

DEVELOPMENT CENTRE FOR ALTERNATIVE POLICIES

5, Babar Road, New Delhi 110 001.

C-5/6, Cottage, Holiday Home, Almora, Uttaranchal

Tel: (011) 23353 774 ; 9868127328, 09412092349

E-mail: dcap@del3.vsnl.net.in; devcentreap@gmail.com

**LOCAL SELF GOVERNANCE AND ENVIRONMENTAL DECISION MAKING :
POTENTIAL AND PRACTICES IN UNITED STATES AND INDIA**

by

M.S.VANI AND ROHIT ASTHANA

**PAPER PRESENTED AS VISITING SCHOLARS TO ENVIRONMENTAL LAW
INSTITUTE, WASHINGTON D.C. USA. AUGUST 2004.**

1. INTRODUCTION

Poverty and Environment

It is a matter of common knowledge around the world that there is a direct link between poverty and environmental degradation. Natural resources constitute the means of livelihood and sustenance for people in most developing countries. In developed countries, environmental pollution poses a serious threat to the health and well being of large populations, an especially the poor and marginalized among them. Environmental degradation, therefore, constitutes a direct threat to rural and urban people, particularly the poor, across the world. The causes of poverty are many -lack of access to land, water, markets, technology, education or employment, pollution- induced illnesses and poor health, natural disaster, etc. Any drastic changes in the environment directly affect the living status of people. Soil erosion and deforestation, habitat alteration and the degradation of watersheds has been targeted as the "highest risk to human health and quality of life."¹. Strategies related to environmental protection, conservation and development therefore directly contribute to the elimination of poverty of all kinds.

The U.N. Declaration on the Right to Development recognizes equitable access to basic resources as inherent to the right to development, which is a common right of mankind². In holding up the goal of "sustainable development", the global declaration makes the right to equitable access to basis resources a right not only of present society but also of future generations. In predominantly agrarian societies such as India, wherein the larger proportion of the population is engaged in agricultural and allied activities, sustainable and equitable management of water and other natural resources are critical to enable and ensure the right to livelihood, which has been legally recognized as an inalienable part of the fundamental right to life. The question that arises is as to the mode of governance that would ensure and protect such a right.

Sustainable development and integrated natural resource management.

According to the WCED, sustainable development is "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." Sustainable development implies economic growth together with the protection of environmental quality, each reinforcing the other. The essence of this form of development is a stable relationship between human activities and the natural world, which does not diminish the prospects for future generations to enjoy a quality of life at least as good as our own. Some people also believe that the concept of sustainable

¹ USEPA, 1990

² U.N.Declaration on the Right to Development, 1986, Art 8(1)

development should include preserving the environment for other species as well as for people.

Integrated resource management has been identified internationally as a necessary framework for the augmentation, conservation, protection and management of natural resources, on which the livelihoods of the greater majority of the world's people are dependent. State legal and policy traditions in most countries, however, reveal an indifference towards the basic laws of nature in which all living things are integrated and inter-dependent. Long traditions of such governance frameworks have led to the current state of over-exploitation and destruction of natural resources which in its turn has given rise to global concerns on sustainable development. The integration is required firstly at the level of the resource itself – in which, land, water, forest and air and all living things associated with them – are viewed as an integral whole, and not as independent resources for exploitation. The second level of integration required is at the level of human concerns and actions – economic, social, political and environmental – which must reflect the principles of sustainable development.

Sustainable development and decentralization of governance.

Sustainable development, it is now generally agreed, can only be achieved through a strengthening of democratic governance institutions and processes that provide the necessary framework for social and economic progress. Effective institutional arrangements for sustainable development at all levels is critical to the realization of the goals of sustainable development as reflected in Agenda 21. To achieve these goals and to meet the emerging challenges, the sustainable development governance architecture needs to be strengthened not only at the international, regional and national levels but at the **local** levels, as well, as these are inextricably linked and mutually interdependent.

Some of the identified requisites for the improvement of democratic governance structures are :

- Promoting effective arrangements and mechanisms that integrate in a balanced manner the three dimensions of sustainable development i.e.: economic, social and environment.
- Promoting and ensuring horizontal and vertical coherence and consistency in policy formulation and implementation and ensure coordination at the appropriate level.
- Promoting transparency and effective involvement and accountability of all relevant parts of government and of civil society in decision-making.
- Strengthening institutional mechanisms dealing with effective policy formulation, coordination, implementation and review as well as reinforcing inter-linkages among these mechanisms.

Hitherto, governance structures and processes at the international, regional and national levels have received far more attention and focus from the international community, than those at local levels, where the immense diversity of world populations and cultures are reflected most. This is the area which presents most challenges in the evolution of the sustainable development agenda. The integration of local, national, regional and international concerns with harmony represent the most difficult challenge in national and international politics. A starting point for this immense task is to assess the current status and capacity of local governments in particular contexts in achieving sustainable development goals. An attempt is made in this paper to review local government practices in India and the United States.

The Indian Context

Sustainable development and management of natural resources is critical in India for the eradication of poverty. The post-Independence governance of natural resources continued the colonial legacy of centralized exploitation of natural resources, with only token attention paid to conservation and sustainable and equitable management. The results were quick to emerge. By 1980, Government was constrained to acknowledge the extensive land degradation that had taken place across the country due to unsustainable management of land and water resources. According to estimates made by the Ministry of Agriculture in March 1980, as much as 175 million hectares (mha) out of a total of 305 mha for which records exist, were subject to environmental problems.

Table 1 : Land Areas with Environmental Problems

S. No.	Problem	Area (Million Hectares)
1.	Serious Water and Wind Erosion	150.00
2.	Shifting cultivation	3.0
3.	Water Logging	6.0
4.	Saline Soils	4.50
5.	Alkali Soils	2.50
6.	Diara Lands	2.40
7.	Other culturable waste lands fit for reclamation	6.60
	Total	175.00

Source: Sixth Five Year Plan, Govt. of India, at page 343

Needless to say, the magnitude of this environmental degradation caused a corresponding impact on the lives of millions of people across the country.

In recognition of the seriousness of this situation, watershed development as a policy for land improvement, soil conservation, water conservation, improvement of productivity and income etc. was started by Government on an experimental basis in the late 70's and early 80s. While in the initial stages, more emphasis was placed on biophysical criteria to evaluate the success of watershed development, in the late 1980's to mid-90s, other important aspects of WSD were recognized in addition to productivity, i.e. social,

ecological/environmental, and equity issues³. In current concerns, the issue of sustainability has also been included. The National Watershed Development Project for Rainfed Areas (NWDPR) and other externally-aided watershed development projects were started with the objective of applying a holistic approach to bring about the development of integrated farming systems on watershed basis. During the Eighth Plan, an area of 28 lakh hectare was targeted to be covered with an allocation of Rs.1,100 crore.

The issue of interest here is about the nature of institutional frameworks that were prescribed by Government for what had been recognized as a critical matter in agricultural and rural development. In the Ninth Plan, organizing self-help groups of beneficiaries in the micro-watersheds to institutionalize people's participation in the projects was stressed. In addition to such beneficiaries, the active involvement of non-governmental organizations (NGOs) was also sought. The stated reason for this policy of inclusiveness was not, as we might presume, to initiate a reversal of State-centred and State-controlled land and water management, but, to quote the Ninth Plan, to “make soil treatment cost-effective.” In pursuance of limited policy perspective, no legal reform for improvement of land and water resources through a watershed approach was undertaken at national or regional levels over the last quarter century to change the bureaucratic method of management.

Thus the promotion of non-State and community level institutions through official policy followed a path that maintained a safe distance from legal frameworks which are responsible for the definition of rights and control of management of natural resources. That the intention to devolve powers of control over resources and thereby promote local initiatives was absent from State policy throughout the last half century of self-governance, is made clear by the current state of the law. Not only are policy-generated institutions such as SHG, watershed committees etc. out of the purview of natural resources law, but, as we shall see in the following pages, panchayat institutions have not fared any better.

2. BRIEF REVIEW OF HISTORY OF LOCAL GOVERNMENT – UNITED STATES AND INDIA.

2.1 Local Government in the United States

Local government in the United States has a rich history. Institutions of local government are known to have been functioning in the country much before the adoption of the US

³ Cathryn Turton, “Enhancing livelihoods through participatory watershed development in India”, Working Paper 131, Overseas Development Institute, Portland House Stag Place London SW1E 5DP UK April 2000

Constitution. Alexis de Tocqueville, when he came to the U.S. in the 1830s, ostensibly to inspect prisons, saw local government as critical to the American system. He said, “The principle of sovereignty of the people governs the whole political system of Anglo-Americans.” And continuing —“Municipal independence in the United States is . . . a natural consequence of this very principle of sovereignty of the people.”⁴

The English municipal governments served as the model for the early American, pre-Revolutionary War colonial governments. In the mid-17th century, corporations or boroughs were formed by grant or charter by the governors of the various new world colonies. The boroughs were somewhat independent from the colonial legislatures and their charters were considered to be contracts, which could be changed only with the approval of both the colonial legislature and the local municipal corporation. In practice, however, the relationship developed into one of direct control by the legislature over the individual boroughs⁵.

After the Revolutionary War, cities and towns were formed by act of the state legislature. Those that existed before the Revolution continued, for the most part, to operate under their existing charters. New municipalities were created by the state legislature adopting a special or local law establishing a separate charter for each municipality. Even though, in theory, the state legislature retained direct control over municipalities, by custom the actual control was lax, primarily due to the fact that the county was still largely rural. Prior to 1820, there were no cities with a population of over 50,000. These fledgling cities did not yet engage in large-scale activities that merited extensive concern by the state legislature⁶.

Constitutional Provisions

The US Constitution neither prohibits nor requires states to establish local government units⁷. A cardinal principle on which the Founding Fathers of the US Constitution agreed upon was that power should not be concentrated in one person, or among one group or in one place⁸. The mechanisms in the Constitution to achieve this are:

- The division of power at the federal level between the president, Congress and the Supreme Court
- The few and defined powers of the federal government vis-à-vis the States

⁴ Cited in Richard P. Nathan, “Note on Theories of Local Government”, www.rockinst.org/quick_tour/new_york_activites/LGR_Theories.pdf

⁵ Diane Lang, [Assistant Information Services Director], “Dillon’s Rule .. and the Birth of Home Rule, Reprinted from *The Municipal Reporter*, December, 1991, web article.

⁶ *ibid*

⁷ *ibid*

⁸ David R. Berman, “The Powers of Local Government in the United States “, usinfo.state.gov./journals/itdhr/0499/ijde/berman.htm

A consistent principle throughout the history of the United States has been that state governments -- and through them local authorities -- have separate powers under the Constitution that the federal government cannot abrogate.

It is generally held that the Constitution does not explicitly mention local governments, but leaves it to the states by default. However, the words of the Tenth Amendment to the Constitution do indicate that the federal government and the states are not the only institutions of governance. Powers can be exercised by an authority other than the federal government or the states – that is, “the people”. The Tenth Amendment to the US Constitution reads: "The powers not delegated to the United States (the federal government), nor prohibited by it to the states, are reserved to the states respectively, or to the people." This may be interpreted to indicate either local governments or the people themselves through direct democracy.

Two legal concepts of Local Government have competed for endorsement in the American federal system: home rule and creatures of the State. The home rule concept [granting greater discretionary authority to local governments] has been gaining ground on the creatures-of- the state concept on strict limits on local discretionary authority⁹.

