

CHAPTER 33

An Analysis of the Indian Laws and Policies addressing Historical Injustice with Local Communities and Deforestation for Sustainable Forestry

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Abstract

Forests were managed by the local communities in India and forests possess the characteristics of subtractability and non-excludability making them common property resources. However, with the Britishers denied the local communities with access to forest lands due to the doctrine of *Terra Nullius*. It was assumed that state-control will reduce degradation but it continued. Subsequently, many scholars debated for community management of forests to achieve sustainable forestry. Based on such ideology, regulations were adopted in many countries and in India too, laws for addressing historical injustice with the local communities and improving the forest health were adopted. However, issues of determination of local people and their rights could not be solved adequately. Therefore, study of such regulations becomes important. This paper thus analyzes those Indian legislations to understand the gap between the allocation of rights to the local forest dwellers and the achievement of sustainable forestry.

Keywords

Community Rights; Eminent Domain; Forest Dwellers; Historical Injustice; Sustainable Forestry

1. Introduction

Forests are humanity's most important source of subsistence, and the relationship between forests and local people can be better understood when they are viewed as Common Property Resources (CPR, hereinafter). CPRs are natural resources that are owned by a community or a group as a whole for common use rather than by a single individual. (Gurung 2005) As a result, there is little doubt that such resources play an important role in a country's economy, particularly where the proportion of poor people who cannot afford private property ownership to support their livelihood is high. (Regmi 2011) India is a developing nation and also a majority of the population still resides in rural areas that are dependent on agricultural sources of income. (Trending Economics 2020) Although urbanization, (The World Bank 2018) industrialization, (IBEF 2019) rural-urban migration, (Singh 2016) etc. are all taking place in India at a rapid speed, the dependence of the rural poor on forests is not decreasing. (D. Singh 1952) At the same time population explosion, (Jodha 1989) over-encroachment, (Jodha 1986) environmental pollution, and degradation (Sahoo

and Swain 2013) have all resulted in decreasing the area of existing CPR including forests as well as their quality. These challenges have prompted many questions in the minds of scholars and academicians, who have debated the management of these CPRs from many perspectives to find a solution to these problems. Some have campaigned for the state to regulate these CPRs to prevent their degradation, while others have advocated for collective efforts, and still, others have advocated for local communities to have authority over their own CPRs. (Ostrom 1990) However, all these arguments hold good in their sphere but again are not that good in different critical situations. (Wade 1987)

At the moment, humanity is seeking to accomplish the Sustainable Development Goals (SDGs) by 2030, (UN General Assembly 2015) however fulfilling those goals would be a distant dream unless CPRs improve. It is vital to use CPRs, including forests, sustainably not just to conserve them but also to eradicate poverty. Both conservation of Natural Resources for securing the benefits to the future generation and eradication of poverty to solve present environmental degradation, since the environment cannot be protected without eliminating poverty, is the essence of these SDGs. (UN SDG Knowledge Platform 2015)

Although most natural resources in India were under common ownership of villagers before British rule, such ownerships were limited by various legislations after the British colonial rule, and only a limited set of legal rights were granted to a large section of the population who were historically known for holding property in common for their common welfare, and their traditional knowledge was accounted for managing such commonly owned properties. (Chaithanya 2012) However, as a result of concepts such as *Terra Nullius*, *Eminent Domain*, and *Parens Patriae*, the local people began to lose control over such resources. However, as the importance of local communities in the long-term management of natural resources has become more widely recognized, the legal framework for their active engagement has been broadened. As a result, India began to recognize the rights of local people in domestic legislation as part of its commitment to global sustainable development norms. However, such legislation did not achieve the desired level of satisfaction, and several issues arose during implementation, resulting in conflicts between various segments of society, with even the judiciary encountering difficulties in resolving issues relating to local community rights to forests and forest resources. This paper will therefore attempt to understand the gap between the laws in theory and the issues in practice.

