After Gandhi's assassination in 1948, his ideas were forgotten by many of those in power, but they continued to exercise a powerful influence on Indian civil society, particularly among environmental movements. He advocated for placing local autonomy and social accountability at the core of government: a vision in which local communities would manage their own natural resources and have free and prior choice related to extractive-sector initiatives.<sup>57</sup> In 1945, his friend and associate Mirabehn took this vision forward through establishing a social action-oriented ashram in the holy city of Haridwar, a Himalayan foothill town in the Garhwal region of Uttarakhand state. What she witnessed was a deforested region characterized by an altered climate, increased water run-off and floods, and shortages of drinking water, largely owing to colonial-era resource laws.<sup>58</sup> Over the ensuing decades, she engaged in efforts alongside local residents to stem environmental degradation and address basic development needs.

On 27 March 1973, in a small village named Mandal in the Garhwal region, a landmark event took place when a community group gathered on state-owned forest land to prevent loggers from felling timber. Local residents had used timber from the forest to craft their farm implements, but the state had denied them access for conservation reasons.<sup>59</sup> The Mandal uprising inspired a series of protests across the region and the Chipko movement was born. It called for a socially inclusive form of development that overturned the colonial policy of 'preservation of the natural habitat through purging it of all human contact'. This approach had stripped tribal communities of natural-resource access and benefits. The birth of the Chipko movement, as well as increasing Western and global environmental consciousness in the 1970s, encouraged the rise of local non-governmental organization (NGO) movements across India focused on inclusive and sustainable development.<sup>60</sup> The 'tree huggers' from Garhwal became symbols throughout the Third World that sustainability and social equity went hand in hand. Garhwal went on to witness success in the use of local village forest councils, with state surveys reporting 'exemplary work in connection with forest protection and development' and council-managed forests outperforming state-managed systems.<sup>61</sup>

Gandhi believed in the corrective potential of social mobilization and rule of law and there remains a spirit of non-violent social action in Indian society, which places a high premium on social accountability, both through the ballot box and through public participation in administrative decision-making. A series of mass protests have swept India in recent years, as rapid industrialization and a surge of new natural-resource projects have clashed with tribal communities. For example,

56 M. Dasgupta, *Indigenous Land Rights, Development, and Social Action Litigation in the Indian Supreme Court*, Annual Meeting of American Sociological Association, Atlanta, 16 August 2003.

57 Argyrou, *supra* note 44, at 22.

58 R. Guha, *How Much Should a Person Consume: Thinking through the Environment* (2006), 102.

59 *Ibid.*, at 55.

60 A. Prasad, *Environmentalism and the Left: Contemporary Debates and Future Agendas in Tribal Areas* (2005), 12.

61 Guha, *supra* note 58, at 119.



25 000 tribal and farmers' groups joined forces on Mahatma Gandhi's birthday in 2007 for a four-week march to New Delhi to call for inclusive and sustainable development.<sup>62</sup>

In pursuit of progress, India moved from 'underdeveloped' to 'developing' and recently reached 'emerging' status. Paradoxically, while Third World states have been encouraged to develop, developed states have realized that their economic model is unsustainable. As environmental and economic challenges are thrust into the global spotlight by social movements around the world, this contradiction has become impossible to ignore. Western development models, whether capitalist or communist, are premised on the possibility of endless economic growth and have not adequately addressed ecological limits.<sup>63</sup> Dominant law and development frameworks have served to 'reinforce instead of challenge the stratification of people . . . and places. Current systems have institutionalized unequal enforcement of safety precautions, traded human health for profit . . . exploited the vulnerability of economically and political disenfranchised communities' and 'subsidized ecological destruction'.<sup>64</sup> Local communities have higher expectations now for equitable use of resources and preserving value for future generations. As social movements around the world seek alternatives, they look to indigenous knowledge for inspiration from different world-views and understandings of law and development. Thus, as the United Nations Environment Programme (UNEP) report on the *Cultural and Spiritual Values of Biodiversity* states, '[t]he dominant global system assumes that traditional communities must change to meet modern standards, but indigenous peoples feel the opposite must occur: the international community must begin to recognize and accommodate local diversity'.<sup>65</sup>

#### 4. RECENT INDIAN LAW REFORM

Issues of equity and sustainability have been debated in India since the founding of the nation. Mahatma Gandhi's vision was an India driven by self-determination, village democracy, prior consent and participation in decision-making, and the equitable use of land and natural resources for the poor.<sup>66</sup> But there were also strong advocates for a liberal, free-market orientation, such as India's first governor-general, Chakravarthi Rajagopalachari, who feared that an overly socialist agenda and a 'license-permit-quota raj' would hold back prosperity. The development policies adopted by Nehru attempted a third way with an Indian version of social democracy and a state-planned economy.

