SUSTAINABILITY OF RIGHTS AFTER GLOBALISATION

Edited by
Sabyasachi Basu Ray Chaudhury | Ishita Dey

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This publication is an outcome of the research programme on 'Globalisation and Sustainability of Rights' conducted by the Calcutta Research Group. The present body of work is a result of a one-and-a-half year long research and dialogue on various concerns of globalisation and its interface with rights. This work builds and expands on our previous work on rights and globalisation, where the main objective was to engage with the notions of 'justice', 'rights', 'welfare', 'vulnerabilities' and 'marginalisation' in the contemporary globalising time, thereby linking international norms to the issue of dignity and justice in our lives. The present volume, through a combination of microhistories, legal analyses and policy critiques, examines the ways in which the process of negotiating rights has undergone a change in recent times.

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Sabyasachi Basu Ray Chaudhury
Ishita Dey

Introduction

Ishita Dey

The present volume examines the interface between globalisation and rights, and provides a new way to understand the constitution of 'rights' through various microhistories drawn from the field of environmental rights, law, information and labour studies in India. While the present body of work draws upon the existing studies on 'globalisation', particularly its political impact, the main aim of this volume, however, is to examine the way in which the question of rights has been reconfigured in a post-colonial democracy, such as India, in face of the particular dynamics of power emanating from a nexus of political and economic institutions caught in the web of globalisation, with some of them deeply implicated in the latter.

Studies of globalisation have indicated the interdependence of market forces, the state and neo-liberal economic policies, with their adverse effect on people's livelihoods. Erosion of rights and continuous marginalisation of sections of population—be it the indigenous groups or other sections—are also the standard themes in these studies. The gap that exists in these works is in the form of a lack of appreciation of the relation and interface between these two different ideas, which have been customarily treated as two separate entities. This body of work brings together the concerns and issues from studies on 'globalisation' and those on 'human rights' in order to examine how the rights language has been re-negotiated in the past 20 years.

Limits of Globalisation: Scenario of Edges

Mobility of capital, resources, subjects, images and ideologies has been the key to understand the social and economic processes of globalisation that have produced interconnectedness between different spaces and time. According to J.X. Inda and R. Rosaldo (2002) globalisation 'is a world of motion where capital traverses frontiers almost effortlessly drawing more and more places into its dense networks of financial interconnections'. They also argue that there are limits to mobility and the very processes that produce movement and linkages also promote immobility, marginality and exclusion. One of the concerns that emanates from this is that the market forces are destroying community and social solidarity. Alan Scott in his introduction to the book *The Limits of Globalisation: Cases and Arguments* begins with two interesting extracts from two different articles that appeared in *Guardian* on 4 January 1994. In the first extract, noted political theorist John Gray points to 'the rhetoric of globalisation' which reduces the scope of the political life to management of market institutions. In the second extract, Hutton draws from Karl Polyani to call for 'social democratic planning as a means of holding the destructive force of the market in check before it is met by some much more desperate political action' (Scott 1997: 2). Scott argues that these articles call for a renewal of politics that can at least resist the subordination of the political and social to the economic forces.

The context of globalisation can be read from various vantage points and the issues that have been addressed under the ambit of globalisation in the recent anthologies are a testimony to that. The idea of 'free' market and its control and impact on our socio-economic cultural life has been documented. Each microhistory tells a different story and the present volume of essays goes a step further to show what does rights mean in the present Indian scenario. Do we read the scenario of edges, produced by contradiction of economic interest and people's rights, as post 1990 syndrome with the opening of markets and encouragement of free trade?

In the postscript, Ranabir Samaddar illustrates that the Indian scenario is marked by scenario of edges in three dominant areas: the 'pure' economic scenario, the political economy scenario and the present 'economy' of politics. What we see here is that the

market forces have been responsible for certain social political changes and there is a need to read the connections, ruptures in these interconnections to understand the limits of globalisation. Drawing from G. Balachandran and Sanjay Subrahmanyam (2005), we should read the process of globalisation in the context of the 'conjecture, and the institutions—both internal and external—that underpin the market today'. There is a need to look into the interface of globalisation and people's movements to look into the reframing of rights as a consequence of 'limits of mobility'.

Globalisation is understood as ambivalent dynamics (bringing both possibilities and challenges in the socio-economic realm) and it encompasses global processes that increase interconnectedness between peoples and countries, and intensify global trade in products between them. In this context the neo-liberal model of globalisation promoting the right of free trade and capital has a basic clash with the tenets of universal human rights. Thus, there is a constant tension between the 'social' yearning for democratic values and 'economic' competition for unhindered profit, trade and movement of capital. Studies on globalisation have addressed this tension, whereas a gap clearly exists in the available literature revealing another aspect of globalisation, namely that in itself it is a rights conflict between the different interests of various actors in direct confrontation. These actors are *(a)* the nation states, *(b)* the international institutions (UN, WTO, World Bank, IMF, etc.), *(c)* the MNCs, and *(d)* the affected population groups in various countries, in this case, India. Nation states have to assert their right to retain their sovereignty. International institutions clamour for the right to global governance. Multinational corporations claim the right of free trade and commerce. Affected population groups demand that basic human rights be achieved and sustained.

It is against this backdrop and context that we need to understand the way popular struggles feature in the contentious framework of rights and rights-bearing actors. The rights question has assumed significance in such a perspective; and it differs significantly from the traditional Western concept dominated human rights scenario. In the post-colonial context the rights discourse is a part of the claim making dynamics in a democracy; it expands democratic tolerance, stresses the preservation of popular gains in face of globalisation and emphasises socio-economic rights in the same measure as civil and political rights.

In this 'glocal' (global plus local) paradigm local institutions are portrayed in the 'state' policies and 'protective' legislations as self-sufficient, for instance, 'The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (hereafter referred as FRA)', passed on December 18, 2006 and notified into force on December 31, 2007. Legislations like Forest Rights Act (FRA) are cited as recognition of people's rights and people's movements. The interface between the people's struggle and state in the age of globalisation has been a two-way process. The concern here is that even after such historic legislations (such as the FRA) for most of the movements the agency to access to 'rights' is determined or influenced by a lot of external factors promoted by globalisation. For instance, in case of forest rights, the debate is now between conservation of natural resources, management of resources and forest management, where the discourses are influenced by powerful external elements. The studies here indicate strengthening of local institutions and governance of rights by local population groups still seem a farfetched dream.

In other words, globalisation has produced various paradigms (governmental, political, neo-liberal, popular-democratic, 'ethnic', etc.) of rights articulation and rights entitlement. The rights based movements have moved at times from local to global and the various world social forums or social networks of movements across the world provide an alternative space of dialogue and future action to these movements. The main agenda of these movements is twofold: first to strengthen local institutions and second to bring in state accountability through judicial activism. On the other hand, we have also witnessed over the past few years as in India an overflow of 'policy' approach to mitigate the demands of the social movements and find a middle path to negotiate the demands from below. For instance, both the Forest Rights Act and the Right to Information Act reflect the post-colonial nation state's attempt to negotiate the rights of the people in the framework of governance and governmentality. Thus, while this is true that the rights agenda has put its stamp on governmental policies and actions, the same governance of the post-colonial nation state has been driven by the 'global' economic agenda, and has been prey to structural adjustment programmes, and programmes like those of development of infrastructure and dams at the cost of removal of government

support mechanism in terms of subsidies, loans, assistance prices and other such policies, which had strengthened the agriculture sector in past. In this post-globalisation milieu, land is seen not as something required for meeting the food needs of population, but as real estate—meant for development of Special Economic Zones (SEZs), creating high-class infrastructure, multi-storied housing projects, export-based units—while depriving thousands of the only available source of income or sustenance. In such cases, the state has used the legislative avenue to curtail people's rights, promote special measures to create SEZs; where the labour laws of the land can be put to rest.

This 'scenario of the edges' opens up crucial questions, which the present volume of research papers (on themes such as forest rights, right to information and labour rights within SEZ and of the internal migrant workers, with focus on women, dalits, indigenous population and the vast informal sector) seeks to address. Collectively they address the following issues and concerns: What is the legal shape of rights? How does democracy reconcile competing claims? How can rights be sustained in face of globalisation? What is the nature of the erosion of rights we are witnessing? What is meant by 'sustainability'? And, finally, what is the nature of justice emerging from this complex situation?

Reframing Rights and Popular Struggles

This publication is an outcome of the Indian Council of Social Science Research (ICSSR) supported research programme 'Globalisation and Sustainability of Rights'. The research papers from three different areas of popular struggles in India in the areas of *(a)* environmental justice, *(b)* law and right to information and *(c)* labour rights—all in the context of globalisation—demonstrate the above mentioned scenario. They do this through the studies of people's negotiations with the 'liberal' rights discourse, and look into the important question of how the notion and the conception of 'rights' have undergone a change. The research papers not only address how the re-conceptualisation of rights has taken place in current time, but also whether this negotiation has brought about a change in the relevant institutional profiles.

Section I: Environmental Justice and Rights

One of the main concerns of the popular struggles against globalisation occupying centre stage in the recent times has been against the efforts of various forces towards privatisation and erosion of the hold of local communities over common property resources. This tension has been reflected in debates round issues of environmental justice, control over resource, resource management and people's livelihood. The proposed section will contribute to that debate. Through two studies respectively on the Forest Rights Act and the 'commons' in the Jadugoda, where uranium mining has had an impact on the indigenous people there, this section will reflect on the question of sustainability of rights.

Suha Priyadarshini Chakravorty in her essay on 'How Equal Is Common? Common Property Resources and Local Institutions' moves beyond the much talked about nature, content and context of common 'property' to understand the notion of the 'common' and 'commons' through a study of the 'common environment', a form of 'common property', through a detailed study of Jadugoda uranium radiation crisis and associated risks that have affected and continue to affect a large segment of the tribal populace of the region. Through a detailed study of the functionality of local institutions in and around Jadugoda region, namely Tilai, Tand, Bhatin and Digri, Suha tries to examine the metamorphosis that has taken place in people's claim making processes in the present scenario by drawing a comparison with past mechanisms of access, control and functioning. She examines how the socio-cultural beliefs and practices of the adivasis with regard to 'common property' and the notion of preserving 'the common' and the role of the local institutions like Gram Panchayat and JOAR (Jharkhandi Organisation Against Radiation) in people's day-to-day lives. In her analysis of JOAR, Suha reveals how the articulation of people's rights, in this case protest against Uranium Corporation of India Limited (UCIL), has been stamped by UCIL as anti-national. The UCIL has been responsible singularly for the major displacements that have taken place in the region without having given the displaced the minimum resettlement/rehabilitation compensation for a long period of time. This study reveals how the local institutions struggle to re- negotiate 'rights' through their movements against UCIL in Jadugoda and try to bring in the larger

issues of landlessness, exploitation of common property and natural and environmental resources.

Madhuresh Kumar in his chapter on 'Forest Rights Act and Polemics of Correcting Historical Injustices' makes an attempt to study the antecedents of the Act, constitutional provisions for securing adivasi rights, hurdles in implementation of the Act, points for struggle and contention, and lastly, tries to analyse the potentials of this law to redress historical injustices. Madhuresh Kumar argues that one of the significant differences in case of FRA is that unlike other forest laws which are being governed or promulgated by the Ministry of Environment and Forests, this one is administered by Ministry of Tribal Affairs. This in itself marks a great shift and recognition of existence of tribals in forests and need for their welfare. Those advocating for this Act knew pretty well the opposition of forest departments to any such move and also from their experience of 1990, when Ministry issued six notifications for regularisation and settlement of various rights of forest dwelling communities. Since, the spirit of Forest Rights Act challenges the supremacy of the principal of eminent domain, as manifested in functioning of the forest department it also could not have been expected from the same agency to implement the legislation. However, the basic question still remains: can law deliver justice? In this case it becomes more poignant given that there are contradictions in the definition of rights as such. The Act promises to recognise rights over the resources which communities traditional claim to already have had. In their understanding forest department is an 'encroacher' on their property. This might not be true in all cases but it is most certainly true for the indigenous tribal groups.

Section II: Law and Information in a Globalising World

The post-colonial nation states have adopted various strategies to govern populations and law has been a crucial tool to manage, control, or conversely, empower the rights of the people. In this context, the ways in which law has been utilised to mediate the global economic, ecological agenda is crucial to understand the effectiveness of laws and legislations.

Ashok Agrwaal in the chapter on 'Globalisation and Justice: Fait Accompli or Choice' examines the nature of the 'rule of law' regime, which, is the lynch pin of the globalised world order. In modern times the superiority of law (and rule of law) has acquired a special edge and Ashok Agrwaal examines this through the unfolding of the rule of law regime against mining in Lanjigarh-Niyamgiri by Sterlite-Vedanta which shows how law is part of the globalised world order and yet contains the potential to identify the limits of that order. It is this tension that the struggle for rights produces and entails which is significant to the studies on globalisation and its interface with rights.

Sabyasachi Basu Ray Chaudhury in his chapter on 'Right to Information as a Means of Mass Persuasion' argues that India has been a democracy since her de-colonisation in 1947 except during the period of Emergency (1975–77). But, the bitter experiences of Emergency started creating awareness among the citizens that the mere form of democracy is not enough and its content is sometimes more important for empowering people. In that context, the enactment of Right to Information (RTI) reflects a substantial shift in the predominant view (among citizens and elites alike) of the state's role from trusted guardian to merely that of an agent of the people that requires careful monitoring of citizens. The governments so far preferred to withhold information on many occasions to cover up malfeasance or to protect themselves from political embarrassment. In this scenario, the citizens had to have the right to access that information in order to hold the government accountable for its actions. However, access to information is a relatively new norm. It is important so that the public can be effective advocates for its causes. Many would argue that, the civil society needs to know of threats and trends and understand the origins and consequences of these factors. The new opportunities of globalisation, like Right to Information Act, he argues, can become a means of mass persuasion provided these fresh legal mechanisms are taken seriously and implemented at different levels of governance.

Sibaji Pratim Basu in his chapter on 'Globalisation and Right to Information' examines the function and reach of Right to Information Act and says that the rights discourse in India attained its 'Human Rights' phase in this decade of transition (i.e. 1990s), which also marked the end of the 'cold war' and emergence of a new world order. This decade also witnessed a global rise in

enactment of right to information/freedom of information laws. He argues that globalisation has acted as a catalyst in right to information movements. In a time of declining/undermined national sovereignty, when the welfare/protectionist policy of the 'third world' states are shrinking day by day, the common/disadvantaged citizens are taking two courses action: *(a)* negotiating with the state by resorting to claim makings dynamics of right-based politics, or *(b)* resorting to armed movements that challenge the very sovereignty of the state. From the experience of last two decades it is now clear, the author argues, that at least in India, the state has badly failed to combat the second course of movement only through over-armed coercion or by patronising counter-insurgencies. Thus the possibilities of rights-based politics are gradually gaining ground. The RTI movement as well as the Act has indeed become a very powerful instrument in this direction.

Section III: Globalisation and Labouring Lives

Studies on global labour markets, flexibilisation of production process show how global spaces have produced newer division of labour and work categories. This shift as the two studies on internal migration and special economic zones indicate, the shrinking space for articulation of labour rights as the economies in the global world not only compete with each other but are also dependent on each other.

Swati Ghosh in her chapter on 'Labour Out-flow and Labour Rights' shows that in development policy discourse, there is a general consensus that circular or seasonal migration is a 'win–win' model of human mobility. Circular migrants maximise return and minimise cost for both sending and receiving economies. For receiving governments, circular migration is a way for importing low-skilled labour without having to incorporate them in the social fabric. For sending economies, they provide a regular source of remittance without permanent loss of skill/brain/care services. For the migrant worker, however, circular migration is a survival strategy when economic opportunities do not respond favourably at home. Her study is based on two migration streams of skilled labour that has gained momentum in the last 20 years, one in

Hooghly and the other in Howrah districts in West Bengal. The study includes interviews of 60 out-migrants, 36 in Domjur area of Howrah and 24 in Arambagh area of Hooghly districts. As evident from the study, the regular flow of migration from Domjur is linked to the gold jewel industry of Mumbai and the migration flow from Arambagh is directed to the embroidery and zari work in the garment industry of Delhi. Studies show that both the migration streams have been able to escape poverty without participating in the employment opportunities created in the rural economy through NREGP. Other case studies confirm the trend when they observe that in certain pockets of West Bengal, out-migration has emerged as a way of accumulating a useful lump sum, rather than simply a surviving strategy.

Ishita Dey in her chapter on 'Negotiating Rights: The Case of a Special Economic Zone' examines if 'rights' have acquired a new meaning in the context of SEZs as the Act carries a provision of ensuring the rights of developers, the SEZ authority, but nowhere mentions the rights of the people working in SEZ apart from issue of identity cards which implies control and surveillance. Her study is based on interviews with contract workers, management employees and union leaders inside and outside the Falta Special Economic Zone, West Bengal, a former export processing zone, to understand how the special economic zones have produced differentiated citizenship rights through 'techniques of state and governance for differential administration of localities in the interest of accumulation, and these techniques are made possible precisely because of globalisation within a national context'. The chapter gives an in-depth study of the functioning of the special economic zone with special reference to governance structure within the zone, production processes and work time, contractualisation of work, feminisation of work and the scope of democratic accountability within the act and its translation in the everyday life of a worker. Dey argues that contractualisation and feminisation of an unskilled workforce in the wake of globalisation produces contradictions of rights and claim-making processes in the SEZ, making it a successful experiment of neo-liberal mantra of cheap production to ensure economic growth.