2. Status of Common Property Resources in India

After the publication of Hardin's Theory of Tragedy of Commons in 1968, the term "Common Property Resources" gained prominence. (D. Singh 1952) But the same principle has been used in human culture from the dawn of time. (Basu, Jongerden and Ruivenkamp 2017) However, numerous scholars with unique and diverse intentions for application through their ideologies have presented varying interpretations of this notion from time to time. CPR can be defined as natural resources that are claimed solely by a group of people, have the property of being indivisible, similar to public goods, and are used in a subtractive manner. (Kadekodi 2004) CPR, may or may not grant ownership rights, and they are not open to everybody. This CPRs differ from Open Access Resources (OAR) in that OAR have no rules or regulations governing their

use, and the possibility of misuse or improper use is open, whereas in the case of CPRs, there are norms governing access to such CPRs in the form of either Customary Laws or State Legislations, and the possibility of misuse is always a concern. CPRs can thus be defined as resources that are used by a group of individuals living in a community who have certain shared requirements that can be met from such resources for the common good. This aspect of common good may be considered unique from other types of Natural Resource Property Ownerships.

CPR is a word used in India to describe resources that are accessible to and collectively owned, possessed, or managed by a community that can be identified, and on which no individual can claim exclusive property rights. It covers assets held or managed by Co-operative Societies whose members were co-users of those assets. So, it includes Village Panchayat Grazing Land or Posture Land; Village forest and woodlots not under the control of the Forest Revenue Department; Village sites and threshing floors used for economic activities by the villagers, such as processing agricultural products, storing grains, and other household purposes; common water resources; and all other such resources, even if they are owned by the government but are used in common by a particular community for cohesion. (NSSO 1999) CPR has been proven to be very relevant and important for securing livelihood for the poor in India, (Mahanta and Das 2017) where there are roughly 17,000 villages in the forest areas with a population of approximately 147 million people. (Chitkara 2020) According to the World Bank, CPR provides a living for around 1.1 billion of the world's impoverished. (Wilusz 2010) It is also said that the CPR provides poor people with far greater economic revenue than most government measures in India aimed at eradicating poverty. (Wade 1987) It is estimated that the poor in India earns around the US \$ 5 billion from CPR. (Wilusz 2010) It has been discovered that regions with high CPR have higher economic growth than those with low CPR. Furthermore, CPR benefits poor families that are landless the most. (Prakash 2019) As a result, there is little doubt that CPR can provide a community with long-term development.

However, it has been shown that there has been a significant decline in these CPRs, both in terms of geographical extent and quality. (Mahanta and Das 2017) India's CPRs are said to have degraded as a result of population growth, (Hardin 1968) industrialization, privatization, (Chaithanya 2012) and even state management through legislative frameworks. (Wade 1987) The policy frameworks and laws are said to be insufficient to manage these CPRs because laws have failed to recognize the rights of communities over the CPRs that these communities have been managing for centuries in India, and it is assumed that these communities are more capable of efficiently managing these CPRs. (Menon and Vadivelu 2006)

3. Understanding Forests as Common Property Resources

Forests are the second-largest stock of natural resources after the ocean. It provides almost all the resources essential and very basic for human civilization. (WWF 2020) It is even assumed that humanity first survived within the vicinities of the forests and many contemporary civilized nations were established from within the forests. However, humanity evolved in society and within their prescribed territorial boundaries they managed to regulate their natural resources through customary regulations and this led to the development of

traditional knowledge. This traditional knowledge has become very vital for the sustainable utilization of forest resources. This also indicates that forests were owned in common in many civilizations. (Murphree 2009)

Further, human civilization is so heavily dependent on forests that it is almost impossible to exclude human settlements absolutely from the forest's vicinities. Thus, forests possess the attributes of high non-excludability. It is often held by conservationists that forests do not require human intervention for their protection since forests can protect themselves, only humans shall not destroy them and leave them free from human intervention. But a human cannot survive independently from forests. Although forests are not dependent on humans, humans are dependent on forests for which forests are non-excludable. Moreover, overutilization of particular forest resources will lead to the diminishing of such resources. If one individual utilizes one particular forest resource then such resource will become scarce for others to utilize. This makes forests highly subtractable in nature. (Tewathia 2015)

Thus, from the above observation, it can be stated that forests share the attributes of common property resources since they possess the qualities of subtractability and excludability.

