LOCATING PUBLIC TRUST DOCTRINE AND ENVIRONMENTAL HARM WITHIN THE QUESTION OF TRIBAL LAND ALIENATION IN NORTH EAST INDIA

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ABSTRACT

This article tries to locate the issue of tribal land alienation within the context of environmental harm and the doctrine of public trust. Under eminent domain, the state has the sovereign right to take away land for development purpose, which often causes environmental destruction. Though the public trust doctrine has been used for environmental protection, but the ambiguous application of the doctrine has failed to address the alienation of communal lands in tribal areas in the North East India. The paper argues that without mainstreaming the concept of environmental harm, the law will not be able to address tribal land alienation and also destruction of ecology.

I. Introduction

Since the day Harry Trueman gave a speech of embarking journey for the "improvement and growth of underdeveloped areas"[1], development has become a catchword for every country. Though development could be defined in different ways[2], but for the purpose of this article development means "materialist progress on largely capitalist lines".[3]As many third world countries embarked on the journey for development, it has also came in conflict over acquisition of land. For tribal communities in North East India, land is considered the most valuable resource of cultivators and land as a resource is under attack in the region and that its alienation is the cause of most ethnic conflicts.[4] On the other hand, the demand for high economic growth has ushered to a new era where vast tracts of lands are acquired.

Seemingly, the state has two important and contradictory roles, of facilitating acquisition of land for development purposes and also as a trustee of natural resources including land for the protection of environment under the public trust doctrine. The public trust doctrine is seen as a democratic project to reassert the status of the state as a trustee and challenges the theory of paramount sovereign control on framing rules regarding access, allocation, and conflict resolution etc.[5]

Juxtaposing these competing interests of the state, the paper problematise the role of the state, the doctrine of public trust and its effect on the communal land of the tribes in North East India. The paper is divided into three parts. The first part examines the shortcomings of the concept environmental crimes and contends to expand its conceptualization for addressing ecological destruction. The second part of the article addresses the relationship of law, power of the state and its intending effect on the tribal lands. The third part analyses the role of the public trust doctrine and its short comings and how it has been used in land acquisition cases. The fourth part of the article looks into the questions of land alienation among the tribes in North East India.

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[1] Subhabrata Bobby Banerjee, *Who Sustains Whose Development? Sustainable Development and The Reinvention of Nature*, 24(2) ORGANIZATION STUDIES 143, 149 (2003).

[2] Some defined development as a freedom, See AMARTYA SEN, DEVELOPMENT AS FREEDOM (Oxford University Press 2014). But development has been reduced to mere economic growth.

[3]ANTHONY P. D'COSTA & ACHIN CHAKRABORTY, THE LAND QUESTION IN INDIA: STATE, DISPOSSESSION AND CAPITALIST TRANSITION 17(Oxford University Press 2017).

[4] WALTER FERNANDES ET. AL., OWNERSHIP, MANAGEMENT AND ALIENATION: TRIBAL LAND IN NORTHEAST INDIA, 1 (North Eastern Social Research Centre & Omeo Kumar Das Institute of Social Change and Development 2019).

[5] Paromita Goswami, *Public Trust Doctrine: Implications for Democratisation of Water Governance*, 9 *NUJS LAW REVIEW* 66, 70 (2016).

II. Limits of environmental crime in addressing ecological destruction

The definition of "environmental crime" is not widely agreed upon, but different writers have attempted to define based on different perspective. Most of the definitions of environmental crime convey what is 'wrong' about certain activities, which are thus considered illegal by the state. For instance, an environmental crime may be defined as any illegal activity that harms the environment and benefits individuals or groups or companies, including serious crimes and transnational organised crime. It is often used to describe any illegal activity that harms the environment and benefits those who profit from the exploitation, damage or theft of natural resources.[6] Mostly lawyers define environmental crime to include only those actions or omissions that directly or indirectly damage the environment and which are prohibited by law. This legalistic approach of defining environmental crime leaves a number of issues. For example, the legal definition of environmental crime doesn't address the ecological destruction and harm caused by various actions which are considered legal but still harm the environment.

It has been argued that contemporary thinking on environmental crime is based on the culture of regulating inherently anti-ecological activities. Rather than implementing tougher penalties or better regulations, what is required is to find an alternative approach of explaining what constitutes an environmental problem. It requires understanding how a particular problem is related to a wider politico economic system in which it occurs.[7] Thus the problem lies itself in the *structural embeddedness*[8].