Dillon's Rule

A persistent issue at the state level has concerned the degree of local autonomy permitted by each state¹⁰. The operative principle was enunciated by John Forrest Dillon [a 19th a 19th century Iowa state chief justice who also wrote about municipal government], which came to be known as “Dillon’s Rule”. Dillon’s Rule says that local governments are “creatures of the states,” which breathe the very life into them. States, said Dillon, set the boundaries and prescribe taxing and other powers of local units¹¹.

The roots of the Dillon Rule lay in the specific context of the time when he enunciated it. After the Civil War, a hitherto largely agrarian society metamorphosed into an urbanized society as a result of the great waves of European immigration and the industrial revolution. Cities were not equipped to handle this overwhelming need for new infrastructure and services. The municipal governments were weak, un-organized, and inefficient. This made them easy victims for political machines and local bosses that led to a widespread and fundamental corruption in municipal government. Accordingly, the state legislatures were reluctant to confer upon municipalities the powers necessary to professionally address the new and complex problems they faced. It was in 1868, amidst the backdrop of this corruption – described as the lowest point in the history of the municipalities of US – that Judge Dillon issued his two famous opinions. Because of the rampant corruption in cities, he had little faith in local government and local officials' abilities and, thus, his opinions reflected the view that cities are creatures of the state and

⁹ Supra note 5.

¹⁰ Ibid.

¹¹ ibid

must be limited to those powers specifically granted to them by state laws or constitutions¹²

Under Dillon's Rule, the state legislature is recognized as having complete control over municipal government except as limited by the state or federal constitution. As a result of this complete legislative control, local government powers are quite limited and only extend to those powers which are:

- (1) granted in express words;
- (2) necessarily implied or necessarily incident to the powers expressly granted; and
- (3) absolutely essential to the declared objects and purposes of the corporation – not simply convenient, but indispensable.

Dillon's second rule establishes that any fair doubt by the courts as to the existence of a power is to be resolved against the municipality. In other words, if the power in-question was not expressly authorized by the statute or the Constitution, or cannot be necessarily implied from a power that has already been authorized, it is presumed that a municipality does not have the power¹³.

Home Rule

As a consequence of Dillon's Rule, many state legislatures began enacting innumerable local or special laws, without any constitutional check, interfering in municipal matters of purely local concern, in an attempt at controlling minute details of municipal functions. City charters were frequently amended, reorganizing municipal governments on a regular basis, granting or withdrawing powers with no consistency¹⁴. This excessive control bred corruption, allowing legislators to enhance their own powers by rewarding friends or penalizing foes¹⁵. Corrupt local and state political machines often worked hand in hand with one another. The preoccupation with details of local government precluded attention to substantial matters of state policy. The result of all this was unnecessary meddling in local affairs by the state, lack of uniformity in local government, increased corruption and a failure to provide for professional local self-government¹⁶.

The first response to these conditions, and other abuses of local and special laws, was the amendment of many state constitutions to limit the use of these local and special laws. In some states they were completely prohibited; in others they were allowed for certain specified purposes or when the subject matter would not be capable of treatment in a general law. States then began authorizing incorporation of municipalities under general laws instead of individual charters.

¹² *ibid*

¹³ Diane Lang, [Assistant Information Services Director], "Dillon's Rule .. and the Birth of Home Rule, Reprinted from *The Municipal Reporter*, December, 1991, web article.

¹⁴ *ibid*

¹⁵ *Ibid.*

¹⁶ *ibid*

However, while the state legislature's power was limited, state constitutions were not amended to grant more local powers to the municipalities, to enable them to respond properly to local problems. Local government was not strengthened in reaction to the limitation on state legislative power. Municipal reformers then created a new concept of local control, which incorporated part of the inherent right to local self-government rule, yet retained a part of the sovereignty of the states. That new principle became known as home rule¹⁷.

Home rule can be generally defined as the transfer of power from the state to units of local government for the purpose of implementing local self-government. In most states, it also provides those local governments with some measure of freedom from state interference as well as some ability to exercise powers and perform functions without a prior express delegation of authority from the state.

Cooley Doctrine.

The pre-cursor to the Home Rule doctrine was the Cooley Doctrine, an older, but less famous perspective articulated by another 19th century jurist, Judge Thomas Cooley of the Michigan Supreme Court. He, along with his supporters, argued that localities are not creatures of the state, but have inherent powers. In contrast to the Dillon Rule, under the Cooley doctrine, local autonomy is seen as an absolute right¹⁸. Under the Cooley doctrine, localities have significant powers to initiate policy and immunity from state interference because those powers are inherent. From the early 20th century, the Supreme Court has rejected the Cooley doctrine of inherent powers.

Fordham Rule

The Fordham Rule represents a variant from Dillon's Rule. It emanates from Jefferson Fordham's Model Constitutional Provisions for Municipal Home Rule [Chicago: American Municipal Association, 1953]¹⁹ This Rule gives localities broad discretion in addressing responsibilities delegated by states, even if a specific grant of authority was not made. Fordham advocated devolution, i.e. the ceding of powers and responsibilities to lower levels of government. Most states have adopted this rule which sets out an area of devolved powers for local governments within which they can act freely.

Current status of Local Governments

After a long and eventful history, today, local government is well established in the US. Cities, counties, towns, townships, boroughs, villages, school districts, and a host of special purpose districts, authorities, and commissions make up the 86,743 units of local government counted in the 1992 Census of Governments. They have been

¹⁷ Ibid

¹⁸ USACIR, 1993, p.1 cited in "Local Self Government in Alabama", Randolph Horn and Jim Williams, www.samford.edu/schools/artsci/polisci/LocalGov/LSGinAl.htm

¹⁹ ibid

institutionalized in thousands of compacts, charters, special acts, statutes, constitutional provisions, resolutions, ordinances, administrative rulings and court decisions²⁰.

The precise relationship between state and local government is stated to be complex, evolving and wildly diverse. In some states, local governments have much more independence from the state -- and revenue-raising authority -- than in others. There is no one pattern of local government in the United States, nor one universal relationship between a state and the local jurisdictions within it.

The United States Advisory Commission on Intergovernmental Relations, a federal agency composed of mayors, state and federal legislators, federal officials and private citizens issued a comprehensive report “Local Government Autonomy” in 1993. According to this report, home rule for municipal and county governments is now available in most states²¹.

Number of States granting Home Rule to Municipalities	48
Number of States granting Home Rule to Counties.	37

These grants of authority are provided by the state constitutions and /or by general law.

Source of Powers of Home Rule for Municipalities and Counties

Source of Powers	Municipalities	Counties
Constitutional Provision	37	23
General Law	34	25

Source of Power	Municipalities	Counties
Both Constitution and general law	24	12
Constitution only	13	11
General law only	10	13

Local Government autonomy consists of discretionary authority separately established for cities and counties in four basic areas²².

1. Structure – determining their form of government and internal organization
2. Function – choosing the functions they perform
3. Fiscal – raising revenue, borrowing and spending.
4. Personnel – fixing the numbers, types and employment conditions of employees.

²⁰ Michael E. Libonati, “Local Government”, www.camlaw.rutgers.edu/statecon/subpapers/libonati.pdf

²¹ Cited in Libonati, supra note 5.

²² Ibid

Discretionary authority differs for cities and counties and for the four different types of power.

Specifically, Home Rule can:

- Empower local governments to take initiative
- Confer immunity on local governments from the reach of state legislation.
- Instruct the state courts to interpret grants of local authority liberally in favor of local discretion.

Several factors, however, can adversely affect local autonomy²³:

1. Grants of structural and functional authority that exceed grants of financial and personnel powers. This also includes the imposition of mandates and regulatory restrictions on local governments by state legislatures as a result of state wide policies, without relaxing fiscal autonomy of local governments or providing them with additional resources to cope with mandates.
2. The absence of instructions to the courts to interpret liberally in favor of local governments.
3. Absence or weakness of immunity from the reach of state legislation
4. Substantial constitutional and / or statutory limits on the powers of local governments to take initiatives.

When these conditions are present, courts generally rule in favor of the state. The complexity of the relationship between state and local governments has engendered an equally complex, varying and contradicting rulings of the courts to home rule²⁴. However, the overall trend in recent years on balance is toward returning as much authority as possible to local government²⁵.

Functions of Local Governments

The success of local governments in environmental conservation and management depends to a large degree on the nature of functions that they have been granted by law allowed to perform.

A brief review of the provisions of some state constitutions²⁶ show the following functions that local governments may undertake – municipalities and counties.

²³ Ibid

²⁴ Ibid

²⁵ Diane Lang, supra note 12

²⁶ Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Texas, Washington

1. Adopt Home Rule Charter.
 2. County boundaries [formation, consolidation, merger, division, dissolution, consolidation of counties, and for the transfer of territory between counties].
 3. Elections in county boards and county-wide referendum.
 4. Power to license for revenue.
 5. Levy taxes exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive.
 6. Intergovernmental cooperation
 7. Transfer of assets for payment of outstanding debts.
 8. Providing for the punishment of crimes and misdemeanors.
 9. Regulating the practice in courts of justice.
 10. Providing for changing the venue in civil and criminal cases.
 11. Granting divorces.
 12. Changing the names of persons.
 13. Providing for laying out, opening, and working on, highways, and for the election or appointment of supervisors.
 14. Vacating roads, town plats, streets, alleys, and public squares.
 15. Summoning and empanelling grand and petit juries, and providing for their compensation.
 16. Regulating county and township business.
 17. Regulating the election of county and township officers and their compensation.
 18. Providing for the assessment and collection of taxes for State, county, township, or road purposes.
 19. Providing for the support of common schools, or the preservation of school funds.
 20. Relating to fees or salaries, except that the laws may be so made as to grade the compensation of officers in proportion to the population and the necessary services required.
 21. Relating to interest on money.
 22. Providing for opening and conducting elections of State, county, or township officers, and designating the places of voting.
 23. Providing for the sale of real estate belonging to minors or other persons laboring under legal disabilities, by executors, administrators, guardians, or trustees.

 24. Powers to amend, modify, repeal legislative charter.

 25. Adopt regulations for land use, zoning, and historic preservation, which authority is declared to be a public purpose.
-

26. Induce and encourage the location of or addition to industrial enterprises therein which would have economic impact upon the area and thereby the state.
27. Reclaim blighted, sub-standard or insanitary areas.
28. Issuing of revenue bonds for industrial development.
29. Police and sanitary regulations not in conflict with general laws.

State constitutions provide that the General Assemblies of states will not legislate on these matters unless specifically required.

Future of Local Governments

Assessing the current status of local government, the United States Advisory Commission on Intergovernmental Relations has made the following recommendations.

1. It reaffirmed its previous recommendations to the states to increase and clarify local home rule by adopting constitutional and /or statutory provisions granting broad powers of structural, functional, fiscal and personnel authority to local governments and to authorize them to exercise their authority jointly with other governments as they deem best.
2. Strengthen local immunity from state preemptions and mandates
3. Enhance the ability of local governments to challenge state governments in suits over powers, by providing continuous, well-financed and well-staffed legal support devoted to advocating the local government assertion of local initiative powers and local immunity from the reach of the state government.
4. Taking cue from an ignored part of American history, recognize an alternate theory of Local Government Autonomy that stresses the primacy of *local government sovereignty*, as opposed to that sanctioned by the Supreme Court that local governments are the creatures of the states.

The growth of local environmental law is dependent to the extent that local governments are successful in evolving and implementing their development plans in the light of environmental sustainability.