4. Sustainable Forestry and the Role of Local People

From the above discussion, it becomes clear that CPRs are very much essential for the maintenance of the livelihood of the poor and forests are the major source of CPR. Thus, forests have a major role to play in reducing poverty. In the speech of Smt. Indira Gandhi, the then Prime Minister of India during the Stockholm Conference explained the importance of reducing poverty for environmental protection. (Mathiesen 2019) Thus, contemporary goals of sustainable development cannot be achieved with more than half of the population surviving with a hungry stomach. Sustainable forestry is thereby essential for the reduction of poverty which again cannot be achieved without the participation of the local people in and around such forests.

Participation of local communities is also essential for safeguarding the forests since they possess their traditional knowledge over management of such resources and this allows them to sustainably utilize such resources. On the other hand, it is also true that if they are allowed to manage the resources which they were owing historically then they will manage them more efficiently for their own interests compared to any other stakeholders. Ensuring the participation of local communities in the management of forests will also ensure greater justice in the distribution of resources. Since their ancestors managed those forests therefore, they shall have the legacies of such rights and rights are corollary to duties which will make such local people liable for their actions against the forest health. (Maggio 1987)

The local people can also enhance the self-sufficiency of the communities concerned if allowed to build up a healthy and sustainable trade ecosystem. Such developments will not only resolve communal clashes between insiders and outsiders but will also increase the self-sufficiency of the economy in the longer run. All these developments in total are also expected to build a sense of responsibility within the local forest

dwellers for sustainably utilizing their forest resources. Thus, empowering the local communities for the management of forests will not only serve the local communities but is also expected to reduce the rate of deforestation during the phase of capitalist expansion. (Shelton 1999)

5. Management and Ownership of Forests under the Indian Legal System

Forests include a diverse range of natural resources with great economic value. At the same time, a large portion of the population relies on the forest's resources for survival, whether directly or indirectly. (Sharma and Sarma 2014) Because forests are recognized as properties of national importance in most government policy documents in India, this makes ownership rights over forests for their management extremely important. This affirms state authority and ownership over them.

In the case of *Olga Tellis*, the Supreme Court (SC) held that the Right to Livelihood is a Fundamental Right under Article 21 of the Indian Constitution. (*Olga Tellis v. Bombay Municipal Corporation*, 1985) Thus, it becomes clear that all those who are poor and are landless have a Right to livelihood in India. Similarly, the Right to a Clean Environment (*M.C. Mehta v. Union of India* 1987) and Right to Shelter (*UP. Avas Evam Vikas Parishad v. Friends Cooperative Housing Society Ltd* 1985) (*State of Karnataka v. Narsimhamurthy* 1995) (*Chameli Singh v. State of UP*. 1996) (*Ahmedabad Municipal Corpn. V. Nawab Khan Gulab Khan* 1997) have also been given Fundamental Right status in India. Furthermore, the Democratic Nature of our Constitution is based on the two most important concepts, - *Eminent Domain* and *Parens Patriae*, where Eminent Domain means that the State has the ultimate authority to decide over the ownership of its resources (Umamaheswari and Latha 2018) and Parens Patriae means that the State is the mother and father of all of its citizens. , (Verma 2014) In such a setting, one could wonder if the Indian poor are truly exercising their fundamental rights. Before the arrival of British rule in India, the local people had full access to all Natural Resources, but if we look at the evolution of the legal framework in India, we can easily see that during the Colonial Rule, the Imperial government enacted several laws such as the Forest Acts, Land Acquisition Laws, and even the Societies Registration Acts, which introduced Government Authorities such as the Forest Departments and others, which made ownership of Natural Resources to be regulated. (Roy 2002)

