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**RETURNING TO EDEN: COMBATTING
ECOLOGICAL CHANGE THROUGH
INDIGENOUS RIGHTS**

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RETURNING TO EDEN: COMBATting ECOLOGICAL CHANGE THROUGH INDIGENOUS RIGHTS

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1. Introduction

In 2012 world leaders gather in Brazil for the UN Conference on Sustainable Development, marking twenty years since the first Rio Earth Summit in 1992. As populations grow and consumption levels of society and industry continue to mount, the pressures on fragile ecosystems and increasingly scarce natural resources have become a major concern for countries across the world.³ Recent estimates show a dramatic rise in humanity's ecological footprint in recent years, with global society now using the ecological goods and services of the equivalent of 1.3 Earths.⁴ The 2012 Rio Earth Summit will review global challenges in slowing down the rate of ecological decline and implementation status of landmark international environmental laws passed twenty years ago, including the UN Framework Convention on Climate Change (UNFCCC) and the UN Convention on Biological Diversity (UNCBD). With countries starting to emerge from one of the worst recessions in world history, ecological change has also raises concerns for the consequences of ecological change for a sustainable recovery and social stability, with many impacts expected to be felt disproportionately by the poor and vulnerable in society. The Summit will therefore also place top priority on reviewing trends on national and local achievement of the overarching principle of sustainable development endorsed in the 1992 Rio Declaration on Environment and Development, including responses that achieve coherence between ecological sustainability and social equity.

1.1. Sustainability as Justice

The process of negotiating a new global climate regime in recent times has been a particularly poignant reminder of the challenges that remain in finding coherence between issues of equity and sustainability. While issues of technology, finance, and enforceability of targets stand at the top of the agenda for negotiations, the most formidable challenge and roadblock to negotiations have been underlying issues of fairness, equity and the right to development. Indeed the developing world's consciousness of unfairness stands as a primary hurdle impeding global agreement on this and many environmental issues. The accepted wisdom in many Western circles has been that, after nearly twenty years of the UNFCCC and UNCBD, international environmental law has already reached a

³ Lester Brown, *World on the Edge: How to Prevent Environmental and Economic Collapse*, Earth Policy Institute, W.W. Norton & Company, New York (2011). See also Richard Heinberg, *Peak Everything: Waking Up to Centuries of Decline*, New Society Publishers, Gabriola Island, Canada (2007).

⁴ Erik Assadourian, *State of the World*, Earthscan, London (2010), 4. See also Donella Meadows, Jorgen Randers and Dennis Meadows, *Limits to Growth: The 30-Year Update*, Chelsea Green Publishing Company, White River Junction, Vermont, USA (2004).

level of normative maturity and thus focus needs to shift to improving systems of compliance rather than continuing debates on basic principles of sustainability.

However, the emergence of large developing countries and middle-income economies at the centre of the world economy, and as a primary source of future resource consumption and carbon emissions has challenged this agenda. Large developing countries now assert their views and concerns on issues of equity from the centre of global policy dialogues, in a much stronger way than in the past. A recent catalyst for increased attention to fairness has been the debate over the nature of participation by emerging economies in a new climate regime, and the need to strike a balance between their rapid growth and relatively low levels of per capita consumption and emission levels. As the debate over sustainability and equity proceeds, a particular need has arisen to go beyond the developed/developing country dichotomy that has historically tied global negotiations in a deadlock.

As noted by the 2010 Human Development Report, if past rates of progress continue into the future, by 2050 three of every four people will be living in countries with very high average Human Development Index (HDI) values.⁵ However, while progress in middle income countries is to be commended and their future impact on the global environment and new duties is will bring are to be recognized, middle income countries will also host the majority of the world's poor and thus retain serious domestic challenges related to poverty reduction and social equity that could continue to hamper their ability to engage fully in global regimes. While large emerging economies will indeed produce a large share of future resource demands and carbon emissions, significant internal disparities exist across regions within large emerging economies in per capita resource demand and carbon emissions.

The ability to achieve coherence in equity and sustainability within global policy is increasingly tied to our ability to achieve such coherence at national and sub-national levels as well, as countries seek to balance global commitments with the right to development for poor communities in their countries. Fairness in international environmental law will be increasingly defined not only by debates over retributive justice at the global level between developed and developing countries, but also by principles and actions for distributive justice at the local level with new resource-sharing and burden-sharing between segments of society.

⁵ UNDP (2010), *Human Development Report 2010: The Real Wealth of Nations*, Palgrave Macmillan, New York, 3.

With regards the latter, countries will need to go beyond programmatic initiatives and focus on issues of justice.⁶ As explored further below, with three out of every four people today living outside of the rule of law, a major challenge to achieving both equity and sustainability will be to enhance legal empowerment of the poor and rights-based approaches in indigenous communities.⁷ As noted by Sen in his classic *Development as Freedom*, “[t]he solutions to these problems - 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.”⁸ What the situation calls for is new approaches to governance that address economic, social and environmental pillars of sustainable development.⁹

1.2. Finding Policy Coherence between Equity and Sustainability

Historically, issues of social equity and environmental sustainability were often seen as contradictory forces. Links between poverty and environment were traditionally seen as elements of a ‘vicious cycle’. However in recent years, options for ‘win-win’ solutions have come into focus through governance approaches that support coherent policies that achieve both equity and sustainability. The basic premise of policy coherence is that returns from policies aimed at enhancing equity are dependent not only on social welfare policies themselves, but also on policies related to environmental sustainability for example, and that coherence among policies needs greater attention from decision-makers if either goal is to be achieved. Increasing per capita consumption and income, access to food, land and water, improving health and other elements of poverty reduction are all strongly linked to ecological services such as a stable climate, and food and water supply. Human security can be affected both by ecological change, which can affect the likelihood of inequity and conflict over declining resources, and by changes in ecological dynamics that influence the frequency and magnitude of disasters, disproportionately suffered by the poor.

At the core of the challenge of policy coherence is the surge of demand for increasingly scarce natural resources often hosted by poor communities, and the disproportionate impacts on the poor from rapidly increasing consumption and pollution levels of a globalized industrial society which continues to expand rapidly. In most countries it is the poorest and most vulnerable in society

⁶ Ananda and Sen (1994), *Sustainable Human Development*, UNDP, New York, 1.

⁷ UNDP and the Commission for the Legal Empowerment of the Poor (2008), *Making the Law Work for Everyone, Volume II Working Group Reports*, UNDP, New York, 2-3

⁸ Amartya Sen, *Development as Freedom*, Anchor Books, New York (1999), 267

⁹ James Gustave Speth, *The Bridge at the End of the World: Capitalism, the Environment, and Crossing from Crisis to Sustainability* (2008), Yale University Press, New Haven, 16.

that suffers disproportionate impacts of ecological change, while their potential role in climate change mitigation and adaptation is often undervalued. The urban poor tend to live in communities with scarce resources while also often suffering disproportionately the ill effects of ecological change, while the rural poor are heavily reliant on natural resources for livelihoods but are often excluded from fair access and benefit sharing.¹⁰ Poverty-environment linkages can be conceptualized in many ways, notably in terms of their relationship to livelihoods, resilience to environmental risks, health and economic development.¹¹ Rural communities depend on the environment to earn incomes through agriculture, forestry and fishing. The poor are more vulnerable to disasters like floods and droughts, climate change and other ecological risks that threaten livelihoods and water and food security.

The cumulative impacts of inequity and ecological change together affect the prospects for achieving and sustaining human development, the freedoms and choices of individuals and the capacity of the State to achieve inclusive growth and development. Vulnerable communities are the ones who suffer the most from ecological impacts, while also being the least able to mobilize against abuse of power, corruption and other causes of inequity and unsustainable policies. For the poor, empowerment and enhanced freedom of opportunity means not only increasing personal consumption and social well-being, but also being free from the inequities and ecological impacts that result from current systems of growth often geared for the benefit of private corporations and the wealthy, a system of ‘unequal protection’ under the law. Nowhere is this more evident than in indigenous communities.

2. International Law from Below: Indigenous rights and legal pluralism

2.1. Resource pressures and social exclusion

In attempting to address issues of fairness and equity in the formulation and implementation of international environmental law, special concern must be placed on the plight of the world’s indigenous communities.¹² They stand as the most socially excluded communities in the world, while

¹⁰ UNDP/UNEP (2009), *Mainstreaming Poverty-Environment Linkages into Development Planning: A Handbook for Practitioners*, UNDP/UNEP, New York.

¹¹ Ibid 7-8.

¹² The most widely used definition was put forward in 1986 by UN Special Rapporteur 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 of their ancestral territories, and their ethnic identity, the basis of their continued existence as peoples, in accordance with their cultural patterns, social

also hosting much of the planet's remaining reserves of natural resources. As noted by the first ever 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% of the world's poor.¹³ The world is experiencing an unprecedented surge in demand for natural resources and basic commodities such as energy, timber and minerals, largely owing to increased needs of emerging economies. As demands grow and supplies shrink the world's last remaining reserves of natural resources are increasingly found in remote areas largely inhabited by indigenous communities. Increasing resource scarcity is creating new pressures on already fragile ecosystems, and is escalating the strain on the communities that host these resources.¹⁴ Indigenous peoples are thus central to preservation of a plural and diverse world from both ecological and social perspectives.

The special plight of the world's indigenous peoples has been a topic of debate for many years. 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, land and water degradation and loss of culture.¹⁵ But it has only been in recent times that the world's indigenous movement has made significant strides to put forward its concerns over social equity and ecological sustainability. This has resulted in the launch of the UN Permanent Forum on Indigenous Peoples in 2000 and the historic enactment of the UN Declaration on Indigenous Peoples in 2007 both of which place issues of sustainable development at the center. Another important prospect for indigenous communities is a prospective global framework for Reduced Emissions from Deforestation and Land Degradation (REDD) being negotiated as part of a post-2012 global climate regime. REDD could emerge as an important point of convergence between social equity and ecological sustainability, providing communities a new source of investment in exchange for conserving forests as important sinks of carbon.

institutions and legal systems." Jose Martinez Cobo, 'Conclusions, Proposals and Recommendations' in *Study of the Problem against Indigenous Populations, Volume V*, UN Doc E/CN4/Sub2, add 4 [379, 381] (1986/7) <<http://www.undp.org/csopp/CSO/NewFiles/ipaboutdef.html>>. See also Paul Keal, *European Conquest and the Rights of Indigenous Peoples* (2003), 92.

¹³ UN, *State of the world's indigenous peoples*. ST/ESA/328. UN Department of Economic and Social Affairs (2009), New York. See also Lennart Båge, *Policies and Lessons for Reaching Indigenous Peoples in Development Programs*. 2020 Focus Brief on the World's Poor and Hungry People (2007).

¹⁴ See UNDP, 'Human Development Report, Cultural Liberty in Today's Diverse World', New York (2004) 92.

¹⁵ 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).

