

Common lands made 'Wastelands'
– **Making of the 'Wastelands' into Common lands**

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Abstract

This paper explores the evolution of the discourse on “wastelands” in India – from the colonial time to the present – and how it has shaped India’s land related policies. This paper is an attempt to understand the changing rights of the communities to use the resources over the past two centuries. The concept of wastelands in India originated during the colonial period and included all lands that were not under cultivation through the process of settlement for all land held under different property regimes.

While the state took all the wastelands under its purview through the principle of Eminent Domain, these lands were supposed to be managed with the principle of Public Trust Doctrine – where the State is not an absolute owner, but a trustee of all natural resources. With the competing demands over the wastelands, the discussions and discourse have emerged on the relevance of the common lands (wastelands) in ecological and economic terms and against the use of such wastelands for commercial purposes. This has further been strengthened by the enactment of the Forest Rights Act in 2006 and the recent judgments by the Supreme Court of India on the protection of the common lands. This has brought in a discourse on the Communitization of the wastelands as Commons.

Key Words

Wastelands, forests, commons, Policy Discourse, Supreme Court Judgements, India.

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² *This paper is apart of FES’ work on improving the attention and working towards better governance and policies on Commons through the 'Commons Initiative'. The author works with FES and can be contacted @ subrat@fes.org.in, subratasingh@gmail.com.. I thank my colleagues for their valuable comments and inputs.*

“AND WHEREAS the forest rights on ancestral lands and their habitat were not adequately recognized in the consolidation of State forests during the colonial period as well as in independent India resulting in historical injustice to the forest dwelling Scheduled Tribes and other traditional forest dwellers who are integral to the very survival and sustainability of the forest ecosystems;

AND WHEREAS it has become necessary to address the long standing insecurity of tenurial and access rights of forest dwelling Scheduled Tribes and other traditional forest dwellers including those who were forced to relocate their dwelling due to state development interventions.”

*- The Scheduled Tribes And Other Traditional
Forest Dwellers (Recognition Of Forest Rights)
Act, 2006*

The above statement sums up the history of the struggle for the rights over forest lands by the communities across the country. While the statement relates to the forest rights, it reflects the sentiments of all the communities on the common lands that they have been dependent on for the ecological services they provide and the livelihoods that they sustain.

Introduction:

On 28th January 2011, the Honourable Supreme Court of India in its judgement in connection to the hearing on the Civil Appeal No. 1132/2011 @SLP(C) No. 3109/2011, Jagpal Singh & Ors. .. Appellant (s)-versus- State of Punjab & Ors. .. Respondent (s) paved the way for protection of the commons across the country when it asked the State Governments to come up with a scheme for eviction of illegal/unauthorized occupants of Gram Sabha/Gram Panchayat/ Poramboke/ Shamlat land and these must be restored to the Gram Sabha/Gram Panchayat for the common use of villagers of the village. The judgement instead of just adjudicating between the parties mentioned took it up as a systemic problem relating to the common lands across the country and asked all the Chief secretaries of the State to respond. The judgement brought the issue to the fore from the backburner and invoked the policy makers to review and take note of the issue.

The judgement would impact about 15-25% of the entire land mass of the country which is based on the definition of common lands by various studies³ majority of which include wastelands and grazing lands. The precise area of wastelands in the country has been a subject of controversy because of varying definition used by the Agriculture and Forest departments of the Government of India⁴ (NSSO, 1999). The wastelands (as defined in the colonial period) is of critical significance to rural livelihoods and contributes some US \$5 billion a year to the incomes of poor rural households in India, or about 12% to household income of poor rural households (Beck, 2000, 2001).

This paper is an attempt to understand from history the evolution of “wastelands” in the property rights discourse in India – from the colonial time to the present – and how it has shaped the discourse on common lands and community rights along with the evolution of India’s land and forest policies. The paper explores the creation of ‘wastelands’ through the unfolding of the land settlement process under various tenure systems over the last two centuries and the policies that evolved around the wastelands and the corresponding rights and use systems that emerged. The history is marked by various peasant uprising during the land settlement process, which shaped the policies in different parts of the country.

The paper attempts to capture the discourse post-independence that have shaped the status and condition of the wastelands (including forests) in the country and the gradual recognition of the value of these wastelands for the communities in policy making. The recognition of community forest rights in the Scheduled Tribes And Other Traditional Forest Dwellers (Recognition Of Forest Rights) Act, 2006 has been a watershed in the struggle of communities for rights over the forests. The implementation of the Supreme Court Order of 29th January 2011 is expected to push for the communitization of the wastelands for common good.

³ The NSSO study estimates common property land resources to be about 15% that include the categories of land like community pasture and grazing grounds, village forests and woodlots and village sites, on which the villagers have legal usufructory rights. These also include all other lands ((‘Other’ includes the village site, threshing floors, and other barren and wasteland) formally held by the panchayat or a community of the village. The estimates by Chopra and Gulati (2001) suggests common resources to be around 25.61% of the total geographical area of the country and includes fallows, protected forests and other forests in addition to the categories mentioned in the NSSO report.

⁴ The Ministry for Agriculture maintains that only culturable wastes and unculturable lands out of the nine-fold classification of land should be included in the category of wastelands (which emerged from land settlement during the Colonial Period), the total of which comes to 36.9 mh, the Minister for Environment & Forests estimates the area of wastelands in the country was 175 mh which is based on the ecological status of land irrespective of the land category recorded..

Historical Evolution of 'Wastelands':

Baden-Powell⁵ (1892) in the book 'The Land Systems of British India' describes:

'We shall have something to say about this here- after; at present it will only be necessary to note that the British Government has everywhere conferred or recognized a private right in land, and in large areas of country' (Bengal, Oudh and the whole of Northern India for example) it has expressly declared the proprietary right of the landlords and the village owners; it is then impossible any longer to say broadly that the State takes a rent from the landholders regarded as its tenants. There are no doubt cases where Government is the immediate owner of particular lands, as it is of all waste and unoccupied land in general; but we are speaking of cultivated land in villages and estates.'