Direct Democracy

A significant aspect of local democracy is the phenomenon of direct democracy. It has been reported that voters in many cities have made use of referenda to force changes on both state and local government. Referenda, or ballot initiatives, an example of direct democracy, are in use in about half the states. In states that do not have referenda, voters and other interested parties often work through state legislatures to enact restrictions on local governments they believe have become too powerful.²⁷

²⁷ Ibid

It has not been possible to research this critical subject to the extent it deserves in this paper. It holds significance not only for the history of local self government but for local environmental law as well.

2.2 Legal History of Local Government in India

Local government institutions have always existed in India in one form or another since ancient times. The term 'panchayat' that is used to refer to modern elected local government institutions is an ancient one, denoting the tradition of a committee of five persons (usually village elders) which functioned to administer the affairs of the local community. The ancient Panchayat, however, had a range of powers and functions that has not been seen in modern times. The status of modern local government institutions in India is briefly reviewed below.

The present form of local government owes its genesis to British colonial rule. The role envisaged initially for them was mainly of a civic nature – maintaining health and sanitation, promoting education, and “minor matters of village importance”²⁸ When initial efforts at encouraging local bodies failed, the Royal Commission on Decentralization of 1909, recognizing the inadequacy of its approach, suggested a broadening of the functions of these bodies. The remarks of the Commission on the history and subsequent fate of local institutions are significant. Commenting on the difficulties in constituting and developing village Panchayats, the Commission observed:

“The Indian villages formerly possessed a large degree of local autonomy, since the native dynasties and their local representatives did not, as a rule, concern themselves with the individual landholder as responsible for the payment of the Government revenues, and the maintenance of the local order. This autonomy has now disappeared owing to the establishment of local civil and criminal courts, the present revenue and police organization, the increase of communications, the growth of individualism, and the operation of the individual raiyatwari²⁹ system, which is extending even in the north of India. Nevertheless, the village remains the first unit of administration; the principal village functionaries – the headman, the accountant and the village waterman –are largely utilized and paid by Government, and there is still a certain amount of common village feeling and interests.”³⁰

²⁸ The Madras Local Self Government Committee, following the recommendations of the Local Self-Government Committee of 1882.

²⁹ A form of revenue administration introduced by the British Government whereby the individual farmer or raiyat was responsible directly to Government for payment of land revenue. This replaced the earlier tradition of the village as a whole paying a share of its produce as tax to the State, and retaining the powers of taxation within the community, which powers helped substantially in local resource management. The British Government then went on to co-opt traditional village functionaries until then hired by the village community, as 'government servants'.

³⁰ Report of the Royal Commission on Decentralization in India, London 1909, p.237.

The Commission further remarked that it “did not think it possible, even if it were expedient, to restore the ancient village system under which the community was responsible for each of its members: and that “it is most desirable alike in the interests of decentralization and in order to associate the people with the local tasks of the administration, that an attempt should be made to constitute and develop village Panchayats for the administration of local village affairs”. The suggestions made by the Commission as to the powers and functions to be devolved indicate a paternalistic devaluation of the potential of local institutions, discounting their historical traditions of “local autonomy”. These functions were:-

- Civil and criminal jurisdiction in petty matters.
- Construction and repair of local minor works such as wells and drinking water tanks, the cleaning of village roads and of buildings such as rest houses.
- Construction and maintenance of village school houses; “some local control” over village schools in such matters as village attendance, holidays, prizes, and subject to general rules, the exemption of poor children from school fees could also be “allowed”.
- The management of small fuel and fodder reserves ‘in conformity with a few simple and essential rules’.
- Control of village pounds and markets, distribution of lump remissions of revenue or loans to agriculturists; with the distribution of irrigation water; location of sites of liquor shops, and local administration of famine relief or of measures to combat epidemic disease.

Regarding the last suggestions, the Commission remarked, “We think that the management of the village cattle pound and of a market which is of purely local importance might be *safely* handed over to these bodies(*emphasis added*). As regards matters appertaining to revenue, agricultural loans or the distribution of irrigation water, while we do not say that these should always remain outside the scope of the Panchayats duties, we think that the village councils will at the outset be fully employed in the discharge of the functions we have already suggested for them. A Panchayat which is working efficiently would, however, be an obvious and useful auxiliary in regard to measures against famine or epidemics”. The Commission was against vesting in the Panchayats any power to raise new forms of local taxation. It suggested as resources of local bodies, a portion of the land cess, special grants from particular objects and receipts from cattle and markets.

In May 1915, the Government of India issued a cautiously worded policy suggesting the formation of experimental Panchayats.³¹ The Resolution commented on the Royal Commission’s recognition that any policy of establishing Panchayats would be ‘the work of many years, would require great care and discretion and much patience and judicious discrimination between the circumstances of different villages’. “The Government of India”, the Resolution stated, “are content to leave the matter in the hands of local Governments and administrations”.

³¹ Indian Local Self Government Policy, Government of India, Calcutta 1915

After Independence, the Government of India was content to follow the policy and strategies of a colonial power in the matter of dis-empowering its own citizens. This can be deduced by the position accorded to village Panchayats in the structure of the Constitution. The makers of the Constitution made a deliberate and conscious choice against a system of indirectly elected government, advocated by Mahatma Gandhi³², which would have given Panchayats an entirely different status³³. The Congress Experts Committee with Nehru as its Chairman, prepared the Objectives Resolution which formed the basis of the debate in the Constituent Assembly on 9 December 1946, which determined the structure of the Constitution as a loose federation based on parliamentary government. The Resolution made no mention of Panchayats or indirect government. In the debate on the resolution there was neither criticism of the omission of Panchayat government nor was the subject mentioned.³⁴ Three Committees which worked over the next seven months discussing the principles on which the Constitution was to be based, and preparing model constitutions made no mention of a Gandhian Constitution, or of Panchayat or indirect government. In later sessions of the Constituent Assembly, only one member raised the issue, arguing that the greatest measure of power should vest in village republics, and then in the provinces, and then in the centre³⁵. However, when the Draft Constitution was prepared, the word Panchayat did not once appear in it. In subsequent debates on the Draft Constitution, members who criticized the Draft for not giving Panchayats their due place did not attempt to put forward an alternative constitutional philosophy, since their objections were more against administrative centralization rather than political centralization. Writing into the Directive Principles of State Policy that it was the State's duty to foster development of Panchayats was considered a *via media* retaining the centralized direct constitution as well as Panchayats. Even this was "grudgingly" conceded by the Assembly leadership under "strong pressure" (to include an Article in the Directive Principles).³⁶

Given this precarious birth, and ineffective status in the Constitution, Panchayat institutions could not be hoped to be vested with sufficient powers of local self governance.

Constitutional Provisions for Local Government

Power to legislate for local government which includes village administration rests with the States by virtue of entry 5, List II of the Seventh Schedule³⁷.

Under Article 40, the Directive Principles of State Policy of the Constitution imposes a duty on States to establish Panchayat Raj. According to the Article:

³² Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, 33, OUP, 1972.

³³ Mahatma Gandhi advocated direct elections only at the lowest level of the village, and a system of indirect elections at all upper levels, including the Parliament.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ The provision is verbatim similar to entry 13 of the Provincial Legislative List of the colonial Government of India Act 1935.

“The State shall take steps to organize village Panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.”

As the Directive Principles are non-justiciable, there has been no opportunity for judicial review and interpretation of the “powers and authority as may be necessary to enable them to function as units of self government”. Local government institutions in India, unlike those in the United States, have no legal remedy if their powers are curtailed or withdrawn by state law.

Almost all States in India have Panchayat Acts on their statute books. Legislation for Panchayats had nearly a three decade history before Independence, having been enacted by Provincial Governments in the second decade of the century and continued with some modifications after the Constitution of India was adopted. So Article 40 does not confer any new duties on States or novel protection of village institutions.

The status of Panchayat Institutions in India since Independence may be assessed in general terms as follows³⁸.

- In the making of the Indian Constitution, there was no consensus on the desirability of decentralized governance structures
- There being no state constitutions as in the United States, the Legislative Lists in the Indian Constitution defines the powers of states. Local Self Government is a subject included in the states’ exclusive legislative list.
- The majority of States – excluding some tribal states in North East India have enacted laws on Local Government dealing with all aspects of their existence – structure, functioning, personnel, powers and responsibilities. Rules enacted under the statutes provide for the minutest detail of the functioning of local governments under the complete regulatory control of the State.
- There were several phases in the history of panchayati raj in India and the associated committees: Balwantrai Mehta Committee and the phase of ascendancy (1959-64); phase of stagnation (1965-69); phase of decline(1969-77); Ashoka Mehta Committee and the revival of panchayats but as political institutions in a few states
- Elections to local governments frequently postponed at the discretion of the state governments, or in many cases because of writ petitions to the courts.
- Over the years, rural development in the Indian context came to be characterized by a proliferation of government schemes and programmes, staffed by a corrupt bureaucracy which had no accountability to political institutions at the lower level

³⁸ Shubham Chaudhuri [Department of Economics, Columbia University], “What difference does a constitutional amendment make? The 1994 Panchayati Raj Act and the attempt to revitalize rural local government in India, May 2003

- Governmental planning and decision making processes at the central and state level are characterized by a preoccupation with narrow sectorally-specific physical targets, with little attention to integrated outcomes.
- Inefficiencies, leakage, corruption associated with the plethora of government schemes; increasing flow of funds through panchayats in their role as implementing agencies for various schemes led to emergence of collusive networks connecting bureaucrats, local and higher-level elected representatives, and other members of dominant local elites. This undermined the legitimacy of the panchayats and wreaked havoc on the performance of various schemes
- In 1991, under the pressure of a severe balance of payments crisis, the government then in power initiated a broad package of economic policy reforms, which subsequent governments have, for the most part, maintained and supplemented. While the 1991 trade and industrial policy reforms coincides with the attempt to revitalize local government through constitutional means described below, their aims and purposes are distinct and unrelated. The liberalization and globalization policy poses a new threat to local governments which have not yet had an opportunity to exercise their skills in development planning and implementation.

Current status Constitutional Amendments on Panchayat Raj

The 73rd ³⁹ and 74th ⁴⁰ Constitutional Amendment Acts of 1992 and 1993 respectively were the first attempt to give a new constitutional status to Panchayats since the adoption of the Constitution.

The Statement of Objects and Reasons in the Constitutional Amendment Act acknowledges the problems associated with local government functioning by stating: “Though the Panchayati Raj Institutions have been in existence for a long time, it has been observed that these institutions have not been able to acquire the status and dignity of viable and responsive people's bodies due to a number of reasons including absence of regular elections, prolonged supersessions, insufficient representation of weaker sections like Scheduled Castes, Scheduled Tribes and women, inadequate devolution of powers and lack of financial resources. In the light of the experience in the last forty years and in view of the short-comings which have been observed, it is considered that there is an imperative need to enshrine in the Constitution certain basic and essential features of Panchayati Raj Institutions to impart certainty, continuity and strength to them “.

Since local government was a state subject in the Seventh Schedule Constitution, legislation reforming the structure of local government had to be enacted at the state level. Under the amendments, states had a year, from the date the amendment went into effect, to pass conformity acts, which either introduced new legislation or amended

³⁹ for rural local bodies commonly referred to as the Panchayati Raj Act

⁴⁰ the Nagarpalika Act for municipalities

existing legislation, to bring the state laws into line with the provisions of the amendment.