In 1991, following a series of economic crises, India launched broad-based economic liberalization. While India's GDP growth since then has been impressive,

62 Simon, *supra* note 54, at 7.

63 See, further, G. Rist, *The History of Development: From Western Origins to Global Faith* (2003).

64 R. Bullard, *The Quest for Environmental Justice: Human Rights and the Politics of Pollution* (2005), 29.

65 UNEP, *Cultural and Spiritual Values of Biodiversity* (1999), 1.

66 Y. P. Anand, 'Gandhian Ethics for a Socially Relevant Market Economy', January 2011, *RITES Journal*, 91–8.

reducing poverty remains a major challenge.<sup>67</sup> In recent years, taking inspiration from China's model of export-oriented GDP growth and poverty reduction, India has expanded foreign-invested export-oriented special economic zones (SEZs). Government has also strived to expand resource-based industries to capitalize on large mineral reserves and historic commodity-price highs. As the extractive sector expands, the gap between corporate profit and rural poverty has grown and, while growth continues at a high pace, social inequality is on the rise.

Tribal populations, known as *adivasis*, have been the most excluded from India's growth story. 'About 260 million people live below the poverty line, out of which 100 million are partially or wholly dependent on forests, out of which more than 70 million are tribals'.<sup>68</sup> Twenty-one per cent of India is covered by forests, with more than 6 per cent of this home to tribal populations. India has a strong convergence, as in most countries, between areas of rich natural resources and areas of tribal concentration where high rates of poverty prevail. The most valuable mineral and forest reserves are situated within least-developed districts across India's 'tribal belt' in the states of Odisha, Chhattisgarh, Jharkhand, Karnataka, Madhya Pradesh, Maharashtra, and Rajasthan.

Article 342 of the Indian Constitution calls for special protections for tribal communities, referred to in the Constitution as Scheduled Tribes. Two states, Chhattisgarh and Jharkhand, were the focus of political reforms to expand tribal autonomy and benefits from natural resources. Both were formed in November 2000 following long-standing social agitation for greater autonomy and recognition of cultural identity. Chhattisgarh was formed out of several districts in south-east Madhya Pradesh with high tribal populations, while Jharkhand was formed out of southern districts of Bihar, an area hosting India's largest concentrations of mineral resources. Jharkhand has had a long colonial and post-colonial history of struggle. It has been at the heart of tribal social movements in India, with anti-colonial revolts starting as far back as 1771, one of the first anti-colonial movements in India. It was of particular importance for the extractive-sector ambitions of Britain and its East India Company, and its economic importance continued in the post-colonial industrial era.<sup>69</sup>

Alongside these initiatives for greater regional autonomy, the government has also reacted to tribal agitation in recent years by pursuing a series of law-reform initiatives focused on integrating inclusive, sustainable development into India's resource-governance regimes. This section discusses, first, draft revisions to the 1957 Mining Act; second, draft revisions to the 1894 Land Acquisition Act and passage in 2006 of a new Tribal Forest Rights Act; and, third, the new Green Tribunals Act enacted in 2010. These and other legal innovations may provide valuable lessons on

67 V. Jha, 'Effects of India's Growth on the Global Economy and Environment', Overseas Development Institute, 27 February 2008, available at [www.odi.org.uk/events/growth\\_series/080227/index.html](http://www.odi.org.uk/events/growth_series/080227/index.html).

68 Patnaik, *supra* note 36.

69 See A. Prakash, *Tribal Rights in Jharkhand* (2007) for a description of the history and emergence of Jharkhand state undertaken by UNDP to analyse options for inclusive and sustainable development in the new state.

whether and how the rule of law can respond to social movements for inclusive and sustainable development.

#### 4.1. Benefit-sharing in the extractive sector

India is one of the world's most mineral-rich economies. According to a 2011 study by the Center for Science and Environment, India has 2628 officially registered mines and more than 20 000 mineral deposits. The sector has experienced a doubling in the value of minerals produced from US\$21 billion in fiscal year 2006–07 to US\$40 billion in 2010–11, with 68 per cent of revenue from fuel minerals (coal, lignite, oil, and gas) and 21 per cent from metallic minerals (iron ore, chromite, lead, and zinc).<sup>70</sup> India exports minerals to 193 countries, with main destinations being China, Hong Kong, the United Arab Emirates, the United States, and Belgium. The sector's high rates of return have inspired a new surge of investment in recent times.