Surprisingly, these regulations remained in effect after independence, indicating that natural resource ownership was directly under the control of the state. However, laws for the protection of the rights of marginalized groups were adopted in the following years, such as the Civil Rights Act, the Protection of Scheduled Castes and Scheduled Tribes Act, and several more laws for women and other Backward Classes, but these laws remained in principle. Even while the Panchayat Act of 1986, also known as the Panchayat Extension to Scheduled Areas (PESA), and the Forest Act of 2006 stated a wish to restore the rights of those communities who had lost their ancestral rights over CPRs, they were never fully implemented. (Balooni and Inoue 2009)

Civil societies were transformed into self-help organizations that did not represent any political parties and were not answerable to anybody save the sponsors who provided funding for their operation. As a result,

they represented the funders' aspirations rather than the requirements of their target demographic. Following the advent of globalization, resource privatization increased, and several development projects financed by large sums of Foreign Deposit Investments (FDIs) resulted in the eviction of a large local population, who were given land for rehabilitation, mostly in the common land of the villages. (Jain 2002) Furthermore, the legal definition of landless people previously covered those with less than 2 decimals of land, but this has recently been changed to specify that claimants must not have any male family member with more than 2 decimals of land. Many landless persons are now unable to claim a piece of the land. (Roy, Sarin and Ramanathan 2002)

The Chipko Movement was a remarkable example of how local people had to battle to protect forests from natural resource exploitation. (Chipkoppn 2005) Not only that but there are other examples where natural resources have been commodified for economic benefit, denying local populations access to those resources based on public interest. (Chaithanya 2012) For example, the state of Chhattisgarh recently sold a 22-kilometer length of the river *Shaonath* to a private individual. (Thakkar 2002)

Conflicts arising during the installation of hydroelectric projects are another example of LCs being denied access to CPRs. (Chaithanya 2012) Although *Gram Sabhas* and *Village Panchayats* have been established to manage several CPRs in village areas, they are required to report to different government servants who are in charge of different departments separately, such as Forest Departments, Fisheries Departments, Agricultural Departments, and so on, making it extremely difficult for local people to bring up common issues that affect more than one of these departments. Furthermore, the public servants are protected while on duty by state laws, making it illegal to refuse their orders. (Bhai 2002)

This demonstrates that, although the notion of CPR is mentioned in government papers, no community has exclusive control over the management of such CPRs. Furthermore, the government has an inherent power to acquire these CPRs for public interests under *Eminent Domain* and *Parrens Patriae*; for example, the public has a very limited right to question land acquisitions made under the National Highways Act, 1056, (Act 48 of 1956), but what constitutes such public interests is a crucial question.

Such acquisitions cannot be justified because they are required for the conservation and sustainable use of CPRs based on the theory of the Tragedy of the Commons, Prisoners Dilemma, or Collective Action as provided by various scholars from time to time to conserve and preserve Natural Resources, at least in India, where CPRs have decreased from 26 to 65 percent in the last three decades, (S.R.Hiremath 2010) while such CPRs as having been discussed are directly under State regulations. It will even be incorrect to argue that privatization will result in the long-term usage of such CPRs, given that around 150,000 hectares of Forest Sites are exploited for commercial industrialization in India each year. The construction of several Developmental Projects, such as hydroelectric dams and the designation of forest areas as National Parks, Wild Life Sanctuaries, Ramsar Sites, and other Biodiversity Conservation Areas, have resulted in the displacement of a large number of Tribal People and turned them into encroachers on their own land. Members of the Tribal Communities make up roughly 55.1 percent of the displaced population in India. (Chitkara 2020)