The amendments contain both mandatory and discretionary provisions. The mandatory provisions related to the structure of local governments, while the discretionary provisions related to the functions – powers – of the local bodies. Thus, while the Constitution installed the skeleton, it was left to the discretion of the states – which had enjoyed a half-century of unmitigated power - to infuse them with life.

The operative features of the 73rd Amendment [Art.243] are as follows.

Panchayats.

1. The Constitution mandates the formation of a three-tier Panchayat system in every State, whose members are to be directly elected.
2. Mandatory provisions have been made for the tenure of Panchayats, their composition, reservation of seats for specific groups, disqualification of membership, constitution of Finance Commissions in every State for recommending financial structures for local bodies, etc.
3. There are no mandatory provisions for powers to be devolved on Panchayats. The provisions in regard to this aspect are:
 - The Legislatures of States *may* endow Panchayats with powers.
 - Such endowing is subject to the provisions of the Constitution (i.e. existing distribution of legislative powers).
 - The Panchayats *may* be endowed with such powers as may enable them to function as institutions of self-government.
 - Such law *may* contain provisions for the devolution of powers and responsibilities upon Panchayats at the appropriate level, subject to such conditions as may be specified therein.
 - The devolution of powers *may* be with respect to:
 - a) the preparation of plans for economic development and social justice.
 - b) *The implementation of schemes for economic development and social justice as may be entrusted to them, including those in relation to the matters listed in the Eleventh Schedule.*
 - c) Levy, collect and appropriate taxes, duties, tolls and fees as the State may determine subject to such conditions as it may consider appropriate.

In effect, the Constitutional Amendment indicates a highly circumscribed role for local bodies, restricted to *implementation of schemes* handed down to them by the States, with respect to the subject matters listed in the Eleventh Schedule. There is no devolution of authority, such as legislative authority, which is critical to the role of “self governance”.

The Eleventh Schedule ⁴¹ lists 29 functional items ranging from agricultural extension, implementation of land, reforms, poverty alleviation, and promotion of small-scale

⁴¹ The list is presented in Annexure 1

industries to health, primary and secondary education and family welfare. A significant omission is “Law and Order”, which empowers or authorizes the regulatory role of government.

Of the matters listed in the Eleventh Schedule, as many as 14 are relevant to natural resources management, with implications for water resources

In summary, except for the mandatory constitution and periodic election of Panchayat institutions, the 73rd Amendment Act does not devolve any special or new powers on these bodies outside the overall authority of the State and Central Governments. The matters listed in the Eleventh Schedule for the functioning of the Panchayats do not imply that any new powers have been Constitutionally devolved on them. The list is merely advisory in nature. Whether or not States devolve powers, and to what extent is entirely a matter of the State’s choice, enabled by the legislative powers conferred on the States by the Constitution. Whatever powers or functions are devolved, will be subject to provisions in existing enactments. This implies that powers of local bodies to manage water and other natural resources will be subsidiary to those of the States, and by corollary, the Central Government.

The position of Municipalities after the 74th Constitutional Amendment is exactly identical to that of Panchayats in the Constitution. A half of the total 18 matters listed in the Twelfth Schedule relate to natural resources use and management.

The Constitutional Amendments on Local Governing Bodies therefore do not create any new dispensation that would enable a pluralistic, decentralized governance of resources. This is evident from the fact that the legislative powers of the Centre and the States remained unchanged.

3. LOCAL ENVIRONMENTAL LAW IN US AND INDIA

3.1 Local Environmental Law in India

“A page of history is worth a volume of logic”⁴²

The subject of local environmental law in India has necessarily to be approached with a historical perspective. The use and management of natural resources for human purposes has a history that is substantially older than the history of modern law introduced through colonial rule. These traditions have persisted, resulting in a sustained tension between State and non-state legal frameworks.

The modern or formal legal framework relating to natural resources in India has its origin in the colonial period, which has been carried forward into the post-Constitutional period in a substantially identical form. The jurisprudential framework underlying formal natural resources law is the Anglo-Saxon legal system, the foundation of the Indian legal system today. Under this system, the three identified sources of law are *statute*, *precedent* and *doctrine* in that order of precedence, with statute bearing over-riding authority over the other sources. Wherever precedent or doctrine contradicts statute, however old the former, the latter will prevail.

The modern *formal* legal framework is thus entirely statute-centred. This is of particular importance in the realm of natural resources management in India, where there prevails a significant level of combination of old and new technologies and institutions. The older technologies and institutions have their origin in a much earlier and entirely different jurisprudential base. The governance of natural resources, which was essentially decentralized in character, had its legal basis almost entirely in *Custom*. In traditional Indian jurisprudence, custom constituted a source of law *independent* from all other known sources i.e. religious or ethical doctrine, texts, or royal decrees⁴³. In pre-modern Indian society, the undisputed law - making and judicial authority of the King did not permit him to modify either *dharmic* laws or common customs of localities and groups⁴⁴. The King was prohibited [by Dharmic law] from interfering with the customs of countries, castes and families and other groups⁴⁵. In addition to this prohibition, the State was also expected to ‘act’ in support of customary law. Extensive autonomy in the functioning of guilds, corporations, artisans, religious fraternities, local governing bodies etc. characterized the structure of the State. The conventions of these bodies were recorded in writing, constituting their statutes or by-laws.⁴⁶ The King was bound to accord his royal seal to these agreements, when called upon to do so, as well as insist

⁴² New York Trust Co. v. Eisner, 256 U.S. 345, 349, 41 S.Ct. 506, 507, 65 L.Ed. 963 (1921) cited by J. William Futrell in “Environmental Law: From Resources to Recovery, Celia Campbell-Mohn, Barry Breen, & J. William Futrell, Environmental Law Institute, West Publishing Co., St. Paul, Minn., 1993, p.4.

⁴³ Dharma [ethical or moral principles governing all life, representing balance, harmony etc.] , Royal Order and Custom are the three main sources of law recognized in traditional Indian jurisprudence. For more details, see M.S. Vani, “Customary Law and Modern Governance of Natural Resources in India – Conflicts, Prospects for Accord and Strategies”, in Rajendra Pradhan (ed) *Legal Pluralism and Unofficial Law in Social, Economic and Political Development*, Papers of the XIIIth International Congress, 7-10 April, Chiang Mai, Thailand, ICNEC Kathmandu, Volume I, pp. 409-446.

⁴⁴ Basham, A.L., "The Wonder That Was India", Rupa & Co., New Delhi, Third Revised Edition, p.114 cited in Vani, *ibid*.

⁴⁵ Lingat, Robert, “ The Classical Law of India “, The Thompson Press (India) Ltd., 1975, p.200.

⁴⁶ *Ibid*.226-27. Archeological evidence of South Indian history is replete with evidence of this kind, relating to various spheres of function of local bodies.

upon these conventions or regulations being respected by all sections of the society. The role of the state was mostly non-interventional - the collection of taxes on grain production; the imposition of a limited number of taxes; the exercise of authority to bestow land grants on individuals as circumstances required; infrequently settling disputes; establishing claims to hunting preserves; recruiting soldiers into armies etc. were actions which were not designed to interfere with or disrupt local governance of natural resources. Rural society was left to be ruled by custom and tradition rather than by royal edict. In the Muslim period, for example, which substantially followed the mode of governance of earlier Hindu kings, there were no taxes on horticulture, sheep raising, fisheries or on forest holdings. When once a tax was imposed by a governor in Srinagar on sheep and fishing, strong local protests resulted in a royal edict withdrawing the tax as it was opposed to custom.⁴⁷

With custom having an authority as an independent source of law, local control and management of resources was thus not only de facto, but de jure. The role of the State in resource management – construction of water systems, giving land grants - did not preclude local autonomy in management. The role of the State in the realm of custom was “administrative” not “legislative”. This particular legal arrangement promoted local law-making in consonance with local conditions and needs.

Custom is of current relevance because of the persistence of customary practices or local laws in the use of natural resources in the country. This may be observed in prevailing community forest use practices, traditional water technologies, landholding patterns, agricultural practices, fisheries, common land uses for agricultural and non-agricultural purposes, etc. They are a pointer to the fact that the skills of local governance- local rule making and rule enforcement – are still in evidence. However, the politico-economic macrocosm within which local governance can be sustained has undergone fundamental changes.

During colonial rule, it was the task of the British to establish the rule of a unified legal system. Colonial administrators could not conceptually or administratively hold together the three interconnected planes of moral order, royal decree and local law-ways.⁴⁸ English law rests on a fundamentally different foundation - on the primacy of written law, on statute or positive law. All other sources of law - case-law, legal doctrine, jurisprudence, custom - are only subsidiary to it, even if they play a role in the ‘discovery’ of law by contributing to the interpretation of statutory provisions. Primacy belongs always to positive law, particularly statute.⁴⁹ While the existence and importance of custom was recognized, its validity and authority was subjected to English notions of jurisprudence and political economy. Early Anglo-Indian case law did confirm

⁴⁷ Ibid, p.107.

⁴⁸ Kolff,D.H.A., “ The Indian and British Law Machines: Some Remarks on Law and Society in British India. In W.J.Mommsen and J.A.De Moor (eds), *European Expansion and Law: The Encounter of European and Indigenous Law in 19th-and 20th-century Africa and Asia*, pp. 201-237. Oxford: Berg.

⁴⁹ Lingat, at 257.

the primacy of custom over the written law.⁵⁰ However, English law, by reason of its fundamental difference in doctrinal foundation, perceived custom through the eyes of law, through the notion of “legality”, rather than the notion of “authority” which underlies Indian legal tradition. Thus, custom, even if it was a source of law, had to be sanctified by statute declared by the State. In other words, *custom has no existence outside statute law*. From being a system of law with its own authority, it had to be discovered and asserted, case by individual case before courts. The institutionalization of colonial administration of law and justice involved a process of a gradual realization of the nature of Indian tradition, and substantive modification of it in stages.

Impact of Modern Law on Customary Management of Natural Resources

Under colonial rule, a shift in rights and control over resources in favour of the State was combined with ‘de-authorization’ of custom as a source of law and centralization of law-making and implementation or enforcement of law – a change which terminated the potential for local “self-governance”.

The impact of colonial law on natural resources custom was three-fold.⁵¹

Firstly, there was a *separation, by statute, of resource use practices from the wider spectrum of social behaviour and norms*. A distinction was introduced by the British legal system between *territorial laws*⁵² and *personal laws*⁵³. The latter were left subject to the laws of the various religious communities. This resulted in a dis-aggregation between natural resources use and management on the one hand, and customary social, juridical, and religious networks on the other. The economic value of natural resources, abstracted from the totality of value systems, formed the basis of state law and policy.

This in turn gave birth to centralized institutions for the management of resources. The composite of social norms, behaviour, and institutions that made for a pluralistic regime of governance was replaced by monopolistic, centralized rule through a legal regime that was antagonistic to equitable and sustainable management of resources.

At a second level, resources were disaggregated in law. The legal regime on each of the natural resources of land, forest and water, though linked by the same objectives of political economy of colonialism, developed independently of each other, resulting in their fragmented administration through separate laws.

A third dimension of change in natural resource custom was the separation of “rights” from “duties”, opposed to the characteristic feature of their symbiosis in customary patterns of resource use. The observance of ‘duties’ with respect to products of nature,

⁵⁰ Ibid.

⁵¹ Vani M.S. and Rohit Asthana, “Law and Custom in Water Resources Administration: A Case Study of Uttaranchal, India” Development Centre for Alternative Policies, New Delhi, *forthcoming*.