Almost all of India's mineral riches lay under forested areas inhabited by tribal populations, but the districts with the highest levels of mineral extraction also stand as the poorest districts in India.<sup>71</sup> For example, Koraput District in Odisha state produces 40 per cent of India's bauxite but also has a 78 per cent poverty rate. Keonjhar District in the same state produces more than 20 per cent of India's iron ore and has a 60 per cent poverty rate. Bellary District in Karnataka likewise produces 20 per cent of the country's iron ore, ranking third from bottom in Karnataka's district development rankings, and Bhilwara District in Rajasthan produces 80 per cent of India's zinc while ranking 25th out of 32 districts in the state's development rankings.<sup>72</sup>

Tribal communities represent more than 50 per cent of those displaced from mining-sector activities.<sup>73</sup> In mineral-rich areas, exclusion from development dividends and the ecological impacts of extractive industries have become main points of contention, driving social movements and calls for reform of mining legislation. While mineral-rich countries such as India placed great emphasis on the doctrine of permanent sovereignty over natural resources as a basis for building the post-colonial industrial state, the state now faces increasing calls for social accountability in its exercise of this power.<sup>74</sup>

In 1997, tribal groups in the state of Andhra Pradesh brought the seminal *Samatha* case to the Indian Supreme Court. The court held that all mining ventures in tribal areas required public participation. The case also called for a greater share of royalties, at least 20 per cent of net profits, to be allocated to local human development initiatives. As a result, in 1998, the government issued instructions for setting up consultative processes with village councils (*gram sabhas*) related to the Panchayat (Extension to Scheduled Areas) (PESA) Act (1996). The decision opened up public debate on how to achieve inclusive and sustainable growth in the extractive sector.

70 Center for Science and Environment, *Sharing the Wealth of Minerals* (2011), 3.

71 *Ibid.*, at 9.

72 *Ibid.*, at 10.

73 C. Bhushan et al., *Rich Lands Poor People: Is Sustainable Mining Possible?* (2008), 7.

74 UNGA Res. 1803 (XVII) on Permanent Sovereignty over Natural Resources, UN Doc. A/5217 (1962).

In an attempt to decentralize resource management to tribal areas, PESA sought to match the modern Indian system of statutory *panchayats* (local elected councils) with traditional governance based on tribal chiefs and social functionaries. It increased powers for village councils and intended to both extend local governance and engage traditional institutions.<sup>75</sup> However, implementation gaps arose, with the vision of PESA and the processes called for by *Samatha* left unfulfilled. Challenges included a paternalistic form of implementation by the administrative apparatus, lack of effective space for traditional social structures in decision-making frameworks, and broad discretion for states in designing the nature of local measures.

With lack of progress in integrating social inclusion and sustainability into the mining sector, a series of social movements developed over time, leading by 2005 to establishment of a High-Level Committee (known as the Hoda Committee) to explore potentials for balancing increased investment in the sector with social and environmental issues in tribal areas. The Commission called for, among other things, a Sustainability Development Framework to guide the balance between social, environmental, and economic interests within future investments.

The combination of social movements and the Hoda Commission set the foundation for law-reform efforts, resulting in tabling in Parliament draft revisions to the Mines and Minerals (Development Regulation) Act (1957). The average tax burden for mining companies stands at 22 per cent, while corporate profit after tax stands at 30 per cent of gross sales.<sup>76</sup> The existing system has not succeeded in bringing major gains to communities, with proposed revisions to the Mining Act seeking to increase contributions to local development. The revisions include new community benefit-sharing provisions in line with the *Samatha* case, with tax or royalties increased and managed by new district-level development foundations both to address current needs and to compensate future generations for today's use of scarce natural resources.<sup>77</sup> The revisions also call for bottom-up participatory process with tribal and non-tribal beneficiaries and multi-stakeholder boards with public, private, and community representation for effective management of development foundations. This would converge with state-level initiatives such as in Gujarat, for example, where local regulations require that 90 per cent of all royalties collected by the state go to the district level and 20 per cent to the sub-district level for local development initiatives.<sup>78</sup>

If the act's revisions are passed, at current rates of production and sales, it could mean an annual allocation of US\$100 billion per year towards development initiatives at the local level.<sup>79</sup> Other options explored in the revisions include conversion of resource rents into direct cash transfers to individual households, as well as provision to communities of equity in mining operations. Such revenues could be used to improve social development initiatives, put in place improved

75 Prakash, *supra* note 69, at 45.

76 Center for Science and Environment, *supra* note 70, at 4–6.

77 *Ibid.*, at 30–1.