Ranabir Samaddar in the concluding chapter on 'Rights after Globalisation' through a demonstration of the current scenario of edges produced by India's development policies unravels the

lessons we need to learn from India's experience to understand reframing of rights or claim-making processes. The regime of developmental democracy he argues needs to be looked from five specifics of technologies of governance. The specifics of rule are crucial to understand the regime of developmental democracy and prescribed forms of claim-making. The basic aim of technologies of governance is to integrate life with an efficient system of control over society. There is a need to revisit some of these specifics to understand 'the life controlling aids emerging out of the combination of development and democracy have produced in terms of new forms of power and new forms of subjugation'. With development, he argues that bio-power 'as a mode of power is strengthened, because developmental issues affect the society at the level of life; and democracy is the framework that forces development to reinforce bio-political issues'. Through the narrative of the ban on bar dancers in Mumbai, Maharashtra he illustrates the contested sites of claim-making where the female political subject emerges as resilient to the regime of developmental democracy with its own logic of rule.

Jean Drèze in his interview shares his experience of working with the National Advisory Council, his role as an economist and activist, in his work on food rights. The interview also focuses on the limitation of governmentalisation of rights, need for public action and the future of food rights.

Conclusion

In a nutshell, these studies woven together reveal how the entire rights language has been re-negotiated in the last 20 years and how a certain 'glocal' way of re-conceptualising rights have come into place. Second, the volume tracks the changes in the rights-related institutional profiles—changes that have much to do with popular struggle and legal enactments.

Section I

Environmental Justice and Rights

1

How Equal Is Common? Common Property Resources and Local Institutions

Suha Priyadarshini Chakravorty

Background

There have been numerous efforts in typifying the concepts of property and ownership in further crystallising the notions of 'rights' in terms of access and control over a resource that defines the 'acceptable' perimeter of political manoeuvres. The fallout has been widespread contestation in refining these very framings that have further contributed to the politicisation of the process of claim making and the augmentation of 'pendular politics'[1] circumscribing the economy. The Indian scenario is no exception, with such claim-making processes having had significant repercussions on the 'glocal' Indian economy, while having undergone a metamorphosis in structure and form themselves, due to the feedback of post-globalisation undercurrents.

While some hold that 'property' and 'ownership' are largely consequential to formed expressions of the relationship defined between humans and their natural environment (Bromley 1991), some define 'it' as a political relationship between individuals (Macpherson 1978), whereas, some others believe that it is 'the power' to control access and use of a resource that is defined in terms of Property Rights and Ownership (Waldron 1988). It is not the relationship of the people to the land that defines their social relations but rather the relationships between individuals

that determines rules and laws pertaining to property ownership (Bohannan and Bohannan 1968). Meanings of terms such as 'land' or 'property' are not uniform and 'different rights and obligations flow from differences' in types of resources (Benda-Beckman 2001: 53). The term 'property' has therefore remained a socio-economic construct whereby certain sections of people have 'framed' it according to their own distinctive perceptions of such sociopolitical and economic relations coupled sometimes with sheer political convenience.

The issue of Common Property Resource Management (CPRM) and the question of sustainability rights in a globalised economy entail critical cognition. The most common vignette of CPRM stems from the 1990 government circular that sought to involve local communities towards regenerating degraded forest cover that officially marked the launch of Joint Forest Management (JFM) of over 14 mha of land under 62,890 JFM groups as of December 2001 (Saigal 2001); however, the decade after had shown the inadequacies of JFM to bring about desired consequences due to its unilateral state-centric apparatus. The government had more often than not used the community-based natural resource management (henceforth referred to as CBNRM) as a euphemism to proliferate its quintessential brand of top-down bureaucracy. However, it is not the government alone that is to be held responsible. The way in which the politics of 'rights' in general has been played out with regard to CPRM and understanding the 'common', there needs to be an assessment of the very 'fulcrum of rights'[2] in understanding and further analysing what could constitute 'common'.

The chapter looks into the dialectics of economic and political 'framings' to understand the way in which 'common property' and the notion of 'commons' have been recognised in the government literature—laws and policies in India (at the national level) and in the state of Jharkhand (at the regional level) and developmental as well as regional literature (both written and oral). The basic objective of the study was to examine what impact, if any, has globalisation had on the rights discourse; the rights dissonance imminent in the issue of understanding and managing the 'common' due to the obvious positioned disparities (that are a consequence of a diversity of vested interests) and the manner in which these disparities could be effectively diminished if not altogether alleviated. The study had also explored the dynamics of livelihood vis-à-vis 'the common' in enunciating the quandary of 'rights'.

In the study I go beyond the much talked about nature, content and context of common 'property' in extending it to understand the notion of the 'common' and 'commons' through a study of the 'common environment' that seems to me to be an extension of 'common property'. As a frame for the field study, the Jadugoda region (in the Indian state of Jharkhand) was consciously chosen as a reference point towards studying the 'environment' of the region in general and in addressing critical anxieties that thwart the lives of the people in it. It is in this context that an analysis of the uranium radiation crisis was made and associated risks at Jadugoda were discussed (that had affected and continues to affect a large segment of the tribal populace of the region).

Common Property Resources (CPRs): Understanding Associated Laws and Rights

It is approximated that nearly 12 per cent of the poor people's income in India is derived from CPRs, including community pastures, forests, wastelands, ponds, rivulets, rivers, their banks and beds (Jodha 1986, 1995). When writing about the decline of these CPRs, Jodha opines that the decline is not only representative of the degradation of a community asset but also leads to an 'erosion of survival options'. CPRs have been fundamental to a definite source of employment for a number of people and have also acted as an important means of subsistence during the lean seasons, especially in poverty-stricken rural areas. The significance of CPRs and the issue of interrelated rights on CPRs has been the 'hot cake' in recent studies of CPRs.

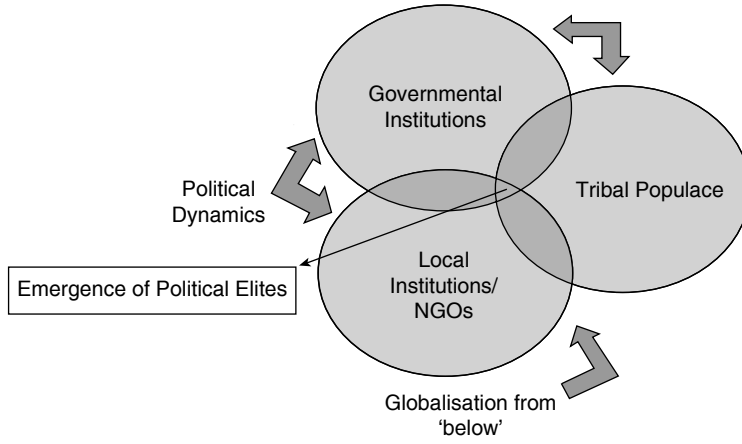
Chatrapati Singh (1986) in his understanding of the 'commons' maintains that there is a pressing concern to address and examine the legal status of resources, in particular to the ones pertaining to the 'rules of acquisition, utilisation and regeneration' that correlate to the varied livelihood options of the people in question. Any legal recognition of native or tribal land is significant for indigenous people since it creates space towards the recognition of their rights. The nature and content of the legal frameworks may vary depending on local contexts and on other historical and cultural factors, but the essential hypothesis is that indigenous communities

already have special rights over historically occupied land that they have used for an extended period of time. Thus, there is a very basic approach that identifies the tribal people with the question of land (Chaudhury 2003, Upadhya 2009, Vani 2003) and reiterates that indigenous people have 'original' or 'immemorial' rights to their lands and resources and that they have continued to lose 'these rights' after colonisation and increasingly with the formation of new nation states. This has obvious implications on the indigenous identity that has further accentuated tribal-land alienation coupled with the problems of environmental degradation, inability to access natural resources, etc. Parthasarathy (2003) and Jodha (1995) however mention in this regard that degradation and inability to access to the commons does not necessarily mean the loss of those very resources that people had access to, but also systematically affects other livelihood systems indirectly.[3]

Also, it is crucial to see that there remains 'a level of complimentarity between common property resources and private property resources' (Babu 1998: 2) where especially analysing the term 'common property' becomes a problematic exercise since it even includes resources which were conventionally regarded as private or even state property by law. The issue of limiting the margins of property rights (both in case of common and private) by law and the question of resource degradation (both common and privately owned) could result in a denial of 'customary rights' (for the ones who owned or had property rights) together with the refusal to negotiate for the 'transfer of rights'. Commercialisation imminent with simultaneous globalisation undercurrents also has had its impact on the issue of denial of rights and negotiation of certain resources, for instance, on the right to collect berries and fallen fruit and so on (Marx [1842] 1996). Commercialisation and subsequent changes in property laws have always gone hand-in-hand, and it is not merely individual landholders who could (and do) deny traditional rights but the state as well.

It is not an unknown fact that forests in India have been taken over by the state through legislation since time immemorial (even before independence) and with an accentuation of resource politics, globalisation and commercialisation, the process of neo-colonisation has only been further reiterated. The monopoly of the state and its paternalistic attitude has meant that even where access is possible, it is (more often than not) flawed in terms of exchanges. The contents of these processes have largely remained the same

Figure 1.1: Linkages and Zones of Political Manoeuvre



Source: Author's own.

over time; however, the political form of the dynamics has attained a 'new character' with the evolution of technology and the effective facilitation of public opinion formation and connectivity in terms of reach—a process which is better understood as 'globalisation from below'. See Figure 1.1.

The 'globalisation from below' has also affected the very interactions of 'rights' emerging out of the linkages and zones of governmental institutions, local institutions as well as the tribal populace in defining the shape of politics. Also, the political dynamics inherent in the interactions between the aforesaid three categories in the figure facilitating the emergence of 'political elites' determine the potency of 'rights' in terms of either their authority over the others or their ineptitude. The question of potency of rights, similarly, applies to the concept of 'common property' management where the aforesaid interplay between governmental institutions and local institutions, and the tribal populace determine the outcome of the political dynamics in terms of the political influence.

The very thought of dealing with common property is conceived of 'as a mechanism to fracture the exclusivity' attached to the idea of individual property 'ownership' (Chaudhary 2003) and the issue of rights enmeshed within it. Nonetheless, there are major problems that one needs to take into account when discussing about the 'rights'

associated with managing such 'commons'. Even in a relatively egalitarian society, where a group of individuals share the same piece of land and at the same time are either affiliated by choice or ascription to intra-groups on the basis of various pre-existing socio-cultural and/or economic stratifications, the idea of the 'common' does not reflect the true spirit of equality. Therefore, any assumption with regard to equal access, use and the rights to use and access remains largely dubious. Beck (1994: 187) has talked about the way in which there is use of private resources in the 'common'. To extend it further would mean to talk about the way in which there is appropriation of either 'parts' (mostly) or the 'whole' of the 'common' for private interests by the ones placed at a relatively convenient location in the heterogeneous hierarchy of social life.

Chaudhary (2003) maintains that the Indian government should have had extended the notion of property rights to the question of fundamental rights in ways to extend and include community-based property rights, if it were to be truly 'strategic' and concerned about social welfare, therefore, widening its interpretation to 'include' rather than 'exclude'. What further occurred as a result was a process of disenfranchisement of the natural resource-dependant disadvantaged, as they lost the right to demand the recognition of property rights for themselves and/or their communities. Alongside non-recognition of land resources, governments also contribute towards worsening environmental problems in terms of setting up industrial zones in areas that are primarily aboriginal in terms of demographics (McKean 2000). These reasons have been disconcerting enough to call for an analysis of the 'foundation of governmentality'[4] in further studying modes of operation of institutions (local institutions, including Gram Panchayats, local village communes, local NGOs as well the affairs of the state and the central government).

Customary Law and Its Significance in Globalising India

The history of customary rights mechanisms for CPRs dates back to pre-colonial times in India. Even in the colonial arrangements where there existed wholesale takeover of forest land, ownership

of the 'commons' were rested with the community (Damodaran 1991). It was the state interventions and legal shifts in post-colonial India that nonetheless tried to alter a country of diverse laws of land (Brara 2006) into a country of homogeneous laws as far as the questions of land and CPRs were concerned. The formal legal system which was founded on statutes as in cases of natural resource management practices, where 'old and new technologies' coupled with a shift in the 'rights' discourse and the authoritative legitimacy over natural resources in favour of the state, the legal regimes of local communities had lost much of its powers due to its state-centric approach. However, in the current legal configuration, customary law has been downgraded to a status that is subsidiary to statutory law (Vani 2003).

Similarly, as in the Anglo-Saxon context, statute, precedent and doctrine were the sources of law; the traditional Indian jurisprudence scenario gave primacy to dharma, royal order and custom as the three sources of law. Looking at them specifically would translate to *customs* as being purely social in content, while *dharma* as largely transcendental with *law* being 'what ought to be' (Lingat 1975: 177). Although they were all distinct and each had a specific authority for management, a fundamental balance was maintained between these sources. However, in the current legal framework, this balance is largely misconstrued if not largely absent. Moreover, the practices that stemmed from customs almost always entailed an understanding of the 'social' and the larger 'common good'.

Thus, customary practices of indigenous communities in using and utilising natural resources generally are often conducive to the conservation and sustainable development of their natural environment in ways of preservation of their own eco-social and cultural lives and livelihoods. These practices often include various forms of self-imposed restrictions on forest clearance, on hunting, taboos on harvesting particular species and protection of sacred land and groves. Customary practices, as long as they maintain social balance and preserve the environment together with offering a sustainable solution to indigenous modes of living, should be endorsed wherever relevant in thereby recognising and addressing legal pluralism in India.

Marx (1842 [1996]) holds that for customary rights to be eligible as legal rights, that is, 'customary right as a separate domain alongside legal right is therefore rational only where it exists alongside and

in addition to law, where custom is the anticipation of a legal right'. B.J. Krishnan (2000) maintains that when the court upholds a customary right, it attains the character of law, thereby becoming customary law. But there are certain criteria for the customary rights and practices to derive a legal status; for instance, the custom must be 'ancient, certain and reasonable' and in derogation of the general rules of law, be strictly interpreted. The Constitution of India treats customary law together with other branches of civil law. A custom or usage is proved to be in law in force under this article; however, when certain customs are not upheld as laws then it does not necessarily lose its bearing or applicability.

Marx had opined that 'all customary rights of the poor were based on the fact that certain forms of property were indeterminate in character for they were definitely private property but neither were they definitely common property, being a mixture of private and public rights' where he further talked about the twofold private right—of the owner and the non-owner. He further maintained:

> [I]f however every medieval form of right and therefore property also was in every respect hybrid, dualistic, split into two, and understanding rightly asserted this principle of unity in respect of this contradictory determination, it nevertheless overlooked that there exists objects of property which by their very nature, can never acquire the character of predetermined private property, objects which, by their elemental nature and their accidental mode of existence, belong to the sphere of occupation rights of that class which precisely because of these occupation rights, is excluded from all other property and which has the same position in civil society as these objects have in nature.

The understanding is that these rights are pivotal for the survival of certain communities which do not have many means of livelihood, and so it can be extraordinarily debilitating to take away these entitlements from such groups.

The conflation of 'custom' as an ethnological category with 'customary law', which is supposed to provide for flexibility and local variation, in the context of colonised people is significant for it often meant that local practices could be legitimated only by a colonial or anthropological authority. Cederlof (2008: 270) notes:

> [W]hile in legal terms custom represented negotiated law and thus had an inherent capacity to change in content and practice, in an ethnological perspective it carried fixed even static connotations by which the concept was made a constituent part of what was perceived as an organic whole of tribal society and culture.

The concept for customary law in general provides for the operation of 'local customs and usage' rather than inflexible adherence to the written law in particular. Local customs are supposed to be interpreted and validated by the courts, but this process is highly problematic because justice tends to be reverted to descriptions of tribal customs available in the colonial era texts as their primary sources of authority, instead of seeking direct testimony on local practices. According to the lawyers in Jharkhand, it is very difficult to win an argument about local customs in court on the sole basis of oral evidence of witnesses. In the courts as in the law, 'customs' thus become immutable and it is the same timeless notion of tribal culture that is appropriated by adivasi social movements (Upadhya 2008).

Customary legal regimes have provided both property and usufruct[5] rights as well as flexibility of operations being seen as the key aspect of indigenous regimes, especially the question of freedom for people to modify rules to respond to changed conditions in managing the 'commons' (however, with intricate detailing problems). These metamorphosed conditions include social, economic and environmental challenges that need to be taken into account on issues of management of the 'commons'. It is therefore not merely adequate to guarantee legal entitlements without transferring rights of ownership because people are not encouraged to implement customary rights and obligations in the absence of the aforesaid ownership rights. Das (2000) argues that rules and regulations of the state lead to inappropriate resource-use even in the absence of direct state appropriation but in conditions where other kinds of legal enforcement may have an effect on property rights, the situation worsens. By this he refers to the ways in which redrawing of village boundaries have had serious impacts on common village land and resources that further disturb customary modes of management of the 'commons'.