⁵² Criminal, civil and commercial laws which were made applicable to all

⁵³ Marriage, adoption, joint family, guardianship, minority, legitimacy, inheritance and succession, and religious endowments.

enjoined by social and environmental conditions, was co-terminus with the exercise of 'rights'. Rural peasant society in pre-colonial India was constituted by innumerable endogamous groups of different castes, each following well-defined, specialized occupations. They were linked together in a 'web of local property custom', that accommodated the demands of hunter-gatherer, nomadic and semi-nomadic social groups within their territorial jurisdiction. In such an environment, the 'duty' to accommodate, to practice self-restraint, to respect mutual access rights would have been an economic necessity to ensure the survival of all. 'Duties' were prescribed not only in human relationships, but also with respect to other species – flora and fauna – as well as with respect to the natural resources of land, forest and water. A manifestation of the concept of 'duty' with regard to natural resource use, translates into the practice of "restraint" of resource use in peasant societies⁵⁴, which ensured not only sustainable use of the resources but also equity in some measure.

Colonial natural resources law – statutes on land, forest and water – disrupted the 'rights-duties' dynamics of customary group behaviour through the introduction of private and State property rights, while ignoring common property rights and management regimes.

The totality of powers assumed by the Colonial State over natural resources through legislation completely transformed the earlier ownership, use and management patterns, the survival of which depended on how 'legal' they now were.

After Independence, colonial natural resources laws remain on the statute book in a substantially identical form. Hardly any changes were brought about in the structure and form of natural resources administration to strengthen local institutions.

Post Constitutional Environmental Law

The fountainhead of environmental or natural resource statutes- land, forest, and water laws - in India is the Constitution. 'Equitable and sustainable natural resources management' or 'environment-based development' as a fundamental aspect of and special approach to *political* governance was not envisaged in India at the time of creation of the Constitution. As a corollary, natural resources statutes – land, water and forest legislations – of colonial origin, founded on the colonial policy of resource *exploitation*, were legitimized by the Constitution and continued into the post-Constitutional era in a substantially identical form. It was not until 1976 that concept of environmental protection and development was first given Constitutional recognition.

In the absence of clear directives in the Constitution on principles of governance of environmental resources, an attempt has to be made to review its current provisions and their appropriateness for decentralized governance of natural resources and elimination of

⁵⁴ Gadgil, Madhav and Guha, Ramachandra, "This Fissured Land – An Ecological History of India", Oxford University Press, New Delhi, 1993, p.37.

poverty. Particularly, it has to be seen what rights, powers, and duties in relation to natural resources management that the Constitution legitimizes. These are briefly reviewed below.

Fundamental Rights.

The right of every citizen to the benefits and support of environmental resources is obliquely recognized as a fundamental right by imputing it as an integral part of the “right to life and personal liberty” under Article 21 of the Constitution. The expression “life” assured in Art.21 of the Constitution, it has been clarified, does not connote mere animal existence or continued drudgery through life. It has a much wider meaning, which includes right to livelihood, better standard of life, hygienic conditions in work place and leisure⁵⁵. In *Bandhua Mukti Morcha v. Union of India*⁵⁶, the Supreme Court held that the right to live with human dignity, enshrined in Art.21, derives its life-breath from the Directive Principles of State Policy.⁵⁷ Since access to natural resources is fundamental to achieving and sustaining means of livelihood for the rural and urban poor in India, the Fundamental Right to Life as guaranteed by Art 21 implies the right to adequate natural resources as well.

The question that arises is, how strong or effective is the guarantee that is provided of the right to life and livelihood under this chapter?

The answer lies in Article 31A, B & C in the same chapter. While guaranteeing certain Fundamental Rights under Part III, including the right to life/livelihood, the Constitution also “saves” certain laws enacted by the Parliament and Legislatures.

Art.31A, inserted by the Constitution (First Amendment) Act of 1951, states that, notwithstanding anything contained in Art.13, no law providing for –

- a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modifications of any such rights, or
- b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property or

- - - - -

⁵⁵ The Constitution of India, Delhi Law House, 1999.

⁵⁶ (1984)3 S.C.C. 161 atp.183,184; A.I.R.1984 S.C. 802:atp.811,812.

⁵⁷ Consumer Education and Research Centre V. Union of India, A.I.R. 1995 S.C. 922 at p. 939.

- e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or license for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Art. 14 or Art. 19.⁵⁸

The types of ‘land’ covered by this Article included not only that held under any type of tenure or grant, but also land used for agriculture and ancillary purposes, *including waste land, forest land, pastures*, building sites etc. This provision means, in effect, that laws relating to land resources cannot be challenged, even if they fail to assure environmental rights, or if they take away or abridge the fundamental right to ‘life’.

In addition to the above “general” saving of laws made by Governments, provision has also been made in the Constitution, through Art. 31B, to protect specific enactments from being challenged as violative of fundamental rights. These enactments are listed in the Ninth Schedule of the Constitution. Statutes listed in this schedule that having a bearing on natural resources are those that deal with the following.

- Tenancy.
- Land Reforms.
- Land Acquisition.
- Land Ceiling.
- Land Development and Planning.
- Land Revenue.
- Private Forests Acquisition.
- Regulation of Village Common Lands.
- Regulation of lands of Scheduled Tribes.
- Industrial Development and Planning.
- Development and Regulation of Mines and Minerals, etc.

None of these statutes were originally enacted from the perspective of environmental sustainability – conservation, equitable use and management. The rights that they define, the institutions created, the powers vested in these institutions were not crafted from an environmental sustainability or equity perspective. However, in their current form, they are protected by the Constitution from being challenged as violative of the fundamental right to life.

Through an amendment of the Constitution in 1971, Article 31C was inserted, which sought to give protection to any laws giving effect to the policy of the State *intended to secure all or any of the principles laid down in Part IV of the Constitution – i.e. the*

⁵⁸ A proviso to the Article states that, land held by any person within the ceiling limit applicable under any law in force, could not be acquired by the State without payment of compensation

Directive Principles of State Policy. This amendment sought to give precedence to Part IV over Part III in the event that Government made any laws in furtherance of the former.

This Article carries the potential to enable environmental-friendly legislation. However, even if such laws had been enacted, they would have been nullified in effect by the continuance of existing natural resource laws protected by Art.31A and 31 B.

This, however is not the only source of weakness of Art.31C. Strangely, the Article sought to nullify its own effect by including the proviso that “no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it *does not* give effect to such policy.”⁵⁹ (italics added).

The interpretation of the right to life under the Constitution as including rights to natural resources is hardly sufficient to empower citizens over resources. In effect, the right can be accessed or defended only when an individual litigant approaches the court – an untenable practice in a country with a population of one billion.

Directive Principles of State Policy

The significant (negative) feature of the Directive Principles enshrined in Part IV of the Constitution is that they are not enforceable in any court. Art 37 merely prescribes, without providing any means of enforcement, that the principles shall be fundamental in the governance of the country and that it shall be the duty of the State to apply these principles in making laws.

Only one of the total 17 Directive Principles - Art. 48A - relates directly to environmental issues, while several others [Articles 38, 39 and 40] encourage the adoption of principles of equity in the use of resources and public participation in governance.

Art. 48A, inserted by the Constitution (Forty Second Amendment)Act, 1976, imposes a [unenforceable] duty on the State to endeavour to protect and improve the environment and safeguard the forests and wild life of the country. In effect, therefore the Directive Principles amount to no more than exhortations.

Fundamental Duties.

The concept of fundamental duties was first introduced by the Constitution (Forty Second Amendment)Act, 1976. A set of ten mandatory duties are enjoined by the Constitution through Art.51A on *every citizen, but not on the State*. Of these, 51A(g) states that it shall

⁵⁹ The Supreme Court held this proviso to be invalid in *Kesavananda Bharathi v. State of Kerala* Supp. S.C.R. 1.

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 *M. C. Mehta v Union of India*⁶⁰, the Supreme Court has invested the Central Government with the duty to ensure environmental education in educational institutions.

Thus the only mechanism to enforce the State's duty to protect the environment is through legal action *case by individual case*⁶¹.

Legislative Powers

Articles 246, 248-254 of the Constitution spell out the respective legislative fields of Parliament and State Legislatures contained in List I, II & III in the Seventh Schedule. Parliament has exclusive power to legislate on matters listed in List I, the States have similar powers over matters in List II, while List III is the Concurrent List relating to matters over which both States and Parliament may legislate. Parliament has been vested with residuary powers to legislate on any matter not included in the State or Concurrent List. Laws made by Parliament under List I and List III are also declared to prevail over Laws made by the States on similar subjects.

Both the Union Government and the State Governments together or separately exercise monopoly legislative powers over the following subjects.

Table –1 Scope of Powers of Union/States

Control over Basic Resources.	Control over Products of Resources	Administrative/Judicial Powers.
Mines and Minerals.	Fishing and Fisheries beyond Territorial Waters	Treaties, Agreements and Conventions.
Forests.	Fisheries (Inland, and within territorial waters.)	Land Revenue, Taxes of Agricultural Income, taxes on minerals
Water Resources	Electricity	Trade; Commerce; Production, Supply & Distribution of goods.
Land Resources.	River Valley Development	Local Government.
Protection of Wild Animals and Birds.	Shipping and Navigation in inland waterways.	Regulatory powers on these subjects.
	Pilgrimages	Judicial powers
	Pounds and Cattle trespass	Acquisitioning and Requisitioning of property.

⁶⁰ A.I.R. 1988 S.C. 1115 at p.1127.

⁶¹ Such a difficulty has been experienced in the United States as well : “We have been fighting corporate assaults against nature timber harvest plan by timber harvest plan; factory farm by factory farm; dying stream by dying stream [Dave Henson, *The End of Agribusiness: Dismantling the Mechanisms of Corporate Rule*, (May 2002)]

	Industries	Economic and Social planning
--	------------	------------------------------

From the above table, it is evident that legislative powers with regard to the use and management of natural resources are distributed between the Union and the States. The States have more legislative powers over land and water resources (inland). Forest resources are in the Concurrent List, with however, Parliament holding superior powers of legislation. Financial, judicial and other administrative powers are also distributed accordingly.

In effect, this means that institutions below State level – district, intermediate or Panchayat level – do not hold independent powers of control over natural resources. They may exercise only such powers as may be delegated to them. No State in India has adopted the “watershed approach” as the exclusive development model, particularly in rural areas. Nowhere in India has “empowerment” in totality over natural resources descended below the State level. These two factors continuously militate against the possibilities of decentralized and sustainable management of natural resources.

Other Disabling Laws

Natural resource management in India has not only been deprived of *enabling* legislation to strengthen, protect and promote pluralistic institutional mechanisms, but has been assailed by a host of *disabling* laws. These have prevented the development of technological, environmental, social, economic and political arrangements that could promote decentralized management of natural resources. More importantly, they have been the main tools in the fragmentation of customary legal frameworks and their untenable subjection to formal law.

Almost all States have on their statute books statutes such as Land Reform laws, Land Revenue Codes or Acts, Land Improvement Acts, Soil Conservation Acts, Tenancy laws, Land Development Acts, Forest Act, Irrigation Acts, etc.