This builds on the World People's Conference on Climate Change and the Rights of Mother Earth convened in early 2010 in the wake of the controversial UN Climate Change Conference in Copenhagen. This global gathering of indigenous peoples, UN representatives and world leaders highlighted the need for new visions of the balance between human development and nature, and the central role of traditional knowledge in providing alternative paradigms of progress. As noted at the conference, "the only way we can contribute to the future of humanity and our planet is through recuperating our origins, strengthening our cultural practices and our forms of collective organization for the sustainable use and management of natural resources, guaranteeing the rights of indigenous peoples, and promoting traditional knowledge and notions about living in harmony with Mother Earth".¹⁶ Despite recent progress in crafting a new vision for equity and sustainability in indigenous communities, real progress also needs to confront the historical complicity of international law in creating social exclusion and ecological devastation of indigenous communities.

2.2. Conquest of Eden: The State of Nature and the Nature of the State

Mainstream discourse in international law and policy has remained committed to a linear trajectory of progress from a mythic 'state of nature' to a modern state led by 'scientific man'. The pursuit of development in the modern era has seen developing countries strive for progress along this timeline, moving from 'underdeveloped' and 'developed' to 'emerging' and 'developed' status over the past decades. Paradoxically, at the same time that developing countries were encouraged to strive towards the ideal of modernity, this way of life has gradually showed itself to be unsustainable and inequitable. The environmental and social challenges that have now been thrust into the global spotlight make it increasingly difficult to ignore this paradox.¹⁷

While indigenous peoples look to international law to address their plight, ironically modern law itself was born from the confrontation of the West with indigenous peoples during the 16th-18th centuries, carrying within it from then on the Enlightenment's mythological distinctions between 'culture' and 'nature', and between 'primitive' and 'modern'. Modern law to this day maintains this dualism.¹⁸ Enlightenment philosophy sought to contradict what were perceived as 'primitive' laws and customs in the encountered societies, the 'Other' against which the law would set its

¹⁶ World People's Conference on Climate Change and the Rights of Mother Earth. 2010. "Group 7: Indigenous peoples". Cochabamba, Bolivia: 19-22 April 2010. [<http://pwccc.wordpress.com/2010/02/07/group-7-indigenous-peoples/>]. Last accessed on 20 July 2010

¹⁷ Parts of this section have been published in adapted form as Khoday K. and Natarajan U., *Sustainable Development as Freedom: On the Nature of International Law and Human Development*, 2010 Global Community Yearbook of International Law and Jurisprudence, Oxford University Press, UK (2010)

¹⁸ Peter Fitzpatrick, *The Mythology of Modern Law*, Routledge, London (1992), 45.

universalizing focus.¹⁹ The indigenous person was seen as being driven by irrational myths and stories, being ‘of nature’ while the modern was seen as guided by rationality and science, being ‘of culture’.²⁰ “Modern law was founded in the very denial of the mythic realm which had so deluded the pre-moderns” but “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”.²¹

Modern law’s denial of its own mythic elements is itself a continued mythology within the law itself, a myth which says that the law is an evolved more progressive form of the ‘primitive’ laws of past. The 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”.²² “The programme of the Enlightenment was the disenchantment of the world, the dissolution of myth and the substitution of knowledge for fancy.”²³ Modernity became what myth was not, and modern law became what indigenous tradition and custom was not.²⁴ In this negative construct, the denial of the ‘primitive’ itself is the myth, carrying forward through modern law the Enlightenment distinctions between ‘culture’ and ‘nature’, and between ‘primitive’ and ‘modern’. What resulted from this encounter with indigenous communities was not the reduction of the power of myth to modern society, but rather the incorporation of the Enlightenment’s own mythological elements of dualism and negative teleology into an all encompassing modern law, spread the world-over through the colonial encounter. Through this process, a natural law of human progress and civilization, and the forms of politics and law that came with it, was spread as a universal truth in opposition to the diversity of worldviews across the planet.²⁵ This negative teleology would serve as the driving force for a ‘civilizing mission’ that took shape during the colonial era.²⁶ Along with a self-declared cultural superiority came an assumed responsibility to spread the truth of scientism and forms of modernity

¹⁹ Habermas 1985 cited in Fitzpatrick at 44.

²⁰ Fitzpatrick, 45.

²¹ Fitzpatrick, ix.

²² Fitzpatrick, 10.

²³ Adorno and Horkheimer 1979 cited in Fitzpatrick, 27.

²⁴ Bidney 1958 cited in Fitzpatrick, 28.

²⁵ Ibid, 10

²⁶ Ibid, xiii

as salvation to the world.²⁷ This fed into the process of colonization, supporting its further expansion and its zenith in the nineteenth century, justified as a means of imposing scientific light, order and virtue on the indigenous communities of the world.

In Enlightenment thought, culture confronted nature in standard mythic terms, and won.²⁸ Enlightenment worldviews held that “acquaintance with the physical laws of the world, and the accompanying power of unlocking the secrets of nature and adapting nature to mans own ends, are on the whole, lowest among savages, mean among barbarians, and highest among modern educated nations”.²⁹ The indigenous state of being was defined as being ‘underdeveloped’ and trapped in a ‘state of nature’ in negation to a state of ‘modernity’ and civilization. Particular emphasis was placed on the evolutionary modes of subsistence from hunting and pastoralism to agriculture and finally industry, with legal and social systems deemed developed as control of nature evolved through this transitory scheme of development.³⁰ Conquest of nature and growth of industry was seen as the destiny of all societies as 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’.³¹

The ability of societies to shape the environment became a pre-condition for marking progress and civilization, with principles of law and property the force for the rise of modern forms of state and modalities of industry and appropriation of resources. Control over nature became identified with freedom and took on a mythic character at the base of international and national constitutional orders which continue to this day. Intimate knowledge of nature and her workings, and the ability to efficiently exploit the environment became the hallmark of being modern as opposed to ‘primitive’ and ‘under-developed’ societies devoid of the gift of science. The emergence of this new overarching paradigm of human progress became the triumph of a new political worldview marked by the linear march from a ‘state of nature’ to the ‘modern state’.

²⁷ Albert Bayet, quoted in Raoul Girardet, *L’idée coloniale en France, 1871-1962*, 183: ‘The country which proclaimed the Rights of man, which brilliantly contributed to the advancement of science, which made education secular, and which is the great champion of liberty in front of the nations, has by virtue of its past the mission to spread wherever it can the ideas that made it great.’

²⁸ Peter Fitzpatrick, *The Mythology of Modern Law*, Routledge, London (1992), 44-53.

²⁹ Vassos Argyou, *The Logic of Environmentalism: Anthropology, Ecology and Post-coloniality*, Berghahn Books, Oxford, (2005), 17.

³⁰ P. Stein, *Legal Evolution: The Story of an Idea*, Cambridge University Press, Cambridge (1980), 19.

³¹ Jean-Baptiste Say, *Cours complet d’économie politique* (1828, 1843 ed) 74.

Transformation of the environment became the cornerstone of the transformation of humanity from ‘primitive’ indigenous past to ‘developed’ modern future.³² The Enlightenment discourse was based on a vision of the environment being a “domain of utility, to be mastered and brought under man’s control, compelled to satisfy his needs and administer his happiness. Opposers to this agenda were seen as primitive, traditional and underdeveloped. This was the ‘anthropology’ of the modernist paradigm” in which “nature was devoid of a spirit, and was a standing reserve of resources for man to serve his development. Mastery of nature came to be regarded as expression of cultural superiority and the key mark of civilization.”³³ For Locke, the absence of transformation of the environment accounted for the lack of reason itself.³⁴ This shaped early conceptions of sustainable development during the colonial era and origins of the schism between equity and sustainability that remain with us to this day. During the mid-19th century, colonial governments began to study and understand the complex impacts of human intervention on tropical forests, out of which came the idea of nature reserves as a means of sustaining production of timber and other resources that were vital to the imperial regimes of the day.³⁵

The emergence of international law and concept of state sovereignty became a celebration of mastery over nature and over indigenous peoples. Legality and civilization were seen as a triumph over rather than an expression of human nature, just as they were a triumph over external nature. “The primary cause of its 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.”³⁶ Humanity’s subordination of nature then becomes the single most important criterion for defining the meaning of progress, essence of social value and paradigm at the base of international law and the modern nation state. The modern world that followed and spread across the world became a celebration of humanity’s mastery over nature, and indigenous communities. Thus in many ways international law was complicit in the process of creating the state of inequity and ecological decay that indigenous communities find themselves in today.

³² Fitzpatrick, 50-51

³³ Vassos Argyrou, *The Logic of Environmentalism: Anthropology, Ecology and Post-coloniality*, Berghahn Books, Oxford, (2005), vii.

³⁴ P. Hulme, *The Spontaneous Hand of Nature: Savagery, Colonialism and the Enlightenment*, in P. Hulme and L. Jordanova, *The Enlightenment and its Shadows*, Routledge, London (1990), 30.

³⁵ Gregory Barton, *Empire Forestry and the Origins of Environmentalism*, Cambridge University Press (2005), UK, 19.

³⁶ Buckle H.T. *History of Civilization in England*. Vol.1. London: Longmans, Green and Co. (1878) at 153 quoted in Argyrou, 12-14.

Indeed this paradigm of law and development supporting our ‘freedom from nature’ took on even greater force in the days following the modern post-colonial era. In the post-World War II years, for some countries it was a time to pause, some for years some for decades, to compose 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.³⁷ As noted by the UN at the start of the post-colonial era in the 1950’s, “progress occurs only when people believe that man can, by conscious effort, master nature”³⁸. However, as a new post-WWII generation emerged in the West, the internal contradictions in traditional thought began to be recognized as contrary to the stated goals of social equity and sustainability espoused by the new global frameworks under the United Nations.

Starting with the 1972 Stockholm Conference on the Human Environment, the colonial era biases in international law began to be transformed. Now the environment began to be seen not as a ‘state of nature’ in combat with humanity, but rather a complex ecosystem with a delicate balance in need of protection. While the science of ecological change was emerging clear, “facts themselves are not enough to explain effective engagement with the world. What is needed above science is something that captivates peoples full being - a system of values, a moral story, an ontological master narrative within which the ecological crisis becomes not only visible but also relevant and meaningful.”³⁹ Now it was seen that “for the purpose of attaining freedom in the world of nature, man must use knowledge to build, in collaboration with nature, a better environment. To defend and improve the environment...has become an imperative goal of mankind”.⁴⁰ Just at the time when the modernist paradigm was taking root in newly independent developing countries, a new post-modern vision of global environmentalism sought to reverse the Enlightenment’s great divide between humans and nature and the devastating impacts it has had on the planet’s ecosystem and indigenous communities. Nature was now seen as being on the brink of collapse in dire need of humanity’s protection and humanity was also seen in a new light, now aware of our place in the natural order as one of many species and a steward of all life on the planet. Humans were to “desist from our combat with nature, disengage and make peace.”⁴¹ But for newly formed nation states, still in the thrall of implementing the modernist vision became apprehensive and suspicious of this new paradigm.

³⁷ Argyrou, 33.