Thus, the concept of harm w.r.t. environment and the use of its approach in environmental discourse become imperative. Harm could be examined via the lens of legal procedure, where the harm is defined by law. Another approach is that of the socio-legal approach wherein harm is conceives in terms of the damaging practices which may be either legal or illegal. Regarding environmental destruction, either one can address it through the lens of mainstream environmental crime or through socio-legal approach wherein harm is conceived in terms of the damaging practices which may be either legal or illegal. It is because the work on

[6] Christian Nellemann et. al.,*The rise of environmental crime: A growing threat to natural resources, peace, development and security,* UNEP Interpol rapid response assessment 1, 7 (2016) https://www.cms.int/sites/default/files/document/unep_cms_mikt1_inf-5.4.a_the_rise_of_environmental_crime.pdf.

[7] Mark Halsey, *Environmental crime: towards an eco human approach,* 8(3) CICJ 217, 217 (1997).

[8]For example the problem in the question of oil spill is that what constitute an environmental problem has been constructed according to the anthropocentric criteria (i.e. which course of action will benefit human rather than non-human well-being). It is, in short, the element of *structural embeddedness* that ensures that the transportation of oil by sea (in addition to the extraction of oil from land or the depths of the sea-bed) remains legal despite being an *intrinsically* hazardous activity. See *Id.* at 219.

environmental crime uncritically accepts the state's definitions of environmental crime. Furthermore, the basic understanding of environmental crime does not consider those social actions which are legal but environmentally destructive.[9]

Environmental discourse can be classified as anthropocentrism, biocentrism and ecocentrism. Under anthropocentrism, environmental regulations are primarily intended to facilitate, privilege, and rationalise human benefits as defined and arranged through capitalist market relations. Environmental regulation, according to anthropocentrism, is intended to control specific instances of environmental harm like oil spills, rather than to address fundamental problems of reliance on fossil fuels.[10] In biocentrism, human beings are viewed as 'another species' to be accorded the same moral status as other organisms such as whales, wolves and birds. It asserts that "human beings should be concerned about resources for all living species".[11]

Ecocentrism is based on the idea that "humans and their activities are inextricably integrated with the rest of the natural world in communal or communal like arrangements".[12] It aspires to comprehend the influence of present production methods on the ecosystem and overall the impact on human needs. Under ecocentric approach, the environmental regulation ensures to balance between human needs and ecological health.[13]

The mainstream environmental discourse still revolves around human centeredness, and anthropocentrism is widely accepted as central concept in environmental philosophy. Yet, it has been argued that in order to bring long-term solutions to environmental destruction, the conception of environmental harm must focus on the politico-economic system that permits various environmental harms rather than on those 'criminal' environmental acts.[14]

State, law and the rights of the tribal over land

The issues of land governance in India are complex. For the tribal communities, constitution laid down certain protections and privileges. The schedule tribe is an administrative term for providing certain constitutional privileges, protection and protection for specific historically

[9] Halsey, *supra* note 7, at 218-232.
[10] Halsey, *Crime ecophilosophy and env harm* 2(3) Theoretical criminology 345, 351 (1998).
[11] White R., *Green politics and the question of population* , 40 Journal of Australian Studies 27, 32 (1994).
[12] Brian K. Steverson, *Ecocentrism and ecological modelling*, 16(1) Environmental Ethics 71, 71-72 (1994).
[13] Halsey, *supra* note 10, at 364-66.
[14] Mark Halsey, 1997b, *The wood for the paper: Old growth forest, hemp and environmental harm*, 30(2) Australian and New Zealand Journal of Criminology121, 140 (1997).

disadvantaged and backward communities[15]. The Fifth and Sixth Schedules- to the Constitution of India provide special arrangements for areas inhabited by STs.[16] In North East India, except for Manipur and Nagaland, Sixth Schedule is applicable which arranges various schemes to the tribals to govern themselves by Autonomous Districts and Autonomous Regions and Regional councils.