78 Environmental Resource Management, *Sustainable Development Framework for the Mining Sector in India* (2010), 4.

79 *Ibid.*, at 37.

environmental safeguards, and diversify the economy. The focus on local participation and social accountability would enhance transparency in revenue management and counter corruption. The draft revisions also call for corporate social-responsibility plans from mining firms to plan, identify, and allocate how they will help achieve inclusive, sustainable development in local communities.

For effective transformation of resource-governance regimes, synergies are needed between different strands of natural-resource laws. In addition to revisions to the Mining Act, equally important are parallel social movements and law-reform efforts under way in the areas of land acquisition and recognition of tribal rights and customary law.

#### 4.2. Land rights

The sovereign power of eminent domain allowing the state to acquire land for public purposes was codified during colonial times by the Land Acquisition Act (1894) and amended in 1984. Unlike other countries, limits and restrictions on state taking of land are not guaranteed in India's Constitution, but derive instead from the Land Acquisition Act and related jurisprudence on citizen land rights. With one of the world's largest populations, and vibrant agriculture and industrial sectors, issues of land acquisition have long been a catalyst for debates over the nature of social exclusion and development policy.

Some estimate that approximately 40 million Indians have lost land to large development projects since 1950.<sup>80</sup> With urban-industrial expansion increasing since the launch of neo-liberal reforms in 1991, the dispossession of rural land has become a clarion call for hundreds of millions of rural citizens rising up against the social and ecological consequences of rapid growth.<sup>81</sup> With 60 per cent of the population dependent on agriculture and related resource-based activities for their livelihood, land and natural resources provide social security for rural communities across India.

At the convergence point of India's rise to emerging-economy status and issues of land rights are new SEZs spreading across the country. An SEZ Act was passed in 2005 to establish specially designated areas where, in line with standard neo-liberal prescriptions for export-oriented growth, foreign and local corporate investors would be given preferential treatment, tax exemptions, and reduced regulatory burdens. Land for SEZ-based industrial activities can be purchased or leased from landowners or acquired by the state. As land becomes scarce, developers reach into rural lands, creating tensions and a surge in protests over state land acquisitions. To put the Act in perspective, land acquired for SEZs amounts to only 0.02 per cent of arable land.<sup>82</sup> Thus, the rise in protests was not so much a struggle over land redistribution as it was about the rise of corporate dominance and exclusion of communities from decisions that profoundly affect their lives.

80 National Center for Advocacy Studies, *Advocacy Update on Land Rights: Issue 18* (2005).

81 Parts of this section are adapted from K. Khoday and J. Bonnitca, 'Globalization and Inclusive Governance in China and India: Foreign Investment, Land Rights and the Legal Empowerment of the Poor', in M. Gehring et al. (eds.), *Sustainable Development in World Investment Law* (2011), 481.

82 S. Tripathi, 'India Must Face Its SEZ Reality', (2007) 170 *Far Eastern Economic Review* 27, at 29.

Social movements focus on the rising gaps between urban rich and rural poor, between record corporate profits and exclusion of communities from decision-making over use of their land and natural assets. They focus on the way the law is structured and how the land is acquired, inadequate compensation for land takings, lack of adequate rehabilitation, the risks of ecological change in rural areas, and lack of clear benefit-sharing regimes. In many ways, social protests over land rights surrounding SEZs have come to represent the challenge of balancing India's emerging-economy status with concerns of inclusive and sustainable development. As noted by leading social advocate Vandana Shiva, '[t]he future of the Indian people and Indian democracy rests on the land question'.<sup>83</sup>

As a result, draft amendments to the 1894 Land Acquisition Act were introduced in the Indian parliament in 2007 to address growing public concerns. Still under review and debate, if the revisions pass, they would expand citizen rights and limit state discretion in defining the scope of what constitutes a public purpose for land acquisition. Under the draft revisions, a 'public purpose' would be limited to defence, public infrastructure, and other industrial and extractive projects of benefit to the general public – but only where 70 per cent of the land has already been purchased by investors and developers through the open market.<sup>84</sup> Land acquisition resulting in displacement of more than 400 families in the plains, or 200 in hill or tribal areas, would need to be accompanied by a Social Impact Assessment to study the effects of displacement, a Tribal Development Plan accounting for social and environmental concerns, and commitments to infrastructure development for adequate resettlement areas.