The Access and Benefit Sharing method (ABS, hereinafter), which was recently developed, is intended to provide some benefit to Local Communities (LCs, hereinafter) in terms of managing their common resources. However, research conducted in Assam's Kamrup District indicated that the majority of Forest Department officers were unaware of Biodiversity Management Committees (BMCs, hereinafter), although members of Forest Departments were also made members of those BMCs. Those who worked in BMCs also reported that LCs were hesitant to cooperate with Biodiversity Authorities since they were mainly unaware of the benefits, and even if they were aware, they rejected because they were making more money from forest resource traffickers. The Forest Officers, on the other hand, admitted that they were not adequately equipped to protect the entire Forests, since they lacked both manpower and weaponry to fight themselves against equipped encroachers who were allegedly aided by locals who knew the Forest far better than the Forest Guards. Forest Guards have been known to become Martyrs while on duty safeguarding the forests. The formation of BMCs and the documentation of People's Biodiversity Registrars are both time-consuming processes. Furthermore, there are many additional concerns with it for which the Biological Diversity Act of 2002, which introduced this notion in India, has been submitted for change multiple times. The authorities charged with enforcing this Act have also discovered that a middle class is forming, which is acting as a link between bioproduct traders and LCs, making it impossible to bring such a middle class under the Act's monitoring to prevent unlawful bio-trading. (Boruah 2021) This Act stipulates that LCs in possession of bio-resources receive a share of the benefits. However, as previously stated, LCs have very limited ownership rights over CPRs, and those who do have them do so either under Government Regulations or as Private Owners with legal Certificates of Title. As a result, there is much skepticism about the application of this ABS mechanism to CPRs, as well as how far this mechanism will aid the actual poor who rely on CPRs for their livelihood. As a result, the definition of LCs under this Act may exclude those who do not have legal ownership of any Natural Resources, as well as CPR itself, because no individual can claim ownership of CPR, and Indian laws do not allow the public, including communities, to have exclusive ownership over the property.

During the British Colonial Administration in India, notions like forest conservation and protection got legal sanction through approved legislation. Forests were under the control of the Central Government until 1935 when the Government of India Act 1935 was passed, and they became the responsibility of state governments. The States, on the other hand, followed the same legislative framework as the Indian Forest Act of 1878 until India's independence. Forests remained a state subject after independence and were included in Schedule VII of the Indian Constitution until 1976. The Indian Forest Act of 1927 was enacted to regulate the forests, but a few states, including Assam, had their own legislation, such as the Assam Forest Regulation of 1891. The 42nd Amendment Act of 1976, however, transferred forests from the State List to the Concurrent List 1976. This limited the states' ability to regulate the forests, which was further limited in 1980 when an Ordinance for Forest Conservation was issued, which was quickly followed by an Act. (Srivastava and Barman 2019)

Forest management in India is largely governed by national policies formulated at the national level. Since independence, India's forest management has been separated into two periods: 1947-1980, known as industrial forestry, and 1980 onwards, known as social forestry, with the active engagement of the people. During this time, three important policies may be mentioned: the Forest Policy of 1952, the National Commission on Agriculture of 1976, and the National Forest Policy of 1988, all of which played an important part in the management of India's forests. National Forests, Protected Forests, Village Forests, and Tree Lands were the four categories established by the 1952 policy. Village communities, on the other hand, were not permitted to use the forests in the name of "national interest." The National Commission on Agriculture, established in 1976, focused on commercializing forests by destroying areas with valuable mixed species and replacing them with species with higher commercial value. The commission, on the other hand, highlighted the village poor's needs for fodder, fuelwood, and small timbers. However, it was also claimed that the rural people were primarily responsible for the over-exploitation of forest resources, and thus pushed for reversing the rights to forest resources allocation. Forest policies were created to meet the needs of the five-year plans at the time, and they leaned toward forest commercialization. (R. n.d.)