³⁸ Argyrou, 27.

³⁹ Vassos Argyrou, *The Logic of Environmentalism: Anthropology, Ecology and Post-coloniality*, Berghahn Books, Oxford, (2005), 48.

⁴⁰ UNEP, *Declaration on the Human Environment* (1973), 3.

⁴¹ Argyrou, 38-39.

Nevertheless, slowly but surely over the decades from 1972 Stockholm Conference and the 1992 Rio Summit to the upcoming 2012 Rio Summit, the world has begun to look over its shoulder and reconsidered our “evolutionary uncertainties and one-way determination”, based on this post-modern vision and understanding of the planet and our place in it.⁴² Ecological change now “calls into question the Enlightenment principle that human progress will make the future look better than the past”.⁴³ Key to this has been the emergence of social movements and civil society calls for both ecological sustainability and social equity as converging principles for a new post-modern vision of sustainable human development.

2.3. Confronting the past: The UN Declaration on Indigenous Rights

Indigenous communities have increased calls in recent years for remedying historic injustices, with calls for more transparent, accountable and participatory governance. Calls for reform have centered on new international and local legal frameworks that accommodate a more pluralistic vision of development, whereby the rights of indigenous peoples are recognized and validated through proactive measures to achieve a more inclusive form of governance; acknowledges their rights to access and benefits from land and resources, and access to participation and remedy in the decision-making process. “The 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.”⁴⁴

In moving forward on this agenda, indigenous communities have now gone global and sought to shape international policy. “In the spaces between power and hegemony, the tribal village builds relationships with the global village”.⁴⁵ A key step has been the establishment in 2000 of the UN Permanent Forum on Indigenous Issues, the first global UN platform for indigenous communities to voice their concerns over development policy. Through the Forum, indigenous peoples have called for recognition of indigenous customs and laws related to the environment, and the need for free and informed consent prior to approval of development projects affecting indigenous lands.

⁴² Argyrou, 33.

⁴³ UNDP, *2007 Human Development Report: Fighting Climate Change: Human Solidarity in a Divided World*, Palgrave Macmillan, New York (2007), 1.

⁴⁴ UNEP, *Cultural and Spiritual Values of Biodiversity* (1999) 1.

⁴⁵ Alison Brysk, *From Tribal Village to Global Village: Indian Rights and International Relations in Latin America* (2000) 2.

More recently, in September 2007, after twenty years of debate, the General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples. As noted by UN Secretary-General Kofi Annan on the International Day of the World's Indigenous People in August 2006, "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". The Declaration pronounces the collective and individual rights of indigenous peoples over their land, their cultural autonomy and their unique paths to development.⁴⁶ It symbolizes the aspiration to counter historical exclusion of indigenous communities, affirms the right to self-determination and recognizes indigenous rights to redress for the historic deprivation of natural resources and control over the environment.⁴⁷ It also calls for the elimination of discriminatory policies and asks for proactive measures for participation in decision-making processes.

But as indigenous communities around the world move forward to apply this new global framework for equity and sustainability, they confront international and local legal systems which have for years neglected concerns of social equity. "The dominant environmental protection framework in many countries serves 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."⁴⁸ "Environmental harms and human rights abuses often go together" and are symptomatic of political and socio-economic contexts through which threats to environment also constitute threats to life, livelihood and health.⁴⁹ At the base of these systemic challenges to making international and local law more equitable and socially-responsive to the poor are entrenched remnants of past colonial regimes which sought to exploit the natural environment at the expense of indigenous rights and equity.

In many ways international and local legal systems continue to retain structural biased against indigenous rights. The battle to reclaim the legitimate status of indigenous peoples and their rights to natural resources and a healthy environment seeks to reshape the very soul of international law and

⁴⁶ United Nations Department of Public Information, 'Indigenous Rights to Land Resources Basis for Collective Survival, Inextricably Linked to Self-Determination, Forum Told' (17 May 2007) UN Doc HR/4918.

⁴⁷ Permanent Forum on Indigenous Peoples, *Indigenous Peoples, Indigenous Voices – The Declaration on the Rights of Indigenous Peoples*.

⁴⁸ Robert Bullard (2005), *The Quest for Environmental Justice: Human Rights and the Politics of Pollution*, Sierra Club Books, San Francisco, 29.

⁴⁹ *Id* at 9.

the paradigms of progress on which the modern development-oriented state has been constructed. This agenda of reform seeks to overturn the divide between ‘civilized’ and ‘primitive’ created during the Enlightenment era, and perpetuated by our modern world order. Through this process we engage the issue of fairness and equity in international law and our ability to design a just order based on cultural pluralism and ecological sustainability. The twenty-first century will see an intense struggle for the world’s last reserves of natural resources and in the balance stands not only the sustainability of the planet’s ecosystems, but the soul of the world’s indigenous community.

3. Legal Empowerment of the Poor

Key to implementing the new UN Declaration on Indigenous Rights and responding to calls by society for change will be new legal measures that empower the poor, bolstered by global expansion of rule of law and local autonomy regimes providing greater voice and participation in decision-making. In 2008, following three years of global reviews and analysis by the UN High Level Commission on Legal Empowerment of the Poor, a high level report Making the Law Work for Everyone was launched followed in 2009 by the launch of UN Secretary-General Report on Legal Empowerment and Poverty Eradication (A/64/133) and UN General Assembly Resolution on Legal Empowerment of the Poor. These documents summarize the emerging approach to legal empowerment of the poor, highlighting its operational scope and focus, and summarizing national and regional experiences and the role of various organizations of the UN in fostering empowerment of the poor.

Legal empowerment of the poor is an agenda of inclusive development that complements other development strategies and linkages to sustainable use of natural resources and the environment are critical. A key goal will be to explore institutional innovations through which global regimes can be made fair in context of the transformational change taking place in developing countries and the aspirations of indigenous communities for justice. Legal empowerment of the poor has arisen as a key strategy in this process. Rather than a threat to growth, institutional innovations can provide the critical space needed to frame the evolving local boundaries of globalization and build coherence between ecological sustainability and social empowerment of indigenous communities.

3.1. Adaptive Governance: Bridging Scales and Epistemologies

As the effectiveness of international environmental law becomes increasingly tied to the nature of local governance and development and disparities within large developing countries, understanding the interplay between institutions at global, national and sub-national levels will need to grow with this complex web existing as “nested structures of rules within rules, within further rules”.⁵⁰ This is particularly important for empowering indigenous communities who host an array of traditional customary laws related to natural resources and the environment, often at odds with international and national modern frameworks of law. The dominant legal framework in many countries “serves 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.”⁵¹

Legal and regulatory regimes must address both the science and politics of ecological risks while also remaining adaptive in their nature to the evolving state of nature and society. In the absence of strengthened governance arrangements, limited progress will be made on achieving policy coherence among social equity and environmental sustainability or on reducing social risks from ecological change. Sustainable development policy would “continue to be guided more by good intentions than by firm decisions and clarity; with sustainability and resilience more grand ideals than specifically defined outcomes.”⁵²

Adaptive governance is premised on the notion that different communities have varying capacities to respond to ecological change, and varying cultural worldviews. Thus policy responses must be sufficiently adaptable to the complexity of risks across scales and epistemological systems of thought. Sustainable development requires us to confront a number of locally-driven, highly contextual factors influenced by structural inequalities in society, including vulnerabilities that fall on the poor.⁵³ It seeks to address the complexity of sustainable development as an ecologically-driven and socially-driven process, locally crafted responses as opposed to ‘one-size-fits all’ universalist

⁵⁰ Ostrom, Elinor (2007) *Institutional rational choice: An assessment of the institutional analysis and development framework*, In Paul A. Sabatier, ed. *Theories of the policy process*. Cambridge MA: Westview Press.

⁵¹ Robert Bullard (2005), *The Quest for Environmental Justice: Human Rights and the Politics of Pollution*, Sierra Club Books, San Francisco, 29.

⁵² Perch, 26-27.

⁵³ Perch, 6.

approaches of the past. This has arisen as a multi-dimensional approach to policy responses, in contrast to the technically-driven approach of ecological forecasting, analysis and technology.

Policy responses to ecological change have often attempted to rise above local political or social complexities, with a view to the science of ecological change as a common basis from which to craft efficient responses. Over the years this led to technocratic approaches at the global and national level, with policy responses increasingly resigned to isolated experiments without broader political or social resonance.⁵⁴ But it has been increasingly clear that the effectiveness of policy initiatives depends on our ability to reconcile global goals with other priorities within local development policy, and recognition that scientific and technological solutions are very much viewed by communities as ‘politically contested’ projects as opposed to universally scientific objectivity.

Adaptive governance approaches are distinct from purely technocratic approaches in that they take bottom up community-oriented approaches with a focus on the social and political contestation and debate. This is in line with the goal of more transparent, accountable and participatory forms of governance and the goal of policy coherence between social equity and environmental sustainability. This allows not only for local social engagement with the science of ecological change, but also for the integration of local knowledge into policies to bring forth collective experience and aspirations for change. Thus, adaptive governance matches the complexity of ecologic change with the complexity of local political and institutional factors with the convergence of these spheres determining our ability to bring about sustainable development.⁵⁵

Institutions are often limited in their capacity to address the needs of the poor, and thus it is not always self-evident that sustainability initiatives will bring about dividends in society equity. Effective governance can help address this by more transparent, accountable and participatory governance, and rights-based approaches where citizens have access to information, participation and remedy in decisions concerning ecological change. This engages indigenous communities not as victims of ecological change but as agents of change in their own right, able to participate in the process of crafting solutions. Adaptive governance can be seen as a process by which decision-making and policy-setting processes are enhanced to address the needs for greater political responsiveness and social resilience to ecological and social risk at the local level. While much work

⁵⁴ Ronald D. Brunner and Amanda H. Lynch (2010), *Adaptive Governance: Proposals for Climate Change Science, Policy and Decision Making*, in *Adaptation and Mitigation Strategies for Climate Change*, 269-284. Springer, USA.

⁵⁵ Ibid.

has been done globally in the analysis of ecological risks and identification of technology and finance needs, a major gap exist in making transformational changes in local policy which can help prevent ecological impacts, particularly in indigenous communities. Adaptive governance is a way to increase resilience of development results by mainstreaming solutions into the process and outcomes of development.

3.2. Sovereignty over natural resources

Higher expectations now exist within international policy fora and local society for more effective, accountable and participatory use of the environment as a public good; making equitable use of resources for social equity goals and preserving its value as natural assets for future generations. Achieving fairness and coherence between equity and sustainability will very much rest on the ability of legal and regulatory systems and other forms of social capital to protect the environment, as natural capital for the poor. The principle of permanent sovereignty over natural resources on which the modern developmental state was based must adapt to the new drivers of change in society; with greater space for indigenous community access to participation in decision-making and equitable access to and benefit sharing from the use of natural resources and the environment.⁵⁶ This confronts various foundational principles of law that remain in the basic genetic make-up of international and national legal systems, not the least of which is the utilitarian principle of eminent domain and efficient use of land and resources for market efficiencies.