The State authorisation of private property rights in land resulted in the separation of public land from private land and facilitated the takeover of public land by the colonial government. Land not under cultivation, termed 'wasteland', as it did not provide revenue, was declared to belong to the State and taken over by the revenue department. Such land included lands near villages that were traditionally a common resource available to the villagers for grazing and other purposes. Such lands were also sought to be brought under revenue settlement. Title to such land was offered for consideration to local landlords and the general public through an order of the Court of Directors of the East India Company in 1856, and rules for selling 'wastelands' were published in 1864 (2008 Kannan Kasturi⁶). The policy of enclosures and fences was extended to India, and large chunks of common land became the property of the Crown (2011 Nitya Ghotge)⁷.

⁵ Baden-Powell, B.H. (1892) *The Land Systems of British India, Vol I*. Clarendon Press, Oxford [Reprinted in 1974 by Oriental Publishers, Delhi].

⁶ Quoted from (Vani, 2002 Vani, M S. '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, April 7-10, 2002, Chiang Mai, Thailand, ICNEC Kathmandu, Vol 1, pp 409-446). (2008 Kannan Kasturi)

⁷ 2011 Nitya Ghotge, How grazing lands became 'waste' lands, Agenda (Enclosure of the Commons), Infochange India (<http://infochangeindia.org/agenda/enclosure-of-the-commons/how-grazing-lands-became-%E2%80%98waste%E2%80%99-lands.html>)

Though various rules had from time to time been issued in different districts, for the disposal of Government Wastelands, the state of the country and its general development had allowed these lands to be expanded for agriculture to improve the revenue from the land. The Mughals and the British shared a preference for agricultural production systems and introduced taxes and collected revenue, staking ownership over the land and resources. Lands, which were not cultivated, were considered primitive. To be ‘civilised’ meant being settled, owning lands and property which were under crops. (2011 Nitya Ghotge)⁸. In 1861, under the Viceroyalty of Lord Canning, the subject of government wasteland was first seriously considered and the value of State Forests — to be made out of the best and most usefully situated wooded and grass lands — was not even then recognized, and the occupation of the waste by capitalists and settlers was alone discussed (Powell, 1892). The government asserted its ownership by enacting laws such as the Waste Land (Claims) Act of 1863 and the enactment of the Forest Acts of 1865 and 1878 and the establishment of Imperial Forest Department in 1864. The main purpose of these legislations was to assert government’s control over all uncultivated lands in the country. With the realization of the value timber, the wastelands with large chunks of forests were demarcated as forest lands leading to the promulgation of the 1865 Forest Policy. The Land Acquisition Act (1894) further enabled the state to acquire the best lands for the Crown. Even today, the Act remains so powerful that it gives the state power to take land away from ordinary citizens (2011 Nitya Ghotge). By the second half of the 19th century, the British government had codified a series of laws to enable it to extract as much as it could from the acquisition, sale and transfer of lands and forests. (2008 Kannan Kasturi)

Ownership of wastelands under different proprietary regimes

David Ludden (1999)⁹ in the book ‘An Agrarian History of South Asia’ writes

.....The areas for which the most continuous, accessible historical record is available from medieval to modern times are those that came under direct British administration, and their institutional geography divides roughly into two groups of territories. Zamindari and malguzari regions covered the northern river basins and the valleys and plains in the central mountains. Here, agrarian regions colonialism meant landlordism

⁸ 2011 Nitya Ghotge, How grazing lands became ‘waste’ lands, Agenda (Enclosure of the Commons), Infochange India (<http://infochangeindia.org/agenda/enclosure-of-the-commons/how-grazing-lands-became-%E2%80%98waste%E2%80%99-lands.html>)

⁹ 1999: *THE NEW CAMBRIDGE HISTORY OF INDIA - IV. 4, An Agrarian History of South Asia*, DAVID LUDDEN, University of Pennsylvania

(in western Punjab, Ganga basin, Bengal, and Assam, and also in many western mountain regions, in Uttarakhand, the Indus valley, Sindh, and Bundelkhand). The expansion of cultivation and legal struggles produced various admixtures of private farmer and peasant holdings, which became ever more prominent in territories of (later) malguzari settlements in the Central Provinces (Chhattisgarh, Khandesh, and Berar). Regions of ryotwari and mahalwari (village) settlement covered the peninsula, including most of the coast and the interior (Madras and Bombay Presidencies), and also Myanmar, Ceylon, and eastern Punjab. These regions had some zamindars and Native States, but the British regime for the most part enforced individual farm property rights. Here, the land of individual owners ' ryots ' was assessed individually and revenue was collected in return for a pattah that became a title to private property. In Punjab, Uttar Pradesh, and the Nagpur territories (across Chhattisgarh and much of the central mountains), the British applied a motley combination of zamindari and ryotwari modes, depending largely on local circumstances. Like all ryotwari and mahalwari revenue settlements, these were temporary; that is, the amount due to the state would vary according to periodic assessments by state officials.

As captured in the above paragraph, the proprietorship of wastelands in India at the time of British occupation varied in accordance with the historical and political conditions prevailing in each province. With the land under different proprietary regimes presented a complex situation of land settlement. The actual identification of wastelands and forestlands took place through the process of "settlement", a term applied to the method of assessing the land revenue demand. Extensive land survey and settlement operations were carried out throughout the country to streamline the land revenue collection system. These operations resulted in creation of detailed village records and often demarcation of cultivated lands and wastelands/forestlands on maps. (2011, Saigal). Various proprietary regimes that existed across the country at the point of time were the Zamindari System, Jagirdari system, Mahalwari system and Ryotwari systems.

Zamindari System

A Zamindar was an aristocrat, typically hereditary, who held enormous tracts of land and held control over his peasants, from whom the zamindars reserved the right to collect tax. Often zamindars were Indian princes who lost their sovereignty due to British Rule. They were considered to be equivalent to lords in some cases they were also seen as independent, sovereign Princes. During the Mughal Empire, zamindars belonged to the nobility and formed the ruling class. The practice took structural footholds prior to the Mughal Era but was solidified by the indirect system of taxation in the Mughal Empire and British Raj.

Jagirdari system

A Jagir was a type of feudal land grant bestowed by a monarch to a Sardar (Minister) in recognition of his loyal service to the Crown. The recipient of the *Jagir* (termed a Jagirdar) was the de facto ruler of the territory and was able to earn income from taxes. This feudal system of land ownership is referred to as the *Jagirdar* system. It was first established in the 13th century by the Sultans of Delhi, was later adopted by the Maratha Empire in the early 17th century, and continued under the British East India Company.