Another important element of the proposed revisions is a nationwide system of Compensation Dispute Settlement Authorities – a system of administrative tribunals with the full force of trial courts at both state and federal levels to review and settle disputes resulting from state land acquisition. This would allow greater technical expertise in the judicial process to address complex land-use, social, environmental, and industrial investment issues. Regarding compensation, the original colonial-era 1894 Act was based on calculation of compensation based on current-day land value and this regime continues to this day. The revisions require a calculation employing the highest value of (i) the minimum land value for the area as specified in the Indian Stamp Act, 1899; (ii) the average sale price of at least 50 per cent of the higher-priced sales of similar land in the village or vicinity; or (iii) the average sale price of at least 50 per cent of the higher-priced land purchased for the project.<sup>85</sup> The intended use of the land and the current market value would also need to be considered.

In addition to reforms to the Land Acquisition Act, a parallel process has been initiated with a special focus on the plight of indigenous communities. In 2004, India's Ministry of Tribal Affairs began writing a Scheduled Tribes and Forest

83 P. P. Royal, 'Do Indian SEZs Steal from the Poor?', USLaw.com, 8 November 2007, available at [www.uslaw.com/bull/etin/just-compensation-do-indian-sez-steal-from-the-poor.php?p=901](http://www.uslaw.com/bull/etin/just-compensation-do-indian-sez-steal-from-the-poor.php?p=901).

84 P. Parker and S. Vanka, 'New Rules for Seizing Land', Center for Policy Research, available at [www.indiatogether.org/2008/may/law-land.htm#key](http://www.indiatogether.org/2008/may/law-land.htm#key).

85 Ibid.

Dwellers (Recognition of Forest Rights) Act to address the historical injustice experienced by indigenous peoples and recognize rights to forest land.<sup>86</sup> The draft legislation was released in 2005 for public consultation and passed on 26 December 2006. Its passage faced vigorous public debate concerning, among other things, the ecological change that may result from increased rates of forest land conversion, with some fearing that forest cover could decline by up to 16 per cent.<sup>87</sup>

Despite broad public debates over the right balance to strike between social justice and ecological protection,<sup>88</sup> the Tribal Forest Rights Act passed, enacting for the first time legal recognition of the adverse impacts colonial and post-colonial utilitarian land-use policy have had on tribal communities. It acknowledges the social function of natural resources in tribal people's lives, and encourages community-based management through inclusion of tribal peoples in conservation measures. The act serves to 'recognize and vest the forest rights and occupation in forest land in forest dwelling Scheduled Tribes and other traditional forest dwellers who have been residing in such forests for generations but whose rights could not be recorded'.<sup>89</sup>

The act sets up a process for reviewing and processing tribal claims to land title for individuals living on a unit of forest land for a significant length of time prior to 13 December 2005. It also recognizes group rights over common property and resources.<sup>90</sup> In passing the Tribal Forest Rights Act, Parliament did not aim to establish a broad land-redistribution process. Rather, the Act seeks to recognize pre-existing rights over forest land taken away during the colonial era, when large forested areas were converted to official nature reserves.<sup>91</sup> Village councils (*gram sabhas*) are delegated the power to oversee the process of recognizing tribal rights claims in line with the Gandhian spirit of local governance as framed in the Panchayat (Extension to Scheduled Areas) (PESA) Act (1996).<sup>92</sup> The Tribal Forest Rights Act also calls on village councils to ensure conservation in the face of risks of escalating forest conversion.

Apart from granting titles to traditional tribal lands, when state acquisition of land is pursued, the Act calls for compensation to tribal communities based on fair market value, net present value of all assets, and a proper assessment of the potential social and environmental impacts of the new use of land, along with ways to mitigate those risks. The Act requires prior informed consent before forest lands inhabited by tribal communities can be taken by the state for extractive-sector or development

86 Scheduled Tribes and Forest Dwellers (Recognition of Forest Rights) Act (2006).

87 Ministry of Tribal Affairs, *Invitation of Views/Suggestions on the Draft Scheduled Tribes (Recognition of Forest Rights) Bill*, Document No. 17014/4/2005-S&M (Pt) (2005). See also Asian Indigenous and Tribal Peoples Network, *Occasional Paper on Report of the National Consultation on the Draft Forest Rights Bill* (October 2005).