Finding positive convergence of natural and social capital is a challenging one at the local level given high economic and political stakes that have emerged from decades if not centuries of conflicting priorities among various stakeholders concerning access, use and control of environmental assets. Implementing the UN Declaration on Indigenous Rights through a legal empowerment perspective entails going beyond measures to increase income and consumption levels to also increase systemic capacity of legal systems as a force for transformative change from perspective of increased control over resources as assets for the poor. Assets include natural capital (land and water, forests and ecosystems, energy and minerals, etc) and social capital (formal and customary law and institutions, contracts and informal relationships of trust and reciprocity, global and local social networks, etc).

⁵⁶ See Nico Schrijver, *Sovereignty Over Natural Resources-Balancing Rights and Duties*, Cambridge University Press (1997)

Achieving justice for indigenous peoples has as much to do with confronting local strongholds of political-economic power and how interests are expressed and formalized into legal and institutional systems, as they do with general failures in global and national development policy. Solutions will rest on bringing about more transparent, accountable and participatory governance. Legal empowerment can give the poor tools to proactively protect themselves from the effects of ecological change while also supporting more equitable access and benefit-sharing related to natural resources. This helps redress long-standing issues of injustice over resource use as well as achieving convergence of equity and sustainability within more forward-looking opportunities. As noted above, and explored in the case study below, “secure land rights, for example, will be critical to ensuring that poor farming communities can attract carbon financing to rehabilitate forests, grasslands and agricultural land. Land rights for the poor and equitable access to land would produce a triple dividend: improving livelihood security, stimulating economic development, and reducing concentrations of greenhouse gases.”⁵⁷

3.3. Social accountability and human rights based approaches

The lack of coherence between environmental sustainability and social equity in indigenous communities is defined by lack of accountability and rule of law. “Environmental degradation generates further poverty by the exhaustion of natural resources and creates prejudice to the exercise of basic rights.”⁵⁸ For indigenous communities, legal empowerment and enhanced freedom includes accountability of government to citizens, being free from the inequities that often result from entrenched and corrupt systems of resource use and disproportionate impacts of ecological change. Indigenous rights movements thus often find an important environmental undercurrent to their calls for human rights and increasingly recognize that their engagement in public life is critical to effective sustainable development measures.

Justice for indigenous communities must address the complicity of the state in excluding communities from local resources and livelihoods while also allowing disproportionate environmental impacts from industrial development initiatives either through negligent actions or intentional disregard for their well being. For indigenous communities, misuse of natural resources and increasing impacts of ecological change are an affront to their ability, and that of their children,

⁵⁷ UNGA (2009), Report of the UN Secretary General on Legal Empowerment of the Poor and Eradication of Poverty, UN General Assembly A/64/133, New York, 4-5.

⁵⁸ IUCN (2007), *Human Rights and the Environment: Overlapping Issues*, IUCN, Gland, 1.

to earn a livelihood and live a healthy life. As noted by Ananda and Sen, sustainable development about more than charity, and is very much about justice and accountability.⁵⁹ Justice is an “ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs.”⁶⁰ About three quarters of the world’s population falls outside of the rule of law, and as noted above indigenous peoples has historically been among the most excluded from the benefits of human rights and access to justice.⁶¹ “The rule of law...refers to a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to law.”⁶²

Putting in place rule of law and accountability systems can help protect the poor against the impacts of ecological change, check abuse of local resources by officials and corporations, and ensure effective functioning of policies related to sustainable development. This includes two key components: (i) answerability as the obligation to provide an account and the right to get a response as to the status of sustainable development policies and actions; and (ii) enforceability as the means of ensuring that actions are taken and redress provided for misuse of natural resources and impacts of ecological change on indigenous communities.⁶³ A human rights-based approach (HRBA) emphasizes the relationship between the duties of the state and the corresponding entitlements of citizens and helps identify who has a responsibility to act to ensure that rights are fulfilled. The impact of ecological change on indigenous communities is now seen as a critical element of HRBA.⁶⁴ This builds on the underlying environmental rights discourse, first recognized in the 1972 Stockholm Declaration on the Human Environment which stated that citizens have "the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being" and in Principle 1 of the 1992 Rio Declaration on Environment and Development that stated that citizens are "entitled to a healthy and productive life in harmony with nature".

For poor communities across the world, ecological change poses fundamental threats to their ability to sustain standards of living, local ways of life and the exercise of their basic Right to

⁵⁹ Ananda and Amartya Sen (1994), *Sustainable Human Development*, UNDP, New York, 1.

⁶⁰ *Id* at 3.

⁶¹ UNDP (2005), *Legal Empowerment of the Poor*, UNDP, New York.

⁶² UNDP and the Commission for the Legal Empowerment of the Poor (2008), *Making the Law Work for Everyone, Volume II Working Group Reports*, UNDP, New York, 2-3.

⁶³ UNDP (2010), *Fostering Social Accountability: A Guidance Note*, UNDP, Oslo.

⁶⁴ IUCN (2007), Human Rights and the Environment: Overlapping Issues, IUCN, Gland, 1. See also UNEP, *Human Rights and the Environment*, Proceedings of UNEP Geneva Environment Network Roundtable, Geneva (2004). See also Watt-Cloutier S, *Climate Change and Human Rights*, Human Rights Dialogue, Series 2 No.11 pp 10-12, Carnegie Council, New York (2004)

Development, “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural, and political development in which all human rights and fundamental freedoms can be fully realized.”⁶⁵ The UN Special Rapporteur on Human Rights and the Environment further elaborated the link, arguing that the right to development would be violated if trends of ecological change continue, encapsulated in the idea of a ‘right to prevention of ecological harm’ as part and parcel of the right to development.⁶⁶ The importance of HRBA also lies in the importance of civil and political rights to foster a sustainable development-friendly political and legal order.

With ecological change seen as an existential threat to human survival and a driver of injustice and inequality, countries seek to integrate the right to a healthy environment within Constitutional and rights-based discourse to entrench sustainability into rule of law and accountability frameworks. More than one hundred countries have now established environmental protection as a provision in their Constitutional frameworks with indigenous rights an increasing component of claims against the State.⁶⁷ A particular focus of legal empowerment is the need to enhance citizen access to information regarding use of natural resources and the environment which may have a bearing on their livelihoods and well-being, access to participation in decision-making concerning the resources on which they depend, and access to justice and means of remedy where issues like abuse of power and legal violations.

Participation in governance entails raising issues of sustainable development in legislative and regulatory reform hearings that support more open decision-making processes. Participation allows indigenous peoples to put pressure on decision-makers and allows them to become involved in local government oversight and accountability processes, to participate in Environmental Impact Assessment (EIA) processes, etc. Meanwhile most environment-related public decisions, including those related to the poor, take place through administrative agencies. Thus a country’s public administration at national and sub-national levels is a key interface for issues of accountability when it comes to decisions that affect issues of equity and sustainability in indigenous communities. The right to information is intimately connected and a key foundation for effective participation in decision-making. Without adequate access to information on the status of natural resources or the

⁶⁵ UN General Assembly (1986), Declaration on the Right to Development, UN, New York.

⁶⁶ Dias A (2000), *Human Rights, Environment and Development*, UNDP Human Development Report 2000 Background Paper, New York, 3.

⁶⁷ Tim Hayward (2005), *Constitutional Environmental Rights*, Oxford University Press, New York, 4.

nature of ecological risks, indigenous communities are unable to analyze many of the problems, or solutions, that underlie the challenges of equity and sustainability.

Last but not least access to justice and remedy is a foundation for a shift to a rule of law and accountability framework, and the ‘judicialization of politics’ entailing a “right to a fair and public hearing in front of an independent tribunal.”⁶⁸ This builds on the over 350 specialized environmental courts and tribunals have been established in 41 countries globally.⁶⁹ Some of the benefits of specialized tribunals focused on issues of environment include: providing a forum for experts in environmental law where they can engage in a free and beneficial exchange of ideas and information, enabling the formation of panels of officers with expertise allowing the adoption of a holistic approach to the resolution of environmental matters including links to social equity+-, through comprehensive jurisdictions and interdisciplinary decision making, quick progress of complex environmental cases, boosting efficiency of litigation, appealing to the conscience of the public, thereby encouraging adherence to environmental laws and greater participation in programs to protect the environment.⁷⁰ This includes the role of legal aid and indigenous development groups, including CSOs who take action on behalf of indigenous groups and assist the poor to enhance their access to courts which are often limited by inability to pay for legal representation and capacity to articulate claims.

4. Case Study: Legal Empowerment of Tribal Forest Dwellers in India

As the world’s largest democracy and one of its most active in terms of localization of global policies and norms, India provides valuable lessons and experiences of ways in which international environmental law confronts the call for indigenous rights. Issues of equity and sustainability have been at the center of debate in India since the founding of the nation following independence, with Mahatma Gandhi setting a vision of India driven by self-determination, village democracy, equitable use of land and natural resources for the poor and prior consent and participation in decision-making. But there were also strong advocates who feared an overly socialist agenda and put forth a more liberal, free market GDP-orientation to resource use as a base for rapid industrialization and progress. The years that followed would be characterized by a balance between these strands of

⁶⁸ IUCN, 10.

⁶⁹ Pring G and Pring C (2009), *Greening Justice: Creating and Improving Environmental Courts and Tribunals*, The Access Initiative, World Resource Institute (WRI), Washington DC, p. xi

⁷⁰ Lin T, Wang C, Chen Y, Camacho T and Lin, F (2009), *Green benches: Learning from environment courts of other countries?* Asian Development Bank (ABD), Manila, p. 9-10.

thought resulting in a conservative set of development policies adopted by India's first Prime Minister Jawaharlal Nehru. Indeed it was only in 1991 following a series of economic crises and structural reforms that India launched broad-based economic liberalization that has seen it re-emerge over the past twenty years at the center of the world economy.⁷¹

Meanwhile, alongside rapid growth in recent years India also faces serious challenges of social equity and ecological sustainability that threaten to derail its development trajectory. Inequality in India is stark, with India's 80 million strong tribal populations having suffered the most from social exclusion and environmental impacts, and coming together in recent years to lead non-violent civil protests and calls for greater convergence among social equity and ecological sustainability. "About 260 million people live below poverty line, out of which 100 million are partially or wholly dependent on forests, out of which more than 70 million are tribals".⁷² But in moving to address these issues India takes action in the context of a complex democratic society. India has spent decades establishing and refining a constitutional, rights-based democratic system the world's largest federal system and an active system of checks and balances with parliamentary and judicial autonomy as a base to the subsequent building of what is now one of the most innovative and vibrant economies in the world. As witnessed in recent years, India's democratic governance has also brought the possibility for checks and balances against the state with issues of social equity and environmental sustainability at the center of political debates. In particular, the rural poor have played a critical role in recent elections, pressing issues of equity and sustainability in the face of rapidly expanding growth.