Ryotwari System

The *Ryotwari* system, instituted in some parts of British India, was one of the two main systems used to collect revenues from the cultivators of agricultural land. These revenues included undifferentiated land taxes and rents, collected simultaneously. Where the land revenue was imposed directly on the ryots -- the individual cultivators who actually worked the land—the system of assessment was known as *Ryotwari*. Under the *Ryotwari* System every registered holder of land is recognised as its proprietor, and pays direct to Government. The *Ryot* under this system is virtually a Proprietor on a simple and perfect title, and has all the benefits of a perpetual lease. (John Stuart Mill 1857)

Mahalwari system

In 1833, Lord William Bentinck implemented a new system called the "Mahalwari" or village system under which landlords as well as ryots entered into a contract with the Government. This system was similar to that of the "Village Settlement" where the land was handed over directly to the ryots who paid their rent directly to the government. Under this system the unit for revenue settlement was the village. The village lands belonged jointly to the village community. The body of village community is jointly responsible for the payment of land revenue, though individual responsibility was always there. If any community member abandons his land, it is taken over by the village community as a whole. The village community is the owner of village common land area, including the forestland, pastures etc.

The above four systems can be classified into two broad systems based on the understanding on their part about village proprietorship in India with little variations – Zamindari (including the Jagirdari system) and Ryotwari (including Mahalwari system). The estates in eastern and northern India were generally settled as part of the Zamindari system and the western and Southern India as part of the Ryotwari System.

In Zamindari areas, the local Zamindar continued to be the owner of both cultivated and uncultivated lands, as he was before the arrival of the British. Under such a system, one family

claimed to be owner or Zamindar (landlord) of the entire area, both cultivated and uncultivated. The uncultivated portion of the village was the common property of this proprietary body. It would locate tenants to cultivate its land, and tenants of longer standing could graze their cattle on the shamlat of the landlord, as long as they did not cultivate it. (1892, Baden Powell, 19... NC Saxena). In the states of the north like U.P. and Bengal uncultivated lands were included in the estates owned by the zamindars, and were not retained by the Government. The revenue of the entire estate was fixed irrespective of the area under cultivation, but the zamindar could charge rent from the cultivator only on the basis of actual cultivated area. There was, thus, an incentive to both, landlord and the cultivator, to extend actual area under cultivation. (N.C.Saxena). Each of these zones contained wide variations in the pattern of village settlements at the time of British entry, hence they responded in a variety of ways to the same external stimuli. (1990, Minoti Kaul-Chakravorty).

Some of the variations as recorded by Baden Powell (1892) are

In Bengal, the estates were settled without any survey; most of them included — and were freely allowed to include as their own — as much of the waste (often forest land) as naturally adjoined the estate. It was always contemplated, that, as the Land Revenue was fixed in the lump for the whole estate, the extension of cultivation into the parts at present waste should be wholly for the benefit of the estate, making the Revenue burden lighter and lighter as more and more success in this direction was attained.

... in 1828 Regulation III asserted the right of Government (which had always existed in theory), and then various efforts were made to separate the waste tracts and deal with them. This especially affected districts like Chittagong and others in Eastern Bengal (now in the Assam Province), but also the vast tract of forest land towards the mouths and delta of the Hughli and other rivers, known as the 'Sundarban.' There were also great tracts of waste in the districts of Jalpaiguri and Darjiling ; and some forest land in the Chutiya Nagpur districts and in Orissa. These lands were henceforward taken in hand, and afterwards leased to cultivators, or made into public forests, as I shall presently explain.

In the North-West Provinces and Oudh. — In the North-West Provinces, in the ordinary districts, the whole of the waste was divided up and given over to the village-estates to

which it was adjacent; this is true of all the populous Ganges plain districts. But where there were large tracts of jungle land, in the hill districts, and in Dehra Dun, Jhansi, Mirzapur, etc., these tracts remained as Government waste. In Oudh very much the same procedure was followed; only the excess wastelands (exceeding 500 acres in any one plot) were reserved to Government and have since become State forests.

In the Central Provinces and the Panjab, the waste area between the cultivated villages was much too large to be entirely given over. A rule was adopted in both, that a certain area of waste (usually about 200 per cent, on the cultivated area) should be included as village property, the surplus being marked off as Government land.

In the Panjab, the areas so cut off became the 'rakh' or 'Fuel reserves' so called because they mostly contain a peculiar stunted growth of wood admirably adapted for fuel. These lands are partly kept as forest and grazing lands, partly for the extension of cultivation.

In the Central Provinces, the area so left was enormous: it was declared originally as 'Government forest' under the Forest Act of 1865; but the arrangements were not always well carried out, and of late it has been found desirable to give up some of the area to cultivation, or for village purposes generally.

In Ryotwari states as sovereignty passed from the local kings to the British, uncultivated lands became government property all uncultivated land, except that allowed for use to the village for grazing land, remained government property. Cultivated land in the villages in Western and Southern India was settled with individual farmers, while the kings claimed only uncultivated areas (Ribbentrop 1900: 86-122). The kings appointed a local village headman, who was in charge of the uncultivated land of the village. Anyone wanting to extend cultivation could apply to the headman, and obtain land without difficulty. (1892, Baden Powell, 19.... NC Saxena, Minoti Kaul-Chakravorty)

According to Baden Powell (1892) -

Wasteland in the Raiyatwari Provinces — In the Raiyatwari countries (Madras, Bombay, &c.) the Settlement system does not deal with 'estates,' and there is therefore

no question of allowing surplus waste to provide for expansion or for lightening the Revenue burden. Each field or holding is separately assessed on its own merits. Consequently all the waste land (except that allowed for use to the village for grazing ground, &c.) remains Government property and is made into 'survey numbers' and assessed (lightly) according to its class; any one therefore who wants one of these plots has only to make application at a certain time to the local Revenue Officer, and agree to pay the assessment: in this way the expansion of villages and family holdings is amply provided for.