88 A. Kothari and N. Pathak, 'Forests and Tribal Rights', (2007) IX *Advocacy Internet* 17.

89 *Ibid.*

90 T. Dash, 'Early Gains from Forest Rights Act', *India Together*, 21 September 2008, available at [www.indiatogether.org/2008/aug/gov-forestact.htm](http://www.indiatogether.org/2008/aug/gov-forestact.htm).

91 *Ibid.*

92 Ministry of Tribal Affairs, *supra* note 87.



projects. Land acquisition is only permitted after the consent process is completed, alongside required measures to protect customs of tribal communities.<sup>93</sup>

The two best-known recent cases in which indigenous communities relied on the Act to challenge mining, land use, and development policy were the Posco and Vedanta investments. India's largest foreign direct-investment project, Posco is a planned US\$12 billion steel and iron export project in Odisha state on land inhabited by a tribal population that has vigorously disputed the acquisition. Posco is South Korea's Pohang Steel Company, the world's fourth-largest steel producer. It awaited mining licenses to extract iron ore as raw material for steel production and export. With layers of clearance provided in 2007 and 2009, the Posco group began a process for land acquisition in 2010 but tribal social movements succeeded in halting the process, claiming a lack of prior consent for use of land and resources. Another case was a planned bauxite mine investment by Vedanta Resources in Niyamgiri Hills, also in Odisha state, considered a global biodiversity hotspot and sacred ground for the Dongria Kondh tribal group. The project was cancelled owing to strong protests and finding by the government of a lack of compliance by the firm with social and environmental requirements.

Settlement of claims is still at an early stage. The status report on implementation of the act as of the end of 2010 shows 14 000 claims to land titles in West Bengal, Chhattisgarh, and Karnataka, and only about 350 titles approved.<sup>94</sup> The implementation of the Tribal Rights Act thus far has been plagued with inconsistent interpretations, many large extractive-sector projects put on hold owing to debates over non-compliance with the Act, and the complexity of balancing goals of economic efficiency, social justice, and ecological sustainability. Detailed guidance and rules for interpretation of provisions are under development. As in the case of the proposed revisions to the Land Acquisition Act, the role of courts will be vital for compliance, enforcement, and resolution of conflicts under new legal regimes.

### 4.3. Access to justice: green tribunals

As the *Samatha* case illustrates, India's judicial independence is critical for overseeing government and corporate compliance with converging requirements of the new Tribal Forest Rights Act, the SEZ Act, proposed revisions to the Mining Act and Land Acquisition Act, and a host of other laws and regulations. India's activist judiciary has evolved a special role in upholding the importance of ecological sustainability for local communities in the face of rapid industrialization.<sup>95</sup> The courts' entry point into the sustainability debate was through two main legislative provisions: Article 48-A(4) of the Directive Principles of State Policy (1976), which notes that the 'State

93 S. Narayan and R. Guha, 'Tribals to Get Special Shield against Industries, SEZs', *Economic Times*, 17 December 2007, available at [http://economictimes.indiatimes.com/News/Economy/Tribals\\_to\\_get\\_special\\_shield\\_against\\_industries\\_SEZs/articleshow/2626756.cms](http://economictimes.indiatimes.com/News/Economy/Tribals_to_get_special_shield_against_industries_SEZs/articleshow/2626756.cms).

94 M. Sanwal, 'Forests and the Development Debate', *Economic Times*, 28 February 2011, available at [http://articles.economictimes.indiatimes.com/2011-02-28/news/28642186\\_1\\_forest-policy-forest-lands-forest-rights-act](http://articles.economictimes.indiatimes.com/2011-02-28/news/28642186_1_forest-policy-forest-lands-forest-rights-act).

95 R. Sharma, 'Green Courts in India: Strengthening Environmental Governance?', (2008) 4 *Law, Environment and Development Journal* 50.

shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country'; and Article 51-A(g) of the Indian Constitution, on the Fundamental Duties of Every Citizen of India, which states that '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'.

