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"Environmental Justice in Rural South Asia: Applying Lessons Learned from the U.S. in Fighting for Indigenous Communities' Right and Access to Common Resources"

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Introduction

The Kathmandu Declaration of 2004 set out bold goals and declarations on the issue of environmental justice in a South Asia context.[2] Drafted and adopted by a body of judges from the Supreme and High Courts of Bangladesh, India, Pakistan, Nepal and Sri Lanka, the Declaration recognizes the interlink between environmental issues, poverty and the rights of local communities.[3] Within the declaration, there is an explicit statement recognizing the exploitation of biodiversity and the need to curtail such measures.[4] Implicit within the recognition of the importance of biodiversity is the role local communities play in preserving and sustainable use of biodiversity.

With respect to natural resources, communities play more of a role than just preserving and sustaining biodiversity. Community ownership and control over common resources has many recognized advantages.[5] For instance, community ownership results in management of resources by a group more familiar with the resources than a regulatory entity.[6] Local resource users can then establish resource use limits based on a more intimate "local knowledge" of the resource.[7]

However, communities are increasingly facing difficulties managing and owning property and resources. State governments and private interests have stepped in to claim ownership over community lands and resources. The result is that many local and indigenous communities struggle to maintain their livelihoods. This struggle is exacerbated by the fact that many local and indigenous communities heavily depend on natural resources for their livelihoods.

The struggle facing local and indigenous communities is an example of a fight for environmental justice. Environmental justice focuses on eradicating the disproportionate environmental burden marginalised people are forced to bear. By restricting access and ownership of natural resources, local and indigenous communities shoulder a greater environmental burden that other communities due to their heavy reliance on natural resource use and access.

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[2] See Kathmandu Declaration
[3] See id, section
[4] see id, section
[5] See Hsu p. 844-845.
[6] See id at 844.
[7] See id.

There are also elements of environmental justice struggles within local and indigenous communities. Marginalised individuals within a community also face a struggle for environmental justice and often either do not receive the benefits of natural resource access and use or face more environmental harms than other members of the community.

This paper explores the environmental justice struggles of communities facing an outside force and intra-community struggles for environmental justice. The first section details the evolution of environmental justice and its beginnings in the U.S. The discussion then moves to the struggle for environmental justice that faces local and indigenous communities when their ability to access and use natural resources is taken by an outside source. The third section looks at the intra-community struggles for environmental justice and the difficulties facing marginalised individuals within a community. The final section aims to take lessons learned from the example of the U.S. and apply them to the natural resource use and access case of South Asia.

The Beginning of Environmental Justice: A Fight Against Environmental Racism

The environmental justice movement in the U.S. arose to fight the inequality of environmental burdens that faces communities of colour. This movement is distinctive because it looks at cases of environmental harm not just as a purely environmental concern, but also as a civil rights issue. In particular, below, environmental justice advocates often use civil rights law when fighting environmental battles.

For some time, the fact that people of colour lived in some of the most severely polluted environments was being ignored.[8] The phrase "environmental injustice" defines the situation where people of colour are forced, through their lack of access to decision making and policy making processes, to live with a disproportionate share of environmental harms.[9]

The idea of environmental justice encompasses the impact of culture, race, gender, age, class, and power relations on issues ranging from health-related agricultural issues to inner-city toxic contamination of children.[10] It recognises the fact that clean air and water and non-toxic living conditions must be viewed as basic civil rights, not just environmental concerns, which are no less important than freedom of speech and the freedom to vote.[11] The environmental justice movement is meant to unite environmentalism and social justice by challenging the business-as-usual environmentalism that is generally practised by the more privileged wildlife and conservation oriented groups.[12]

Historically, the mainstream environmental movement in the United States revolved around the causes of preservation of nature, resource management, and pollution