This remark applies to the villages in the plains: but in parts of Bombay, in Coorg, and on the West Coast, there are local forms of landholding, and local methods of cultivation, which always involve a certain patch of wood and grass-bearing land being attached to each cultivated land holding: in such cases, a certain 'waste' area is allowed to form part of the holding, and cannot be used for public forest or other State purposes. The waste is however in this case held on definite conditions; it cannot be permanently cultivated or separately alienated.

Recording of Rights over common lands

It is believed that prior to colonisation by the British, the common property resources under the control of villagers were greater. In pre-British India, a very large part of the country's natural resources was freely available to the rural population. They were largely under the control of local communities. With the extension of state control over these resources and the resultant decay of community management systems, CPRs available to villagers declined substantially over the years (1999, NSSO; 2011, Ghotge).

The 1886 Anderson settlement report established the rights of villagers to the forest in Law. As opposed to other areas in India, it has been suggested that village rights in the Kulu district may have been generously defined. As noted by ODA (1994) "Contrary to indications from other areas in India the process of settlement of rights in Kulu and Mandi did not result in the termination of local people's rights, but rather their acceptance and formalisation." The forest settlement officer, Anderson, revealed a concern for village rights in his writing of the settlement report. He notes early in the settlement report that forest rights are important to the livelihoods of villagers: "The people are dependent on these rights for their very existence, and the extinction of the

rights would be the most unjustifiable expropriation." (Anderson 1886:7) Furthermore, he expressed the view that rights previously recognized during the revenue settlement should not be abridged, "these rights were recorded at the Revenue Settlement and that settlement was accepted on the distinct understanding that the rights were to be respected." (Anderson 1886:3).(Kaul-Chakroborty 1990)

Dietrich Brandis, the first Inspector General of Forests envisioned that such forest would provide numerous items gratis to the villagers: firewood for domestic consumption, and sale by poor head loaders; wood for agricultural implements, cart construction, and repair; wood, bamboo, and grass for green manure; and pasture fodder, excluding those blocks closed under the recommended rotational system. Brandis proposed creating village forest in at least 52 of the 83 talukas of Mysore. (Guha, 1995 as in G.Raju 1999). These discussions led to the section 28 on 'village forests' in Indian Forest Act. The rights over commons have been an issue during the settlement process and there have been a series of peasant uprising in different parts of the country. Van Panchayats in Uttaranchal were born out of conflicts and compromises that followed the settlements and reservations of forests in the hills at turn of the last century. The first government approved Van Panchayat was thus formed in 1921.

In response to the repeated agrarian uprisings that occurred in Jharkhand throughout the 19th century, a series of legislations was enacted, culminating in the Chhotanagpur Tenancy Act (CNTA) of 1908 – still the major land tenure act in force in the region. The CNTA provided not only for the creation and maintenance of land records, it also created a special tenure category of "Mundari khuntkattidars and restricted the transfer of tribal land to non-tribals. Most significantly, the CNTA provides for the recording of various customary community rights in land and other resources ('jungle or wasteland'), such as the right to take produce and to graze cattle, as well as the right to reclaim "wastes". (Carol Upadhyay, 2005)

Rules for village nistar and grazing rights were framed in the Holkar State (presently Indore) at the Settlement of 1908, when it was laid down, "Every cultivator in any village shall have the right of pasturing his cattle in the State village waste and of cutting thorns for the protection of his field or house without any permission". Further, "any cultivator wishing to take away from the State village waste grass or firewood or babul thorns or any tree not being a reserved species of tree, or a fruit tree or any produce or material which is not reserved by the Durbar, may do so with the permission of the village Panchayat ". This position continued until the Indore

Land Revenue and Tenancy act of 1931 was brought into force. This Act also laid down the rights of the cultivators in regard to grazing and nistar in the village waste and to trees in their holdings. A tenant was given the right, free of charge, to graze his agricultural cattle in the waste land of his village and to collect from such waste land, grass, dry wood, thorns and leaves for his agricultural or domestic purposes.

In 1936, when Orissa became a separate province, many or parts of the Estates/States then under the Governments of Madras and Central Provinces respectively were also transferred to this province while many / part of the Estates / States remained separated from it on the basis of linguistic and other factors. In this new province, there were virtually two divisions, viz; British Orissa and Princely Orissa¹⁰ (corresponding respectively to British India and Princely India). Because of the Prajamandal Movement in 1930s-40s related to tenure reforms and rights over forests, most of the princely states enacted forest acts that provided for village forests and rights over timber and other forest produce.

In Punjab, these rights and liabilities were recorded in two documents called the *Wajib-ul-arz* and the *Riwaj-i-am* and they became the basis of the system of customary law initiated by the Colonial judiciary and administration. In Rajasthan, they were recorded in a document called the *Dastur Ghanwai*. The Chota Nagpur Tenancy Act CNTA provided not only for the creation and maintenance of land records in the form of Village Note, Khatian-I (private lands) and Khatian-II (for common lands) for recording of various customary community rights in land and other resources ('jungle or wasteland'), such as the right to take produce and to graze cattle, as well as the right to reclaim "wastes". The Revenue policy recognized communal management of resources by the village proprietary body but it also recorded the user rights of the tenants and the service groups, therefore the proprietary bodies increasingly found themselves restricted by the conditions which they had accepted in the first settlements of the village.

Post-Independence Changes in Land Revenue Laws and status of wastelands

¹⁰ Princely Orissa was constituted by the following 26 feudatory States: Athgarh, Athmallik, Bamra, Baramba, Boud, Bonai, Daspalla, Dhenkanal, Gangpur, Hindol, Kalahandi, Keonjhar, Kharsuan, Khandapara, Mayurbhanj, Narsinghpur, Nayagarh, Nilgiri, Pal-Lahra, Patna, Rairakhol, Ranpur, Saraikela, Sonapur, Talcher and Tigiria. On the other hand, the Estates remained in the British Orissa since they did not have a sovereign status like the States though they did have certain independent administration. (2000, Bikash Rath Aspects Of Garjat Forestry, Vasundhara In Collaboration With Centre For International Forestry Research(CIFOR) Bogor

<http://www.vasundharaorissa.org/Research%20Reports/Aspects%20of%20Garjat%20Forestry.pdf>

In most states the *Zamindari* system was abolished soon after independence with the 1st amendment to the constitution of India, which amended the right to property. This allowed the states to make their own "*Zamindari Abolition Acts*". In the north, after the abolition of the *Zamindari*, all uncultivated lands became vested in the state. Where there were large tracts of forests, these were handed over to the Forest Department, and the rest was vested in the village panchayats, which are under the overall supervision of the Revenue Department. (Saxena ____). In the south, under the *Ryotwari* system, often they had no control as these lands were the property of the Revenue Department, and the uncultivated lands are still considered to be government property, known as C&D lands in Maharashtra and Karnataka, or poromboke in Tamil Nadu. In most States, all the lands not under cultivation either by the intermediary or by the tenant, i.e. all waste lands and all forests, were acquired by the State as a result of intermediary abolition (Planning Commission, 1966.)