Despite these councils having power under section 3(1) of the Sixth Schedule to make law with respect to allotment, occupation, or use, to promote the interest of the inhabitants; the multiple interpretations by judiciary gave conflicting signals regarding the right of these traditional institutions to enact laws for the protection of community land under their jurisdiction.[17]

Earlier in both pre-independence and post-independence India, both the private sector and the Indian state did usurp land for public and private purposes, for dams, roads, steel mills, and other infrastructural projects.[18]Today, however, it is a different matter; "public purpose" of the state has taken on "private benefit" and is rationalized with economic development arguments.[19]Thus the difference from the earlier acquisition of land to the recent rush for land acquisition is that the widening of the definition of public purpose or eminent domain to acquire for private capital.[20] In the name of 'larger common good', tribal lands have been targeted and displaced from their lands. Furthermore, these constitutional provisions and safeguards (like the sixth schedule) to protect the traditional way of life and landholdings of the tribes under the hegemony of capital have little success in preventing dispossession of the tribes from their

[15] See INDIAN CONST. art 366 & 342.
[16] See INDIAN CONST. art 244.
[17]ANTHONY, *supra* note 3, at 311. In Sunil Dev v. State of Tripura 2002 (1) GLT 538, it was decided that under clause (a) of paragraph 3(a), the District Council can make law controlling the occupation or use of any land within the tribal area, it can make laws fixing minimum ceiling limit of allotment, prohibiting conversion of agricultural land into non agricultural and preventing diversion of land. It can compel the landholders to keep some portion for grazing purposes and for promotion of social forestry. It can set up its own infrastructure to supervise the proper, fruitful, and beneficial occupation and use of land. In Tarima Kanta Das v. Karbi Anglong District Council, 1990(1) GLR 78 it was stated that land comprised in autonomous districts, however, does not belong to the District Council and is owned by the state government. These conflicting judgments regarding the rights of the District Council to frame rules concerning land often created an impression in the mind of the elected councilors that they can legislate like state legislators. In Jaintia Hills v. Sitimon Sawin (1971) 3 SCC 708, the constitutional bench of the Supreme Court held that the power of the District Councils to make laws were extremely limited unlike the Parliament or the State legislatures.

[18] Mircea Raianu, *How much land does a capitalist need? Historical patterns of land acquisition and Indian industrialization,* in ANTHONY, *supra* note 3 at 265-282.
[19]Malabika Pal, *Land Acquisition and Fair compensation of the project affected: Scrutiny of the law and its interpretation*, in ANTHONY, *supra* note 3 at 151-175.
[20]ANTHONY, *supra* note 3 at 32.

historically established communal resources sanctified by customary laws.[21]

It is through the power of eminent domain that the state can dispossess the land from the citizens.

The Constitution of India recognizes the power of eminent domain through Article 31A. The Supreme Court in *Chiranjit Lal vs Union of India*[22] held that eminent domain is a right inherent in every sovereign to take and appropriate private property belonging to individual citizens. The Supreme Court has held that eminent domain is recognised in Article 300A of the Constitution and it requires existence of public purpose and payment of money for acquisition of property.[23]

In India, the power of eminent domain is expressed through the 1894 Land Acquisition Act, now replaced by the Land Acquisition Rehabilitation and Resettlement Act, 2013. Eminent domain is the legal right to acquire property by forced rather than by voluntary exchange.[24] The doctrine of eminent domain invests power in the state to acquire private land for public purpose on payment of compensation.[25] Eminent domain has three essential ingredients; first, power of the state to take over private land, second, exercise of this power for public good (public purpose); and third, the State had to compensate those whose lands were acquired for public purpose.[26]

The principle of *terra nullis* (nobody's land) still is the basis of land laws in India. Its first facet is that natural resources such as forest as well as land with no individual title belong to the State. Its second facet is that the State alone has the right to decide what constitute the public purpose and to deprive individuals of their assets in its name.[27] In the case of *Tekaba AO and Anr vs. Sakumera AO and Anr*[28] the Supreme Court of India said: so far as natural resources like land and water are concerned, dispute of ownership is not very relevant because undoubtedly the State is the sovereign dominant owner. It becomes more dangerous as the

[21] *Id.* at 316-317.
[22]AIR 1951SC 41.
[23]MAHENDRA PAL SINGH, CONSTITUTION OF INDIA 909 (Eastern Book Company, 2013).
[24] Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 (3) Journal of Political Economy 473, 473 (June 1976).
[25]Usha Ramanathan, *Land Acquisition, Eminent Domain and the 2011 Bill*, 444/45 EPW 10 (Nov. 5, 2011).
[26] Mihir Desai, *Land Acquisition Law and the Proposed Changes*, 26&27 EPW 12(June 25, 2011).
[27] Walter Fernandes, *Displacement and Alienation From Common Property Resources*, in LYLA MEHTA (ED.) DISPLACED DEVELOPMENT: CONFRONTING MARGINALIZATION AND GENDER JUSTICE 113 (Sage Publication, India 2009).
[28] AIR 2004 SC 3674.