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[8] *See* Alan H. McGowan, *Environmental Justice for All*, ENVIRONMENT, vol. 45:5, 1 (June 2003).
[9] *See* Agyeman, *supra* note 493.
[10] *See* Rosemarie Russo, *Unheard Voices: Environmental Equity*, ELECTRONIC GREEN JOURNAL, (Dec 2003).
[11] *See* Hilda L. Solis, *Environmental Justice: An Unalienable Right for All*, HUMAN RIGHTS, 5 (Fall 2003).
[12] *See* Russo, *supra* note 498.

abatement.[13] This mainstream movement was primarily supported by white middle to upper middle class members of society.[14] Even though environmental concerns cut across racial and class lines, the traditional activist in the mainstream environmental movement came from a background of above-average education, greater access to economic resources, and a greater sense of personal power.[15]As a result, expanding the environmental agenda of mainstream groups to include the idea of race and class as factors of environmental protection has been a slow process.

Moreover, these mainstream environmental groups were ill-equipped to deal with the environmental, economic, and social concerns of communities of colour.[16] They struggled with the impact terms like "environmental racism" could have on their mainly white middle to upper middle class members. The potential for alienating the majority of their members was great, especially considering the environmental justice movement heavily focused on the impacts felt by communities of colour and not on the traditional ideas of conservation and resource protection.

They also had a misconception about the level of interest communities of colour had in environmental issues because when communities of colour struggle for environmental rights, they are rooted in a wider struggle that includes community, labour, and human rights issues.[17] Because the focus was not purely on environmental rights, communities of colour were not thought of as "environmentalists" in the traditional sense.

This changed in the late 1980's when the multiracial environmental justice movement emerged.[18] At this time, communities of colour began to organise around environmental issues at an unprecedented rate. In 1987, a report by the United Church of Christ's Commission for Racial Justice entitled, "Toxic Wastes and Race in the United States," brought the idea of environmental racism into the mainstream environmental movement.[19] The Commission found that, by far, race was the most prominent factor in the siting of commercial hazardous waste landfills.[20] This report started government officials, academicians, and grassroots activists talking about environmental problems that disproportionately affected communities of colour, marking the start of the environmental justice movement carving out its own niche within the mainstream environmental movement.[21]

This sub-movement has two key distinctions from the traditional environmental movement. One, it is more racially diverse and two, it is more ideologically

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[13] *See* Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*, in Robert D. Bullard, (ed.), CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS, 22 (1993).
[14] *See id*.
[15] *See id.*
[16] *See id.*
[17] *See* Charles Lee, *Beyond Toxic Wastes and Race*, in CONFRONTING ENVIRONMENTAL RACISM *supra* note 502, at 50.
[18] *See* Dorceta Taylor, *Environmentalism and the Politics of Inclusion*, in CONFRONTING ENVIRONMENTAL RACISM *supra* note 502, at 53.
[19] *See* Jeff Chang, Lucia Hwang, *It's a Survival Issue: The Environmental Justice Movement Faces the New Century*, available at <http://www.arc.org/C_Lines/CLArchive/story3_2_03.html> (visited 27 Aug 2003).
[20] *See* Bullard, *supra* note 502, at 42.
[21] *See id.*

inclusive, integrating both social and ecological concerns and paying particular attention to questions of distributive justice, community empowerment, and democratic accountability.[22] The ideological inclusivity allowed many groups to fall under the umbrella of environmental justice, ranging from grassroots activists well versed in civil disobedience to groups with little previous knowledge of environmental activism or political activism but compelled to take action to fight environmental injustice.[23]

The new group of activists has a distinctive approach. Instead of a purely legal strategy where the focus of the movement is to engage the other side in legal battles, environmental justice groups look to increase their community's ability to effectively participate in the decision-making process. The legal aspect of the movement is just one part of a broader movement focused on changing the way decisions are made. Besides the desire to change the decision-making process, environmental justice advocates are faced with a stark reality. Even though they draw from both substantive environmental laws and civil rights law, there are a limited number of legal tools available for their use. The U.S. courts have effectively blocked the ability of advocates to use civil rights law in fighting environmental battles.