Some common features of these statutes for instance, are:

- A critically debilitating feature of existing legislation on natural resources is that they establish independent, mutually exclusive administrative frameworks for each of the resources separately – in faithful allegiance to the colonial policy of “divide and rule”. Thus land laws, forest laws and water laws take no note of each other, endorsing a fractured system of governance, which is completely contradictory and damaging to the interests of integrated management of resources.
- None of the natural resources statutes have the avowed objective of managing natural resources sustainably primarily for the purpose of development and elimination of poverty in the country. They are mostly designed for the optimum exploitation of resources. Regulatory provisions in these statutes are linked to same purpose of resource exploitation. This underlies the lack of necessity felt for participatory management frameworks.

- Powers of control of all *land* resources are vested in the states, with statutory authorities vested with all powers necessary for administration of land resources. Participatory institutional frameworks for the administration of land resources do not feature in any of the land laws. District –level panchayat institutions have, in some states been conferred with administrative powers over land resources. However this has been done within the rubric of existing land laws, which do not reflect an ‘integrated natural resource management’ perspective, and which retain the residual powers of the State Governments over the resource.
- Individual rights to land are recognized, subject to the payment of land revenue. This is based on the assumption by the State of the role of “supreme landlord”. This concept forms the foundation of centralized empowerment of the State over all land resources.
- Prior to land reform laws, or post-Independence land revenue acts, customary rights of village communities over village common *lands* were recognized and protected. After these Acts, village common lands were re-designated as “Government Lands”⁶². Rights to *resources* from common lands are recognized in some states such as Madhya Pradesh⁶³, Punjab etc. However, such rights are perceived in isolation, with no concomitant local powers of management, or duties of conservation, which are inalienable components of powers of *control* over land resources.
- ‘Customary rights’ to natural resources in rural areas are often generated from “common property systems” – such as village common lands, villages forests, community irrigation systems, community water bodies, etc. Where collective rights are involved, these are legally defined as “concessions”, for two reasons. One, to exert the proprietary rights that the State exercises in the name of sovereignty, and secondly to avoid the legal recognition of collective property rights. Administration of rights legally is done on an individual basis. Land Revenue, water tax, Lease or licence fees, fines or penalties are collected individually. Rights are thus *privatized*, with almost no legal recognition to *common property systems*.⁶⁴
- The “powers” of allocating *legal* rights to natural resources is exercised monopolistically by State authorities, far removed from local contexts of management and conservation. Thus, while community irrigation systems⁶⁵ in fact allocate *customary* rights among right-holders in consonance with duties to maintain and operate such systems, the same rights are “legally” recognized, or conferred by the State, on an *individual* basis, divorced from community management systems.
- Monopolistic powers held by the states over the resources frequently result in loss/destruction or dilution of rights. Degradation of lands, loss of forests, depletion of water resources etc. which result from State action or inaction cause loss of rights which in many cases are not compensated.

⁶² For instance, U.P. Land Revenue Act, 1905; Kumaun and Uttarakhand Zamindari Abolition Act, 1965.

⁶³ Nistar Rights, as per Madhya Pradesh Land Revenue Code, 1959.

⁶⁴ An exception is common property rights that are still extant in tribal areas, particularly in the North East.

⁶⁵ First inventoried by the Government of India through the quinquennial Minor Irrigation Census started in 1985.

- In the context of the State's monopoly powers over resources, rights to land, forest, water etc, are not absolute, but subject to control by the State. They are mostly "use rights", and are contingent on the payment of prescribed taxes to the State, which are mostly nominal. Property laws enable inheritance or transfer of these rights. However, such rights have not been made subject to the sustainable use of the resource. Norms of sustainability of resource use may only be defined at a local level, on scientific assessments of resource availability and demand. The antiquated resource legislations that are in force do not provide for any such management models. Legal rights, therefore are totally abstracted from sustainable management practices.
- Existing laws on forests, land resources, irrigation, drinking water supply, soil and water conservation, fisheries etc, have constituted "line agencies" with monopolistic powers of control and management of natural resources. This has promoted bureaucratic methods of functioning, which are inappropriate, where more participatory frameworks are required. The monopoly powers of control over water, land and forest resources vested on government prevents public participation in planning. These statutes do not provide for a broad-based institutional framework that offers scope for a spectrum of stakeholders to participate in planning, construction, operation and management of systems based on these resources.⁶⁶
- Programme strategies devised by external agencies/non-government organizations in partnership with government, have introduced participatory institutional mechanisms – such as Joint Forest Management, Water Users Associations etc. initially on the basis of executive orders, which were later strengthened by the enactment of Rules under the respective statutes. However, in no case did the original resource law undergo reform to transform the prevailing management paradigms. The Rules contribute to the continuation of such exercises as 'programmes' without legally decentralizing the control of resources. This legal mechanism prevents the emergence and sustenance of local legal frameworks that can support more democratized governance of natural resources.
- While "forest resources" are in the Concurrent list, the central government exercises near monopoly powers. The comprehensive central legislation on forests management [Indian Forest Act 1927] and conservation [Forest Conservation Act 1980] precludes any state initiatives in this sector.
- In most States, natural resource laws, by conferring monopoly legal powers on government to collect and utilize revenue from land, water and forest resources have deprived local bodies of the important power of taxation.
- Decentralized and informal dispute resolving processes have been marginalized by the operation of formal State Judicial Institutions. This is enabled by the monopolistic powers of the Central and State Governments over the administration of justice.
- None of the existing basic natural resources statutes incorporate the Constitutionally prescribed "obligation" to protect and preserve the environment, the reason being

⁶⁶ Some recent attempts – such as participatory irrigation management, joint forest management, etc, which are backed by legislative measures or executive orders merely transfer maintenance responsibilities, without in any way devolving powers in a holistic manner for integrated management of resources.

that they were enacted several decades before the emergence of environmental consciousness in governance. Instead of reforming these statutes, to introduce the concept of sustainability and mechanisms for practicing it, new legislations – the Water (prevention and Control of Pollution) Act, 1974 and the Environment Protection Act, 1986 – were enacted for the purpose of protecting and improving the environment. These laws are regulatory in nature. They define offences and liabilities in relation to damages to the environment. However, the strategies for implementing the Act is no different from earlier legislation – i.e. monopolistic, bureaucratic state authorities vested with powers to identify case by individual case, for taking appropriate action. The fundamental weakness of such laws is that, firstly, *regulation* is divorced from *management* of resources. As such, they do not represent an integrated environmental perspective. Secondly, they empower only State agencies. No role is envisaged for people's institutions.

- A critical shortcoming – perhaps the most important – in existing natural resource statutes is their inability to ensure *equity* in access to natural resources. While land, water and forest laws define “rights”, and regulate “rights”, there are no provisions in these laws to *ensure* equitable access rights to all sections of the community. Rights are not located in a total management framework, but are individualized, isolated and confined to specific contexts. For example, irrigation systems are created by the State through administrative policies, which are not regulated by any legal principle or laws relating to establishing equity of access. Once systems are installed, irrigation acts come into play to “regulate” already created rights. This process leaves out large segments of the rural population from access to the benefits of irrigation. Land reform or equitable distribution of land, equity in access to forest or water resources, equitable right to clean air and water etc are not legally recognized as fundamental rights, nor are there any legal mechanisms to achieve or enforce these rights. Currently, the legal administration of natural resource rights is carried on without a foundation of environmental sustainability and social equity perspectives. This is one of the main reasons for the emergence and prevalence of poverty.

In conclusion, it may be stated that the legal framework on natural resources in India is antithetical to decentralized, participatory, equitable and sustainable management of natural resources. They are antithetical in substance to pluralistic approaches and have very little scope for adjustment or accord with alternative governance frameworks.

3.2 Local Environmental Law in the US.

Brief overview of the history of Environmental Law

The history of environmental law in the United States shows that local governments have played a significant role in its making.

In the United States, the beginnings of environmental conservation policies may be traced back to the 1860s when the earliest legal and administrative framework for resource

stewardship was begun at the federal level with a focus on protecting forests, promoting civil service reform, and a more humane Native American policy⁶⁷. Between 1876 and 1891, when the Forest Reserve Act was passed, more than 200 bills were introduced in Congress relating to forest protection⁶⁸. The Forest Reserve Act of 1891 reformed land sale laws [which were the primary cause of the earlier rapid destruction of forest resources], and authorized the President to reserve timber lands as national parks and as water supply protection areas. A Forest Service was also created in the same period amidst fierce opposition for the western states⁶⁹. The 1897 Forest Management Act provided the framework for an ecology-based forestry. The earlier philosophy of unlimited possibilities of natural resource exploitation – the frontier syndrome – was tempered by the understanding of the limits to resources, and the need to “hold the line”. The period also saw the rise of citizen’s organizations for the preservation of nature and wildlife. A series of great urban parks were created across the country. Simultaneously, concerns of health and safety led to the enactment of pollution control laws in *municipal* ordinances and common-law actions⁷⁰.

These federal efforts however, have to be viewed in the context of the powers of the states, which have been strongly defended, to manage their own affairs without federal interference. Local governments, too, soon became active agents in crafting environmental policies and laws. With the turn of the century, rapid urbanization and industrialization and the resultant increase in pollution of air, water, noise and refuse led to a heightened citizen focus on environmental quality. The consequence was a drastic reform in municipal functioning – the creation of new institutions for management and new laws to control pollution. Local institutions were more preoccupied with pollution issues and legal tools to tackle them, while the conservationists’ view extended to the federal level, with their focus on public lands⁷¹.

Municipalities used their police powers to tackle pollution, and during this period, courts at the federal and state level were sympathetic to police power regulation in the name of environment and health. Police powers of states and local governments have been the foundation for the common law of public nuisance, which has been the main source of environmental law at this level⁷².

Although environmental law has had a long history, most of the important pollution abatement statutes were passed between 1970 and 1980.

⁶⁷ J. William Futrell, “The History of Environmental Law”, in *Environmental Law from Resources to Recovery*, Campbell-Mohn, Breen and Futrell, West Publishing Company, St. Paul, MN, USA, 1993.

p.13

⁶⁸ Ibid.

⁶⁹ Ibid, p.16

⁷⁰ Ibid, p.18

⁷¹ Thereby beginning the split between natural resources and pollution abatement in environmental law: Ibid, p.19

⁷² Sheldon M. Novick, Donald W Stever, Margaret G Mellon, Editors *Law of Environmental Protection*, Vol 1, Environmental Law Institute, Washington DC, USA, 2002. Part –C, 7-13

Some of these are:

1. Marine Mammal Protection Act 1972
2. Endangered Species Act 1973
3. Deepwater Port Act 1974
4. Forest and Rangeland Renewable Resources Planning Act 1974
5. Fishery Conservation and Management Act 1976
6. National Forest Management Act 1976
7. Soil and Water Resources Conservation Act 1977
8. Surface Mining Control and Reclamation Act 1977.
9. National Environmental Policy Act 1970
10. Clear Air Act of 1970
11. Clean Water Act 1972
12. Coastal Zone Management Act in 1972
13. Safe Drinking Water Act in 1974.

The plurality of such laws, however, do not imply that the federal government has been in the forefront of the implementation of environmental law.

State and Local Authority for Environmental Regulation

Environmental law has primarily “happened” in the states. State environmental law is independent of federal authority. State laws are based on the police power, not upon a federal “delegation” of the commerce power. Federal statutory overlay does not “empower” the states. Rather, it enlists the states to exercise their inherent authority to enact laws regulating activities that affect the environment⁷³.