While India's recent growth story and the resilience of its democracy has been impressive, a main challenge remains to drastically reduce levels of poverty and create employment for millions of youth soon to join the ranks of the work force.⁷³ The Government has been striving over the past decade to rapidly increase labor-intensive manufacturing which only accounts for 27% of GDP at the moment while holding the opportunity for millions of new low-skilled jobs for India's poor. In particular India now relies on a strategy of establishing new foreign-invested export-oriented

⁷¹ Parts of this section also appeared in adapted form in Khoday K, *Towards the 2012 Rio Earth Summit and the Evolution of International Environmental Law in a Multi-Polar World*, 9th Global Community Yearbook of International Law and Jurisprudence, Oxford University Press, UK (2009).

⁷² Sanjoy Patnaik, Regional Centre for Development Cooperation, INDIA. *Can Tribals Continue to Depend on Forests?* International Conference on 'Poverty Reduction and Forests – Tenure, Market and Policy Reforms, 3-7 September 07.

⁷³ Veena Jha, *Effects of India's Growth on the Global Economy and Environment* (Presentation given at the Overseas Development Institute, London, 27 February 2008), online: ODI <http://www.odi.org.uk/events/growth_series/080227/index.html>.

industries akin to the Chinese model with a series of special economic zones (SEZs) emerging across the country in recent years. However unlike countries like China, India moves ahead with its economic liberalization within the context of a solid democratic system of governance, affording rural communities greater access to information, participation and remedy in the face of rising social inequity and ecological degradation. As a result, a series of non-violent protests by indigenous communities have emerged in recent years pressing for reforms, challenging India's democratic systems to bring social and ecological stability to development results. Some argue that India's democratic character allows for more effective correction for social and ecological problems and gives it a sustainability advantage.⁷⁴

4.1. The Evolution of the Gandhi's Vision: Sustainability as Justice

India was shaped heavily by its colonial encounter with the West. But unlike many countries, modernist principles of freedom from nature and the civilizing mission were met by strong intellectual confrontation and qualified acceptance. Rather than building a monolithic, unitary industrially driven state, the model that was to emerge was based on a vision of local autonomy, civil and political rights and constitutionalism. It was the founder of modern India and famed lawyer and social advocate Mahatma Gandhi who advocated for an indigenous adaptation of international development theory and political-legal worldviews, placing local autonomy and civic engagement in public life at the core of the nation's soul, a vision in which communities would manage their natural resources and environment.⁷⁵

For Gandhi it was clear that the modernist vision of modern state's mastery over nature and over indigenous communities should not be the benchmark of progress, calling for a broader concept of human well-being, equity and justice as necessary public goals. The Gandhian vision of the modern state was not simply about accepting the basic idea of progress inherent in the modernist vision and adding India's own cultural traditions. For Gandhi, it was also about a full reinvention and "valorizing of local traditions as an act of self-awareness of the nation".⁷⁶ But with Gandhi refraining from taking a Government function in India, and heavy debates among leaders over the future of India's development paradigm, following de-colonization India set out in the words of

⁷⁴ "China or India: Which Is the Better Long-term Investment for Private Equity Firms?" *Knowledge@Wharton* (26 April 2006), online: Knowledge@Wharton <<http://knowledge.wharton.upenn.edu/article.cfm?articleid=1456>>. See Cait Murphy, "Why India will Overtake China" *Fortune* (31 August 2006), online: CNN <http://money.cnn.com/2006/08/30/magazines/fortune/IndiavsChina_pluggedin.fortune/index.htm>.

⁷⁵ Argyrou, 22

⁷⁶ Ibid

India's first Prime Minister Jawaharlal Nehru to "catch up as far as we can with the Industrial Revolution that occurred long ago in Western countries".⁷⁷

Nevertheless, the Gandhian vision lived on, through a spirit of social action for environmental sustainability and social equity, and through a society that placed high premium on public participation in decision-making and on the corrective mechanism of the law to shape the process of development. In 1945 his close assistant Mira Behn took this vision forward through establishment of a social action oriented ashram in the holy city of Haridwar, a Himalayan foothill town in the Tehri Garhwal district in northern India. Owing to colonial-era forest laws and land use policies, what she witnessed was a deforested region characterized by altered local climate, increased trends of run-off and floods and drinking water shortages.⁷⁸

A landmark event in carrying the Gandhian vision forward took place on 27 March 1973 in a small village named Mandal in Garhwal, when a group of people hugged trees to prevent loggers from felling them on land classified as forest land under ownership by the state, having previously been denied access to extract timber for crafting into farm implements.⁷⁹ Combined with a series of related civil protests across the region inspired by Mandal uprising, the famed Chipko movement was born calling for a shift from the "preservation of the natural habitat through purging it of all human contact" which resulted in stripping tribal communities of rights to access and use natural resources. Alongside the birth of global environmentalism in the 1970s, the 1970s-80s saw the rise of local NGO movements across India focused on an 'environmentalism for the poor', community rights and environmental sustainability, challenging the continuity of modernist principles in the post-colonial state and calling for the revival of indigenous autonomy over natural resources and the environment.⁸⁰ The convergence of Gandhi's vision and the courageous acts of the Chipko movement 'tree huggers' from Garhwal served as a symbol for communities around the world at the start of the new post-modern global environmentalism of the 1970s and the emergence of social equity at the heart of what environmental sustainability would come to mean in the Third World. In doing so they did not reject science and other forms of modernity, but rather called for equity and sustainability in development patterns. Garhwal also witnessed success stories in the use of local

⁷⁷ Robinson Simon, *For Richer or Poorer*, Time, November 12, 2007 at 25

⁷⁸ Ramachandra Guha, *How Much Should a Person Consume: Thinking Through the Environment*, Permanent Black Publishers, Ranikhet, India (2006), 102-104.

⁷⁹ Ibid, 55.

⁸⁰ Archana Prasad, *Environmentalism and the Left: Contemporary Debates and Future Agendas in Tribal Areas*, Leftword Books, (2005) New Delhi, 12.

village forest councils with surveys reporting that "exemplary work in connection with forest protection and development" and that council-managed forests often outperformed state-managed systems.⁸¹

The tribal rights movements in India from its onset has been about increasing fairness and equity in the application of environmental regimes and in overcoming historical injustices based on decades and centuries of exclusion from natural resources. This spirit of non-violent protest has grown over the years and infused current debates over inequity and ecological change. There is growing recognition in official circles to establish "policies that can counter the negative distributional impacts of market-oriented reforms and globalization."⁸² The social and environmental consequences of growth on land and resources of tribal communities across the countryside have become a clarion call for millions of communities seeking to engage the benefits of a democratic system of due process to redress a history of injustice. A series of mass protests have swept India in recent years, as pressures to utilize land and natural resources for a surge of new industrial projects have resulted in serious clashes with tribal communities. In 2007 for example 25,000 tribal and farmers groups joined forces on Mahatma Gandhi's Birthday in a four-week march to New Delhi to express concerns over social equity and land rights, to remind the nation of its commitments to both the social and environmental aspects of development and Constitutional commitments to pluralism and human rights.⁸³

As described below, the process of managing these tensions is critical to the future of India's pluralistic, democratic model of development, and its role as a potential model on the role of democracy in bringing about greater convergence between goals of social equity and ecological sustainability. As noted by Vandana Shiva, "[t]he future of the Indian people and Indian democracy rests on the land question."⁸⁴ Land and natural resources serve as social security for tribal peoples and rural farmers who rely on it for day-to-day survival and for posterity of the next generation. How India manages these emerging tensions will be critical not only for the social and environmental

⁸¹ Ramachandra Guha, *How Much Should a Person Consume: Thinking Through the Environment*, Permanent Black Publishers, Ranikhet, India (2006), 119.

⁸² Bajoria, Jayshree, *Inequities in Asia's Giants*, November 6, 2007, CFR, Washington DC. http://www.cfr.org/publication/14706/inequalities_in_asias_giants.html

⁸³ Robinson Simon, *For Richer or Poorer*, Time, November 12, 2007 at 7.

⁸⁴ See <http://www.uslaw.com/bulletin/just-compensation-do-indian-sez-steal-from-the-poor.php?p=901>

sustainability of its own pathway but also for the world as it seeks democratic models for achieving sustainability.⁸⁵

4.2. Returning to Eden: Overcoming History through Indigenous Rights

India's forest cover stands at 21% of land mass, with more than 60% of this hosted by tribal communities, throughout 187 tribal districts. India hosts a tribal population of more than 80 million (known as adivasis), the single-largest population of indigenous peoples in the world, living within the world's largest democracy and one of its fastest growing economies. India thus serves as an important case of how equity and sustainability can be addressed through indigenous rights and legal empowerment. This is also important with regards the coherence between local equity measures and emerging global regimes for environmental sustainability.

India is in process of launching a new Multi-Stakeholder Partnership for Forestation, one of the world's largest reforestation programmes with a goal of 33% forest cover by 2012 with possible connections to REDD in the future. India's evolving pathway to engaging indigenous communities will be important as we move towards a new post-2012 climate regime, as an example of how a large rapidly growing emerging economy can design a new generation of sustainable development policies within a democratic system which upholds the principles of social equity and indigenous rights alongside conservationist priorities. But in doing so, indigenous communities hold deep levels of distrust based on a history of exclusion from forests based on conservationist principles and initial colonial era theories of climate change. Indeed the relation between climate change, forest conservation and indigenous rights was an important element of colonial policy as far back as the 19th century. Local climate change was a phenomenon which imperial foresters were concerned with, as they noted the history of land degradation, desertification and reduced water and food security that often followed deforestation.⁸⁶

⁸⁵ Zoelick, Robert, *India and China model for developing countries*, April 11, 2008. Indo Asian News Service. <http://www.aol.in/news/story/2008041101089012000009/index.html>

⁸⁶ Gregory Barton, *Empire Forestry and the Origins of Environmentalism*, Cambridge University Press (2005), UK, 29. As noted by Berthold Ribbentrop, Inspector General of Forests in India (1884-1899), "the wholesale destruction of forests had the most deteriorating effect on the climate of India." Indeed from interaction between Ribbentrop and famed author Rudyard Kipling, the latter created the idea of his Jungle Books series revolving around the tribal child Mowgli and the exploits of imperial foresters, characterized as heroes bent on reforesting the world for the salvation of humanity. As further noted by one Reverend Guilding at the time, "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." Ibid, 31-33.

The pre-colonial system of land use in forest areas revolved around the role of tribal chiefs who controlled access to forests and communities.⁸⁷ The intervention of British imperial policy radically changed this. By 1860 the East India Company gained control over all forestlands, managed as reserves towards the goal of a sustainable stock of timber, with local rights to land and resource use prohibited. Forest products such as teak were a key resource for the British used to construct various colonial infrastructure projects in India and to support a lucrative export market. This followed with the passage of the 1865 Forest Act which placed all forest areas under State control and began the era of state intervention under the banner of conservation and sustainable stocks of resources, a modernist policy that resulted in the eviction of indigenous communities from their land and the establishment of a national park system in the name of an efficient use of resources.⁸⁸ The law serves to formalize a “tripartite alliance between political reality, revenue enhancement, and climate theory.”⁸⁹

A prime driver of this process into the 20th century was the 1927 Indian Forest Act, established during colonial rule to convert a perceived ‘state of nature’ among tribal populations into state-managed reserves with the goal of conserving forests and ensuring sustainable development of timber for industry and trade. Under these regimes and the post-colonial ones that followed, indigenous people were conceived as encroachers with several state actions and judicial decisions over the decades calling for the removal of communities from public lands.