The eroding of civil rights law affects the ability of the environmental justice movement to frame environmental burdens as a form of racial or class discrimination. The use of civil rights law is important because, as stated above, the recognition that hazardous waste and polluting industries are located based on racial concerns is an important aspect of the movement.[24] The use of civil rights law would validate this ideal by indicating that the decisions were made with the intent to discriminate against a community of colour in violation of the community's right to be free of race-based discrimination.[25]

There are, however, substantive environmental laws that can be used to fight the purely environmental aspect of the community's struggle. While the social impact may not be as heavy as using civil rights law, the substantive statutes can result in revoking of operating permits or forcing the relocation of polluting industries.

The environmental justice movement in the U.S. highlights two important issues: movement inclusivity and diversity of tools. The more groups and members that can be included in a social movement, especially one as far-reaching as environmental justice, the more political power and energy the movement can attain.

Additionally, diversifying tools, both legal and community mobilisation and empowerment tools, can lead to greater success. Relying exclusively on the legal system, for instance, would result in limited movement success. This is particularly true in the case of environmental justice, as environmental justice aims to shift power from those that have it to those that don't by removing environmental burdens and allowing access and use of resources.

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[22] *See* Taylor, *supra* note 507, at 52.
[23] *See id.* at 53.
[24] *See* Bullard, *supra* note 502.
[25] *See* Cole, *supra* note 96.

The next section positions the environmental justice discourse in a South Asian context. In South Asia, the fundamental idea of environmental justice remains the same. Marginalised communities still face a disproportionate environmental burden. However, in South Asia, the context is not urban poor and marginalised, but rural poor and marginalised. What constitutes an environmental burden differs in the rural context. The focus is not exclusively on pollution, but rather the use and ownership of natural resources. The next section explores this distinction.

Chipping Away at Local Communities Access and Ownership of Natural Resources

The ability to own and access natural resources is a continual struggle in South Asia. The lack of community property ownership schemes is a well documented phenomenon. In some cases, the state simply does not recognize the existence of local rights that dictate the uses that have been in place for generations.[26] Land ownership is assigned instead to the government or to a private enterprise.[27] In other cases, the customary laws and norms are recognized formally but ignored in practice.[28]

In the Chittagong Hill Tracts (CHT) area of Bangladesh, for example, land acquisition and access is a very contentious issue. The CHT is different from the rest of Bangladesh both geographically and culturally. The indigenous populations of the CHT are not Bengali and instead are thought to be descended from Burma or Thailand. Geographically, the CHT is very hilly, as opposed to the plains of the rest of Bangladesh.

Previous to the British colonizing India, the CHT was completely ruled autonomously. Even once the British had annexed the CHT, it was treated as separate from Bengal and had its own operating rules and regulations. It wasn't until Pakistan took control of the CHT as part of East Bengal after partition that the CHT lost its autonomy.

After the loss of autonomy, the people of the CHT faced further difficulties when the government of the newly independent Bangladesh began a mass relocation program, taking Bengali settlers from the plains and giving them land in the CHT. The relocation program continues today and now, the CHT is only half populated with indigenous peoples. The remaining half is now Bengali resettlers.

Besides the strain of an increased population on the natural resources, the method by which the government re-assigned the land property rights was problematic. The government assumed that the land was free because there were no written documents that showed land ownership or rights.

However, while it was not explicitly written, there was a sophisticated customary system of land rights and ownership. The indigenous populations had specific rules and regulations for land transfer and use. However, as per the definition of customary law, the rules and regulations were not written.

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[26] see Breckenridge p. 752
[27] see id.
[28] see id.

The case of the CHT is a classic example of the struggle for environmental justice. The indigenous peoples of the CHT are a very marginalised community. As stated above, marginalization can occur as a result of man factors. Here, the indigenous groups of the CHT are marginalised because they are a) ethnically different from the mainstream group of Bengalis, b) the language they speak is different from the majority language, c) they do not practice Islam, unlike the majority of Bangladesh, and most strikingly, d) they do not have anywhere near the same political power as the majority.