The post-independence discourse on the common lands needs to be looked at in terms of the way the discourse on forests and wastelands has emerged in the past sixty years almost independently of each other.

Discourse on Forestlands (1947-1980)

According to J.W. Nicholson (1926) "forest requires protection from men, as it is a common failing in human nature that whenever any product is found in abundance its use is abused without thought for the future. Left to themselves, the villagers take no care of their forest." Chapter-II The need for a Forest Department in the book "The forests within Bihar and Orissa"

Unfortunately, after Independence India continued with the 1927 Forest Act without much change in words and spirit. "Control" over forests and natural resources continued to be with the Government. Forests, as in the past, continued to be managed by the Forest Department with the objectives of revenue maximization; the department was mandated to focus on production function of forests. In the process, they overlooked the dependence of local communities on forest and the role of forests as provider of benefits and services to the vast majority of rural population. After the *Zamindari* System was abolished, the forests and revenue wastelands were also brought under the government control. Acts" that the state governments promulgated, the Nistar rights provided to the communities were slowly withdrawn, alienating the people further.

(Singh 2003). According to the Review by the Land Reforms Implementation Committee of the National Development Council, Government of India (1966), as a result of the abolition of intermediaries, considerable areas have come into possession of the State including about 70.4 lakh acres of private forests. This was largely with the interpretation of 'Eminent Domain' which is understood as the power that the State may exercise over all land within its territory and take away lands for public purpose, the purpose in this case being land reforms and increasing the land area under cultivation.

'...within a short while after the promulgation of the Constitution, the Supreme Court was charged with judging the constitutionality of certain laws, which were intended to abolish the feudal zamindari (landowning) system. The power of eminent domain was under the scrutiny of the court, even as that power faced severe contest from the zamindars (landowners). In explicating the power, the court held that eminent domain was 'the power of the sovereign to take property for public use without the owner's consent. The meaning of the power in its irreducible terms is: (a) power to take, (b) without the owner's consent, and (c) for the public use.' (Usha Ramanathan, 2009).

The endorsement of the eminent domain power of the State in the early constitutional years of independent India was assisted by the jurisprudence that had developed around the colonial Land Acquisition Act of 1894. The power to take, and the unqualified nature of 'public use', has made dispossession and mass displacement possible, and is fast becoming a power which is acquiring illegitimacy, especially among the displaced. The displaced were the sufferers, as the wastelands (commons) they used were never compensated, thereby leading to increased distress for the poor.

The commercial extraction of forests resulted in degradation of rich forest lands. The people realizing the fact that their livelihoods are at stake, opposed the destruction of the forests and the displacement of their forest based livelihoods. In some places the communities even initiated the protection of the forest lands adjoining their villages. The Chipko Movement being one of the most referred cases, however there have been many such confrontations between the Forest Department and the communities. There have been constant conflicts between the forest department and the communities dependent on the forests mainly of two types, one being right to access to the local communities primarily for providing fuel wood, small timber, constructions materials for housing, wood for agricultural implements etc and secondly for the protection of ecological functions the forests support like as source for recharging local streams; checking soil

erosion and for increasing soil fertility for fields at foothills of forests; a provider of ecological benefits.

The 1970's and 1980s saw a period of development reforms like the discourse on conservation – forests being brought into the concurrent list, enactment of the Wildlife Act 1972, notification of sanctuaries for conservation of the valuable biodiversity and the enactment of the Forest Conservation Act (1980). This accentuated the conflicts between the communities and forest department as the communities were rehabilitated from the core regions to protect the habitats from destruction.

Discourse on Wastelands (1947-1980)

After independence, increase of agricultural production was accorded the highest priority in planning for the first four-five Five Year Plans. A committee was set up in 1948 to standardize land use classes in the country. The committee suggested a nine-fold classification¹¹ superseding existing five-fold classification and included new categories such as 'Culturable Wasteland'¹² – a category which can be made available for agriculture in future. Another committee was subsequently set up to identify suitable wastelands in blocks of 100 hectares or more. The committee conducted a survey in 12 states and identified around 640,000 hectares of wastelands suitable for cultivation (GoI 1976b). Further surveys were subsequently carried out to locate wastelands in blocks ranging from 5 to 100 hectares as well and around 2.3 million hectares of such wastelands were identified (GoI 1976b).

A significant proportion of wastelands (surveyed as well as un-surveyed) were distributed to farmers for agriculture. The figures compiled by the Ministry of Rural Development (MoRD)

¹¹ To remove the non-comparability & to break up the broad categories into smaller constituents for better comprehension, the Technical Committee on Co-ordination of Agricultural Statistics, set up in 1948 by the Ministry of Food & Agriculture, recommended a nine-fold land-use classification replacing the old five-fold classification, & also recommended standard concepts & definitions for all the states to follow. The nine categories are 1. Forests 2. Land put to non-agricultural uses 3. Barren & unculturable land 4. Permanent pastures & other grazing lands 5. Miscellaneous tree [crops](#) & groves, not included in the net area sown. 6. Culturable waste 7. Fallow land, other than current fallows 8. current fallows 9. Net area sown. *(The five-fold classification included 1. Forests 2. Area not available for cultivation 3. Other cultivated land, excluding current fallows 3. Barren & unculturable land 4. Fallow lands 5. Net area sown)*