These laws continued to be in force following independence. As with other post-colonial states, India adhered to and applied the utilitarian land use concepts at the core of the modernist paradigm, and the principle of sovereign powers of land acquisition through eminent domain. Meanwhile, India’s tribal communities continue to benefit little from the use of the vast natural resources they have hosted for centuries.⁹⁰ There were three broad phases of forest land use

⁸⁷ Sanjoy Patnaik, Regional Centre for Development Cooperation, India. *Can Tribals Continue to Depend on Forests?* International Conference on ‘Poverty Reduction and Forests – Tenure, Market and Policy Reforms, 3-7 September 07.

⁸⁸ Amitabh Behar (Editor) *Forest Land and Tribal Rights*, Advocacy Internet, Vol IX, No.2, Mar-April 2007. National Centre for Advocacy Studies, Pune, India. See also Gregory Barton *Empire Forestry and the Origins of Environmentalism*, Cambridge Press, London (2002)

⁸⁹ Gregory Barton, *Empire Forestry and the Origins of Environmentalism*, Cambridge University Press (2005), UK, 163.

⁹⁰ Dasgupta, Modhurima. *Indigenous Land Rights, Development, and Social Action Litigation in the Indian Supreme Court*, Paper presented at annual meeting of the American Sociological Association, Atlanta Hilton Hotel, Atlanta, GA, Aug 16, 2003. http://www.allacademic.com/meta/p108146_index.html. Sept 15, 2008.

management in post-colonial India.⁹¹ In Phase 1 (1947 to 1970) forests were the source for achieving national objectives of commerce, industry and agriculture, setting the country on the path of becoming a modern industrial nation. Phase 2 (1970-1990) saw the emergence of the modern environmental movement symbolized by the 1972 Stockholm Convention on the Human Environment after which conservation became pitted against tribal livelihoods.⁹² Finally Phase 3 (1990-present) saw the 1992 Earth Summit after which a more balanced goal of sustainable development became the focus to renew the balance between social equity and resource conservation. This agenda saw only measured progress in the years immediately after the 1992 summit. According to Kothari and Pathak, there were 257,226 forest cases against 162,692 tribals between 1953 and 2004 under Sections 26, 33 and 41 of the 1927 Indian Forest Act related to illegal cutting of trees for domestic use and transport of timber.

However, growing levels of discontent and public protests in recent years have resulted in greater efforts by the state to launch a new framework for addressing this longstanding issue on the appropriate balance between tribal rights and conservation. Consciousness over the injustice of the situation rose to the level of national policy in 2004 when a draft National Environment Policy called on the state to “give legal recognition to the traditional rights of forest dwelling tribes. This would remedy a serious historical injustice, secure their livelihoods, reduce possibilities of conflict with the Forest Departments, and provide long-term incentives to the tribal to conserve the forests”.⁹³ In 2004, India’s Ministry of Tribal Affairs was mandated by Parliament to formulate new legislation to redress the historical injustice done to indigenous peoples and for clear assertion of their legal rights on forest land.⁹⁴ A Technical Support Group (TSG) was constituted comprising the representatives

⁹¹ Dasgupta, Modhurima. *Indigenous Land Rights, Development, and Social Action Litigation in the Indian Supreme Court*, Paper presented at annual meeting of the American Sociological Association, Atlanta Hilton Hotel, Atlanta, GA, Aug 16, 2003. http://www.allacademic.com/meta/p108146_index.html. Sept 15, 2008.

⁹² Amitabh Behar (Editor) *Forest Land and Tribal Rights*, Advocacy Internet, Vol IX, No.2, Mar-April 2007. National Centre for Advocacy Studies, Pune, India. The Indian Forest Act 1865, defined forest as a ‘land covered with trees, brushwood and jungle’ with the underlying agenda being timber extraction. The Supreme Court in 1996 defined forest as “an extensive area covered by trees and bushes with no agriculture”, with the aim of ensuring conservation at any cost and increased central controls. In 2007 MOEF defined a forest as “an area under Government control notified or recorded as forest under any Act, for conservation and management of ecological and biological resources”.

⁹³ Ministry of Tribal Affairs, Invitation of views/suggestions on the draft Scheduled Tribes (Recognition of Forest Rights) Bill, 2005. Document No.17014/4/2005-S&M(Pt.)

⁹⁴ Ministry of Tribal Affairs, Invitation of views/suggestions on the draft Scheduled Tribes (Recognition of Forest Rights) Bill, 2005. Document No.17014/4/2005-S&M(Pt.). List of rights as follows:
to hold and live in the forest land under the individual or common occupation for habitation or for self cultivation for livelihood by a member or members of a forest dwelling indigenous community;
rights such as *nistar* (usufruct) or ownership rights, and uses in erstwhile princely States, Zamindari or such intermediary regimes;
right of access to, use or dispose of minor forest produce;
other rights of uses or entitlements such as grazing (both settled and non-settled) and traditional seasonal resource access of nomadic or pastoralist communities,;

of the Ministry of Tribal Affairs (MOTA), the Ministry of Environment & Forests (MOEF) and independent experts in environmental protection and indigenous rights.

The goal was to formulate a new Scheduled Tribes and Forest Dwellers (Recognition of Forest Rights) Act, released in 2005 for public consultation and review. After fierce public debate, centered mainly on the risks of such a regime to the continued conservation of forests ecosystems, the Act was passed by Parliament and came into force on December 26, 2006.⁹⁵ The Act recognizes for the first time by statute the adverse impacts that historical land use policy and modernist, utilitarian principles have had on tribal peoples across India. The Act now 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”. It ensures land tenure for individuals living on a parcel of forest land prior to 13 December 2005, with rights on land of maximum 4 hectares in size. For the first time the Act acknowledges group rights over common property natural resources.⁹⁶ Following this landmark legislation, setting up extractive industry on tribal lands is meant to go through a new, more rigorous process, with a company granted approval only after consultations with and consent from affected communities and steps taken to safeguard interests and customs of tribal communities.⁹⁷ Land acquisition in tribal areas is now to be guided by the principle of compensation according to the market value of land, net present value of assets and social and environmental impact assessments.

The Act is a landmark piece of legislation in that it marks a major shift from previous legal regimes dating from the colonial era, which sought to expressly exclude tribal communities as encroachers on public lands. As noted by the drafters, the Act is not meant to support general land redistribution. Rather, it vests rights in tribal communities residing within forests and only recognizes pre-existing rights over forest land taken away during the colonial process of establishing national

right of habitat and habitation for primitive tribal groups and pre-agricultural communities;
to be exercised for bona fide livelihood needs and not for exclusively commercial purposes;
not to exceed 4 ha per nuclear family of the forest dwelling Scheduled Tribe;
to be heritable but not alienable or transferable;
to include responsibility of protection, conservation and regeneration of forests
to include traditional and customary rights

⁹⁵ *India Forest Rights Act of 2006*, Occasional Paper. Asian Indigenous and Tribal Peoples Network (AITPN).

⁹⁶ Tushar Dash. *Early gains from Forest Rights Act*. Sun 21 Sep 2008 India Together. <http://www.indiatogether.org/2008/aug/gov-forestact.htm>

⁹⁷ *Tribals to get special shield against industries, SEZs* 17 Dec, 2007, 0246 hrs IST, Subhash Narayan & Rajat Guha, TNN. http://economictimes.indiatimes.com/News/Economy/Tribals_to_get_special_shield_against_industries_SEZs/articleshow/2626756.cms

forest reserves.⁹⁸ However, while supportive of social equity and poverty reduction, concerns continue to be raised about the potential environmental impact of the Act through the granting of land rights to tribal communities. Environmentalists originally opposed the law fearful that tribal communities would rapidly deplete forests, with some estimating forest cover could be reduced by up to 16%.⁹⁹ As noted by the drafters, the Act is meant to strike a balance between these two concerns, containing both environmental sustainability and social equity principles.¹⁰⁰ The Act does not eliminate environmental protections in forests, but rather encourages community-based management through inclusion of tribal peoples in conservation measures. It emphasizes use of newly entitled land for subsistence and livelihood needs, not for commercial use of any kind. It also dissuades tribal communities from taking action that adversely affects biodiversity and indeed gives responsibility for sustainable use and conservation of the ecosystem.

In line with Gandhi's original vision of village democracy, the Act provides under Section 6 for local autonomy and community based management of forests and by extension their carbon assets. Existing village councils (Gram Sabha) are to oversee the process of recognizing rights and preparing land records, in adherence to the spirit and provisions of the 1996 Panchayat Extension to Scheduled Areas (PESA) Act which aims among other things at empowering local communities in management of natural resources.¹⁰¹ Evidence regarding the validity of claims is to be obtained from oral testimony, government records, survey maps, satellite imagery, traditional physical structures, Gram Sabha resolutions, and other sources. Gram Sabha powers also include regulating access to natural resources and seeking compliance against violators of the Act.

The Act states that rights vested to indigenous communities are not dependent on the provisions of other laws, but it also states that other laws would continue to take effect as long as they do not contradict the provisions of the Act. This brings the risk of local councils approving developmental activities which run contrary to environmental goals of the Forest Conservation Act of 1980 or other laws, raising the specter of local interests over-riding national ones. While the Act is meant to reverse a history of pursuing national goals at the expense of local tribal communities, a

⁹⁸ Ministry of Tribal Affairs, Invitation of views/suggestions on the draft Scheduled Tribes (Recognition of Forest Rights) Bill, 2005. Document No.17014/4/2005-S&M(Pt.)

⁹⁹ Report of the National Consultation on the Draft Forest Rights Bill, 2005, AITPN, October 2005, cited in *India Forest Rights Act of 2006*, Occasional Paper. Asian Indigenous and Tribal Peoples Network (AITPN).

¹⁰⁰ Ashish Kothari and Neema Pathak, *Forests and Tribal Rights*. Advocacy Internet, Vol IX, No.2, Mar-April 2007. National Centre for Advocacy Studies, Pune, India at 17.

¹⁰¹ Ministry of Tribal Affairs, Invitation of views/suggestions on the draft Scheduled Tribes (Recognition of Forest Rights) Bill, 2005. Document No.17014/4/2005-S&M(Pt.)

clear system of checks and balances will be needed to balance local social justice and global and national environmental protection goals to ensure synergy between the Act and other existing laws.