Court disregard the customary law in the hills in Nagaland, the relationship of local communities to natural resources and the presumption about the sovereign power of the State over such resources all indicate the power that eminent domain has handed over to the State. Thus, an enquiry into eminent domain demonstrates that the power of eminent domain has been interpreted as being close to absolute power of the State over all land and interests in land within its territory.

Further, the definition of "public purpose" in land acquisition laws remains too wide to include the idea of acquisition for private companies even from Scheduled Areas which expands the power of acquisition and alienation beyond what it was under the 1894 Act.[29] In *Sharda Devi* Vs. *State of Bihar & Anr.*[30] the Supreme Court held the land owned by its *subject* can be acquired by the state through eminent domain, which is essentially a sovereign power of the state. And the state can acquire land even without willingness of the owner or person for public purpose. The use of *subjects* for the citizens brings a complete change in the relationship between the state and people. Also, the common property resources in protecting the environment and sustenance of the subaltern groups has been constantly neglected by the Indian legal system toward.[31] On the other hand, the alignment of state interest with corporate interest, which has the state acquiring and transferring land to corporations, has had dispossessed and displaced persons and communities seeing the state as adversarial to their interest.[32] Finally, the legislation of Special Economic Zones Act, 2005 points toward a change in official government policy of handing the land to the private industry.[33]

On the other hand, in *Samatha* vs. *State of Andhra Pradesh,*[34] the Supreme Court upholds and protects the land rights of Scheduled Tribes in Scheduled areas. In this case, it was held that private mining industries are a non-tribal 'person' therefore, mining leases to private industries in tribal lands of Scheduled Areas are null and void and any transfer of land to a non-tribal was prohibited. In *Reliance Natural Resources Ltd.* v. *Reliance Industries Ltd.*[35] (hereafter *Reliance*

[29] Government of India, *Report of the High Level Committee on Socio-Economic, Health and Educational Status of Tribal Communities of India*, (Ministry of Tribal Affairs) 254 https://ruralindiaonline.org/resources/report-of-the-high-level-committee-on-socio-economic-health-and-educational-status-of-the-tribals-of-india/#section02(May2014).
[30]AIR 2003 SC 942.
[31]*Supra* note 27 at 105.
[32]*Supra* note 25 at 10.
[33]Namita Wahi, *State, Private Property and the Supreme Court*, 29 (19) *Frontline* http://www.frontline.in/static/html/fl2919/stories/20121005291903600.htm(December4, 2021, 8 PM).
[34] AIR 1997 SC 3297.
[35](2010) 7 SCC 1.

Industries Limited) the Supreme Court emphasized that the constitutional mandate is that the natural resources belong to the people of this country. The nature of the word 'vest' must be seen in the context of the Public Trust Doctrine. Even though this doctrine has been applied in cases dealing with environmental jurisprudence, it has its broader application. The Court further reiterated that environment related public trust doctrine is very much relevant for distribution of natural resources under Article 39(b) and the doctrine of equality must guide the state in determining the actual mechanism for distribution of natural resources.

III. Public Trust Doctrine in India

The Public Trust Doctrine was recognised as a part of Indian environmental jurisprudence by the Supreme Court in *M.C Mehta* vs. *Kamal Nath.*[36] Articles 48A and 51A of the Constitution of India also furnish the principles of jurisprudence. Under this doctrine, the State has a duty as a trustee under Article 48A to protect and improve the environment and safeguard the forests and wildlife of the country. Further, the Public Trust Doctrine imposes the following restrictions on governmental authority[37]:

> Three types of restrictions on governmental authority are often thought to be imposed by the public trust; first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third the property must be maintained for particular types of uses.

In *Reliance Industries Limited*, the Supreme Court interpreted Article 297 of the Indian Constitution, to find that the people of India as a nation are the true owners of the natural gas. The Court also relied on Article 39 included in Part IV of the Constitution which calls for an equitable distribution of India's material resources to best serve the common good which includes fairness to future generations.[38]

Despite its acceptance as a part of environmental jurisprudence, the doctrine has seen ambiguous applicability. It is because the court has yet to clarify what "public purpose" means under the first restrictions. And what are the criteria to constitute "public purpose".

[36] (1997) SCC 388.
[37] *Id.* at 477.
[38] *Id.* at 71-72.