Agarwal and Ostrom (1999) in critiquing the participatory programmes have maintained that policies and practices with

reference to natural resources downplay the role of power relations in enriching the theories of property rights by further stressing the role of 'powers' (p. 74) in the transference of 'rights' over a set of specific action domain at different levels of social aggregation. It is thus a means by which the politics of rights are played out in terms of 'power' and positioned disparities. It is this therefore not sufficient to merely make a case for simple institutional analysis in enabling access for user communities, but in ensuring that the entire claim-making process is linked to the layered differences in the ruling regimes, i.e. levels of action, etc., thereby creating space for plural legal arrangements.

It could be seen that collective decisions in order to be effective at an operational level must have the sanction of the appropriate authority deriving from legitimate property rights at the appropriate level, which then takes the entire question out of the domain of the formal law into informal rules, norms and decision-making powers. As have been defined in the commons, property rights are capabilities in the sense that 'a property is an enforceable authority to undertake particular actions in a specific domain' (Agarwal and Ostrom 1999: 80). The issue of property rights then goes from one holding the right to alienate the property to one of managing a combination of multiple rights or claims and obligations arising from ownership of a property. This is where a legal system becomes exceptionally decisive in instating and managing rights and obligations in a just and equitable way. The ability to manage, use and benefit from commonly owned property then demonstrates 'levels of capabilities'; 'entitlements' and 'levels of power configurations'. If the users of CPRS merely possess *de facto*[6] user rights without rights to strategise rules of 'use' or effective monitoring practices, they are likely to be grossly eroded over time. Alternatively, *de jure*[7] rights without taking into account power configurations would have the same impact of inequality of access, open access and degradation of CPRs. The strength of customary rights therefore rests in strategically combining ownership rights with rights to manage and enforce rights and duties.

There is a definite need for retaining and developing pluralistic legal frameworks on issues of natural resource management, with specific reference to property rights, which does not however imply to merely offer supplementary legal rights or even provide legal status/sanctions to customary rights. Naive unsophisticated

measures towards accommodating customary rights in the legal system might distort the rights regimes in manners that affect the already disadvantaged. While recognising customary rights and non-constitutional legal and rights regimes, it is absolutely essential that customary property rights are not merely treated as fatalistic determinate sets of regulations and rules. Customary rights exist at the fulcrum of legal traditions that are themselves embedded in distinct institutional frameworks. Rights have meanings within, and are often enabling in the context of local laws, cultures, systems of production and exchange, patterns of social order and in terms of land use. Disequilibrium or conflicts, either in the rights regimes or the social and institutional frameworks, might and do end up being disempowering due to the politics of heterogeneous configurations.

Legal Histories: Jharkhand and the Issue of Mining

In many anthropological studies on indigenous people, it is commonly held that they are closely bound with land and forests and thereby, their very identity is shaped by those of the natural resources, but that one needs to go beyond and analyse whether the relationship is embedded in the political struggles as well as everyday lives of these people (Upadhya 2009). For him, land is not merely an economic resource but also a basis of community identity providing a material and symbolic substratum for sociocultural life. Struggles over land rights have been crucial for the politics and history of Jharkhand. However, unravelling the structure and nature of land rights is not as easy, given the complex socio cultural constitution of the region, the modes of colonial production and inscription of laws and 'customs' in governing access to land and the 'dominant ideology' of adivasi autonomy that underlies control over land.

The Chotanagpur Tenancy Agreement of 1908 (referred to as CNTA henceforth) was an imperative piece of legislation in that it at least was a first step towards recognising and attempting to uphold the right of the local communities over their land, forests and other resources and also other customary rights and practices of the tribes vis-à-vis the state, the landlords and the 'outsiders'. The most important provisions in the CNTA included the settlement of

khuntkatti[8] rights, restrictions on the transfer of tribal lands to non-tribals, recognition of the rights of cultivators to reclaim cultivable wasteland and recognition of the status of the village headman. CNTA could be viewed as a colonial mechanism for governance that embodied a strict, definite and an overtly simplistic model of 'indigenous' social structure and customs. Nonetheless, the model, both because of its roots in the law and its salience for adivasi political assertion, has come widely understood in Jharkhand as an authentic description of traditional tribal social organisation.

Since independence, a series of amendments have modified the CNTA and most of these changes are regarded as having successively weakened the protection given to adivasi in terms of their land rights. In the authentic version of Section 46 there was no provision for the 'sale' of land but in 1947 an amendment was passed to allow for the sale of land under certain conditions from ST to ST and SC to SC, while the sale of land to non-cultivators was also permitted. Amongst the most controversial, however, remains the recent change that was incorporated in 1996 which redefined 'public purpose' in Section 49 to allow for transfer of *raiyati* or *bhuinyari*[9] occupancy holdings for 'any industrial purpose' or for mining and for subsidiary purposes as decided by the state government and with the consent of the deputy commissioner with 'adequate compensation' (Upadhya 2009).

The revisional survey carried out in the Singbhum district between 1958 and 1965 provides an example of the process through which community lands have been thus appropriated by the state. Singbhum is one of the few districts in Jharkhand where a re-survey has been completed after independence. A settlement officer noted that the agitations with regard to settlement operations in the region was a reaction to the tribal 'apprehension that their community rights and specific privileges enjoyed by them both in terms of statues and as well as in terms of age-long customs would not be recorded' (Prasad 1970: 34). Nonetheless, common village lands, which were earlier recorded under the name of the local headmen, were recorded during the new survey as government lands. Although the Settlement Report clearly stated that the lands recorded under *anabad sarva sadharan* 'belonged to the inhabitants of a village as a whole or to a certain section to those inhabitants collectively', it is not clear whether these community rights were actually recorded as before, thereby prompting accentuated land alienation.

Land alienation can be defined as both the alienation of individual landholdings and means of livelihood coupled with a broader understanding of the loss of rights and access to common property and rural commons as well as their physical disappearance, including alienation through acquisition for 'public purpose'. Upadhya talks about the ways in which community rights over land were transformed while being in the corporate tenurial acts. The basic features of the system of landownership assumed by the CNTA included primacy given to the original settlers in *bhuinyari* and *mundari khuntkatti* villages, patrilineal rules of succession which excluded women from ownership but allowed usufructory rights over land, the notion that adivasi land was not transferable beyond the *khunt* or the *killi* (hence Section 46 of the CNTA restricts the transfer of land to the area within a single police station, which can be assumed to encompass the clan) (Sharan 2009). However, even this codified sense of community rights was under threat from two sources, in a condition where the second reinforced the first. In the first phase under the colonial influence, community rights were usurped by community leaders and it is this which got recorded in the reports. In the second phase, these leaders alienated the land to outsiders or it was expropriated by the state.

The Fifth Schedule of the Constitution[10] prohibits the transfer of tribal (adivasi) land rights to non-tribals in certain specified areas known as the Scheduled Areas, which is basically intended to protect the rights of the adivasis to their land, water and forests. Despite this, there have been several cases resulting in the alienation of adivasis in Scheduled Areas, particularly for mining and other extractive industries.

In September 1997, the Supreme Court of India passed a landmark judgement in a case filed by Samatha—an advocacy group for adivasi rights concerning the issue of mining in Scheduled Areas. Now known as the Samatha judgement, this decision has several provisions that mandate the protection of tribal lands, including the requirement that tribal lands in Scheduled Areas cannot be leased out to non-tribals or to private companies for mining/industrial operations and thereby reiterated the right of self-governance of adivasis. The Ministry of Mines, however, in a secret note to the committee of Secretaries proposed amendments to the Fifth Schedule for the removal of the prohibition and restrictions on

the transfer of land to non-adivasis for any agricultural operations including prospecting and mining (para 18).[11]

There has thus been an explosion of mining activities (in predominantly tribal zones) in many parts of India, especially in tribal areas, that has not escaped the state of Jharkhand. In spite of massive environmental impacts of mining operations that damage local natural assets to an extent that communities are no longer able to sustain themselves—threatening their survival, mining operations (including mining of hazardous elements like uranium) continue. The arrival of a mining company usually always has dire social and eco-cultural consequences for local communities including outright displacement. In some cases, communities are displaced as they seek refuge from the adverse effects of a mine, and sometimes accentuate their risks in cases when they choose to stay in the vicinity of the mines.

Mining today is at the heart of the development debate in Jharkhand. The state has vast mineral resources accounting for 37 per cent of the total mineral wealth of India combined. In official and bureaucratic discourses, media propaganda and educated urban middle-class circuits, increased investment in mining automatically translates into 'development'. The 2001 industrial policy was drafted soon after the state was formed, and focused on mining as a thrust area (George 2009). However, there has been a growing resistance to mining because mining leases ignore both the customary rights that villagers have over their commons as well as the protective tenurial laws that govern their management. People are often not informed that their land is to be acquired and when they do protest, their protest is either ignored or forcibly put down. Mining also raises several issues: severe environmental impacts, violation of labour laws, the exploitation of people, and the creation of enclave towns that promise modernity and development but exclude the majority of their inhabitants (Ballard and Banks 2003).

'At every stage in the history and practice of mining in Jharkhand, the law has played a critical role, whether in its presence or absence' (George 2009). Despite a plethora of laws governing the acquisition of land for mining, none of them is sensitive to the cost that the indigenous communities have to pay for the development of mines. Even where laws exist to monitor labour conditions in the mines or environmental rehabilitation post mining, the implementation of the laws is very poor and monitoring is virtually

absent. Additionally, law and order machinery is used by the state and companies to stifle the voices of people demanding their rights. It is a great irony that on the one hand the Indian Constitution is bound to protect the interests of the adivasis through the Fifth Schedule and Panchayats (Extension to Scheduled Areas) Act 1996 (PESA), and on the other hand it enables laws to take away their resources. Though these laws are against the alienation of adivasi land to non-tribals, they do not affect the largest chunk of land alienation, which involves lands given to industry and mining with the full support of state agencies.

This sector has huge potential for attracting large investments to create employment and raise resources. It would be the attempt on part of the state government to accelerate the granting of mining leases. In addition, the state government also provides certain relief to make mining activities easier, and encourages the participation of reputed private parties and multinationals, coupled with central and state agencies in these endeavours (Government of Jharkhand 2001).

There are three laws that are presently being used to acquire land for mining. They are the Land Acquisition Act 1894 (LAA) for acquiring land for public purpose; Coal Bearing Areas Act 1957 (CBAA), for the mining of coal; and Atomic Energy Act 1964 (AEA), for the mining of atomic minerals. The LAA stipulates that notifications for acquisition of land should be published in two regional newspapers, at least one of which should be in the local language, and also be put up at a public place in the area, besides being published in the official gazette. Under the CBAA, it is sufficient if the notification is published in the gazette. However, under both these Acts, the government is neither bound to publish full information about the land to be acquired at any stage nor communicate the same to the landowners. Under the AEA, individual notices should be given to all even before the initial explorations start. All these Acts provide for a certain frame in which affected landowners can raise objections. However, in actual practice the information about impending acquisition does not reach the affected parties in time for them to raise objections. The villagers do not read newspapers, leave alone gazettes (even in the extremely unlikely event that they are available). Detailed information about the acquisition should be available at specific offices for public scrutiny under all three Acts but this does not

happen either. In most cases, the affected only get to know of the acquisition after all the legal procedures are over, sometimes years later when the company is taking possession. Some activists feel that there is a conspiracy among bureaucrats and companies to withhold information on acquisition of land for mining from affected parties and often do not predict the future course of displacement involved in such processes. The laws operating are draconian since they all give the government absolute authority since it is non-justiceable and therefore difficult to challenge.

The last example of the subversion of protective law designed to ensure that land acquisition is fairly carried out is the way in which Environment Impact Assessment (EIA) is carried out. The EIA notification 1994 under the Environmental Protection Act (EPA) has made it mandatory for all projects above the size of 5 ha (later changed to 25 ha in 2001) should carry out an EIA study and hold an Environmental Public Hearing (EPH). The EPH is the only platform where local communities and environmental and social groups can voice their concerns. Communities and activists complain that EPHs are state managed and conducted in such a way that the affected people do not even get to know of them and even if they get to know they are prevented from speaking through the use of violent force. In the unlikely event of getting to speak, their objections do not find any place in the reports. All this is done with the tacit support and consent of the State Pollution Control Board (SPCB) members and district authorities.

There is a well-defined procedure for determining the amount of compensation for land that is acquired under the various acts, based on the market value of the land just before acquisition proceedings started. The actual and potential use of land is taken into account coupled with the value of trees, structures and standing crops. The AEA says that compensation has to be mutually agreeable. But none of these Acts have a provision for land-for-land compensation.

The Mines Act 1952 has specific provisions to ensure good working conditions, safety and health of mineworkers. In bigger mines, the compliance is better than in smaller ones, but only for their permanent workforce. The working conditions are bad in smaller mines. Section 25 of the Mines Act states that if a worker contracts an illness notified as a disease connected with mining operations, it is the duty of the owner or manager of the mine to inform the Chief Mines Inspector within a prescribed time period.

Stricken workers are entitled to get compensation under the Workmen's Compensation Act 1923. The diseases that have been notified include pneumoconiosis, cancer of the lung and cancer of the peritoneum (among uranium and asbestos miners).

Another example of gross violations of occupational health norms comes from the uranium mine at Jadugoda, in Singhbhum East. The Uranium Corporation of India Limited (UCIL), a public sector undertaking reporting directly to the Ministry of Atomic Energy, operates four mines there. Health studies carried out by Jharkhandi Organisation Against Radiation (JOAR) in villages adjoining mines from January to November 1996 showed a high incidence of congenital abnormalities or diseases, including Down's syndrome, spontaneous abortions, neonatal deaths, skin diseases including skin cancers, mental depression/lethargy among the villagers living in 10 villages closest to the mines and tailing ponds where the radioactive waste is dumped.

When JOAR confronted the UCIL management with these findings on the issue of radiation hazards to health, the management denied any such possibility. The UCIL is flouting many national and international safety regulations in its operations. International standards say that there should not be any habitation within 4 km of the mine or tailing ponds. In Jadugoda, there is a village at half km distance from the tailing pond. There is a regulation that the radioactive waste should always be below the water table. However, the waste in the region is mixed with water and pumped into the tailing pond, but in summer this water dries up leaving the fine dust to be blown into all the neighbouring villages. The waste water from the uranium milling plant flows into the neighbouring villages. The rock waste from the mine is used as building material for roads and villagers use it for building houses. The underground mine workers are not provided any safety gear except for gloves and helmets. It is a matter of contention though, whether there is any equipment that can give protection against radioactivity. Workers have to undergo routine medical examinations once in every six months. But the results of these tests are never revealed to them as they come under the purview of the Official Secrecy Act! Many workers suffer from chronic illnesses, but they are not given the correct diagnosis or treatment from the company for reasons best known to it. JOAR activists say that the mortality rates are high among workers but this is another dark area. There

is unwillingness on the part of the Atomic Energy Ministry and the UCIL management to acknowledge the possibility of radiation-related health hazards for a population that is exposed to radiation in many ways every day of their lives. There is, additionally, criminal negligence on part of the UCIL to protect and safeguard the health of the workers and their families. Thus, though the Mines Act puts the onus of reporting cases of occupational diseases on the mine owner/manager and medical practitioners, it is clear that mine inspectors, medical practitioners and the police collude with mine owners/managers so that there is no reporting of, investigation into or action taken against the violation of workers' rights.

Geographical Location and Background of the Area of Field Study

Of the modern day marvels that mark the fulcrum of 'power equations' and 'development' globally, nuclear power finds itself in the most coveted zenith. It is in this context that mining of uranium is critical to the unfolding of such 'power equations'. Uranium was not a useful element when it was initially discovered during the 18th century, but it was after the success of the atom bomb during the World War II that it became a key ingredient towards generation of not only cheap electricity but also nuclear power. Among the numerous radioactive elements that contaminate the earth's surface and that of the atmosphere when mined, uranium is abundantly available in the Jadugoda region and is therefore uncontrollably mined and milled. The name of the place was originally 'Jaragoda', and its later nomenclature 'Jadugoda' according to a version was only a replacement to the former since the natives believed that evil spirits and black magic had now grasped the thick-forested land they once called home, so much so that their land was cursed despite being resourcefully rich.

Jadugoda, a census town located in the Purbi Singbhum district situated in the eastern peninsular region of the Indian state of Jharkhand, is the quintessential adivasi land that has witnessed a protracted saga of dispossession and exploitation of the tribal people. Portrayed in a visual essay of forests and rivers and home to adivasis, such as the Santhals, Hoas, Oraons and Mundas, the

land bears testimony to one of the deadliest decays of modern-day marvels that endangers the lives of these tribal people in the form of aforesaid unrestrained uranium mining and milling practices. Interestingly, pertinent to the case of the Subarnarekha river basin region is the larger issue of 'pollution crisis' arising out of the menace of radioactive waste disposal (that is the consequence of uncontrolled mining practices of mostly uranium) that faces the local communities and has deep-rooted ramifications on both the geo-physical, as well as, the socio-economic status of the region. Rich in minerals and natural resources, the region continues to suffer state repression and abuse of both its natural as well as human resources. Displaced from their ancestral land by force, these adivasi people are made to live in extremely uninhabitable radioactive environments that incessantly jeopardises their healthy existence and right to safe living. It is in the light of this backdrop that an attempt would be made to study the issue of 'common environment' and 'common risk' that predominates the whole question of right to life and livelihood.