Due to a series of cases in which the poor were disproportionately impacted by industry, including the injustices of the Bhopal tragedy in 1984, the Supreme Court began speaking out about the impacts of industrialization on the ordinary citizen and attempted in its decisions to strike an effective balance between issues of growth, equity, and sustainability. Coinciding with the launch of India's neo-liberal reforms, the Supreme Court declared in 1991 that 'issues of environment must and shall receive the highest attention from this court'.<sup>96</sup>

In *Subhash Kumar v. State of Bihar*, the Supreme Court observed that '[t]he right to live is a fundamental right under Article 21 of the Constitution, and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life'.<sup>97</sup> This interpretation by the Supreme Court led to the expansion of rights-based approaches to challenging the social and environmental impacts of growth, and the use of the courts by social movements. Beyond substantive jurisprudence, India's judicial process has also had procedural innovations including public-interest litigation allowing groups of plaintiffs to pursue lawsuits for broad societal harms and inequities in cases of ecological degradation. A series of citizen and NGO lawsuits led to the court's upholding the citizen's right to clean air,<sup>98</sup> the right to clean water,<sup>99</sup> requiring the state and public agencies to strictly enforce environmental laws,<sup>100</sup> and calling for full public disclosure of information that holds consequences for the health, life, and livelihood of citizens.<sup>101</sup>

While courts have been an important part of making India's legal system responsive to demands from below, Indian environmental jurisprudence has also served as an inspiration for social movements around the world seeking justice through the rule of law in their own countries. As India's economy continues to reach new heights and as pressures on equity and ecosystems grow, India has developed a specialized system of environmental courts and tribunals to expand the judicial role in managing societal tensions.

96 *Tarun Bharat Sangh, Alwar v. Union of India*, Supreme Court of India, Judgment of 11 October 1991, 1992 Supp (2) SCC 448.

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

98 *M.C. Mehta v. Union of India*, Supreme Court of India, Judgment of 12 May 1998, (1998) 6 SCC 60 & Judgment of 18 November 1998, (1998) 9 SCC 589; *M.C. Mehta v. Union of India*, Supreme Court of India, Judgment of 16 April 1999, (1999) 6 SCC 9; *Murli S. Deora v. Union of India*, Supreme Court of India, Judgment of 2 November 2001, (2001) 8 SCC 765.

99 *A.P. Pollution Control Board v. Prof. M.V. Nayadu (Retd.) & Ors*, Supreme Court of India, Judgment of 27 January 1999, (1999) 2 SCC 718; *Mrs. Susetha v. State of T.N. & Ors.*, Supreme Court of India, Judgment of 8 August 2006, (2006) 6 SCC 543; *Narmada Bachao Andolan v. Union of India*, Supreme Court of India, Judgment of 18 October 2000, (2000) 10 SCC 664.

100 *Indian Council for Enviro-Legal Action v. Union of India*, Supreme Court of India, Judgment of 18 April 1996, (1996) 5 SCC 281.

101 *Essar Oil Ltd v. Halar Utkarsh Samiti & Ors*, Supreme Court of India, Judgment of 19 January 2004, (2004) 2 SCC 392.

The idea of a national green tribunal first arose in 1996 in *Indian Council for Enviro-Legal Action v. Union of India*, in which the court stated that a system of green tribunals with jurisdiction over civil and criminal aspects of environmental claims could help achieve expediency of justice, helping to reduce large and growing caseloads faced by the general courts that have often delayed social justice.<sup>102</sup> Specialized tribunals would allow for decision-making by experts in environmental law, and would ensure more consistent and holistic approaches to the resolution of environmental disputes. A separate tribunal system also raises the importance and knowledge of environmental issues in the public conscience, encouraging adherence to environmental laws.<sup>103</sup>

After years of debate, the proposal for such a system was tabled to Parliament in 2003 in the 186th Report of the Law Commission of India.<sup>104</sup> After further debate and design, the National Green Tribunal Act came into effect on 18 October 2010. In developing the green tribunal system, India took inspiration from various models around the world, including well-developed, albeit much smaller, systems in New Zealand and Australia. It builds on over 350 specialized environmental courts and tribunals that have been established in 41 countries.<sup>105</sup> The Indian Green Tribunal Act sets the foundation for the emergence of the world's largest network of national and local environmental tribunals. It is expected to increase citizen access to social and environmental justice, enforce and interpret legislative reforms under way, bring tangible remedy to abuse of discretion by state and corporate actors, and consolidate the role of judicial independence and rule of law in achieving social accountability.