As a result, massive forest loss, global pressures for forest conservation, and community resentment over the loss of traditional rights to the forests, particularly among tribal communities that rely heavily on forest products, forced the government to recognize the importance of sustainable forest utilization and conservation. Following the 1980s, policies aimed to distribute the money created by forest products among the communities living in and around forest areas and to make them an integral component of the forest management system for the protection and conservation of the forests. From here onwards the policy planning shifted towards the concept of social forestry. In 1990, the Indian Government under the National Afforestation Policy adopted the Joint Forest Management. (Upadhyay 2010) The main concept of Joint Forest Management is based on the assumption that mere legislation cannot determine property rights over common property resources for which state-society partnership is essential. (Tamuli and Choudhury 2009)

In India, gradually there was a shift from policies of 'people-free zones' over forests to encouraging active participation of local communities in the management of forests and providing them with their traditional rights. But these policies brought confusion among the State agencies, Conservatism, and the LCs. For encouraging the role of LCs in the management of forests, the Joint Forest Management (JFM) system was initiated. But this system came in conflict with the provisions of the Panchayat (Extension to Scheduled Areas) Act, 1996 (PESA) and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA). The National Forest Rights Act Committee even suggested putting an end to the entire Joint Forest Management program once the rights under Forest Rights Act, 2006 get settled. Both the Acts of 2006 and 1996 have failed to recognize the validity of Joint Forest Management which was already under process, and a lot of financial investments were also made by the State. In states like Assam, the local communities were not dependent on forests initially since there was abundant land for cultivation. Several natural calamities like floods and earthquakes coupled with socio-political conflicts have forced the local population to rehabilitate the forest areas for maintaining their livelihood. But the Forest Rights Act, of

2006 failed to recognize this situation in such States. Section 2(c) of the Act provides that Other Traditional Forest Dwellers (OTFD) shall be permanent residents in the forest for 75 years to be entitled to the rights under the Act. This provision is irrelevant in the context of such states since most of the local illiterate people do not possess any valid documents to prove their possession of forest lands for 75 years. The Gauhati High Court 2009 even ruled that there are no forest dwellers in Assam which led to serious confrontations in the State. (MoEF/MOTA Committee on Forests Rights Act 2010) The Forest Rights Act, 2006 makes a classification between Scheduled Tribes and Other Traditional Forest Dwellers. But there appears no major difference in the economic conditions between them, hence such classification failed to address the historical injustice within the local communities. The Act is therefore alleged to have discriminated against the non-tribals. The Forest Rights Act, 2006 is based on Panchayat (Extension to Scheduled Areas) Act, 1996 for its implementation, but in many States, the Panchayat (Extension to Scheduled Areas) Act itself lacks implementation. (Kumar 2016) Moreover, the Forest Rights Act lacks clarity in determining the position of the Gram Sabhas responsible for recognizing the rights under the Act in different types of villages which provided the State with the scope to violate critical provisions of the Act that were meant for ensuring a transparent, accessible and democratic system of settling the claims under the Act. (Sarin and Begnski 2010)

6. Conclusion and Suggestions

It can be argued that forests resemble the characteristics of common property resources that were historically managed by the local communities in common with customary rules and traditional knowledge. However, with the advent of British Colonial Rule, ownership over forests directly shifted to the States. Although from the late 1980s community participation in the management of forests was given priority, studies have shown that such initiatives are not well implemented.

It is therefore required that a uniform approach in the forest legislation is made to address the conflicts like those existing between Joint Forest Management and the provisions of the Forest Rights Act, along with clarity in the legal concepts. Special attention shall be given to the unique situations of each state in India while framing central legislation since, in states like Assam where the issue of citizenship is still unresolved, identification of Other Traditional Forest Dwellers cannot be possible. Similarly, greater autonomy is required to be provided to the local institutions, and even though such autonomy has been provided but the limits are not defined and the power to define such limits still exists in the hands of the State. Therefore, a serious amendment is required in the laws enacted to address the historical injustice done to the forest dwellers in India.

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