At a little distance from the central Jadugoda region is a small peaceful fishing village called Digri. The village comprises of a population of around a 100 households with fishing being the mainstay occupation of the people living there. The fishermen fish from the Subarnarekha River and later supply it to the market at Ghatshila. There is no perceived tension or conflict with regard to fishing and grazing rights on the common land or water resources in the region similarly as in the heartland of Jadugoda.

However, the river water is not clean as Motilal Koibarta reflects, *Chaitra theke jaishthe jol bhalo thake … baishakhe beshi mach othe … kintu goto mashey onek mach morechhe*. Of late, there has been a sudden increase in the number of fish deaths, the last one being in the month of July 2009 that has had obvious impacts on the livelihood of these fishermen. The perceived cause being the radioactive wastes that have found their way to the Gura River (after having being emptied into the tailing pond) and further meandering into the Subarnarekha River.[12]

This particular fishing village uses tube wells for drinking water supply whilst it uses the river for bathing, cleaning and washing, but this has not prevented their radiation anxieties. It is also difficult for them to voice their concerns since the level of radioactive awareness is still relatively low among the fishermen, which can

perhaps be attributed to their distance with the Jadugoda heartland and that they have not been able to connect with the tribals there.

Case Studies

The study attempted to examine 'common environment' as an extension of common property in assessing the patterns of change that have occurred with regard to the question of functionality of local institutions and the metamorphosis that has taken place in people's claim-making processes in the present scenario by drawing a comparison with past mechanisms of access, control and functioning.

The case studies were done essentially at the three villages in and around the Jadugoda region, namely, Tilai Tand, Bhatin and Digri and the time span of the conducting fieldwork in these villages was about 15 days, which included a pre-visit of the field for a day in the month of July 2009, followed by a 14-day stay on the field site in the month of August 2009.

Sociocultural Beliefs and Practices of the Adivasis with Regard to 'Common Property' and the Notion of Preserving 'The Common'

Chargaon/goth-tandi/jhund basically refers to common village land where the cattle are kept together for grazing. All the herdsmen get together on this particular piece of land for grazing their cattle and later whatever is collectively gathered (found in the form of cow dung) on the field is sold and the profit is shared equally amongst them. This piece of land is thought of as a religious ground and therefore there is no perceived competition or problem with regard to grazing rights between the individuals. The tribals practice *Goth* puja (a religious ritual) to offer their prayers to *Goth Muga* or Lord Krishna (the lord of cattle). The *diuri* or the priest would conduct the entire ceremony, whereby the cows would be kept in the *Goth-tandi* and a chicken's egg would be kept in the middle of the land so that a cow touches the egg with its feet. Whoever's cow

would touch the egg first would be considered the most fortunate and would have to contribute towards the expenses to be incurred in the next year for the same ritual. Alongside other activities that the tribals practise, hunting remains one of crucial traditional socio-cultural significance, and when they go out for hunting, the dogs generally accompany them. If they find a deer and kill it, the *Majhi* (the village head) decides the share of this 'common' together with giving the dog a share of the animal.

There are also a number of other similar religious rituals that the adivasis of the region practise that naturally ensure their social solidarity and cohesion in preserving the eco-social culture of their identity. As Durga Prasad Murmu reflects, 'During the month of *Magh* we perform the *Pahari puja* or the *Magh Bonga* … until we perform this ritual we cannot go to the mountains for any purpose'.[13] This marks the first religious observance in a year. The second follows in the spring season during the month of Phagun and is known as *Baha Bonga*, whereby the adivasis worship nature through flowers (*sarjum* flowers of the *saal* trees, along with *mahua* flowers) and play holi with water with this ushering of the spring season. There is another ritual meant for 'protection of the cattle and adivasis' against scorpions and snakes in the fields. This is known as the *Asaria* puja and is a very significant ritual that takes place during the monsoons or the month of Asar during the *krishnapaksha* or the waning phase of the moon. There are other religious observances like the *goth* puja or the ritual that marks sharing 'the common' and the *sohorai* that is basically a thanksgiving ceremony to the cows, buffaloes, bullocks as well as the crops after harvest and takes place generally in the autumn season of *Kartiki amavasya* or no moon. The genesis of this festival occurred since the adivasis believed that the *Marang Buru* (the chief God) had become angry seeing that there was no love for the cattle since the tribals had initially practised hunting indiscriminately and therefore one by one the *Marang Buru* had started hiding those animals. It was because of this wrath of the *Marang Buru* that the adivasis started performing this ritual.

The womenfolk however are not active participants in performing these rituals but nonetheless could observe them. The notion of the 'commons' in the tribal society is relatively egalitarian; however, there is a strict sexual division of labour that is inherent even in performing the aforementioned rituals. Nonetheless, it is through these indigenous ways of cultural and ecological preservation of

the environment that the notion of the 'commons' get strengthened with 'land' being a very important criterion of the tribal identity.

Modus Operandi of the Local Institutions in the Jadugoda Region

The Gram Panchayat comprises typically of the *Panch Paremeshwar*, namely, *Majhi* (the *Pradhan*), *Paranik* (also called *Vicharak* or the judge), *Godeth* (*Dakua* or the calling man), *Jogmajhi* (assistant to the *Pradhan* who generally looks into the sociocultural activities of the young men and women in the village and also arranges marriages) and finally the *Naikay* (the chief priest). However, it is important to note that the Panchayat does not assemble regularly and is only in operation to solve a crisis or make a new decision/ announcement regarding some significant matter of public interest. Similarly, as they have the final say with regards to deciding the set code of conduct for the entire village, they are also specifically pivotal to managing, preserving and protecting the 'common' and the 'commons' of the village.

Alongside the Gram Panchayat, there have been a number of local institutions that have altered the modus operandi of the Jadugoda region to a large extent during the last decade and brought about a new consciousness in changing the process of instating rights. Amongst the more crucial local institutions that call for the minimum protection of human rights, preservation of natural environment and protection against uranium radiation, JOAR stands out to be the singularly popular one that has substantially been able to mobilise the tribal mass in not only generating awareness amongst them of their 'rights', but successfully carrying out campaigns and people-based movements in an attempt to compensate if not altogether rehabilitate them for post-displacement/radiation after-effects.

JOAR was initially known as All Jharkhand Students Union (AJSU) that was working for the unemployed sections of the tribal populace. It was further renamed as the Jharkhand Adivasi Berozgar Vistharpit Sangh (JABVS) and later modified to JOAR. JOAR has been working for the issues of tribal displacement, unemployment and radiation quandaries calling for safe mining practices and safe management of radioactive effluence. It has

been working for the cause of tribal people and had been effective to a large extent in negotiating with the UCIL in demanding compensation and regularised rehabilitation packages.

According to the president of JOAR, Ghanashyam Biruli,[14] if someone spoke against the UCIL and associated radiation problems, s/he was immediately labelled as an anti-national. The UCIL has been responsible singularly for the major displacements that have taken place in the region without having given the displaced the minimum resettlement/rehabilitation compensation for a long period of time. A survey was conducted by the JOAR for people who had been displaced and it was found that none was even offered any compensation deal.

It was in the year 1995 that the UCIL decided to construct the third tailing pond and accordingly sent out a notification. It was the members of JOAR who then made people aware of the displacement quandaries and summoned them to join the organisation to make it a more effective common people's movement. It gained momentum gradually, and JOAR started its agitation against the UCIL slowly and steadily.

There were certain demands that were kept before the UCIL. Amongst them, the more prominent ones included resettling the ones displaced in 1968 for the construction of a tailing pond and then further negotiating for the cause of rehabilitation and compensation for all who were displaced due to the construction of the second tailing pond and were above the age of 18 years. In 1996, the UCIL had employed 72 of the tribal people in the mines as casual workers, however, without providing them with any masks or respirators. It was in that specific year that the radiation issue came to prominence.

Another demand of JOAR was for the most affected people from the villages of Tilai Tand, Chatikucha and Tuar Dingridi to be relocated and rehabilitated elsewhere. In the year 1997, the UCIL met all demands after having assembled for an '*apadkalin baithak*' (emergency meeting) with the politicians, local leaders and the district collector, whereby they decided to compensate the displaced with Rs 40,000. The Chatikucha village was eventually bulldozed, and following this episode the members of JOAR decided that one should not succumb to this agreement and thereby continued their agitation further. The UCIL then employed 500 people from elsewhere in the construction of the tailing pond. However, the movement propelled forward by JOAR gained

immense popularity with the slogan *kaam roko ya jail chalo*. Around 150 men and women were arrested in the agitation.

Ghanashyam Biruli says, 'It was like people wanting to go to the jail like they would want to go to some fair.'[15] The tribals believe in the concept of a sacred place or '*Jaharasthan*', one that is used for worship and when someone cuts a tree there, one is punished. Ghanashyam Biruli maintains further that, 'It was the question of the UCIL taking over the whole of our Jaharasthan and it was about land being one's identity that was challenged.'[16] The fallout was a campaign called Janta Curfew, whereby the tribals cut date trees and blocked roads. The UCIL came with a larger force to counter the agitation but were not very successful. Only the reporters and people from the press were allowed entry to the zone. Ghanashyam Biruli says, 'It was then that we came to realise that the police and the forest guards were our enemies.'[17]

The UCIL representatives then started another round of negotiation. In July 1997, JOAR asked for the release of people in police custody and their demand was met. It was on 14 February 1998 that JOAR with its newfound name came to reinstate the rights of the tribal people. It was with the help of the Majhi Pargana Mahal and Rushika—an NGO—that it discussed and decided on the second phase of the agitation against radiation.

The second phase of agitation chiefly dealt with the demand for independent researches to be conducted to estimate the range of radiation affecting the populace in the region. Countries like the United States have had chalked out Acts, such as the Radiation Exposure Compensation Act, that need to be introduced in high-risk radiation zones like Jadugoda in India.

A lot of vested interests were also playing out in the politics of claim making and one vignette comes through easily when Dumka Murmu says, 'A lot of NGOs were actually breaking our unity … they offered us money and were dictating their terms on us … they were exploiting us … the local electoral candidates were also taking advantage of the situation and trying to buy the agitation in terms of vote banks.'[18]

Dumka Murmu further maintains:

> In the public hearing on 26th May 2009, for the renewal of the UCIL lease, we were not allowed to speak and all the labourers of the mines were made to appear as the locals and when we protested for not allowing us to speak … we were harassed and beaten up.[19]

However, despite efforts of suppressing the organisation's voice in claiming rights, JOAR manages to organise its meetings on the 10th of every month in Jadugoda to discuss radiation dilemmas and associated predicaments of the tribal people.

Another organisation by the name of Rushika works for tribal sociocultural preservation and rights of the adivasis through the various forms of performing arts such as music, dance and theatre in directly protesting against the radiation crisis in Jadugoda. Durga Prasad Murmu, a teacher at a private school (Hihiri Pippiri Shishu Niketan) has been associated with Rushika since its inception in 1981 and despite being differently abled, he continues to perform publicly for the cause of the tribal people. Rushika has presently merged with JOAR to make people aware of the radiation crisis and associated livelihood problems, and has also been successful in giving the tribal movement against radiation in Jadugoda a definite volume in terms of mass participation. Thus, the role of local institutions has been pivotal in terms of not only making the tribal people aware of their 'common good' and 'common bad' but also in ways of empowering them to combat against 'common odds' in thereby protecting and preserving their sociocultural and political environment.

Conclusion

Jagat Mardi, a native reflects, 'We work for our land … our mitti.'[20] It is the question of this soil that is enmeshed with the tribal identity, and therefore any alterations to it can and has had more often than not yielded positive outcomes. There needs to be an assessment of the entire gamut of the rights vis-à-vis the development discourse in further examining the 'language' of development that is co-opted through a language of compensation and rehabilitation; the very intellectual presumption that indigenous knowledge is antithetical to modern development. It is interesting to note in this regard that this language exudes a politics of its own in deterministically thrusting its authority on the voiceless and also politically operates in layers in favour of the ones having a little more voice amongst the voiceless. Therefore, fundamental questions, such as 'Whose rights?' 'What rights?' and the layers in which they operate need to

be understood. The study therefore examined the flavour of rights in the context of this frame of the Jadugoda region and looked into the 'politics of rights' vis-à-vis 'vested interests' that is played out in the post-globalisation era with the intensification of market economy and the quest for comparative advantage.

The pivot of the knowledge system that feeds into the dynamics of 'framing rights' and the question of 'viability' of rights needs to be also examined minutely. In this regard, I would like to argue that 'rights' as a given is but a ploy whose axis is increasingly being skewed to not only the heavier capitalist motives but remains to be a function of the larger socio-economic 'pendular politics' that circumscribes our polity. It is thus through an understanding of 'the common' and the 'commons' in the Jadugoda region that I highlight the saga of the tribal plight of landlessness, exploitation of common property and natural and environmental resources in assessing the modus operandi of 'rights' in the region and the way in which globalisation has further accentuated the 'politics' of such rights through the evolution of technology and overt means of protest in them playing out. Globalisation has brought about new means of access and reach through the various and new forms of technology, media and communication systems that have given force to popular struggles through quick exchange of information thereby being enabling. Pre-globalisation movements largely lacked the momentum, and the struggles would more often than not lose its impact on local people. Post-globalisation tribal Jharkhand had also witnessed new waves of connectivity, which has made easy their struggles to be more public and be in the visibility of the Indian intellectual spectators.

Recommendations

The enduring refusal by governments to provide legal recognition of indigenous and other local community-based property resources poses grave threats to efforts to achieve sustainable development and environmental justice. It also poses challenges to promoters of democracy and sound environmental governance. Throughout the world, indigenous people who are directly dependent on natural resources typically have lesser voice in

official decision-making processes as to how those resources are legally recognised, distributed and used. Government initiatives to promote CBNRM remain inadequate for addressing the magnitude of the challenges that faces India today.

Singh (1986) maintains, 'There is a large legal space within which interpretation and invocation of fundamental principles of justice provide fertile ground for creativity—for the possibility of creating a more just society even when legislations to that effect do not exist.' It is for the question of delivering justice that plural legal systems should be made a case for. However, a standardised 'magic pill' is not an answer to effectively deal with the questions of managing the commons sustainably. One should allow for a flexible strategy that would be open to adaptation in a variety of social, cultural and politico-economic settings. Providing recommendations and analyses for the whole country as a homogeneous entity is neither a possibility nor a solution to catering to the vast diversity and heterogeneity of the people of the Indian subcontinent. As Benda-Beckman (2001: 54) maintain, 'legal pluralism cannot provide direct answers to pragmatic political and economic questions'; it is important to note that the context plays an important role here.

If one goes by the implicit understanding that law secures best, and that inclusion of customary tradition in law would provide legitimacy to unwritten status of oral/ancient customs, one is mistaken. On the one hand, as Bourdieu (1990: 84) goes on to state that 'Law is the realisation par excellence of a symbolic violence that is exercised in formal terms', it reiterates a discourse that allows open public production of a practice that would be unacceptable in any other form, effectively establishing monopoly over legitimate violence; on the other it also plays a role in normalisation, objectification, formalisation and reification of practices, which are all critical elements of the establishment of state hegemony (Vasan 2009). Thus, justice could be delivered by not only a recognition of customary practices into the fold of formal law but also by analysing the sociopolitical context in which it had emerged and by strategically deploying local law-making apparatuses and combining both non-formal and formal legal frameworks in ways to usher effective governance through horizontal rather than vertical hegemonic, hierarchic mechanisms to more participatory practices.

Notes

1. Pendular politics refers to the phenomenon of swinging from one side to the other for comparative political advantage.
2. Fulcrum of rights refers to the very pivot on which diverse rights (more often than not contradictory rights) interact amongst each other and gain further momentum and potency by their dialectic interplay.
3. Refer to paragraph 1 under 'Section I—Environmental Justice and Rights' in Introduction for example.
4. The rationale behind the 'art' of governance.
5. Usufruct is the legal right to use and derive benefit from property that belongs to another person, as long as the property is not damaged.
6. *De facto* implies 'concerning fact'.
7. *De jure* implies 'concerning law'.
8. *Khuntkatti* rights granted villagers the right to forest produce in the periphery of the village, acknowledged in CNTA (1908).
9. *Raiyati* or *bhuinyari* holdings belonged to those tenants-at-will who had no rights of transfer of their land holdings. Raiyats were introduced under the zamindari system in erstwhile Bihar (now Jharkhand) in 1972–73.
10. Schedule V, Article 244(1), 5(2): In particular and without prejudice to the generality of the foregoing power, such regulations may: a) Prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such area; b) Regulate the allotment of land to members of the Scheduled Tribes in such area.
11. No.—16/48/97-M.VI, 10 July 2000.
12. Interview conducted with Motilal Koibarta, a local fisherman on 11 August 2009.
13. Interview conducted on the 14th of August 2009 with Durga Prasad Murmu, a local schoolteacher for Hihiri Pippiri Shishu Niketan and actively associated with Rushika, a local NGO advocating for tribal rights and culture.
14. Interview conducted with Ghanashyam Biruli, president of JOAR, on 10 August 2009.
15. In-depth interview conducted with Ghanashyam Biruli, president of JOAR, on 10 August 2009.
16. Interview conducted on 10 August 2009.
17. Interview conducted on 10 August 2009.
18. In-depth interview conducted with Dumka Murmu (secretary, JOAR) on 13 August 2009.
19. Interview conducted on 13 August 2009.
20. Interview conducted on 12 August 2009 with Jagat Mardi, a grassroots-level tribal activist (currently associated with JOAR).