## 5. CONCLUSION

Narratives of the history of IEL usually describe the 1972 Stockholm Conference on the Human Environment and the 1992 Rio Conference on Environment and Development as two formative disciplinary events. In June 2012, IEL will mark 40 years since its putative beginning with the Rio +20 UN Conference on Sustainable Development. It is an opportunity to assess progress over the last four decades. It is also a time to rethink IEL assumptions with a view to overcoming contemporary challenges, chief among which is the perception of unfairness, inequity, and injustice in global environmental law and policy.

The first 40 years of IEL were predominantly shaped by the Western experience of environmentalism, particularly that of the United States and Europe: the societal challenges in the West posed by industrialization, the domestic social movements it inspired, and law reforms it provoked. Thus, two dominant strains in international dialogue have been the viewpoints of affluent Western environmentalists, and that

102 *Indian Council for Enviro-Legal Action v. Union of India*, (1996) 3 SCC 212, at 252.

103 Y. Lin et al., *Green Benches: Learning from Environment Courts of Other Countries?*, Asian Development Bank (2009), 9.

104 '186th Report on Proposal to Constitute Environment Courts', Law Commission of India, September 2003, available at <http://lawcommissionofindia.nic.in/reports/186th%20report.pdf>.

105 G. Pring and C. Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (2009), xi.

of Third World advocates concerned with the problem of mass poverty. On a diversity of issues from species conservation to climate change, the discipline became characterized by a North–South divide.

This has led to misleading assumptions about environmentalism in the global North and South. In fact, diverse understandings of environmentalism exist across developed and developing states. At times, there have been industrialists and economists across the North–South divide that shared common understandings of development, and there have been environmentalists that shared common conceptions of sustainability. While some Western states have been reluctant to take steps to rectify the damage they have wreaked on the global environment, some Third World states have taken progressive measures towards sustainability and environmental protection, with most states falling somewhere in between. Through examining the evolution of law, development, and sustainability in India, this article argues for a more nuanced IEL discourse – one that moves away from unprofitable developed-versus-developing debates that have characterized the discipline for the last 40 years.

Major environmental movements today are shaped by subaltern social demands in the Third World articulating sustainability on their own terms. As seen in the case of India, debates over sustainability in the Third World are driven not only by the evolution of IEL from Stockholm to Rio, but by a history of colonial and post-colonial use and abuse of natural resources and the communities that host them. Environmental issues in the global South are justice issues. They are about sustainable and inclusive development. Just as IEL was influenced by Western understandings of environmentalism in the past, it will be increasingly shaped by Third World social movements. Emerging economies increasingly contribute to many global environmental problems due to their increasing consumption and pollution. How they understand the local and global implications of their development patterns and address the consequences will be determinative for IEL.

As in other states, Indian understandings about humanity's relationship with the natural environment have profoundly shaped the nation-state, law, and development. The evolution of these understandings, as emerging economies such as India attempt to respond to problems of equity and sustainability, will have increasing relevance for IEL. India can creatively draw on its indigenous experience, whether its Gandhian tradition, tribal knowledge, colonial past, pre-colonial philosophies and religions or the hybridity of experience that characterizes modern India, to formulate sustainable philosophies of human development.

IEL has attempted to rise above the diversity of local political and social complexities, positing the science of ecological change as a common basis from which to craft efficient international responses. Over the years, this has led to increasingly technocratic approaches, failing to effectively capture the broad public imagination or resonate with needs at the grass-roots level. For many IEL academics and practitioners, the assumption is that the disciplinary fundamentals are decided and the challenge remaining is one of implementation through market mechanisms, technological innovation, and fiscal incentives. However, IEL has always been a politically and culturally contested project. Greater local engagement and integration of local

knowledge into IEL will help address perceptions of unfairness. Implementation of IEL is not just about co-operation between inter-state systems. Implementation largely depends on how environmental principles and legal regimes are negotiated and play out at the local level. Indian legislation and jurisprudence that attempt to strike a balance between economic development, rights of indigenous peoples, and sustainable natural-resource use will have an impact on creating an IEL from below – one that is responsive to demands for fairness.

Sen describes human development as not the mere accumulation of goods, but the enhanced freedom to choose to lead the kind of life one values.<sup>106</sup> Human agency is central for empowering the vulnerable and excluded in society. Social accountability at the sub-national level can change, as seen in the Indian example of rights to land and resources, where communities are winning back powers to control their environment and natural resources, participation in decision-making, and access to justice. India's complex web of law-reform initiatives, while causing some uncertainty for investment, holds out hope for negotiating an effective balance between the economic, social, and environmental aspects of sustainable development.

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106 Sen, *supra* note 7, at 18.