They also face a disproportionate environmental burden. For one, they heavily rely on access to and use of land for their livelihoods. Removing access or ownership of land places a great burden on the indigenous communities. Secondly, their tradition of following customary law results in the stripping of land rights by the government, which follows a formal law regime.

The avenues for redress that are available to the indigenous people are limited due to their low level of political power. Public interest litigation writ petitions can be filed with the courts to draw attention to the situation in the CHT. However, the court seems to be unsympathetic to the case of the indigenous tribes of the CHT. The focus must then not be on the eventual outcome of the litigation, but the ways in which the litigation can be used to mobilize communities and gather international support to pressure the government.

The next section continues the discussion of environmental justice in South Asia. The focus, however, shifts from marginalisation from outside communities to marginalisation within a community. The discussion also turns to the difficulties in achieving environmental justice that intra-community marginalised people face.

Marginalised From Within: Intra-Communities Struggle for Environmental Justice

Marginalization does not occur only between communities. Intra-community marginalization can occur in even the smallest of communities, particularly when there are community owned resources. Wealthy and influential villagers in control of allegedly democratic forest councils, for example, can use state resource laws to their personal benefit and to the detriment of the poorer and powerless resource users.[29]

Marginalised and poor people are usually neglected during the planning and operational plan preparation for forest products.[30] This results in the undermining of their role and excludes them getting a fair share of the forest products.[31] Some households belonging to lower income groups feel disadvantaged by community ownership schemes because they work an equal amount as other households but do not see the same gain as others.

Marginalization within a community can occur on the same grounds as marginalization by an outside community. Caste, culture, religion, and gender are all bases for intra-community marginalization. Within a community, those that are marginalised can face an extra environmental burden, even by something as basic as

[29] see Andersen (1995)
[30] see adhikari p. 6
[31] see id.

distance to water sources. Those living farther away from the water source must work and walk farther to access the water than those living closer to the source.

The role that customary law plays in regulating the community poses a barrier to accessing environmental justice for marginalised segments of the community. Customary law evolves through the accepted practices and customs of the community. These practices and customs are accepted only after years of existence. Changes to these ideas, as a result, also take years. Attitudinal changes towards issues of caste and gender, for instance, will only be reflected in the customary laws after years of practice.

In addition, as customary law is unwritten, the interpretation and application of the law is completely subjective. The one approached to resolve the dispute will dictate the terms and conditions of the customary practice. This places marginalised communities at a disadvantage as they cannot challenge the interpretation and application of the customary law. The decision also cannot be challenged at a higher level, as customary cases cannot be heard in formal legal institutions.

Conclusion

The lessons that can be taken from the example of environmental justice in the U.S. are more applicable to the situation where the community as a whole is fighting together against an outside force. In this case, using diverse tools will help motivate community members and increase community involvement in the struggle. Additionally, legal redress can come from formal legal institutions. Moreover, the marginalisation and environmental burden are seen as a uniform issue facing the community as a whole.

Intra-community struggle, however, raises much more difficult issues. For one, the use and prevalence of customary law means that changes in attitude and rights will be slow. Because it is an intra-community issue, formal legal institutions cannot participate in dispute resolution. Further, the community affected will be divided and fighting within itself.

Perhaps the most relevant lesson that can be learned from the U.S. example is the exercise of looking at what are traditional issues and problems with a different focus. In the U.S., the fact that communities of colour were facing a disproportionate environmental burden was also seen as a strictly environmental problem. However, the environmental justice advocates began to use civil rights law to fight the environmental burden and thrust the issue into the civil rights discourse.

Likewise, the struggle to access and use natural resources should look to use other available tools. Framing the ability to access and use natural resources can be introduced into the human rights discourse as an issue of the fundamental right to life. Doing so will avail more tools for advocates use. Additionally, using the human rights discourse can force local communities to acknowledge and take step to eradicate intra-community marginalisation.