Most states had enacted laws and regulations aimed at controlling or abating pollution long before federal environmental programs were introduced. Every state has detailed laws governing air and water pollution, waste disposal and resource management. While the importance of federal law lies in defining the national environmental agenda and in prescribing the means of implementation, environmental law is mostly made and implemented at the state level. The implementation of federal laws and policies is entirely dependent on state law, state regulations, and state permits⁷⁴.

The principle of non-interference by the federal government in state issues is protected in federal environmental statutes by ‘non-preemption’ provisions. For example, the Clean Air Act provides that it shall not “preclude or deny the right of any state or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting control or abatement of air pollution” so long as the state standards are not less stringent than those set forth in the federally- approved state implementation plan. Similar provisions exist in the Clean Water Act and the Resource Conservation and Recovery Act.

⁷³ ibid

⁷⁴ Ibid: Part-C, 7-2

Property Rights, Public Interest and Authority of Local Governments.

For long, the powers of governments – federal, state or local – to extend environmental regulation to land use had to contend with the philosophy of “absolute” dominion over property of the owner, which was recognized by law. The Fifth Amendment to the US Constitution prohibits a taking of private property for public use without just compensation. This inherently conservative view of property greatly limited intensive and innovative uses of land and, by the early 19th century, conflicted with the needs of a developing U.S. economy⁷⁵. Courts were instrumental in bringing about a fundamental change in the concept of property rights to balance them with public rights.

In about 1922, a village council in Euclid, Ohio adopted a local law that regulated the use of land owned by local realty company, by dividing it into three different land use categories. This law resulted in litigation challenging zoning as unconstitutional. After years of litigation, the U.S. Supreme Court held in 1926 that such use-restricting local laws were constitutional unless they “are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare”⁷⁶. From this early judicial endorsement, land use laws have been increasingly used by states and local governments as a tool for furthering environmental protection and conservation goals. This judgement was more than an endorsement of the constitutionality of land zoning regulations against property and contract rights.. It also endorsed the authority of local self government. Associate Justice George Sutherland, writing for a six-member majority of a court, commented “the village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation, the state and federal constitutions.”⁷⁷

“Euclidean Zoning” has been practiced consistently for more than eight decades under a policy of “benign neglect “ by the courts⁷⁸, and has contributed to a large body of state and local environmental law. Under State zoning and planning enabling acts, local governments have been given a key, if not the principal role in land use regulation through zoning. The granting of home rule powers to local governments by states through their constitutions, and broad police powers through statutes, have enhanced the capacity of these bodies to protect and conserve their natural environments⁷⁹.

⁷⁵ James M. McElfish Jr., “Property Rights, Property Roots: Rediscovering the Basis for Legal Protection of the Environment”, 24 ELR 10231 | Environmental Law Reporter | copyright (c) 1994

⁷⁶ John R Nolon, *Discovering and Evaluating Local Environmental Law* in *New Ground: The Advent of Local Environmental Law*, Environmental Law Institute Washington DC USA, 2003, p.xxi

⁷⁷ *Village of Euclid v. Ambler Realty Co.* 272 US 365, 389 (1926) cited in Michael Alan Wolf, “Earning Deference: Reflections on the Merger of Environmental and Land Use Law “ in *supra* note 73.

⁷⁸ *Ibid.* [At the close of the twentieth century, however, under the administrations of Reagan and George W Bush Sr, there was a resurrection of the Takings clause, reflecting the emphasis of these administrations on championing property rights over excessive environmental regulation - Futrell, *supra* note 65, p.44.

⁷⁹ *Supra* note 74, p.17

From this particular constitutional and legal arrangement, and support from the judiciary, local governments across the country have exercised their authority to regulate pollution and manage natural resources in a significant variety of ways and contributed to the development of a distinct body of law – local environmental law. The issues that have been taken up by local governments include:

- clean up of hazardous waste fields
- Groundwater regulation
- Reduction of industrial use of toxic substances
- Non-point source pollution.
- Cluster development
- environmentally sensitive area protection.
- Erosion and sedimentation control
- Standards for grading, filling, and excavations,
- Floodplains control
- Groundwater/ aquifer resource protection
- Soil removal
- Solid waste disposal
- Landscaping
- Ridgeline protection
- Scenic resource protection
- Stream and watercourse protection
- Steep slopes
- Stormwater management
- Timber harvesting
- Tree protection
- Vegetation removal
- Wetlands.

The broad range of issues relating to both pollution abatement and resource management that are being taken up by local governments are helping to establish a greater connectivity between local land use laws and environmental protection and controls, that was missing in the decades of the emergence of federal environmental laws⁸⁰.

Future Directions

Judging from the directions that local environmental law has taken, resource management has emerged as equal in importance, if not more, to pollution abatement. Protecting healthy watersheds and restoring degraded ones is one of the country's major unmet

⁸⁰ Patricia E. Salkin. State Enabling Statutes that Move Beyond Traditional Zoning p. 171-72 in John Nolon Ed. New Ground: The Advent of Local Environmental Law, supra note 74.

environmental challenges⁸¹. Meeting this challenge would require empowerment of local governments to implement to a greater extent, environmental laws and policies that relate to reduction of pollution and conservation of bio-diversity.

Such an empowerment can only be brought by a broad ranging mobilization of public interest around the issue. Such an exercise would have to involve not only representative of local governments themselves, but public associations, the scientific and academic community, and policy makers at all levels.

CONCLUSION

The overview of the law of local self governance and local environmental decision making in both United States and India comparatively shows:

- In both countries, there has been a long history of local government.
- In India, the nature and function of local governments were changed fundamentally under colonial rule in India. Their political character was diffused, their political powers removed and substituted by the 'civic body' tradition, rather than institutions of self governance. The prime cause of this policy was the necessity of the colonial power to assume full political control over all resources. In the United States, British local government traditions were extended, and several such institutions functioned in the pre-constitutional years under charters.
- In the US Constitution, there is no mention of local government. The Indian Constitution contains provisions on this subject.
- In both countries, jurisdiction over local government is held by the states.
- In both countries, almost all states have enacted legislation on local governments.
- The powers and functions of local governments in the US are clearly amenable for environmental protection and conservation, whereas this is wholly lacking in the Indian context.
- In the US, there is scope for legal review of the powers that are devolved on local governments. There is none in India. Such legal review has helped to promote debate, discussion, theories and changes in the US. In India, the situation has been more static, with a corresponding growth of corruption and inefficiency.
- In the US, local governments have been functioning institutions for long periods of time. In India, they have been relatively far less active, with irregularly held elections; no funds, powers etc. On the other hand, there has been in India a significant growth of central and state bureaucracy.
- US has seen the development and establishment of the concept of Home Rule, representing a step forward in the history of local governments. In India,

⁸¹ A.Dan Tarlock, "The Potential Role of Local Governments on Watershed Management", in John Nolon Ed. New Ground: The Advent of Local Environmental Law, p.213, supra note 74.

Constitutional Amendments on local bodies have endorsed these institutions and have been hailed as a landmark in the evolution of rural and urban local government. However, the provisions of the amendment represent only a marginal or incremental reform, as indicated by the gap between the mandatory provisions requiring regular elections, and the discretionary nature of provisions relating to the powers of local government.

- Subsequent to the constitutional amendments, the legislative powers of states and centre remain unchanged in India. On a comparative level, local governments in India today are close to the situation when Dillon’s Rule came to be applied in the United States. Whether the advance of Home Rule in the US has resulted in a simultaneous withdrawal of states from related functions, as expressed by legal reform, is a matter to be examined.
- In both countries, there is a need to advance further towards empowering local governments to achieve goals of sustainable and equitable development.

United States and India are popularly described as the world’s oldest and largest democracies respectively. The history of local government in both countries reflects the impact of changing historical forces that have shaped the nature and function of these institutions. In both countries, a huge potential exists for drawing these bodies more centrally in the task of implementation of the goals of sustainable development.

INTEGRATED APPROACH TO GROUNDWATER LAW

Table 1

Purpose of Act

CENTRE/ STATES	OBJECT OF ACT	USES GROUNDWATER RESTRICTED	OF	EXEMPTIONS
Central Bill [Bill]	To <i>Regulate</i> and <i>Control</i> the <i>Development</i> of Ground-water and the Matters connected therewith	All uses.		Hand-operated manual pump, or manual devices
Madhya Pradesh	To Provide for the <i>Preservation</i> of Water in the Water Sources and for <i>Regulation</i> of Digging of Tube-wells in order to maintain the Water Supply for the Public for Domestic Purposes and for Matters ancillary thereto.	Irrigation, industrial or other purposes		Domestic wells

Tamilnadu[Bill]	To Regulate and Control the Development of Groundwater and Matters connected therewith.	Irrigation, industrial or other purposes	Domestic use either on personal or community basis
Pondicherry [Order]	Control and Regulation of Groundwater	All Uses	NONE
Maharashtra	To Regulate the Exploitation of Groundwater for the Protection of Public Drinking Water Sources and matters connected therewith and incidental thereto.	All Uses near Drinking Water Sources and in Over-Exploited Watersheds.	Drinking water wells in Scarcity Areas
Gujarat	Regulation of Groundwater on Agricultural Land.	Tube, Bore, and Artesian Wells on Agricultural Land.	All uses except agriculture.

A comparison of two Bills, three Acts and one Order in relation to their purpose, reveals variations.

- Central Bill, Pondicherry and Maharashtra Acts cover all uses of groundwater to be regulated.
- Madhya Pradesh and Tamil Nadu attempt to regulate groundwater for irrigation, industrial and other uses, while Gujarat covers only groundwater use for agriculture.
- All the above statutes are directed toward control and regulation of groundwater, not its management in totality.
- The Central Bill, Tamil Nadu and Pondicherry law are for regulation generally.
- The Madhya Pradesh and Maharashtra Acts : purpose of regulating groundwater for protecting Drinking Water Sources only.
- M.P. Act : includes the protection of sources as one of the objects of regulation.
- In Gujarat, the purpose of the Act is to regulate groundwater only on agricultural land. Tube, Bore and Artesian Wells are covered by the regulation.
- Exemptions range from hand-operated manual pumps or manual devices [Central Bill], and drinking water and domestic use wells [Tamil Nadu, Madhya Pradesh and Maharashtra].

- The Pondicherry Order provides for no exceptions.
- The Maharashtra Act seeks to restrict all uses of ground water in Scarcity Areas and Over-Exploited Watersheds.

Table 2 **Extent**

CENTRE/STATES	<i>EXTENT OF ACT/BILL</i>
Central Bill	Whole of State/UT
Madhya Pradesh	Such area of such district for such period as the Collector may order.
Tamil Nadu	Whole State
Pondicherry	Pondicherry and Karaikal regions
Maharashtra	Whole of Maharashtra
Gujarat	Applicable to areas specified in the Schedule to Act – 9 districts.

Summary

The different Acts, Bills and Order referred to above reveal variations in:

- the purpose of the law,
- the uses of groundwater which are to be regulated,
- and the physical areas in respect of which the regulation is applicable.
- Uses of groundwater which are exempted from regulation.

A common feature of all the Acts, Bills and Order: they seek to *regulate* the *development* of groundwater but are not aimed at providing for any management framework.

Variations may be justified by differences in geo-hydrological features between and within States.

However, if a holistic, integrated, watershed-based approach to groundwater management is adopted, legal frameworks that are limited in purpose and coverage may not be acceptable.