¹² *Culturable Wasteland*: This includes lands available for cultivation, whether not taken up for cultivation or taken up for cultivation once but not cultivated during the current year and the last five years or more in succession for one reason or other. Such lands may be either fallow or covered with shrubs and jungles, which are not put to any use. They may be assessed or unassessed and may lie in isolated blocks or within cultivated holdings. Land once cultivated but not cultivated for five years in succession should also be included in this category at the end of the five years. (<http://mospi.nic.in/nscr/ax0405.htm>)

indicate that as much as 6.2 million hectares of government wastelands were distributed up to 2008 (MoRD 2008). Since the area under agriculture increased sharply in 1950s and 1960s but has remained more or less constant since then, it is reasonable to assume that the bulk of distribution occurred in the first couple of decades after independence. In addition, around 2.6 million hectares of forestlands were also brought under agriculture between 1951 and 1980 (MoEF 1998a), bringing the total area diverted for agriculture to 8.8 million hectares. (2011, Saigal)

A small percentage of the wastelands in many states were reserved for pasture and grazing lands (with custodial rights of panchayats) and rest of the lands were retained with the revenue department. Few states came up with acts for regulating the common land like Jammu & Kashmir (The Jammu and Kashmir Common Lands (Regulation) Act, 1956), Punjab (The Punjab Village Common Lands Regulation Act 1961), Haryana (The Haryana Municipal Common Lands (Regulation) Act, 1974) and Himachal Pradesh (The Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974), the later two adopting the Punjab Act after Punjab was divided in Punjab, Haryana and Himachal Pradesh. While some other states have tended to manage these lands by avoiding encroachments through specific acts like the Tamil Nadu Land Encroachment Act, 1905 and the Orissa Prevention of Land Encroachment Act, 1972 or through the respective land acts.

Land distribution however continued to be an important element of the social reform process, as explained by MoRD: Distribution of Governments' Wasteland has been one of the key Strategies of land reforms; it has been the accepted policy that wasteland at the disposal of the Government should be distributed amongst eligible rural poor (MoRD 2001, p. 94).

Discourse on communitization gaining momentum (since 1980s)

Towards decentralized governance of forests

There has also been a parallel discourse on decentralization and devolution of powers to the lower level institutions. The National Forest Policy came up in 1988 that admitted the fact that it would be difficult to protect the forests without the cooperation of the local communities, and therefore the policy laid importance on *the ecological function of forests and the symbiotic relationship between local people and forests*.

The National Forest Policy, 1988 was a departure from all other policies regarding forests that have been enacted so far, it recognized the fact that the forests cannot be protected by “policing” alone, rather the village communities need to be involved in the task of protection of the forest. The 1990s brought in a big change in state attitudes towards forest management in India. The state, until then controlled and managed most of the forest resources in a paternalistic manner, appeared to finally have come around and opened its doors to the concept of "people's participation in natural resource management". The Government of India issued the first set of guidelines in this regard in 1990 and within a period of 20 years following the historic directive, 30 states have issued orders enabling "Joint Forest Management" (JFM). The words "Joint management" or "Co-management" brought in optimism in the management of natural resource management, as it provided access to the forests for the people who had been deliberately kept out of the forests and their use of the forest resources for livelihood was termed as a crime according to the earlier policies (Singh 2003). Some states like Andhra Pradesh took a step ahead with the initiation of Community Forest Management projects where communities were provided more control than in case of Joint Forest Management. This began the process of communitization of forest management across the country though the forest department continued to exercise a greater control over the forest management with the forester being the secretary of the forest management committees.

The discourse during this period was influenced by the 73rd Constitutional Amendment and the enactment of the Panchayati Raj Act, 1992 and the Panchayati Raj (Extension to Scheduled Areas) Act, 1996, through which the protection and development of watershed and natural resource management was delegated to the local government bodies.

Further, as a result of the protracted struggle by the marginal and tribal communities of our country to assert their rights over the forestland over which they were traditionally dependent the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 was enacted. Community Forest Rights (CFRs) recognized under the Forest Rights Act is important for securing livelihoods of the forest communities and for strengthening local self governance of forests and natural resources. This began the communitization process of forests in its true sense and the communities have gained strength with their demand for rights and access over forests was accepted. Though there have been quite a few bottlenecks as well as unwillingness on the part of the forest department to implement the provision of the Act, the

process has begun with communities claiming their rights to the forests they have been using for generations.

Emerging discourse on common lands and livelihoods

Since early 1980s, a large number of field studies on CPRs, of varying scale, have been conducted, particularly in the arid and semiarid areas or hill and forest fringe regions of the country. Various studies documented the contributions from commons to village economies and the level of dependence of various sections of the society (Jodha, 1986; Jodha, 1992; Pasha, 1992; Beck and Nesmith, 2001; Chopra (2001), Adhikari, 2005; Dasgupta 2005; Ghate 2005; Menon and Vadivelu 2006). Besides flow of benefits to farming systems and animal husbandry in terms of food, fodder and timber availability, there are ecological benefits in terms of resource conservation, recharge of ground water and sustainability of agro-ecological systems. However, the range of direct and indirect contributions from Commons limits a complete quantification of benefits due to the inability to monitor and measure these indivisible flows emerging from them.

A significant amount of research highlighted the need for both, to the existence of long-enduring institutions around the Commons (Ostrom 1990, Wade 1988) and the capacity of communities to effectively manage them through these institutions (Iyengar and Shukla 1999, Chakravarthy-Kaul 1998, Gadgil and Guha 1992, Guha 1989, Jodha 1986) as the commons are, by definition, a kind of 'collective holding' and, therefore, require robust institutional mechanisms for their sustainable management. In the course of the policy development around the wastelands, an important factor has been the atrophication of local institutions of management around such resources, leading to the degradation of such lands. However, various research have also brought out community action around such lands but these systems are not recognised in the policy framework.

Jodha's study across seven states in the arid and semi-arid zones of India highlighted the relevance of the Commons to the rural economy at large and their importance as a 'safety net' for the poor in particular. He estimated around 84-100% dependence of the rural poor on the Commons for fuel, fodder and food items, in comparison to 10-19% dependence of better-off households (even for the better-off the figure increases in dry land regions like Rajasthan). The study estimated that 14-23% of household incomes are derived from the Commons and they play an important role in reducing income inequalities, which would have been otherwise starker. The study also indicated that rearing livestock without the support from the Commons would mean a diversion of almost 48-55% of cropland from food and cash crops to fodder crops. Whereas the

alternative, of reducing the number of animals in proportion to the availability of one's own fodder resources, would entail a 68-76% loss of draught power and up to 43% loss of farmyard manure.