To rectify this risk, and to the great concern of advocates of indigenous rights, Gram Sabha decisions under the Act are subject to review by higher authorities. Sub Divisional Committees are to hear appeals against Gram Sabha decisions, including jurisdiction over inter-village conflicts where issues cross village boundaries. District Committees are to act as final appellate authorities, and provide approval of land right records. A broader State Committee is to monitor overall implementation of the Act. By making elected local government the vanguard of the Act, India has put into place for the first time in its history an inclusive, participatory process for addressing local tribal rights and environmental issues in an integrated manner.¹⁰²

India's move to recognize the rights of tribal communities has created great resonance at the local level, with tribal groups across the country newly empowered to voice their concerns in the midst of a new wave of extractive industry projects which seek to fuel India's re-emergence as a global power. India's active and independent judiciary will be critical in overseeing disputes between indigenous communities and corporations as the Act's provisions begin to take practical effect on the ground. And as decisions come through on the nature of balancing environmental sustainability and social equity and environment concerns, as in the past India's judiciary will be a source of lessons and inspiration for communities and countries around the world.

From a conservation standpoint, the law is seen by many as already having positive results. In the State of Orissa there are more than 10,000 forest-protection groups actively involved in efforts to conserve the forests and biodiversity. The Forest Rights Act has created some changes on this front as it explicitly identifies community-based conservation as a legitimate right of communities. These provisions have opened up new opportunities for many community forest management groups to assert their role in sustainable development. Communities have started claiming their rights to forest resources and their interest in biodiversity conservation and there is a hope that holistic models of sustainable development would find great local recognition as a result of the Act.

The Act can be a significant step towards re-calibrating the balance between environment and development in that it provides not only land rights and access to decision-making, but also

¹⁰² Tushar Dash. *Early gains from Forest Rights Act*. Sun 21 Sep 2008 India Together. <http://www.indiatogether.org/2008/aug/gov-forestact.htm>

provides indigenous communities legally recognized assets in the climate change mitigation potential of forests, a significant new asset through which indigenous communities can sell carbon credits in the global REDD climate change regimes that are emerging towards 2012. The co-evolution of both REDD and India's Forest Rights Act can serve as an important example of how issues of global environmental policy can find win-win synergies with local issues of social equity and how this can be done in a vibrant, democratic process.

The importance of this case goes beyond the communities in question, but can be a precedent for future jurisprudence on tribal rights and environmental sustainability throughout India, and indeed can serve as models of progress and change for indigenous communities worldwide as we move towards the 2012 Earth Summit. As the 21st century proceeds, the battle is set to intensify for the planet's last remaining stores of natural resources and in the balance rests the sustainability of the planet's ecological systems, the soul of its indigenous communities and indeed the nature of the sustainable development paradigm.

4.3. Indigenous land rights

As noted above, among the various priorities at the convergence of social equity and environmental sustainability, issues of land rights stand at the centre of the UN Declaration on Indigenous Rights and indigenous communities' calls for reform. As noted above a key matter of contention for indigenous communities in India as elsewhere has been confrontation with powers of eminent domain and land acquisition by the government for public purposes. Notwithstanding newfound tribal rights over forests lands and resources, powers of eminent domain remain, with the ability to acquire tribal lands for public purposes under Land Acquisition Act (1894; amended 1984). Furthermore, apart from the confrontation between state policy and forest dwellers, challenges also exist for tribal communities in non-forested rural areas of the country.

In response to the pressing need to expand employment opportunities for a burgeoning youth population, in 2005 India passed the Special Economic Zone Act (SEZ Act) to catalyze the expansion of preferential investment and export centers with tax exemptions and reduced regulatory burdens.¹⁰³ As land becomes increasingly scarce, developers extend their reach into rural lands

¹⁰³ Parts of this section were published in adapted form in Khoday K and Bonnitcha J, *Globalization and Inclusive Governance in China and India: Foreign Investment, Land Rights and the Legal Empowerment of the Poor*, in Gehring M et al (Eds) *Sustainable Developments in World Investment Law*, Chapter 20, Kluwer Press, Brussels (2011)

outside of urban centers. The social and environmental risks from this process are creating new tensions, with a surge of protests by indigenous groups and farmers in various parts of the country alongside land acquisitions by the state to implement the new SEZ regime. Land serves as social security for tribals and farmers who rely on it for livelihood. About 60% of Indians are still dependent on agriculture and related activities for their existence, but 80% of these farmers own just 17% of India's agricultural land, and about 40 million have lost land for large development projects since 1950.¹⁰⁴ The dispossession of rural land has become a clarion call for hundreds of millions of Indians speaking out against the risks inherent in the SEZ scheme.

However, of the 297 million hectares of India's land area and the 162 million hectares of arable land, the new land for India's current SEZs amounts to only 0.02% of arable land.¹⁰⁵ Therefore, the rise of protests is not simply a struggle over distribution or food security. In an increasingly rights-conscious society, communities fear the rise of corporate dominance, theft of land rights for themselves and the next generation, and "the way the law is structured, and how the land is acquired that has created the crisis."¹⁰⁶ Key concerns include inadequate compensation, lack of rehabilitation, and disputes on legal entitlements.

In lieu of any Constitutional provisions, most land rights in India rest for the moment in the Land Acquisition Act of 1894 (LAA), passed during British rule and amended in 1984, which provides the state with power of eminent domain to acquire land for "public purposes". To address public concerns over land issues, an amended Land Acquisition Act was introduced in the Indian Parliament in late-2007. The new Bill would expand citizen rights and places limits on the scope of what constitutes a public purpose by limiting it to defense purposes, infrastructure projects, or for any project useful to the general public, such as industrial development but only where 70% of the land has already been purchased by investors and developers through the open market.¹⁰⁷ Furthermore, land acquisition which results in displacement of more than 400 families in the plains, or 200 in hill or tribal areas, must be accompanied by a Social Impact Assessment to study the effects of displacement, development of a Tribal Development Plan where relevant to ensure social and environmental concerns are taken into account, and provisions for the need to support infrastructure development within resettlement areas.

¹⁰⁴ National Center for Advocacy Studies, *Advocacy Update on Land Rights: Issue 18* (New Delhi: NCAS, 2005).

¹⁰⁵ Salil Tripathi, *India Must Face Its SEZ Reality* (2007) 170(4) *Far Eastern Ec. Rev.* 27, 29.

¹⁰⁶ *Ibid*

¹⁰⁷ Priya Parker & Sarita Vanka, *New Rules for Seizing Land*, Center for Policy Research, New Delhi, online: India Together <<http://www.indiatogether.org/2008/may/law-land.htm#key>>.

If passed the new Land Acquisition Act would also establish Compensation Dispute Settlement Authorities around the country, tribunals with the full force of trial courts at both the state and national levels. The tribunals would arbitrate all disputes resulting from land acquisition proceedings, supplanting the current role of civil courts as the venue for dispute resolution.¹⁰⁸ As with administrative tribunal systems in general, this allows for greater levels of technical expertise than general civil court systems to address the complex issues related to land use, industrial policy and investment policy. Regarding compensation, in the original Land Act of 1894 only current land value was relevant for compensation. The new Land Acquisition Act would 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% of the higher priced sales of similar land in the village or vicinity; or (iii) the average sale price of at least 50% of the higher priced land purchased for the project.”¹⁰⁹ The intended use of the land and the current market value are also to be considered.

If passed, the new Land Acquisition Act would go some way towards supporting India’s need to “negotiate the development dilemma” of balancing the need for employment and industrial growth with issues of social equity in order to “manage the inevitable transition without political violence.”¹¹⁰ Prime Minister Singh has stated that India’s greatest risk is that low-level protests will turn more violent.¹¹¹ A benefit of India’s democratic form of governance is that the state has not been in a position to evict peasants through use of force, and has had to preserve its legitimacy in the context of regular elections. With general elections having been held successfully in 2009, resulting in a strong victory for the Singh administration, there is now a good platform to move ahead on measures to balance growth with issues of equity and sustainability for the poor. If democracy is seen as the ‘institutionalization of conflict’ then India’s complex web of laws and legal reform initiatives, while possibly causing delays and some level of uncertainty for investments and growth, hold the hope for people-centered development policy, promotion of political debate as a means of resolving disputes and the enduring strength of non-violent civil disobedience championed by Gandhi half a century ago.

¹⁰⁸ Ibid

¹⁰⁹ Ibid

¹¹⁰ Salil Tripathi, *India Must Face Its SEZ Reality* (2007) 170(4) Far Eastern Ec. Rev. 27 at 30.

¹¹¹ Robinson Simon, *For Richer or Poorer*, Time, November 12, 2007.

4.4. Access to justice: India's new green tribunal system

Unlike other countries, India's active judiciary has for years been a strong advocate of rights-based approaches to addressing the balance between social equity and ecological sustainability, calling for a gradually stronger specialized focus on such issues within the country's judicial governance.¹¹² Indeed the entry of rights based approaches to environmental sustainability began with enactment in 1976 of Article 48-A4 in the Directive Principles of State Policy which states that the "State shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country" and Article 51-A (g)5 in 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 wild life, and to have compassion for living creatures."

In the initial years of judicial review, the Supreme Court took a lead role in serving as an advocate for change. This included a series of landmark cases that established India's jurisprudence on ways to balance social equity and ecological sustainability in development, and serves as inspiration for indigenous communities and NGOs across the country and the world. By the 1990s, the Supreme Court declared that 'issues of environment must and shall receive the highest attention from this court'¹¹³ with India's constitution coming to guarantee the right to healthy environment.¹¹⁴ Based on stark cases like the historic Bhopal disaster and a host of cases where the poor and marginalized have been disproportionately impacted by the ecological impacts of industrial development through toxic pollution and inequitable access to natural resources, the Supreme Court established as early as 1991 the right to healthy environment as a fundamental right to life under Article 21 of the Constitution. In *Subhash Kumar v. State of Bihar*, the 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."¹¹⁵ This was followed by the court's upholding of citizen's right to clean air,¹¹⁶ the right to clean water,¹¹⁷ enjoins the State and its

¹¹² Raghav Sharma, *Green Courts in India: Strengthening Environmental Governance?*, 4/1 *Law, Environment and Development Journal* (2008), London, 50.

¹¹³ *Tarun Bharat Sangh, Alwar v Union of India*, Supreme Court of India, Judgment of 11 October 1991, 1992 Supp (2) SCC 448

¹¹⁴ *Subhash Kumar v State of Bihar*, Supreme Court of India, Judgement of 9 January 1991, (1991) 1 SCC 598, 604; *M.C. Mehta v Union of India*, Supreme Court of India, Judgement of 15 May 1992, (1992) 3 SCC 256, 257

¹¹⁵ *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420.

¹¹⁶ *M.C. Mehta v Union of India*, Supreme Court of India, Judgement of 12 May 1998, (1998) 6 SCC 60 & Judgement of 18 November 1998, (1998) 9 SCC 589, *M.C.Mehta v Union of India*, Supreme Court of India, Judgement of 16 April 1999, (1999) 6 SCC 9 and *Murli S. Deora v Union of India*, Supreme Court of India, Judgement of 2 November 2001, (2001) 8 SCC 765.