2

Forest Rights Act and Polemics of Correcting Historical Injustices*

Madhuresh Kumar

An Act to *recognise* and vest the forest rights and occupation in forest land in forest dwelling scheduled tribes and other traditional forest dwellers who have been residing in such forests for generations but whose *rights could not be recorded*; to provide for a framework for recording the forest rights so vested and the nature of evidence required for such recognition and vesting in respect of forest land.

Whereas the *recognised rights* of the forest dwelling schedule tribes and other traditional forest dwellers include the responsibilities and authority for sustainable use, conservation of biodiversity and maintenance of ecological balance and thereby strengthening the conservation regime of the forests while ensuring livelihood and food security of the forest dwelling schedule tribes and other traditional forest dwellers;

* I owe this chapter to my learnings from being with National Forum of Forest People and Forest Workers for the past three years now, and more specifically to Ashok Chowdhury, Roma, Munnilal, Rajneesh, Bipin Girola, Hari Singh, Noor Alam and many others. I would also like to acknowledge the feedback from Kalpana Kannabiran, Ranabir Samaddar and Xonzoi Barbora on my first proposal, and then from Virginius Xaxa on the first draft of the chapter. Last, I would like to thank Ishita Dey for her patience as the programme coordinator for the whole project. I would like to mention that due to paucity of time I have not been able to closely examine the linkages of the Forest Rights Act (FRA) with the climate justice struggle and growing conflict in the forests of central India due to left-wing extremism. All the mistakes are of course mine.

AND WHEREAS the forest rights on ancestral lands and their habitat were *not adequately recognised* in the consolidation of state forests during the colonial periods as well as in independent India *resulting in historical injustice* to the forest dwelling schedules tribes and other traditional forest dwellers who are integral to the very survival and sustainability of the forest ecosystem.

Preamble to *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act*, 2006, as published in Gazette Notification, 29 December 2007 (emphasis added)

… the Act—however well-meaning it may be—by itself solves nothing and just because the Act is there, the State is not going to hand over forest rights to people on a silver platter. The Forest Department and its coercive bureaucratic apparatus and its cronies like the timber mafia will not just vanish, and neither would the Big Conservation NGOs cease to raise a *hulla* (make noise) each time people really get some rights. The development menace would remain, and both forests and people are going to be destroyed as usual, for dams, factories, roads and mines. The Act changes nothing until our struggles lend it teeth and turn it into a weapon....

Introduction to the *Forest Rights Act: A Weapon of Struggle*, published by National Forum of Forest People and Forest Workers of India (NFFPFW), February 2008

Introduction

Indigenous populations across the world have been at the receiving end of the project of modernity and development. It is a well-known fact that colonisation has been responsible for the destruction of indigenous civilisations in the Americas, Australia and Africa. In the recent past, there are instances where these communities have demanded reparation or apologies as witnessed in the United States, Canada, Australia, New Zealand and others. States and governments have responded in varying ways to the claims concerning historical injustices. Many heads of state or governments have issued formal apologies for past acts. Some claims, particularly those of indigenous groups, have led to the negotiated restitution of lands and resources. In the case of India, indigenous and other forest-dwelling communities have suffered

too and the Forest Rights Act (FRA) is such an attempt at trying to redress historical injustices, as mentioned in the opening sections of the Act.

However, one needs to ask what this recognition means in a neo-liberal development climate. This becomes significant since it has been accompanied by two other progressive legislations by the United Progressive Alliance (UPA) government, Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA) 2005 and Right to Information (RTI) Act, 2005. However, on the policy front, the UPA government has also enacted the Special Economic Zone (SEZ) Act, 2005; National Water Policy, 2002; National Environment Policy, 2004; Land Acquisition Amendment Bill, 2009 and a slew of other legislations or policies which are clearly aimed at promoting privatisation, facilitating increased exploitation and trade of natural resources (land, forest, water, air, minerals), liberalising labour laws, agriculture and freeing up the community control over natural resources in its pursuit of a neo-liberal growth model and larger national interest. All this together has meant larger distress in rural India, which is in the grips of unviable agriculture, unemployment, migration, hunger, debt and poor infrastructure (Menon 2007). The situation has further been acerbated with the rise of left-wing extremism in the central Indian forests and has resulted in ensuing violence and counter-violence between the state and Maoists.

These different sets of policies are responding perhaps to two different realities, but in the name of national interest premised on the principle of 'growth with equity and justice'. So, the progressive legislations are an exercise in 'popular constitutionalism'[1] in response to the electoral and democratic compulsions and mandate to deliver justice and relief to the larger majority.[2] This recognises the rights of collective claim making from the government but at the same time does not challenge the state's complete proprietary right over all natural resources or any other property—the power of 'eminent domain'.

This chapter is one such attempt at understanding the thin balance which the state is trying to achieve through FRA. FRA is a continuum in the series of legislations for governing the forests since colonial times. In *Section I*, I trace the continuity in forest governance since colonial times till date. *Section II* takes in account the rights enshrined in the Indian Constitution for the

adivasis which has been continuously violated by the state and often displaced them from their possessions. Section III critically analyses the role of the Environment Ministry and other embedded interests in implementation of the FRA and issues of struggle in front of the movements. The last section puts the FRA in wider socio-economic and political context and poses certain questions as to what FRA could mean for the state and communities and addressing historical injustices.

History of Forest Governance

The enactment of this historic legislation on 18 December 2006 and notification on 31 December 2007 is a result of sustained struggle of millions of forest dwellers, workers and rights activists pitched against the forest department and the environment conservation lobby. It faced opposition on three counts: forest land should be given away to tribals, this will negatively impact conservation and keep tribals underdeveloped.[3] However, these are far from true. In the name of conservation, the forest-dwelling communities have faced repression and lived in a state of semi-citizenship since independence. These injustices derive their legitimacy from the concept of state's eminent domain—the authority to declare its proprietary rights over all natural resources, such as land, forest, air, water, etc. The first time, it was in the Forest Act of 1865 that this right of state was given a legal validity by the British Indian government to ensure their control of the forests, including waste land, to meet primarily their timber and revenue needs. It came in direct conflict with the traditionally enjoyed rights of the communities. In 1883, Mahatma Jotiba Phule graphically described the straits to which this reduced the peasantry:

> In the olden days small landholders who could not subsist on cultivation alone used to eat wild fruit like figs and jamun and sell the leaves and the flowers of the flame of forest and mahua trees. They could also depend on village grazing ground to maintain one or two cows, or two or four goats, thereby living happily in their own ancestral villages. However, the cunning European employees of our motherly government have used their foreign brains to erect

> a great superstructure called the forest department. With all the hills and undulating lands as also fallow lands and grazing grounds brought under the control of the forest department, the livestock of the poor farmers does not have place even to breathe, anywhere on the surface of the earth. (Gadgil and Guha 1992)

The Indian Forest Act 1927 builds on the 1865 policy and seeks to override customary rights and forest management systems by declaring forests 'state property' and exploiting their timber. These legislations were needed to not only exploit the forest resources but also control the stiff resistance which the British had to face from the adivasis. They faced stiff resistance throughout the tribal regions from Pahariyas, Mundas, Santhals, Tamar, Kherwar in Jharkhand; Gonds in Central India; Kolis in Maharashtra; Naiks in Gujarat; Khasis, Jaintia, Khampti, Daflas, Kachari in Northeast region and so on. So, they were never really able to establish their control over these regions and called the tribal-dominated hilly regions in Northeast as 'Excluded Areas' and in mid-India as 'Partially Excluded Areas'. Even though the self-governing institutions remained intact, the intrusion and expropriation of resources continued (Bijoy 2008b).

The 1927 Forest Act continued in the post-independence era too and was used to create reserve forests and take away the rights of those living in these forests. Even though the Fifth Schedule[4] of the Constitution provided for safety from laws applicable elsewhere, this could be detrimental to the scheduled tribes. However, the Forest Act gave absolute powers to settlement of rights of those living in these scheduled forests to one person called the 'forest settlement officer'. Though these forest-dwelling communities had traditional and customary rights, they were not considered for settlements and became encroachers overnight, as they did not have legal rights. They occupied these forests from the time when forest departments did not even exist. The policy of 1952 ensured that people had to continually break laws to fulfil their age-old needs for forest produce and in return keep bribing the forest officials (Gadgil 2008).

Post independence, the unabated exploitation of the forests continued and a large chunk of land was encroached upon by the timber mafia and other landed interests. A large chunk of land was also diverted to agricultural usage by powerful interest groups. In the absence of legislations like Environmental Impact Assessment

(EIA), for a long time much of the forest land was diverted for industrial or infrastructural development use or submerged by big dams. It was only in 1980 to check the unregulated diversion of forest land that the central government enacted the Forest Conservation Act. However, this law in the name of conservation became an important tool to evict the adivasis without even settling their legal claims. Between 1951 and 1988, the IFA 1927 was used to enlarge the national forest estate by another 26 mha (from 41 to 67 mha). Based on unreliable paper records, the non-private lands of ex-princely states and zamindars were declared state forest largely through blanket notifications without surveying their vegetation/ ecological status or recognising the rights of pre-existing occupants and users as rights required by law. Today, 60 per cent of state forests are concentrated in 187 tribal districts confined to one-third of the country. While the zamindari abolition law freed tenants in the plains from landlords, the forest department, which controls 23.84 per cent of the country's territory, became the biggest landlord with control over the lives of close to 10 million people living in these protected and reserved forest areas. Around 200 million people, mostly poor, are dependent on these forests for their livelihood and sustenance.[5]

With the establishment of an independent Ministry of Environment and Forest (MoEF) in 1985, the new Forest Policy was announced in 1988, which for the first time talked about a shift from the tendency to look upon forests as revenue-earning resources. It said that the principal aim of the Forest Policy must be to ensure environmental stability and maintenance of ecological balance including atmospheric equilibrium, which is vital for sustenance of all life forms—human, animal and plant. This policy also marked a significant difference from earlier forest policies and gave:

> … due regard to traditional rights of tribal people on forest land … recognise[s] symbiotic relationship between tribals and forests … envisages agencies responsible for forest management … associate[s] tribal people closely in protection, regeneration and development of forests … provide[s] gainful employment to the people living and around forests … safeguard[s] customary rights and interests of the tribal people on forest lands … emphasises need for undertaking integrated area development programs to strengthen tribal economy in and around forest areas … [and has] provisions for alternative sources of domestic energy on subsidised basis, to reduce pressure on the existing forest areas. (Bijoy 2008b; Government of India 1988)

Later, in May 1989, after a conference of forest ministers where the new policy was discussed, notifications were issued by the MoEF on 18 September 1990 based on recommendations of an inter-ministerial committee. The Ministry asked the states to start procedures to regularise pre-1980 'encroachments' on forest lands and then to review disputed claims over forest land arising out of (faulty or non-existent) forest settlement and disputes (between revenue and forest departments) regarding '*patta*s/leases/grants involving forest land', both indicating the need to distinguish between 'encroachers' and those with disputed claims. Given the abysmal state of government land records, jurisdictional disputes between revenue and forest departments are widespread across the country. The revenue department, under earlier land redistribution policies, has issued *patta*s and leases to lakhs of farmers on land, which the forest department now claims to be forest land. The other notification recognised required conversion of an estimated 2,500 to 3,000 'forest villages' to 'revenue villages'. These villages (also called *Taungiya*) were created by forest departments themselves in the past for ensuring ready availability of labour for forestry operations; but the practice was stopped in 1984. In March 1984, in fact the then Ministry of Agriculture suggested to the state/union territory governments that they may confer heritable and inalienable rights to forest villagers if they were in occupation of land for more than 20 years. But this suggestion was not fully implemented. As a result, those living in *Taungiya*s, disputed villages, etc., remained non-citizens and could have no titles to their land, could not obtain domicile certificates or benefit from social welfare programmes as other departments cannot work on 'forest' land and remain at the mercy of forest department for most needs (MoEF 1990). MoEF reiterated these guidelines on 30 October 2002, 5 February 2004 and 3 November 2005. It also said in clear terms that none of the tribals in possession of land prior to 1980 could be evicted without due process, but even then evictions continued all across the country.

The situation worsened once the inspector general of forests issued a circular on 3 May 2002 to the chief secretaries as well as the secretary (forests) and principal chief conservator of forests (PCCF) of all states and union territories, outlining a 'time-bound action plan' for the eviction of encroachers by 30 September 2002. Between May 2002 and March 2004 alone, evictions were carried out

from 152,400.100 ha of land (Lok Sabha Starred Question No. 284, 16 August 2004). About 30,00,000 forest dwellers were evicted from their habitats and deprived of their livelihood during this period. Their houses were burnt, crops and food were destroyed, women were raped and men were shot at and killed. Hundreds of villages were set on fire or demolished, which led to clashes and deaths in police firings. This emanated from two Supreme Court judgements in 1996 which extended the ambit of the Forest Conservation Act to all lands, conforming to the dictionary definition of forests, irrespective of ownership. It even stayed regularisation of eligible land prior to 1980, and then further in 2000 banned the removal of dead, diseased fallen trees, fallen trees due to storm, drift wood and grasses, etc., from all national parks and wildlife sanctuaries. MoEF and Central Empowered Committee misinterpreted the Supreme Court order to mean that 'no rights can be exercised' in the protected areas and banned the collection and sale of all non-timber forest produce from them and denied livelihood opportunities to the forest dwellers (Bijoy 2008a).

The notification by the inspector general (forests) set the forests all across on fire and initiated a wave of protest by forest communities and also initiated a drive of filing claims by the communities and associated movement groups. As Bijoy notes, around 70,000 adivasis from the impoverished districts of Kalahandi, Bolangir and Nuapara in Orissa declared to boycott the parliamentary elections if their ownership rights were not settled. As a result of the growing pressure, MoEF was compelled to issue a clarification order in October 2002 that the 1990 guidelines remained valid and that not all forest dwellers were illegal encroachers. However, the evictions and atrocities then also made it amply clear to the movement groups that they had to lead a fight to the finish and settle the rights once and for all. The National Democratic Alliance (NDA) government then also sensed this and promised settlement but the damage had been done and they lost the elections. The UPA government later started the process of enactment of the law to legalise the rights in 2005.

During the course of enactment of the Bill, it was referred to the Joint Parliamentary Standing Committee, which said that the Bill is an urgent measure intended to address a historical injustice done to a large section of some of the weakest and most marginal communities of our society and in particular the Scheduled Tribes.

The Committee also took into cognisance that the courts have passed a number of orders in the light of guidelines issued by the MoEF, including stay on regularisation of land title and preventing the process of recognition of rights from being completed. At this stage, any further delay on the ground of litigation will lead to further injustice to the Scheduled Tribes and other traditional forest dwellers and will result in mass eviction. Since this law is directly intended to fulfil the constitutional mandate under the Directive Principles stated in Articles 39(a), 39(b) and 46 of the Constitution and the states mandate under Article 48A, it deserves protection available through Article 31B. The Committee strongly recommended that the Bill after its enactment may be placed in the Ninth Schedule to the Constitution with a view to ensuring smooth and speedy implementation of the provisions of this law (Government of India 2006). It is with this view that the Act was formulated, recognising the historical injustices—social, political and cultural alienation and exploitation from centuries.

The committee made some important suggestions and expanded the scope from Scheduled Tribes to other traditional forest dwellers and recognised the Gram Sabha as the supreme authority determining the forest rights and for deciding any disputes in relation to any forest right. It further argued that these communities have rights not only over the minor forest produce but also over stones, slates and boulders; the products from water bodies including fish, weed and the like; and also fuel wood to make it more inclusive. Recognising displacement as the most severe threats to the livelihood and dignity of forest-dwelling communities, it recognised the rights of those already displaced and recognised their right to in situ rehabilitation and alternative land. Most important, it changed the cut-off date from 1980 to 13 December 2005, that is, the date of introduction of the Bill in Lok Sabha, which provided relief to thousands. It also recommended doing away with the ceiling of 2.5 ha, since the provisions of the Bill do not provide for distribution of the land but only provide for recognition of rights on as is where is basis.

Most of these recommendations were accepted; however, the final Act set a limit of 75 years for the other traditional forest dwellers, which has been contested by the movements. In fact, it has been challenged on the ground that if the existence of the forest department does not go back to 75 years, then how they can ask for

such evidence. However, since oral evidence has also been accepted, communities are trying to get their rights over the land. The other recommendation which the Act did not accept was the ceiling on maximum amount; it did not leave it open-ended but raised it to 4 ha. Even though there are lacuna and problems with the Act, there is no doubt that it is a historical legislation. The legislation has been welcomed by the two leading fronts of the people's organisations struggling for these rights—National Forum of Forest Peoples and Forest Workers (NFFPFW) and Campaign for Survival and Dignity (CSD) and scores of other organisations and individuals. After the passing of the Act, it took considerable uproar in the Parliament and massive protests across the country for the final notification on 31 December 2007 and passing of the rules on 1 January 2008. It has been nearly two years, and the implementation of the Act has met with tough resistance from the forest bureaucracy, conservation lobby and groups at not only the level of execution but also in the high courts and the Supreme Court. However, the FRA has provided the forest-dwelling communities with a tool to struggle for their rights and seek justice in this fast changing system. It has energised the struggles and given these communities a sense of confidence and victory, which has further contributed to the social and political churning in the rural India.