In 1985, the National Remote Sensing Agency, Department of Space, Hyderabad, on the basis of satellite pictures has reported 75.5 million hectare of land as wasteland¹³. To address the problems of large scales land degradation, the government initiated the wastelands development programme in 1985. National Wasteland Development Board was established under the Ministry of Forests and Environment mainly to tackle the problem of degradation of lands, restoration of ecology and to meet the growing demands of fuel wood and fodder at the national level. In the year 1992, the new Department under the Ministry of Rural Development was created and the National Wasteland Development Board was placed under it and is known as the Department of Land Resources. The Board was reconstituted in 1992 and was made responsible for mainly development of wastelands in non forest areas in totality by involving local people at every stage of development. The major objectives of the programmes are: (a) Checking land degradation (b) Putting wastelands to sustainable use (c) increase biomass availability specially fuelwood and fodder and (d) restore ecological balance.

In 1998, the Department of Statistics and Programme Implementation, Government of India through the 54th NSSO, undertook an enquiry for the first time to provide comprehensive state- and national- level estimates of size, utilisation and contribution of CPRs. It also provided separate estimates for different agro-climatic zones of the country. The common property resources included all such resources that are meant for common use of the villagers like village pastures and grazing grounds, village forest and woodlots, protected and unclassed government forests, waste land, common threshing grounds, watershed drainage, ponds and tanks, rivers, rivulets, water reservoirs, canals and irrigation channels. The data indicated that households engaged in the collection from Commons varied across different agro-climatic zones, ranging from 73% in the Eastern plateau and hills to 13% in the Western dry region, forming a national average of 48%. About 30% of the households in the country use common water resources for rearing livestock. Along with the significance of its findings the enquiry into the common

¹³ Wasteland in this context was defined based on the ecological understanding and not the categories mentioned in the Revenue Records. The wastelands are categorized as Guillied & or Ravinous Land; Upland with or without Scrub; Water Logged & Marshy Land; Land affected by Salinity/Alkanity-Coastal/Inland; Under Utilized Degraded Notified Forest Land; Shifting Cultivation Area; Degraded Land Under Plantation Crops; Degraded Pastures/ Grazing Land; Mining Industrial Wastelands; Sands-Desertic Coastal; Steep Slopping Area; Barren Rocky/Stony Waste/Sheet Rocky Area; and Snow Covered and or Glacial Area

property resources itself provided a significant impetus to commons research in the country as well as a focus in policy discussions.

Taking a note on the importance of Commons, the Government of India has been discussing the need for having a National Policy on Common Property Resource lands since 2001. The draft outline for the National Policy on Common Property Resource lands was provided in the Nation Action Programme To Combat Desertification, In the context of United Nations Convention To Combat Desertification (UNCCD), Volume-I, Status of Desertification, Ministry of Environment & Forests, Government of India, New Delhi, 2001 (page 71 & Page 203, 204). Further there was a renewed discussion on the same during the 11th Five Year Plan preparations, during which the Working Group on Natural Resource Management proposed the need for a Policy on Common Property lands.

While these discussions continued and there have been programmes and projects implemented across the country for the restoration of the wastelands, not much consideration has been given for the tenure of such lands and during the same period, there have been policies passed that contradicted the discussions on common land policy. Another reason for decline of Commons is the notion of treating and designating the de-facto common lands lying with the Revenue Department as 'wastelands' (Culturable wastelands, Unculturable wastelands, Unassessed wastelands) and diverting them for other 'productive' uses depriving the local communities of access and meeting their critical livelihood requirements. With the continuation of the lands with the nomenclature as 'wastelands' has continuously been a challenge for the governments to find productive use of such lands. During the last two decades apart from the distribution of such lands to the poor and landless farmers, the government has come up with the Special Economic Zone Act 2005 that envisaged the use of wastelands as the first preference for the establishment of the Special Economic Zone (SEZ) and the National Policy on Biofuels 2009 that suggested that the biofuels would be raised on degraded or wastelands that are not suited to agriculture, thus avoiding a possible conflict of fuel vs. food security. However, across the country, there were several opposition to both the initiatives as they had a negative impact on the livelihoods of those dependent on these lands (Nagar, 2011).

In 2007, the Indian government has announced the formation of National Land Reforms Council that will formulate a National Land Reforms Policy, in response to the peasant demands of the Janadesh Yatra 2007. The Government also constituted a Committee in this regard to look into

the State Agrarian Relations and Unfinished Tasks in Land Reforms, with a sub-committee to exclusively look into issues of Common Property Resources – Identification, management, development and Land use aspects (particularly agricultural land) and recommend measures to prevent conversion of agricultural to non-agricultural purposes consistent with development needs. The report of the committee was submitted to the National Council for Land Reforms in October 2008, which recommended the need to put in place a land use policy and revival of the land use boards at the district level to ensure proper use of agrarian land and access of poor to common property resources (CPR).

While there hasn't been much headway, the discourse on relevance of commons for the livelihoods of rural communities continues. The discussions regarding the need for a Model bill on Common Property Resource lands has been highlighted in the Approach Paper for the 12th Five Year Plan and by the Working Group on Natural Resource Management and Rainfed Areas.

Judicial discourse around Common lands

With its interpretation of Eminent Domain as the (a) power of the government to take, (b) without the owner's consent, and (c) for the public use' enabled the abolition of the Zamindari systems post independence, the principle continued to be used for all developmental projects across the country leading to the displacement of the communities from their private lands as well as the wastelands (forests and wastelands used as commons).