¹¹⁷ *A.P. Pollution Control Board v Prof. M.V. Nayadu (Retd.) & Ors*, Supreme Court of India, Judgement of 27 January 1999, (1999) 2 SCC 718, *Mrs. Suseetha v State of T.N. & Ors.*, Supreme Court of India, Judgement of 8

agencies to strictly enforce environmental laws¹¹⁸ while disclosing information in respect of decisions which affect health, life and livelihood.¹¹⁹

But beyond the substantive jurisprudence and decisions rendered by the Supreme Court in past decades, India's active judicial review has also served as a model for its procedural innovations including the large role allowed in India for public interest litigation (PIL) allowing groups of plaintiffs to commence lawsuits together in recognition of the broad societal harms and inequities among vulnerable groups inherent in cases of ecological degradation. To further consolidate this access to judicial review and rights based approaches, and based on the Supreme Courts advocacy for greater attention to judicial approaches to environmental rights, a process of developing a new National Green Tribunal system started in 2003 with the 186th Report of the Law Commission of India, calling for the establishment of specialized environmental courts and tribunals to enhance governance for social equity and ecological sustainability.¹²⁰ It was also meant to reduce large case loads, lengthy judicial processes which have been slow and ineffective in providing actual justice to claimants. This was highlighted in *Indian Council for Enviro- Legal Action v. Union of India* which noted that Environmental Courts with comprehensive jurisdiction over both civil and criminal matters could help ensure greater expediency of claims.¹²¹

After years of development and with a view to increasing access of the poor to remedy from the environmental impacts of industry, in June 2010 India's National Green Tribunal Act came into effect. The Act has the goal of setting up the world's largest network of national and local environmental tribunals in response to increasing calls from society for making growth more equitable and sustainable and calls by NGOs for a more specialized system of reviewing highly technical environmental lawsuits. In developing the NGT system, India took inspiration from various models around the world, including the well developed ECTs in New Zealand and Australia. As it proceeds to become established across the country, it is expected that the new NGT system can further expand the rights based approach to addressing sustainability of development, with issues of

August 2006, (2006) 6 SCC 543, *Narmada Bachao Andolan v Union of India*, Supreme Court of India, Judgement of 18 October 2000, (2000) 10 SCC 664

¹¹⁸ *Indian Council for Enviro Legal Action v Union of India*, Supreme Court of India, Judgement of 18 April 1996, (1996) 5 SCC 281

¹¹⁹ *Essar Oil Ltd. v Halar Utkarsh Samiti & Ors.*, Supreme Court of India, Judgement of 19 January 2004, (2004) 2 SCC 392.

¹²⁰ LCI Law Commission of India, *186th Report on Proposal to Constitute Environment Courts*, September 2003, available at <http://lawcommissionofindia.nic.in/reports/186th%20report.pdf>.

¹²¹ *Indian Council for Enviro- Legal Action v. Union of India*, 1996(3) SCC 212 at 252.

social equity and ecological sustainability poised to take even greater attention in policy debates and civil society movements in coming years.¹²²

5. Conclusions

In 2012 world leaders gather in Brazil for the UN Conference on Sustainable Development, marking twenty years since the first Rio Earth Summit in 1992. The 2012 Rio Earth Summit will review global challenges in slowing down the rate of ecological decline and implementation status of landmark international environmental laws passed twenty years ago. The Summit will also place top priority on reviewing trends on national and local achievement of the overarching principle of sustainable development including responses that achieve coherence between ecological sustainability and social equity.

The process of negotiating a new global climate regime in recent times has been a particularly poignant reminder of the challenges that remain in finding coherence between issues of equity and sustainability. While issues of technology, finance, and enforceability of targets stand at the top of the agenda for negotiations, the most formidable challenge and roadblock to negotiations has been the underlying issue of fairness. Indeed the developing world's consciousness of unfairness stands as a primary hurdle impeding global agreement on this and many environmental issues. Large developing countries now assert their views and concerns on issues of equity from the centre of global policy dialogues, in a much stronger way than in the past. While progress in middle income countries is to be commended, middle income countries also host the majority of the world's poor.

While large emerging economies will indeed produce a large share of future resource demands and carbon emissions, significant internal disparities exist across regions within large emerging economies in per capita resource demand and carbon emissions. The ability to achieve coherence in equity and sustainability within global policy is increasingly tied to our ability to achieve such coherence at national and sub-national levels, as countries seek to balance global commitments with the right to development for poor communities in their countries.

Fairness in international environmental law will be increasingly defined not only by debates over retributive justice at the global level between developed and developing countries, but also by

¹²² Krista Mahr, *Can India's New Green Court Get the Job Done*, Time Ecocentric Blog, 20 October 2010. Online: <http://ecocentric.blogs.time.com/2010/10/20/can-india%E2%80%99s-new-green-court-get>.

principles and actions for distributive justice at the local level with new resource-sharing and burden-sharing between segments of society. As noted by Sen in his classic *Development as Freedom*, “[t]he solutions to these problems - 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.” As explored in this article, a major challenge and opportunity to achieving both equity and sustainability will be to enhance legal empowerment of the poor and rights-based approaches in indigenous communities.

At the core of the challenge of policy coherence is the surge of demand for increasingly scarce natural resources often hosted by poor communities, and the disproportionate impacts on the poor from rapidly increasing consumption and pollution levels of a globalized industrial society which continues to expand rapidly. In most countries it is the poorest and most vulnerable in society that suffers disproportionate impacts of ecological change, while their potential role in climate change mitigation and adaptation is often undervalued. The cumulative impacts of inequity and ecological change together affect the prospects for achieving and sustaining human development, the freedoms and choices of individuals and the capacity of the State to achieve inclusive growth and development. For the poor, empowerment and enhanced freedom of opportunity means not only increasing personal consumption and social well-being, but also being free from the inequities and ecological impacts that result from current systems of growth often geared for the benefit of private corporations and the wealthy, a system of ‘unequal protection’ under the law. As explored in this article this is evident nowhere more so than in indigenous communities.

In attempting to address issues of fairness and equity in the formulation and implementation of international environmental law, special concern must be placed on the plight of the world’s indigenous communities. They stand as the most socially excluded communities in the world, while also hosting much of the planet’s remaining reserves of natural resources. 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, land and water degradation and loss of culture. But in recent times the world’s indigenous movement has made significant strides to put forward its concerns over social equity and ecological sustainability including passage of the UN Declaration on Indigenous Rights in 2007. While indigenous peoples look to international law to address their plight, ironically

modern law itself was born from the confrontation of the West with indigenous peoples, carrying within it the Enlightenment's mythological distinctions between 'culture' and 'nature', and between 'primitive' and 'modern'. Modern law to this day maintains this dualism.

Key to responding to calls by society for change will be new legal measures that empower the poor, bolstered by global expansion of rule of law and local autonomy regimes providing greater voice and participation in decision-making. For indigenous communities, legal empowerment and enhanced freedom includes accountability of government to citizens, being free from the inequities that often result from entrenched and corrupt systems of resource use and disproportionate impacts of ecological change. As the effectiveness of international environmental law becomes increasingly tied to the nature of local governance and development and disparities within large developing countries, understanding the interplay between institutions at global, national and sub-national levels will need to grow with this complex web existing as "nested structures of rules within rules, within further rules".¹²³ This is particularly important for empowering indigenous communities who host an array of traditional customary laws related to natural resources and the environment, often at odds with international and national modern frameworks of law.

In many ways international and local legal systems continue to retain structural bias against indigenous rights. As explored in the case of India's attempt to rebalance issues of equity and sustainability in its legal frameworks, the battle to reclaim the legitimate status of indigenous peoples and their rights to natural resources and a healthy environment seeks to reshape the very soul of international law and the paradigms of progress on which the modern development-oriented state has been constructed. This agenda of reform seeks to overturn the divide between 'civilized' and 'primitive' created during the Enlightenment era, and perpetuated by our modern world order.

As the world's largest democracy and one of its most active in terms of localization of global policies and norms, India provides valuable lessons and experiences of ways in which international environmental law confronts the call for indigenous rights. Issues of equity and sustainability have been at the center of debate in India since the founding of the nation following independence, with Mahatma Gandhi setting a vision of India driven by self-determination, village democracy, equitable use of land and natural resources for the poor and prior consent and participation in decision-making. For Gandhi it was clear that the modernist vision of modern state's mastery over nature and

¹²³ Ostrom, Elinor (2007) *Institutional rational choice: An assessment of the institutional analysis and development framework*, In Paul A. Sabatier, ed. *Theories of the policy process*. Cambridge MA: Westview Press.

over indigenous communities should not be the benchmark of progress, calling for a broader concept of human well-being, equity and justice as necessary public goals.

The Gandhian vision of the modern state was not simply about accepting the basic idea of progress inherent in the modernist vision and adding India's own cultural traditions. For Gandhi, it was also about a full reinvention and "valorizing of local traditions as an act of self-awareness of the nation". This has been carried forward in recent years through passage of a new legal framework for the Rights of Tribal Forest Dwellers (2007), draft amendments to the Land Acquisition Act and a new landmark National Green Tribunal Act (2010). Together these innovative legal measures seek to empower the poor while achieving global and local goals of environmental sustainability.

Through such processes countries around the world seek to engage the issue of fairness and equity in international law and our ability to design a just order based on cultural pluralism and ecological sustainability. The experiences of large developing countries in addressing the tension between retributive justice globally and distributive justice locally will be important not only for the future of sustainability within the Third World but also for the nature of international environmental law and indigenous rights globally. The twenty-first century will see an intense struggle for the world's last reserves of natural resources and in the balance stands not only the sustainability of the planet's ecosystems, but the soul of the world's indigenous community and the nature of international law.

Centre for International Sustainable Development Law (CISDL)

The Centre for International Sustainable Development Law (CISDL) is an independent legal research institute that aims to promote sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law.

As a charitable foundation with an international Board of Governors, CISDL is led by 2 Directors, and 9 Lead Counsel guiding cutting-edge legal research programs in a fellowship of 120 legal researchers from over 60 developing and developed countries. As a result of its ongoing legal scholarship and research, the CISDL publishes books, articles, working papers and legal briefs in English, Spanish and French. The CISDL hosts academic symposia, workshops, dialogues, and seminar series, including legal expert panels parallel to international treaty negotiations, to further its legal research agenda. It provides instructors, lecturers and capacity-building materials for developed and developing country governments, universities, legal communities and international organisations on national and international law in the field of sustainable development. CISDL members include learned judges, jurists and scholars from all regions of the world and a diversity of legal traditions.

With the International Law Association (ILA) and the International Development Law Organization (IDLO), under the auspices of the United Nations Commission on Sustainable Development (UN CSD), CISDL chairs a Partnership on 'International Law for Sustainable Development' that was launched in Johannesburg, South Africa at the 2002 World Summit for Sustainable Development to build knowledge, analysis and capacity about international law on sustainable development. Leading CISDL members also serve as expert delegates on the International Law Association Committee on International Law on Sustainable Development. For further details see www.cisd.org.