Table 3 **Rights**

Centre/ States	Definition of Rights	Declaration of Rights	Prohibition without licence	Registration
Central Bill	Definition of “user” as a person or institution including Government, who “owns” or “uses” ground water	NONE	✓	✓
Madhya Pradesh	NONE	NONE Over-rides provisions of any other law [regarding rights to	✓	✓

		water.]		
Tamil Nadu [Bill]	NONE	NONE Over-rides provisions of any other law [regarding rights to water.]		
Pondicherry	NONE	NONE	Prohibits sinking of wells for any use whatsoever within six kms of coastline. Rejuvenation of existing wells within 6 kms of coastline, and sinking of wells beyond 6 kms subject to permission of Government. In granting permits, preference to be given to Small and Marginal Farmers.	
Maharashtra	NONE	NONE 1. Over-rides provisions in Maharashtra Land Revenue Code [on rights to water]. 2. Provides for payment of compensation – market value of well and structures – when existing wells are closed down or sealed off. Also, compensation for crops when wells are temporarily closed down.	<i>Prohibition of wells near drinking water sources and scarcity areas.</i>	

Gujarat	NONE	NONE	✓	✓

Rights :

- The Central Bill endorses the existing rights structure in ground water by recognizing privately or government owned wells [depending on ownership status of land.] through a definition of “User”. The Bill makes no declaration of any new rights framework. Its main feature is regulation through licensing.
- States of Madhya Pradesh, Tamil Nadu, and Maharashtra do not define or declare rights to groundwater. They regulate by preventing use in specified areas without prior permission. By over-riding the provisions of other laws, legal rights to groundwater are restricted.
- Maharashtra provides for compensation for well and structures as per market rate, when they are forced to be closed down. This corroborates the principle that groundwater is a property right.
- The Pondicherry Order prohibits use of ground water altogether within 6 kms of the coastline. This amounts to a complete suspension of rights. Information is not available as to how the Government has enforced this absolute suspension of rights. Beyond that distance, new digging or rejuvenation has been made subject to permission. A measure of equity has been introduced by giving preference to small and marginal farmers in giving permits. Again the implementation of this law on the ground needs to be examined.
- The Gujarat Act makes no references to rights at all. It merely restricts the use of wells in specific circumstances.

Summary

- None of the Acts, Bills and Order referred deal directly with the issue of groundwater rights for the purpose of **redefining them** in the context of groundwater management in the context of current critical situations.
- All the laws are aimed at regulation of the use of wells through licensing.
- For this purpose, some of the Acts do provide for suspension and acquisition of rights.

- However, the success of such restriction of private rights depends entirely on the extent to which inventory, registration and licensing of wells is carried out. This is precisely the problem area.
- The capacity of the Government to centrally control millions of groundwater structures is questionable.
- The various State laws have never been properly implemented, in fact not implemented at all.
- The very attempt to do so is likely to invite legal challenge before courts as restrictive of property rights.
- Moreover, the issue is also politically sensitive as ruling governments are seldom prepared to alienate the farming community, particularly the wealthier segments of it which are the more prolific users of groundwater.

Table 5 Institutional Framework

- The institutional framework provided for in legislation reveals the management paradigm that is adopted for implementation of the law.
- In all the statutes under study, the State is the only institution which has a role to play in the regulation of the resource.

- No other partners are envisaged.
- Further, not much of delegation of authority is seen.
- The lowest representatives are the District Collector and the Canal Officer.
- The assumption of a monopolistic role by the State spells the failure of the implementation of the law.

CENTRE/STATES	INSTITUTIONS
Central Bill	1. State Government/Union Territory 2. Groundwater Authority 3. Courts not below Metropolitan Magistrate or Magistrate for the first class for trial of offences. 4.
Madhya Pradesh	1. State Government 2. District Collector 3. Divisional Commissioner
Tamil Nadu [Bill]	1. State Government 2. Groundwater Authority 3. Courts not below Metropolitan Magistrate or Magistrate for the first class for trial of offences, only if cases are instituted by Govt. or Authority.
Pondicherry	1. Government
Maharashtra	1. State Government 2. District Collector 3. Commissioner.
Gujarat	1. State Government 2. Regional Canal Officer.

Powers

The following powers are vested in the institutions under the above laws. **Powers**

- To notify areas
- To give permits in Notified /Scarcity/Over-exploited Areas
- Registering Existing Users in Notified Areas/
- Regulating Existing Wells in Notified Areas.

- Registering Existing Users in Non-Notified Areas or in the State as a whole.
 - Alter/Amend/Vary Terms of the Permit.
 - Cancellation of Permit / Registration.
 - Regulation of Use of Wells through direct government order [not permits] in notified areas.
 - Closure of existing wells, water supply, or any hydraulic work
-
- All the statutes referred to above - primarily regulatory in nature.
 - Main function of the State - prohibiting or restricting the use of wells in specified areas, and issuing licenses or permits for their use on certain conditions and terms.
-
- All the statutes except Gujarat provide for notification of areas for the purpose of regulation. In Gujarat, the Act is intended for the nine districts specified in the Schedule.
-
- All statutes provide for issuing permits or licenses.
-
- All four statutes which have actually been enacted do not attempt to register existing well users in notified areas, realizing the magnitude of the task, whereas the Central and the Tamil Nadu bills prescribe such a task.
-
- However, Pondicherry, Maharashtra and Gujarat provide for *regulating* existing wells in notified areas. How this is to be done without registering such wells is a question left unanswered.
-
- The other three statutes – that of M.P. and the two bills [central and T.N.] do not provide for such regulation.
-
- The Central Bill and Gujarat Act provide for registering users in *non-notified areas*.

Some other powers that have been provided for in relation to regulating of wells are:

- altering or varying terms of permits
 - cancellation of permits under certain circumstances
 - regulating the use of wells through direct government order and not permits.
-
- closure of wells due to misuse or violation of rules

Other Powers.

In order to implement the Act, various other powers have also been deemed to be necessary by the State.

- Powers to enter Land/Property

- Inspect wells/conduct tests/surveys.
 - Order the retaining of soil specimens.
 - Order installation of water measuring device.
 - Enter and Search any place with respect to offences, including the breaking open of premises.
 - Seize Equipment, devices etc.
 - Inspect records, documents, requisition information.
 - Any powers for Implementing the Act/prosecution of inquiry and examination.
 - To make Rules
 - Review of orders, hearing appeals
-
- There are variations among the states as to the nature of powers chosen.
 - The reason for such variations - not clear.
 - Only an inquiry on the ground would reveal the implications.
 - It is sufficient to state here that all types of powers are consistent with the monopoly regulating role adopted by the State in the matter of groundwater management.

Prohibitions and Mandatory Provisions

A main feature of a regulatory legal regime is the prohibitions it imposes and the duties it mandates on subjects of the law.

Prohibitions

Cumulatively, all the statutes [Bills, Acts and Order] studied contain only seven types of prohibitions relating to groundwater use.

- Sinking of Wells in Notified Areas/Scarcity Areas without prior permission.
- Carrying on of Business of Sinking Wells
- Prohibition of taking water by any means from any source in water scarcity areas for irrigation or industrial purpose without permission.
- Prohibition against setting up Industries requiring more than 10,000 litres of potable water within 6 kms of coastline.
- Sinking of wells within prescribed distance to drinking water source or within an over-exploited watershed anywhere in the State without prior permission
- Prohibition of extraction of water in certain periods from existing wells in over-exploited watersheds.
- Sinking of wells beyond specified depth on agricultural land anywhere in the State.
 - Notably, the Central Bill contains no provisions relating to prohibitions.
 - The other statutes each contain provisions prohibiting one or more activities according to the object of the Act.
 - However, these seem to be inadequate in the light of the immensity of problems related to groundwater use.
 - Only a localized assessment of groundwater in relation to other inter-related ecological, social and economic issues can yield a full range of activities that may require to be prohibited

Mandatory Provisions

- Every future User of Groundwater in Notified Areas to apply for permit.
- Every Existing user of Groundwater in the State/UT to apply for certificate of Registration
- Registration of New wells in Non-notified areas/Whole State/UT

- The mandatory provisions relate entirely to the issue of registration of wells as nothing else seems to be required of well-users.

Offences and Penalties.

- Five different types of offences are defined under the different acts
- The offences are - failure to provide information, illegal sinking of wells, violating the conditions of permit, extraction of water from any source without permission, or damaging any public water system.
- The sanctions include fine and imprisonment to varying degrees.
- The efficacy of these provisions are to be tested in the actual implementation of the law.
- The system of regulation prescribed in the acts – a centralized, non-diversified, monopolistic regulatory institution attempting to control millions of individual well owners – implies the prosecution of individual violators case by case, ad infinitum.
- The logistic impossibility of such a task renders these provisions somewhat meaningless.

Offences by Companies

- In law, property can vest not only in individuals but also in institutions which are considered legal persons.
- Industrial and commercial institutions are major users of water resources, particularly groundwater available on their own property.
- The land so used is no less a part of a hydro-geological system as any other, and requires the enforcement of the same management policy.
- Special provisions recognizing the liability of such institutions and procedures to prosecute them are very essential.
- However, among the acts studied, only the Central and Tamil Nadu bills contain provisions relating to offences committed by companies.
- The other Acts/Orders failed to take up this politically challenging task.

Summary of Groundwater Law and Recommendations

- Prevailing or proposed law on groundwater are far from adequate in meeting the multifarious problems associated with groundwater use in India.
- The prevailing rights structure – derived from English Common Law – upholds absolute individual property rights over groundwater attached to land, with no

reference to any integrated land management paradigms that ought to cover all types of land, irrespective of ownership.

- This endangers both ecological sustainability as well as social equity.
- Groundwater legislation – both the “model” bill provided by the Central Government as well as attempted by several states – make no effort to redefine groundwater rights in the interest of ecological and social sustainability and equity.
- Groundwater statutes present a completely sectoral approach to the resource.
- Present groundwater statutes tend to address the single issue of water scarcity, primarily for drinking water purpose, and ignore all the other problems associated with land – such as waterlogging, salination and pollution.
- These require a comprehensive land management approach as well as aquifer management.
- “Development” of groundwater has been over-emphasized [rather from a misguided policy of macro-planning. For instance, India, uses only a third of her estimated annual recharge of some 450 km³, leading planners to think that groundwater development can continue. Yet there are serious problems of over-exploitation.
- Acquirer management takes into account the fact that surface storage from rivers through big and small dams can capture only a fraction of the precipitation.
- Acquirer management requires planned drawals of water in pre-monsoon periods, reducing runoff, optimum recharge etc.
- Current statutes project the view that restricting the digging of wells, or regulating their depths are only measures required to address groundwater problems in India.
- Fourthly, the attempt at providing a single “model” bill that is expected to be appropriate to the significantly varying contexts around the country is contradictory to reality.
- States should be investing their own resources in exhaustively mapping their own groundwater problems with a holistic perspective and strive to develop their own legal frameworks.
- There is a total absence of concepts and strategies for participatory management of groundwater resources. Such a perspective could evolve only if ground water planners and law-makers move from a “development” viewpoint to a “management” paradigm.

- A holistic approach that includes planning, implementation, regulation, resolving conflicts as an integral system of natural resource management needs to be adopted and reflected in the law as well.
- Requirement - Decentralized planning of groundwater law appropriate to each specific State context, through participatory exercises.
- Such planning should be supported by adequate scientific data from an integrated natural resource perspective.
- Groundwater law has to be located in land, water and forest laws, which themselves need to be integrated.
- Restriction of groundwater rights through law can be protected by inclusion in the Ninth Schedule of the Constitution.