Environmental conservation has been an integral part of the Indian ethos. These are reflected in India's Constitution - articles 48A and 51G of the Directive Principles of State Policy enjoin upon the State to protect and improve the environment and safeguard the forests and wildlife. Article 39(b) and (c) lays down the duty of the State and the Centre to develop natural resources for common good. Article 40, on the other hand, calls for organisation of village as units of self-government. The Directive Principles of State Policy, though not enforceable by any Court, are nevertheless fundamental to the governance of the country. (MoEF, 2011)

In discussing this issue, it is important to include in the discussion on wastelands, the Supreme Court of India's judgment related to *M.C. Mehta v Kamal Nath and others*¹⁴ where the court

¹⁴ *M.C. Mehta v Kamal Nath and others* where the Indian Supreme Court applied public trust with regard to the protection and preservation of natural resources. In this case, the State Government granted lease of riparian forestland to a private company for commercial purpose. The purpose of the lease was to build a motel at the bank of the River Beas. A report published in a national newspaper alleged that the motel management interfered with the natural flow of the river in order to divert its course and to save the motel from future floods. The Supreme Court initiated suo motu action based on the newspaper item because the

accepted the public trust doctrine as a part of common law for the first time in 1997 and said that the Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and forests have such great importance to the people as a whole that it would be unjustified to make them a subject of private ownership . The court observed that:

Our Indian legal system, which is based on English common law, includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources, which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the seashore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership. As rivers, forests, minerals and such other resources constitute a nation's natural wealth. These resources are not to be frittered away and exhausted by any one generation. Every generation owes a duty to all succeeding generations to develop and conserve the natural resources of the nation in the best possible way. It is in the interest of mankind. It is in the interest of the nation. Thus, the Public Trust doctrine is a part of the law of the land. The court also ruled that there is no any justifiable reason to rule out the application of the public trust doctrine in all ecosystems in India (M.C. Mehta v Kamal Nath and others).

Following this there have been few judgements, where the Judiciary has taken steps in restoring the common lands in the hands of the communities. In the judgment dated 29/09/2009 related to Union of India (Petitioner(s)) versus State of Gujarat & ors. (Respondent(s)) Special Leave to Appeal (Civil) No(s).8519/2006 took note of a newspaper item published in Times of India¹⁵, Ahmedabad Edition, and ordered 'all the respondents are directed to take immediate steps for removal of encroachment of religious structures on the public space without any discrimination and submit their reports.' In order to ensure compliance of our directions, the Court directed all the District Collectors and Magistrates/Deputy Commissioners in charge of the Districts to ensure that there is total compliance of the order passed by us. They are directed to submit a report within four weeks to the concerned Chief Secretaries or the Administrators of the Union

facts disclosed, if true, would be a serious act of environmental degradation.

¹⁵ The news item published in 'The Times of India', Ahemdabad Edition, dated May 2, 2006 to the effect that 1200 temples and 260 Islamic shrines had encroached on public space, the High Court of Gujarat at Ahmedabad

Territories who in turn will send a report to this Court within eight weeks from the date of judgement.

More recently in the Honourable Supreme Court of India gave a historic judgement paving the way for protection of the commons across the country on 28th January 2011. This came in connection to the hearing on the Civil Appeal No. 1132/2011 @SLP(C) No. 3109/2011, Jagpal Singh & Ors. .. Appellant (s)-versus- State of Punjab & Ors. .. Respondent (s). The Supreme Court noted that

'4. The protection of commons rights of the villagers were so zealously protected that some legislation expressly mentioned that even the vesting of the property with the State did not mean that the common rights of villagers were lost by such vesting.'

This is essentially the principle of “public trust doctrine” as mentioned above in the judgement M.C. Mehta v Kamal Nath and others. The court taking clue from the case observed that similar encroachments of common lands are being taken up across the country and therefore directed that:

22. Before parting with this case we give directions to all the State Governments in the country that they should prepare schemes for eviction of illegal/unauthorized occupants of Gram Sabha/Gram Panchayat/Poramboke/Shamlat land and these must be restored to the Gram Sabha/Gram Panchayat for the common use of villagers of the village. For this purpose the Chief Secretaries of all State Governments/Union Territories in India are directed to do the needful, taking the help of other senior officers of the Governments. The said scheme should provide for the speedy eviction of such illegal occupant, after giving him a show cause notice and a brief hearing. Long duration of such illegal occupation or huge expenditure in making constructions thereon or political connections must not be treated as a justification for condoning this illegal act or for regularizing the illegal possession. Regularization should only be permitted in exceptional cases e.g. where lease has been granted under some Government notification to landless labourers or members of Scheduled Castes/Scheduled Tribes, or where there is already a school, dispensary or other public utility on the land.

This judgement has triggered many cases at the High Courts taking reference from the above case to hand over the encroached lands back to the village or panchayats for better management of such resources. This has forced the States into initiating steps for removal of encroachments and

making efforts for the protection of common lands across all states as they initiated steps for responding to the Apex Court. States like Rajasthan has initiated a process of preparing the Policy on Commons with programmatic action on restoring the grazing lands. Other States too have indicated the steps to the Court and similar actions are expected from few more states.

Conclusion

In this paper, through the historical analysis of the policy changes related to wastelands and later the parallel discourse around forests and wastelands, an attempt to highlight the disconnect between the perspective in which the policies around wastelands evolved and the use that such lands were put into has been made. The peasant struggle and movements through the history has attempted to bring into focus their needs and recognition of the wastelands as their livelihood resource. In the post Independence period, the vesting of all uncultivated lands with the State using the principle of Eminent Domain has undone the rights of access and use that the communities enjoyed under the erstwhile princely states and the estates. While, it was expected that these lands would be managed as public good through the principle of Public Trust Doctrine, these lands began to be treated as government property rather than the lands held in trust. The judiciary also at various point of time has been reminding the Principle of Public Trust to the State, a policy in this regard is awaited. The intent of framing the draft Policy on Common Property Resource Lands expressed in 2001 by the Government of India needs to be taken up.

The analysis of the policy changes around forests (carved out of the wastelands in 1860s) suggests a definite move towards recognizing community dependence and the need for involving communities in the conservation of these lands be it through nesting the Joint Forest Management Committees within the Panchayats or the recognition of the Community Forest rights under the Forest Rights Act 2006. The Supreme Court Order is a call to the policy makers to recognize the dependence of communities on the wastelands, and initiate a process of communitization of these wastelands. The Approach Paper to the 12th Five Year Plan envisages the formulation of the Model Commons Bill, and we can hope a long debate around this topic amidst the Government considering such lands as its land bank for industrialization and a populist agenda of land distribution for the vote bank.

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