Adivasi Rights and Broken Promises

One of the significant differences in case of FRA is that unlike other forest laws which are being governed or promulgated by MoEF, this one is administered by the Ministry of Tribal Affairs (MoTA). This in itself marks a great shift and recognition of existence of tribals in forest and need for their welfare. Those advocating for this Act knew pretty well the opposition of forest department to any such move and also from their experience of 1990, when the Ministry issued six notifications for regularisation and settlement of various rights of forest-dwelling communities. Since, the spirit of FRA challenges the supremacy and control of the forest department; one cannot expect the same agency to implement the legislation. However, can a change of ministries deliver justice or undo historical injustices of centuries, given that

the forest department will continue to exist? As we will see later, the forest department under MoEF continues to create hurdles in its implementation. The contradiction in the definition of rights as mentioned in the FRA is also a matter of concern. The Act promises to recognise rights over the resources which communities traditionally claim to already have had. In their understanding, forest department is an 'encroacher' on their property. After all, how can traditional forest-dwelling communities be asked to prove their existence for 75 years when the country was not even independent and property rights, individual or community, were not defined in any way ? The *Taungiya* settlements, created by the British for the purpose of forest development, gained their claim to these forests because they created those forests and nurtured them for so long. And those who have moved to the forest after being pushed by developmental projects also cannot be called encroachers, since the government evicted them from their land without settling their rights.

It is pertinent to note that the Indian Constitution has recognised the rights of adivasis, but the deplorable socio-economic conditions of tribals reveal a different ground reality. Apart from the special emphasis on the rights of SCs and STs in the fundamental rights and Directive Principles of State Policy, STs are also guaranteed various forms of reservation by Articles 320, 332 and 334 of the Constitution. Article 342 of the Constitution, by providing the President the power to notify communities as STs, implicitly recognises the fact that ST communities are different and need special care and are also the ones who have suffered some of the worst types of deprivation. The most significant article in the Constitution vis-à-vis adivasi rights is Article 244, which respects the traditions and culture of ST communities and allows autonomous functioning within the states. Schedule Fifth and Sixth areas in that way enjoy a special status in the governance structures, recognising the autonomous institutions of tribals and the Governor having direct power to make rules. In fact, from 1970s onwards, the Government of India also started separate annual plans for the scheduled areas and grants were allocated, but the practice was soon discontinued since state governments did not send proposals for the tribal sub-plan and the central government chose to remain silent. Since the powers were conferred on the Governor to make rules for the scheduled areas, it has always been

left to bureaucrats of specific state governments and the results are for all of us to see.

Prior to FRA, the most significant legislation enacted was the 1996 Panchayat Extension to Scheduled Areas (PESA) Act, under which adivasi communities were given substantive powers with regard to natural resource management, self-government and Gram Sabha consultation was mandatory in all cases and consent in some while deciding mining leases, development plans, land acquisitions, rehabilitations, infrastructure projects, etc. It directed the state governments to enact legislations, which would ensure self-government in the Scheduled Areas by these communities and Gram Sabha of the village would be the supreme decision-making body.[6] However, no politicians, bureaucrats or forest mafia, corporations or local feudal elements wanted PESA to work, since the primacy of Gram Sabha would mean erosion of their authority, divesting of their interests and loss of access to forest resources. The FRA in that respect is the most recent in a line of legal initiatives to address adivasi rights and builds on the right to Minor Forest Produce or conservation rights enshrined in provisions of PESA (Sharma 2010).

However, these rights have more often been violated by the state due to its competing concerns of development in the name of larger public/national interests. Adivasis continue to remain at the receiving end of most of these developmental programmes. The webs of these legislations for tribals in the Scheduled Areas along with laws governing other populace are often at odds with each other. The environmental legislations more specifically have led to demarcation of territories in the form of reserved forests, national parks, critical wildlife habitats, sanctuaries, etc. These have been declared reserved even though prior claims by forest dwellers to these claims exist. The majority interests have always found precedence over the minority interests, as the adivasis do not have enough control over the political power in governance structures. These different enclosures are not aimed at conservation, but instead become a reserve for accumulation and exploitation exclusively by the state, tiger and timber mafia and the corrupt forest bureaucracy.

The failure of these legislations in protecting the rights of adivasis can be gauged from the fact that an estimated 10 million adivasis have been displaced due to developmental projects that

have made use of the Land Acquisition Act in the name of the greater common good. A progressive legislation like PESA also failed to stop this onslaught of development because they remain unimplemented since land and Panchayati Raj are state subjects. In most cases, either states have not passed the legislations or have completely watered down the provisions of the PESA Act, which envisioned Gram Sabha in every village consisting of persons whose names are included in the electoral rolls for the Panchayat at the village level as the supreme body in all matters. There has been deliberate non-implementation of the provisions of PESA by states. So, it remains to be seen what FRA can do. These constant betrayals in six decades are referred by B.D. Sharma as the 'unbroken history of broken promises' in independent India.

Post-independence *Panchsheel* of Jawaharlal Nehru[7] with near-ideal constitutional frame for SCs and STs engendered a new fervour in tribal India with all sorts of expectations amongst the simple people about their future. Most of the tribal areas were included in one state or the other. Accordingly, the legal and administrative regime of the concerned state was extended to these areas which hitherto were excluded or partially excluded areas. However, at this stage there was only notional presence of a few functionaries and these remote inaccessible regions that made no difference to them since they were unconcerned about the outside world with a strong system of self-governance. Special multi-purpose tribal development projects were also taken up in some areas as pilot projects for development in these areas. There were some intrusions in the tribal domain for mining and irrigation projects that were tolerated in the name of development. Moreover, there was ample space around, especially in the forests for the displaced to fall back upon (Sharma 2010).

However, like Nehru's other dreams and ideals for India, these principles of *Panchsheel* were sacrificed in the coming decades and forests were exploited for commodities and opened for commercial exploitation since India needed them for its factories, rails, roads and modernisation programmes. The forest dwellers are a victim on this altar of modernity and development, and constitute nearly 40 per cent of the totally displaced people since independence. These forests became 'national sacrifice areas' and forest dwellers 'national sacrifice people' as is evident from displaced people figures mentioned in Table 2.1.[8]

Table 2.1: A Conservative Estimate of the Number of Total Persons Displaced and Tribals Displaced by Developmental Schemes 1951–1990 in India (in lakhs)

	All displaced persons (DPs)			Tribals displaced		
Category of projects	**All DPs**	**DPs resettled**	**Backlog**	**Tribals**	**Resettled**	**Backlog**
Dams	164.00	41.00	123.00	63.21	15.81	47.40
Mines	25.50	6.30	19.20	13.30	3.30	10.00
Industries	12.50	3.75	8.75	3.13	0.80	2.33
Wildlife sanctuaries	6.00	1.25	4.75	4.50	1.00	3.50
Others	5.00	1.50	3.50	1.25	0.25	1.00
Total	**213.00**	**53.80**	**159.20**	**85.39**	**21.16**	**64.23**

Source: Tribals displaced; the price of development (Fernandes and Paranjpye 1997).

The data presented above till 1990 has not changed much whether in terms of continuance of displacement due to developmental projects, in fact it has increased in this hyped-up economic boom as never before, or record of rehabilitation, some put it to 60 million displaced by all means (Bijoy 2008b). The percentage of those rehabilitated is still as low as 25–30 per cent of the total number of displaced population. It is this injustice and alienation that forces these communities to denounce this independence. Dehradun Declaration says:

> … the freedom of 1947 stands an illusion, within and without, hollow-fuelled by a history of inhumane domination and occupation of the forests, the establishment of false laws of oppression—contradicting the law of nature …. Where is your freedom? We see no freedom, in being driven out of our homes. We feel no freedom, when our feet are perennially trapped in your devious chains. There is no freedom, when forest, living being, land, nature and we, stand apart. False Freedom! We see no truth in a society that remains haunted by the prosperity of a few capitalists, whilst, never forgetting to oppress the workers, adivasis and dalits! We reject you!…. (NFFPFW 2009)

It is no coincidence that at numerous meetings and protests demonstrations organised by these communities today, the talk of another freedom struggle reverberates the air. The fact is that the

social, economic and political relations in the society continue to remain feudal, and for millions *swaraj* is yet to be achieved.

Struggles over the Forest Rights Act

One of the key points of debate around the Act has been the concern for conservation, which got polarised into the question of rights of forests and animals versus people. The whole debate seems to have been misplaced, which stems from the fact that tribals are seen outside the forests and not considered as natural occupants of the habitat along with the animals and forests. This idea of conservation and forest management is heavily imprinted by the American experience. In particular, it has taken over two axioms of the Western wilderness movement: that wilderness areas should be as large as possible, and the belief that *all* human intervention is bad for the retention of diversity. These axioms have led to the constitution of massive sanctuaries, each covering thousands of square miles and a total ban on human ingress in the core areas of national park (Gadgil and Guha 1992). However, experience shows that this complete separation has been difficult to implement, but as per law thousands of hectares of land have been designated as protected forest, reserved forest, national parks, sanctuaries, etc., without settling the rights of forest-dwelling communities—making them all the subjects of forest department. This in some places has meant a strong presence of Indian state, but also at times a very weak presence given the inaccessibility within the forests and the inability of the forest department to keep control over all of it. This situation has been cumulatively exploited by the timber, tiger and mineral mafia, landed and upper caste peasantry and above all the forest department bureaucracy. In fact, this has also given rise to the minuscule elite from within the tribals and other forest-dwelling communities who have collaborated with other forces in exploitation, but majority have continued to suffer in various ways.

One thing common to both PESA and FRA is that they promise power to those who are on the margins. Both these acts ensure rights not only to the land that people have been occupying but also community right over forest resources, and governance structures to decide how to use their resources. PESA also gives

them protection of their traditional practices and cultures. If implemented in letter and spirit, these two legislations would mean no transfer of tribal land to non-tribals and would also put an end to use of tribal land for the mineral exploitation or implementation of heavy industries and development. Given the increasing need of mineral resources in an economy driven by growth percentage, these laws will provide more hindrance and will make the already difficult job of acquiring land much more difficult. So, if something is not in the interest of governance then why should governments implement such legislations?

After the Act was passed, it was challenged by the conservation lobbyists and retired forest officials in the courts, most of these cases have now been dismissed by the Supreme Court. Even then, the biggest hurdle today in way of its implementation remains the forest department, which is under the MoEF. Why should it be opposed to its implementation? As mentioned before, the FRA empowers communities and if implemented completely will lead to a democratisation of forests and resources, which will challenge not only the eminent domain of state but also the control of the forest bureaucracy. Let us not forget that forest bureaucracy inherits the colonial and feudal lineages of princely states from pre-Independence era of controlling the forests as their private property, and everyone else was living there only at their mercy, not as a right. It is also no surprise that the conservation of these forests have had a feudal and elite approach where people have been seen as enemy and forest bureaucracy always had representatives from erstwhile princely states, though there have been significant changes from 1970s–1980s onwards.

MoEF has been opposed to the Act from the beginning as the MoTA has been empowered with jurisdiction over forest lands. The attitude of the MoEF is like a zamindar fearing the loss of some of his holdings. It needs to be mentioned that the land on which rights are being recognised now are in essence agricultural land, being cultivated by these communities for long and are not 'forests' (Sarin 2005). It is pertinent to ask why MoEF should have rights over these land and communities, whereas, traditional forest dwellers live there like tenants without any fundamental rights. Since these communities continued to live in the forests, they had no access to various government welfare programmes or schools, electricity, roads, hospitals, etc. They could not even

build a *pacca* house in spite of living over the same piece of land for decades. These villages have continued to be in records as forest villages or encroachments because the forest department refuses to regularise them and ensure their rights. The forest department did not do so when the MoEF issued six notifications in 1990 stating clearly that all the pre-1980 settlements, *Taungiya* villages, encroachments and forest villages be regularised and rights settled and wherever required the revenue status granted. The forest department failed to do so. Similarly, there is no rationality in continuing to categorise community forests/village grazing lands as 'national' forests.

In such a situation it became perfectly legitimate that MoTA was made the nodal agency for implementation because it has the mandate to work for tribal welfare. However, non-cooperation from forest department is the biggest hurdle in implementation of the Act. In addition, central and state governments, in order to safeguard the interests of private and public corporations to extract minerals, timber and other forest produce, have intensified coercive, legal, extra-legal and illegal efforts to suppress and destroy the attempts by adivasis in forest areas who have sought to build democratic control over resources and their homelands. We continue to witness incidences of violence, intimidation, burning of households and threat to life in Burhanpur district of Madhya Pradesh; in Jagatsinghpur and Niyamgiri, Orissa, to grab resources for corporations like POSCO and Vedanta, respectively and in Mudumalai, Tamil Nadu, to grab resources in the name of tiger conservation (CSD 2009).

Ministry of Environment on one hand has been alleging loss of land due to FRA implementation but on the other hand has continued to give clearances to various projects and diversions of forest land for non-forest land. It has failed to ensure afforestation as per the conditions of environmental clearance granted to various projects over the years. According to the MoEF, in the last one decade close to 10 lakh hectares of forest land have already been released for various projects such as mining and industrial development. This area is almost as large as the same Ministry's estimate of the total forest land area under 'encroachment', 13.4 lakh ha, which is approximately 2 per cent of the total recorded forest area of the country (Government of India 2006). However, the State of Environment (2009) noted an increase in forest area

and this has been possible due to the fact that MoEF has been acquiring the community land, grasslands, village fallow lands, grazing areas and lands that forest dwellers are cultivating (but do not have recorded rights on), but which are recorded as forest land for compensatory afforestations and commercial plantations. After afforestation, it is notified as reserved or protected forests and transferred to the forest department and people lose all rights to cultivate, collect firewood or forest produce or graze their livestock in lands that were in fact their own.[9] Between 1980 and 2009, such 'compensatory' plantations took place on 1,183,472 ha of land—of which 554,635 ha was revenue land which was now brought under forest department's control.[10] This Janus-faced action of Ministry of Environment is completely anti-people and illegal encroachment over the communities' land and in violation of provisions for FRA.

MoEF took a year and half after the law came into force to finally issue orders in July 2009 that barred handing over people's lands and forest resources to corporates or projects without their consent. Yet no action has been initiated against the officials responsible for the illegal forest diversion of the preceding year and a half, and meanwhile state governments have continued to threaten people with illegal eviction for large projects in Chhattisgarh, Madhya Pradesh, Orissa, Jharkhand, Andhra Pradesh and elsewhere. The same story of illegal threats has been repeated in wildlife sanctuaries, national parks and tiger reserves (CSD 2009). This was evident in case of Van Gujjars who continued to be evicted from the Rajaji National Park.

Traditionally, Van Gujjars have been living in the forest area, which was designated as Rajaji National Park in 1986. About 1,400 Van Gujjar families live in Rajaji National Park, Dehradun, with their herds of buffaloes who graze in the forests and take their livestock from the Park to the highlands every six months. After declaration of the Park, they have been constantly living under threat of forceful eviction. Park authorities also denied lease grants to them on account of non-availability of any evidence of their stay. For 26 years this tussle has been going on between Gujjars and park authorities. In between, 518 Gujjars were forcefully resettled in Pathri and Gaindikhata, two colonies in Haridwar district. The Van Gujjars finally lodged a writ petition in the Nainital High Court against their forceful eviction in May 2006. The High Court

ruled in their favour and ordered the park officials to honour the new FRA and mentioned that Van Gujjars could not be forcefully evicted without their consent and proper resettlement. Park authorities refused to acknowledge the rights of the Van Gujjars not only in complete violations of the FRA but also in contempt of the order. In a contempt petition, the court again ordered the Park authorities to implement the order but they refused. Very recently, due to growing pressures from the Gujjars who joined hands with NFFPFW, in December 2009, Park authorities started setting up camps for resettling the Gujjars after settling their claims. However, Gujjars formed their own forest rights committees and filled in claim forms for title to land and community rights to the forest produce as entitled by FRA.[11]

This clearly shows the hurdles which forest departments continue to create in effective implementation. The tussle continues, and in the same spirit, the most recent of actions by MoEF is appointment of a 10-member committee to 'review the implementation' of the FRA on 11 February 2010, even though MoTA is in charge of supervision of the law. The true character of the committee is visible from its composition itself. The committee consists of seven serving forest officials, one Tribal Ministry representative—who incidentally is also a forest official—and two outside experts. It is being done in the name of looking into issues of 'sustainable forest management', even as the same Ministry has done its utmost to sabotage the powers of people to protect their own forests under the law, amply demonstrated in environmental clearance granted to the POSCO steel plant in Orissa, in January 2010, in spite of stiff opposition from people in the region and in violation of Ministry's own procedures and guidelines for granting such clearances (CSD 2009).

CSD in January 2009 posted on its website nine points of struggle on the Act. Even after more than a year, the situation on the ground has not changed much. Similarly, NFFPFW in its concept note for the national convention in June 2009 mentioned that overall the challenges before the movements are to establish community ownership and governance—democratic control over the forests as opposed to zamindari of forest department. It further added that the biggest hurdle in implementation would be non-cooperation from forest department apart from other legal challenges and loopholes in the Act. The points of struggle are as follows:

(a) End illegal interference by official agencies, especially the Forest Department, in rights recognition as has been observed in states of Rajasthan, Gujarat, Uttarakhand, West Bengal etc. even though the Forest department has a very little role in this process. They are in turn supposed to help in providing evidence, in the form of working plans, revenues, fines and other receipts issued to claimants from time to time.