Second, the restriction of selling of property for cash is not tenable in Indian context.[39]Third, it has yet to be clarified whether all natural resources are held in public trust by the state.[40]

Meanwhile, it has been argued that this doctrine is a project for democratization and requires to be recognized with other substantive and procedural rights for expanding the space for the articulation and balance of competing interests in society.[41] Without any clear legislations, the inconsistent interpretation and stand of the judiciary has itself led the ineffectual implementation of the doctrine and thus the restriction of state's power.[42]

IV. Tribal Land Alienation in North East India

With this legal backdrop let's consider the alienation of land among the tribal in North East India. Land is considered the most valuable resource of cultivators, especially of tribal communities in Northeast India in particular. For the tribal communities, dependence on land is not only for their livelihood but it also reflects their collective security and to protect a way of life.[43]Tribal lands can be divided into community lands and clan lands. Community lands are those which are used by the tribal communities without the right to private ownership. It can belong to a clan, a village or the whole tribe. It is generally used for public purpose within the communities. The customary law ensures that all members of the clan or tribe have equal access to it. Clan lands belong to the whole clan or tribe. Only the members of a given clan were allowed its use and those not belonging to it were kept out of it. Sometimes outsiders could use it after paying a rent or fine to the chief or the clan.[44]

Gradual alienation of the tribal land could be seen since the colonial times to post independence era. Though conversion of community land into private is prohibited, but long term use of the land for living or economic operations converts land to family land, which eventually enjoys the right to sell as private property.[45]Also changes introduced for outside have resulted in slow but evident changes in traditional land management. For example, it was the British for the first

[39] In Reliance Natural Resources Ltd. v. Reliance Industries Ltd.(2010) 7 SCC 1, the Supreme Court held that central government could not transfer title of resources unless it received just and proper compensation.
[40] In Fomento Resorts & Hotels Ltd. v. Minguel Martins (2009) 3 SCC 571, the Supreme Court reiterated that natural resources are common properties held by the state as a trustee on behalf of the people, especially the future generations.
[41]Paromita Goswami, *Public Trust Doctrine: Implications for Democratisation of Water Governance*, 9 NUJS LAW REVIEW 70 (2016).
[42]*Id.* at 71-72.
[43] ANTHONY, *supra* note 3 at 18.
[44] WALTER, *supra* note 4 at 10.
[45] *Id.* at 11.

time through land laws like Assam Land Act 1834 and the Assam Wasteland Rules 1838 who privatize community land.[46]

One of the main reasons for the change in land relations in North East India after independence is the imposition of formal law on the tribes. Earlier, it was the customary law which governs their land relations. Now the customary law was judged as per the norms of the formal law, thus allowing the exchange of land as marketable commodity within and outside the tribe. [47]This transition of the concept of land as a sustenance of family to commodity has also been encouraged by the policies of the government towards commercial crops which insist on individual land ownership. Further, development projects have also played an important role in the alienation of land.[48] In North East India, in the name of pursuing its development agenda, the state defines property rights in a way that helps it to appropriate land that subsequently leads to dispossession of the hill communities from their community land.[49]

Conclusion

According to Usha Ramanathan, conservation of environment and development is dependent on the concept of eminent domain. She questions this assumption that state has the absolute power over all land in its territory. She questions this assumption that what defines the nature of state power in relation to land which is not held private? The question is about the extent and scope of the state's power? What is the state in relation to land, resources and territory?[50]

Meanwhile, studies have proved that dispossession of community lands has become acute either because of non-recognition of the customary laws or their selective interpretation aided by the lack of record of rights on these lands. It further threatens the economic and social function of community land and thus creating food and livelihood insecurity of the tribes.[51] Using the agenda of development, state appropriates land through policy changes. Also, by judging customary laws through the norms of state made law, it weakens the hold of the community land holdings among the tribes. Significantly, the lack of clarity on the legal concepts like "public purpose" allows a situation where land can be acquired for capital. Being

[46] *Id.* at 14-15.
[47]*Id.* at 12.
[48] *Id.* at 137.
[49] ANTHONY, *supra* note 3 at 303.
[50]See Usha Ramanathan, *On Eminent Domain and Sovereignty*, 613 Seminar, International Environmental Law Research Centre, (September 2010) http://www.ielrc.org/research_land.php(Dec 20, 2017 11 AM).
[51] ANTHONY *supra* note 3 at 319-320.

recognized by law, such acquisition of communal land of the tribes is considered legal despite destroying livelihood of the tribes and the ecology. Without mainstreaming the concept of environmental harm as a manifestation of politico-economic system; the law itself will aid the alienation of tribal lands and destruction of ecology.

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