(b) Provide transparent, accountable procedures for higher Committees such as the Sub-Divisional and District Level Committees, which screen the rights decisions of the gram sabhas, since current provisions are entirely non-transparent.

(c) Respect and recognise community rights, especially the power to protect and manage forest resources, as is evident from the small number of community claims filed, verified and recognised in the current status of the implementation.

(d) Gram Sabha has been undermined by administrative methods, even though the Act specifically provides that gram sabhas should be at most called at the level of revenue villages, and in Scheduled Areas at hamlet level, and never at the panchayat level.

(e) The Act does not provide for any deadline for filing of claims for recognition of rights, yet in all States, the State governments themselves are setting 'deadlines' and declaring that no claims will be accepted after certain dates.

(f) Joint Forest Management committees have been imposed as the Forest Rights Committees in some of the States are in total violation of the Act.

(g) Contrary to the provisions of the Wild Life (Protection) Act as amended in 2006, in December 2007 the government illegally notified critical tiger habitats in all the tiger reserves of the country—without engaging in the public consultations and scientific investigations required by law. This has led to intensified harassment of communities in these areas and intense pressure on them to accept relocation, in total violation of the law. A similar move is under consideration for declaration of the critical wildlife habitats under the Forest Rights Act.

(h) The Act prohibits any displacement of forest dwellers until recognition of rights is complete and areas over which communities exercise forest management rights and powers, or collective rights to forest resources, land can't be diverted without their consent. Yet, the Ministry of Environment and Forests has continued with diversion of forest land for industrial and other large projects, in total violation of the law.

(i) In some states the government has been illegally imposing additional requirements and their own verification forms, even though the Act and Rules clearly provide a list of types of evidence that are required.

These are not merely technical but very important political points for struggle in front of the communities. Another significant challenge is the regularisation of land titles, *patta*s, lease agreements and other such deeds. In the absence of clear data on forest and land surveys, it is going to be extremely difficult in certain cases to establish claim over the forest land and resources, as is evident from the different sets of data available with different agencies. The *State of Forest Report, 2009* (Government of India 2009) reports that forest and tree cover of the country was approximately 69.09 mha in was 2007, which is 21.02 per cent of the geographical area, whereas, the Planning Commission website mentions a forest cover of 67.71 mha, which is 20.60 per cent of its geographical area.[12] To this day, there is no census of families residing within wildlife reserves, or estimates of the recorded forest land under human occupation. As a result, it is also very difficult to actually calculate the total number of beneficiaries.

The implementation of this Act also has the same dangers which any other government programme faces, the task gets compounded where competing claims on the same resources occur between two completely unequal parties: forest department and forest-dwelling communities. As observed in Uttar Pradesh, forest villages on the boundary of forests and revenue settlements have another hindrance to regularisation of land rights, as the local upper caste are feudal landed gentry and most of the non-tribal forest-dwelling population consists of dalits.

Forest Rights Act: A Tool for Struggle

Even then the question arises, why does FRA remain a historic legislation given this largely bleak analysis of its potential? The immediate reason is that adivasis (and activists who support them) have no other choice but to challenge draconian legislation or fight for better protective legislation given the everyday struggles adivasis have to go through to meet their basic livelihood needs.

A repressive forest act that denies adivasi households access to forest produce makes it more difficult, if not impossible, for them to eke out a living. Similarly, the presence of FRA and PESA, if implemented, legitimises adivasi claims to land on their own systems of governance. Non-engagement in these legal battles would simply make it easier for the state to do as it sees fit regardless of prior claims to land. These struggles over the law, however, are more than just livelihood struggles. They are struggles over cultural territories as well. The state's claim of eminent domain through the Land Acquisition Act denies the existence of customary claims to homeland by adivasi communities. Hence, the struggle for 'good' laws is also very much about the right to remain in places which are considered home. Resettlement and rehabilitation, even if implemented properly, deny adivasis these rights to place (Menon 2007). Last, FRA, compared to other legislations, is a product of historic struggle of forest-dwelling communities after years and so it is something with which they identify. An important parallel one could see is the RTI Act that came into being after struggles for a long time and citizens all across the country have struggled to implement it extensively. It has become a tool for struggle and to challenge the opaqueness and might of the state. FRA contains within it the same potential.

The FRA has emboldened the spirits of the forest-dwelling communities like nothing before. In Sonbhadra district, UP, under the banner of Kaimur Kshetra Mahila Mazdoor Kisan Sangharsh Samiti adivasis, dalit men and women residing on the forest land have been waging the struggle to gain control over the land since 2000. The forest department has refused to give them titles and engaged in illegal evictions and frequent harassment. In 2006, when the Act was passed by the Parliament they could see the light at the end of the tunnel. This gave impetus to their struggle and also encouraged those in Chandauli, Mirzapur and neighbouring districts of Jharkhand to start capturing the land they have been tilling. FRA provided them the much needed legitimacy to their land capture and also put pressure on the government to start implementation. In fact, they started putting greater pressure on the government for quicker implementation of the Act. In August 2007, they started this campaign more vigorously with the slogan *jo zameen sarkari hai, who zameen hamari hai* (all government land is ours), which really put the administration on the back foot and gave

them an opportunity to increase repression on the movement as well, but after much negotiation and lobbying the UP government accepted the implementation of the Act. Since then, UP has seen an increase in the pace of implementation of the Act.

The Act in itself has been an empowering tool to the communities against the feudal elements not only within the administration but also in the society, who have oppressed and exploited them over the years. What else can determine the extent of empowerment than this? In Paraspani village, Sonbhadra district, women captured the land and named their village Koyal Nagar. When the police came in large numbers along with the forest officials and asked them to stop cultivating and vacate the land, the women challenged them and asked on whose orders they had come and what right did they have to ask them to vacate. In return, the administration demanded to know on what basis they had captured the land. Women showed them the copy of the FRA and the maps of their settlement and said central and state governments have given them the right to the land their forefathers have been tilling all this while. Police tried to fool them by insisting that this paper is false; in return they shouted back and said go and ask the prime minister and chief minister who have issued the orders for its implementation and rather than harassing them they should cooperate in implementing the Act (Roma 2009).

It is not only in the case of the capturing of the land, but these women have also gained confidence and control over their lives. They have made sure that the land is communally owned by them. Once this has been achieved, they have also now become eligible for employment under NREGA. It is important to note that all the villages in the forests had no access to government programmes or benefits under housing, food distribution, pension and other schemes. Now with the grant of revenue status and also provisions for controlled diversion of forest land for the community's need of building a school, community centre, hand pumps, etc., they can have access to government programmes and various other benefits. Absence of revenue status also meant that they could not have access to employment and were largely dependent on the contract labour in forests which were very few to come by.

Ashok Chowdhury, former convener NFFPFW, would like to believe that FRA is not the end in itself; it is valid as long as the communities can identify their struggle for social justice and dignity in the provisions of these laws.[13] Law is a struggle; it is a tool

towards the larger goal of social change. In the numerous meetings I have attended in UP, Uttarakhand and Delhi, it is no wonder that the communities keep harping on this point and emphasise that claiming right to the land and forests is the beginning of the struggle; the real challenge is to keep their hold on it, for which they will have to build their organisations and their own laws to govern these lands and establish community governance over the forests.[14]

The FRA has given a new ray of hope amongst the forest-dwelling communities. However, it remains to be seen if it will be able to meet the desired expectations. So, on one hand communitie are determined to struggle and take control of the land, but on the other hand with the stiff resistance they are witnessing from the government agencies and the other feudal elements the situation looks grim. It might not be too much to say that the FRA will not meet its desired objectives of correcting historical justice. Instead, after much struggle, various state governments will continue to give individual title rights to land and deny other community rights as mandated in the Act. What remains to be seen is how far the implementation will go; nevertheless, this Act goes a long way in providing for democratisation of forests and for a long time the fires in the forests are going to continue with the communities using FRA as a tool to challenge state's authority.

Notes

1. Kalpana Kannabiran suggested this term for this form of law-making currently.
2. The slogan of *Aam Aadmi* (common man) in the government is all in the same line.
3. This was enacted in the TV advertisements led by a group called Vanashakti or later petitions filed in Supreme Court or High Court by Bombay Natural History Society, Wild Life First and other conservation-related organisations and some retired forest officials.
4. The Fifth Schedule of the Constitution deals with the administration and control of Scheduled Areas as well as of Scheduled Tribes in states other than Assam, Meghalaya, Tripura and Mizoram.
5. Forest and tree cover of the country as per this assessment is 78.37 mha in 2007, which is 23.84 per cent of the geographical area. This includes 21.02 per cent forest cover and 2.82 per cent tree cover. The forest and tree cover becomes 25.25 per cent, if the areas above tree line, that is, 4,000 m are excluded from the total geographic area (State of Environment 2009).

6. See provisions of PESA, 1996 online at http://tribal.nic.in/writereaddata/linkimages/pesa6636533023.pdf (accessed on 10 April 2010).
7. *Panchsheel* of Tribal Affairs:
   (a) People should develop along the lines of their genius and we should avoid imposing anything on them. We should try to encourage in every way their own traditional arts and cultures.
   (b) Tribal rights in land and forest should be respected.
   (c) We should try to train and build up a team of their own people to do the work of administration and development. Some technical personnel from outside will, no doubt, be needed especially in the beginning. But we should avoid introducing too many outsiders into tribal territory.
   (d) We should not over administer these areas or overwhelm them with a multiplicity of schemes. We should rather work through, and not in rivalry to their own social and cultural institutions.
   (e) We should judge results not by statistics or the amount of money spent, but by the quality of human character that is evolved.
8. The term 'national sacrifice area' was coined by the US Academy of Science in 1973 for the four corner regions of the US Midwest, which had been devastated by toxic waste, owing to relentless corporate stripping of its coal, oil, gas, uranium reserves. As quoted in Pedal (1995/2009, 318).
9. See MoEF letter F.No.2-l/2003-FC dated 20.10.2003 as cited in CSD communiqué dated 26 June 2010.
10. Answer to Unstarred Question No. 2494 to Ministry of Environment and Forests, Lok Sabha, on 22 July 2009 as cited in CSD communiqué dated 26 June 2010.
11. Based on the conversations with Gujjars living in the park in December 2009.
12. For details see http://www.planningcommission.nic.in/sectors/envir.html (accessed on 13 July 2010).
13. Ashok Chowdhury in conversation with the author in February 2009.
14. Due to my own association with the NFFPFW and NAPM (National Alliance of People's Movements), I had the privilege of attending the meetings in Delhi where they together held demonstration demanding repeal of the Land Acquisition Act in March 2007, April 2008, July 2009, November 2009 and then independent meetings organised by NFFPFW in February 2009, Dehradun; July 2009, Lucknow; December 2009, Sonbhadra; December 2009, Haripur; February 2010, Dehradun and occasional planning meetings in Delhi 2008 onwards.

Section II

Law and Information in a Globalising World

3

Globalisation and Justice: Fait Accompli or Choice

Ashok Agrwaal

> An inconclusive play is Reason's toil.
> Each strong idea can use her as its tool;
> Accepting every brief she pleads her case.
> Open to every thought, she cannot know.[1]

In an ideal world justice would need no enforcement, being attained through virtue alone. Though apocryphal, the famous Pauranic story describing the change that was wrought with the ending of Satyug (the age of truth) is deeply insightful into the nature of the conundrum that is justice. After being restored to kingship, Rama was one day seated on his throne when two subjects came before him carrying a pot of gold. The gold had been found buried in a field soon after the first person had sold it to the second person. Rama was asked to adjudicate upon the dispute that arose as a result. The buyer contended that the gold belonged to the seller since he was the original owner of the field, and had he known about the gold he would have definitely taken it with him when he sold the field. The seller contended that he could not accept the gold under any circumstances, since he had sold the field and all that stood upon it, or lay beneath it. Even as Rama was pondering over this novel dilemma he was called away from the *durbar* by his wife, Sita. In the brief moment of time for which he was away Satyug ended and the next Age, the Tretayug, began.[2] When Rama came back to his throne he discovered the two men—the buyer and the seller—were

still quarrelling but a fundamental change had come over both of them. Each of them was now claiming the pot of gold for himself.

Pre-modern societies believed that it is not possible to straitjacket the human condition into a singular paradigm of justice. In that view, there are too many variables, too many imponderables, too many mysteries for which there are no answers, for justice to be made an issue of central importance to governance.[3] On the other hand, it was believed that regulation and control of human behaviour are crucial to the survival of the group, a.k.a. the human race. The first justification for law, therefore, was not that it facilitates justice, or the dispensation of justice, but that it facilitates regulation/moderation/control of human behaviour. Justice was seen as a by-product of the 'order' brought about by regulation and control.[4]

While there may be many problems with such a formulation, it provides a rather neat solution to one of the most intractable problems that dogs modern thinking on issues of justice, namely, the viability of the connection between law and justice.[5] Law, including rule of law, enjoys a symbiotic link with force, and to the extent that it connotes an absence of force, rule of law is a misnomer—deliberate or inadvertent.[6] On the other hand, force is an antithesis of justice. Thus, by itself, law encompasses all that an authority is able to enforce, without reference to reason or compassion. Linked to a notion of justice, law is compelled to not only display an inner consistency but also satisfy a set of social, moral and ethical criteria extrinsic to it; which it was not required to do with such a degree of rigour so long as its link to justice was solely through 'order'.

Irrespective of the controversy however—is law is a tool of justice or is justice an excuse for imposing and enforcing hegemony—it is patent that modernity, via its primary instrument, the modern nation state, has forged a special web of links between law and justice. When viewed in the context of modernity's evolutionary history, these links seem inevitable and an important step forward in the eternal quest for justice. Thus, though there can be no denying that we do not live in a just world, and probably never have, under modernity justice has been called 'the first virtue of social institutions'.[7]

The modern failure to attain justice (or a satisfactory state of justice) can also be derived from the foregoing discussion. The very nature of justice precludes the possibility of any group of human

beings, even a relatively homogenous group, enjoying clarity on what is justice (as an ideal) or consensus on how justice (the commodity) must be dispensed, so as to maximise its attainment. As illustrated by the Pauranic story earlier, this lack of clarity and consensus is linked with the need for justice to be enforceable. Had a mere declaration of what is 'just' been sufficient to secure justice, there could have developed a straightforward relation between law and justice—the former being a tool for the better achievement of the latter. Law would then have served its purpose by being nothing more than part of a lexicon of justice.

In an attempt to emerge from this conundrum, modern thought seeks to define justice in terms of concrete notions of equality, liberty, freedom, etc. articulated in the framework of a system of rights. A right is defined as 'the legal or moral entitlement to do or refrain from doing something or to obtain or refrain from obtaining an action, thing or recognition in civil society'. Since civil society can be properly said to have come into existence only with the advent of the bourgeois revolutions, which are themselves an integral part of the early phases of globalisation, it would not be wrong to state that the modern notion of rights is co-terminus with the process currently represented by the expression 'globalisation'. Having taken birth in the era of laissez-faire, this conception of rights proceeded on the assumption that citizen charters and constitutions must seek to extract guarantees with respect to civil and political rights, leaving the arrangement of the social and economic well-being of the subjects/citizens to the civil society.[8] Under such dispensations, a constitution has a twofold object: *(a)* to specify the terms of the sovereign's right to rule and *(b)* specify the limits to the sovereign's powers vis-à-vis the civil and political rights of the citizens/subjects. A bill of rights was seen as a mechanism for enforcing the terms of the contract. This is, even today, the essence of the rule of law, which is believed to underwrite the notion of rights.

It is evident that the modern notion of rights is co-terminus with equality. It is only when a certain basic equality is postulated among a group of people that one can talk of their having rights. Thus, rule of law must postulate equality—including equal application of the law to all—in order to exist as such. In formal terms this is achieved by way of a deeming fiction, with the sovereign being claimed as being embodied in the citizen rather

than in the person of the monarch, by constructing a structure of rulership, which—theoretically—makes every *ruled* a potential *ruler*. Thus, equality/rights and rule of law are bound in a reciprocal relationship: equality cannot exist without rule of law, which makes such equality possible by supplying a transcendent principle to which all—the sovereign and the subjects alike—must adhere. In the words of Dicey, one of the most famous definers of this term, rule of law means that 'every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen'.[9]

Clearly, in its modern avatar law must first and foremost be an equalising principle and, notwithstanding all the other practical objects that it serves, law-rule of law should not be permitted to claim the name, with the attendant attributes, unless it satisfies this condition. It is axiomatic that an equalising principle must itself be neutral. But if, as stated above, law is not neutral—it is backed by force and, commands it also—then the enforcers of law always enjoy an edge over those upon whom the law is enforced. The power to make law, or to enforce it, patently carries within it the power to bend it, break it and to pervert it. In other words, even under the rule of law, equality is more a shibboleth than a natural and inevitable concomitant. But if equality is a myth so is rule of law; a fact that is conveniently ignored by theories of law, or of justice.[10]

The symbiotic link between law and force is illustrated by the following construct. Any two persons who must co-exist will inevitably feel the need for norms to regulate each other's conduct. It can be argued that there are two possible ways in which this need can be resolved: by force, the stronger prevailing over the weaker of the two and enforcing his/her will; or, by law, when norms would get formulated to ensure that both persons get to enjoy an equal degree of freedom of choice, with neither encroaching upon the area of the other's choices (rights). The third possibility, which is often the way it goes in the real world, is that the stronger of the two establishes ascendancy and, using that, lays down a set of rules as being reasonable.[11] The weaker person must, perforce, acknowledge that the rules so imposed are 'fair'.[12] If he infringes any of these, so called, fair rules he is brought to book for violating the law. Since the person who imposed the law in the first place

was able to do so because of his superior strength, it is obvious that this person would also be able to enforce a penalty for the infringement of the law.

It is obvious that if the weaker of the two persons is allowed to stipulate the rule/s to be followed, he would not be able to enforce them unless the stronger person allows that to happen. Thus, irrespective of safeguards, checks and balances, morality, ethics, and whatever else one may throw into the equation, when the weaker person is allowed to wield it, the law or rule of law remains a concession by the stronger person, and ransom to his sense of restraint.[13]

It is the very nature of law to posit itself as something that stands above the people that it essays to apply to. From a utilitarian perspective, it may be argued that law as an instrument for imposing 'order' needs this superiority for better and easier enforcement. Modern rule of law gives this superiority a special edge, which consists of it being positioned as a vehicle of secular change (albeit a Judeo-Christian version of it); that is, the means by which a base human nature common to all mankind is enabled to come closer to a state of perfection, which state is the secular equivalent of divinity.[14] Envisaged thus, law is transformed from a 'necessity' into a 'virtue'. In simpler terms, it is implicit in the way law is viewed today that through law man can become superman.[15] This association of better (betterment) with law is unique to modern law-rule of law regimes.[16] More important, however, is the consequence of the inevitable conjunction between the (perceived) conceptual and ideational superiority of law-rule of law with the physical superiority of the law maker–enforcer. Patently, this combination of an ideological, moral and physical superiority that rule of law imparts to its wielders/proponents is a very potent mix.

The foregoing leads directly to a major premise of the globalisation-rule of law regime. The reason why globalisation seems inevitable: it means universalisation of rule of law, which *has* to be better than all the regimes that it has replaced and continues to replace.[17] The most important fallout of such a premise is that it imparts a special legitimacy to the use of force, in the name of law.[18] A corollary is the facilitation of the framing of an increasing number of laws, covering an increasing number of aspects of life.[19] For, if law makes you better then more law makes you (more) better, or better faster.[20]

Thus, the universalisation of the rule of law regime can be (and is) viewed as a higher purpose, befitting of the status of an ideology. Seemingly value neutral, this object is made to appear as if emanating from some deeper recesses of the evolutionary human consciousness that precedes, or overrides, its differentiation into tribes, clans, nations, races, religions and cultures. Conceived thus, human law (a.k.a. the rule of law regime) appears as a seamless, limitless continuum that has always existed. Just like one cannot, a priori, conceive of anything existing outside the physical universe, it gets postulated that there is no space for human existence outside the rule of law regime.

To sum up at this stage, notwithstanding 'equality', law-rule of law tends to combine with force (or power), and to act as an instrument of regulation and control on the behalf of power-force. Further, it is the nature of law to allow itself to be appropriated by the greater force, to serve the purposes of such force. Globalisation is patently the greatest force the world has ever seen and will, therefore, always appropriate law to serve its purposes. Thus, law-rule of law is unlikely to subserve rights over the interests of globalisation. That globalisation has operated in this manner to consolidate its hegemony is patent. Every chapter in this volume is a particular example of how globalisation has used law-rule of law to do so in India.

Globalisation represents a particular ordering of the earth, including human beings. It is just one of the words that have been used to connote this world order over the last several centuries. In other words, globalisation connotes not just a current situation but the current stage of a centuries-long process. It also connotes the path that this process is likely to take. And, finally, it connotes the implications of this path for humanity. Like globalisation, sustainability is a process. If so, and if we apprehend that either rights or the entire rights regime is unsustainable under globalisation, then not only is the future unsustainable but the present also; and, therefore, the past was also unsustainable. It means that in many significant ways the last few hundred years of human life have moved along paths that are a linear dead end.[21] These paths did not lead to progress, growth, development and many other such expressions that have come to typify the modern era. Or, at least, the progress, etc. came/comes at a price that was, and is, unacceptable by any rational yardstick.

In this context it is relevant to note that linearity survives as a paradigm of thought and action (and as epistemology), despite the development of ideas negating it during the 20th century from within the European mind itself, because of the practice of globalisation. The overwhelming success of the European expansion led to the conclusion that it was inevitable. Putting humanity on a linear track (historically speaking), it was postulated that each succeeding empire–civilisation was bigger, better, more powerful, more sophisticated, etc. In other words, the Western civilisation is better than all previous civilisations, because it is most recent. And, if so, it must be deemed that the reach of the current world order (represented by globalisation) is not merely an expression of the fact that it is more powerful and pervasive than all those that have preceded it but also of the fact that it is built upon the hubris of the past and, therefore, deserving of acknowledgement as the best expression—till date—of humanity.

Here, it is also relevant to point out that the metaphorical East (actually, the rest of the world) is deemed not to have an epistemology, and, largely, a pedagogy, relevant to modernity, which is indubitably the context of both globalisation and rights. As such, the East stands permanently reduced to the category of the unlearned, unlettered, uncivilised child eternally condemned to be led to school by the pedagogical West. While votaries of globalisation frequently essay to make these categories (Western/Eastern) parochial and hence, otiose, in an increasingly cosmopolitan and global world, such a position appears to be untenable in the context of globalisation as it is impossible to take a coherent position on the issue—for globalisation or against it—without also taking a position on the epistemology underlying it. Thus, it can be argued that those who deny the need to preserve and persevere with alternate epistemologies seek to present globalisation as a fait accompli. Whether they admit this or not, they propound that singularity, monopoly and hegemony in all aspects of life is a natural consequence of the evolution of the world.[22] Further, a discussion about globalisation and/or rights which does not actively engage with this aspect must necessarily be sterile, and amount to a covert validation of globalisation, negating any apparent critiquing of it.[23] It also amounts to a negation of rights, and of the rights regime.[24]

Clearly, globalisation and its concomitants operate as the ruling paradigm at all levels, down to the districts and villages of the

still remote fastnesses of India. The saga of the 60 year process in which the magic mantras of modernity and globalisation—progress, development and growth—made it the patriotic duty of every Indian to support the exploitation of the resources locked up under the land, ostensibly for the betterment of the entire nation, has been extensively documented and need not detain us here except to state that with increasing population pressures, growth, development and the advent of liberalisation to India in the 1990s, the adivasi hinterland of India has become the centre stage of major struggles around land use and control of habitat. This period has also seen the rise and growth of a modern consciousness around environment and ecology. More significant, however, from the perspective of this chapter, is the rise of a growing resistance in the adivasis themselves.

The struggle of the Kondhs, residents of Niyamgiri (literally 'mountain of law'), part of the Eastern Ghats system, falling in Kalahandi, Koraput and Raygada districts of Orissa illustrates the point.[25] This region is inhabited by two groups of Kondhs, Dongria and Kutia. The Dongrias live on the hills while the Kutias live at the foot of the Niyamgiri massif. Poor by modern standards, the Dongria Kondhs live relatively self-sufficient lives. The mineral-rich soil of the hills and the forests acts like an aquifer, storing rain water and releasing it slowly throughout the year.[26] Thus, even in drought years the two main rivers of the region, as well as countless smaller rivulets and streams continue to flow, providing water for agriculture and other purposes.[27] The Kondhs, particularly the Dongrias, hold that the mountain top contains the secret to their unique habitat and worship its life-giving principle, calling it Niyamraja.[28] The Dongria Kondhs practise shifting cultivation on the slopes of Niyamgiri but adherence to Niyamraja's rule of law ensures that the slopes of Niyamgiri remain verdant and thickly forested.

In modern parlance, the top of the Niyamgiri massif is one of the richest deposits of bauxite in the country.[29] Globalisation, therefore, seeks to excavate the mountain top and convert the bauxite into aluminium, which is vital to both the aerospace and the explosives industry—thus pitting the 'Niyam' of the Kondhs against the epistemological idiom of globalisation, i.e. modern rule of law. The question then becomes, how justified is the breaking of the Niyamraja egg to make the globalisation omelette. Being the dominant idiom, globalisation and its agencies—e.g.

modern rule of law—can dictate terms to Niyamraja's rule of law, which brings us back to the conundrum of justice and law posed above.

There is ample evidence to establish that mining Niyamgiri will completely destroy the unique and fragile ecosystem sustained by it, including the habitat of the Kondhs, who live on the hill itself.[30] The Dongria Kondhs qualify to be called a 'primitive tribe', and an 'endangered tribe', in law.[31] Under the constitutional scheme of protections and guarantees they are therefore entitled to special treatment. The pristine forests of Niyamgiri are also home to a number of vulnerable wildlife species including the royal Bengal tiger and an extremely rare lizard, the golden gecko (*Calodactylodes aureus*), which is of special interest to herpetologists as it represents one of two known varieties of the genus *Calodactylodes*, and is considered a 'Gondwana relic'. The hills and forests are also part of the migration corridor of elephants. The Niyamgiri hills also have at least seven rare plant species besides scores of rare medicinal plants and wild relatives of crop plants, such as the cultivated sugar cane plant, which can serve as a vital source of pure genetic material for generating new and improved hybrids of sugarcane. These hilltops act as a bridge for evolutionary migration of plant species from the Himalayas southwards and vice versa.

Apart from the massive destruction of habitat, and very high levels of dust and noise pollution, bauxite mining and refining generates copious quantities of 'red mud'. This is a cocktail of very fine grained, mineral rich, highly caustic dust with pH values in excess of 13.2.[32] Being so fine (about 80 per cent of it has a particle size of less than 10 microns), it is virtually impossible to prevent it from flying into the air.[33] Escape of caustic soda, used to extract alumina from raw bauxite, into the ground water is also a serious problem. This increases sodium concentration in ground water, leading to its own slew of kidney and circulatory ailments.

However, all protections and guarantees come nestled in exceptions and exclusions. At the very least these allow for monetisation of the protection or guarantee, substituting the *actual* for an ersatz equivalent. Those who propose to mine it have joined the battle for Niyamgiri on the basis of these exceptions and exclusions, besides the propensity of the 'system' to be subverted by the lure of the massive amounts of lucre that aluminium production represents.

Thus, notwithstanding the several excellent and legally compelling reasons why the entire Niyamgiri area should have been left untouched by destructive industrial processes—whether mining or manufacture—M/s Sterlite-Vedanta were granted permission to set up a 1 million tons per annum (TPA) alumina refinery at Lanjigarh, near Niyamgiri.[34] The refinery reached full capacity production in 2008. Even while this refinery was under construction, Sterlite–Vedanta applied for expansion of the refinery to 6 million TPA, along with a request for permission to mine bauxite from Niyamgiri. It is pertinent to note that mining Niyamgiri was always part of Sterlite-Vedanta's agenda, as is reflected in the various agreements signed between it and the Orissa government and its entities. The separation of the two projects—refinery and mining—was tactical, dictated by political and other extraneous considerations.

While it is obvious to the meanest intelligence that the mining of bauxite, refining it into alumina, and then smelting alumina into aluminium, are symbiotically connected activities, Sterlite-Vedanta persuaded the concerned departments and officials of both the state and central governments that they should consider the application for setting up the refinery dehors the proposal for mining Niyamgiri. To facilitate the grant of clearances for the two projects, Sterlite-Vedanta structured its refinery proposal in such a way that it did not require acquisition/diversion of any 'forest' land.[35] This made it much easier for the various government departments to grant permission for the refinery. Sterlite-Vedanta also submitted that it would bring in the bauxite ore for the refinery from existing mines in Jharkhand and Chhattisgarh.[36] The modified Sterlite-Vedanta proposal found favour with all concerned and it was sanctioned. While doing so, both Sterlite-Vedanta and the government documents accorded prominence to the prospect of 'development of a backward district', and the 'benefits' that local people—Kondhs and Dalits—would derive from the establishment of the refinery. The issue of pollution was treated as of minimal importance—easily contained and dealt with through the application of tried and tested technology.

As proof of the dishonesty underlying the entire process, simultaneously with starting construction of the refinery, Sterlite-Vedanta moved an application for diversion of 'forest' land for laying down infrastructure for mining Niyamgiri. Shortly

afterwards, it also applied for permission for expanding the refinery from 1 million TPA to 6 million TPA. Probably because the Kondhs did not realise that the refinery was only the thin end of the wedge, protests against the Sterlite–Vedanta ventures began only after it became known that it had applied for diversion of protected forest land and for permission to mine Niyamgiri. In the face of these protests, Sterlite-Vedanta started claiming that leave alone the expanded refinery; even the existing 1 million TPA refinery would run at a loss if it was permanently forced to depend on bauxite from distant sources.[37] On the other hand, as the recent Saxena Committee report has pointed out, the Niyamgiri bauxite is hardly sufficient for running a 6 million TPA refinery for 4–5 years.[38] Quoting a company presentation, this report states that Sterlite-Vedanta will need about 1,014 million metric tons of bauxite from various sources, near and far from Lanjigarh, for the 6 million TPA refinery.[39] Thus, the report says, Niyamgiri is of minimal importance to Vedanta's plans, comprising just about 7 per cent of its total bauxite requirements.

On account of its numerous lapses and violations, as enumerated by the Saxena Committee report, and other reports, on 24 August 2010 the minister for environment and forests, Government of India, passed an order:

(a) Rejecting the stage II 'forest clearance' for the Orissa Mining Corporation (OMC) Sterlite India bauxite mining project at Niyamgiri.
(b) Consequently, declaring that the 'environmental clearance' for the mine (granted earlier) had become 'inoperable'.
(c) Ordering an inquiry into reports that Sterlite was currently sourcing bauxite (for its existing 1 million TPA refinery) from mines in Jharkhand that do not possess valid environmental clearance.
(d) In view of the several violations pointed out by the Saxena Committee, directing the Ministry of Environment and Forests (MoEF) to issue a show cause notice to Sterlite asking why the 'environmental clearance' for the existing refinery should not be cancelled.
(e) Directing that a show cause notice be issued to Sterlite as to why the 'terms of reference' (TOR) for the Environment Impact Assessment (EIA) report for expansion of the

refinery from 1 million TPA to 6 million TPA should not be withdrawn. Simultaneously, suspending the TOR and the appraisal process for the expansion.

For this and several other reasons, Sterlite–Vedanta may ultimately not get permission to mine Niyamgiri. Irrespective of the final outcome in this regard, however, the disconnect between globalisation and rights stands sufficiently juxtaposed. The level of 'development' of a polity-country is primarily measured by its per capita 'consumption' of various materials, including aluminium, all of which require extraction (mining), refining and manufacture at some stage. By that yardstick, India is a backward country, and will remain so unless the thousands of Niyamgiris lying unexploited in it are put to 'productive use'. At almost every stage of this process people who live at the margins of globalisation—adivasis, dalits and other poor people—will need to be displaced, and/or otherwise made destitute.[40] On each occasion the arguments in favour of the displacement, etc. (i.e. in favour of globalisation) will claim that the lives of those displaced will improve. The actuality is however vastly at variance with these promises.

Here it is necessary to bring in a major decision of the Supreme Court in the 'Samatha' case, which (technically and theoretically) continues to hold sway in matters and affairs of the adivasis and their habitats.[41] This judgement amounted to a big spoke in the wheels of the globalisation juggernaut that was then gathering momentum in India.[42] The question before the Supreme Court was whether the Andhra Pradesh Scheduled Area Land Transfer Regulation (1 of 1959), as amended by Regulation II of 1970, and the Mining Act (67 of 1957) prohibits grant of mining leases of government land in Scheduled Areas to non-adivasis. The court was required to resolve two contradictory decisions of the Andhra Pradesh High Court. Interpreting Section 3 of the Regulation, which prohibits transfer of adivasi lands to non-adivasis, one bench of the High Court said that the word 'person' used therein includes government and, as such, a lease of government land situated in Scheduled Areas to non-adivasis was not permissible and, hence, void. This decision also held that lease of a forest area for a non-forest purpose, or a renewal of such a lease, without prior approval of the central government, was violative of Section 2 of the Forest Conservation Act, 1980. Accordingly, this bench had directed the

Andhra Pradesh government to stop/prohibit mining operations in Scheduled Areas. A different bench of the same court held to the contrary in a subsequent judgement. The earlier decision was not brought to the notice of a later bench.

The Supreme Court held that the object of the Fifth and Sixth Schedules to the Constitution was not only to prevent acquisition, holding or disposal of the land in Scheduled Areas by non-adivasis from the adivasis but also to ensure that the adivasis remain in possession and enjoyment of the lands in scheduled areas for their economic empowerment, social status and the dignity of their person. The judgement adverted to the 'constitutional duty' of the governor of each state, by legislative and executive action, to prohibit acquiring, holding and disposing of the land by non-adivasis in the Scheduled Areas. The cabinet of the central government was, similarly, held duty bound, while exercising its power under Article 298 of the Constitution, to be equally 'cognizant to the constitutional duty to protect and empower the tribals'. Thus, it declared the competing rights of adivasis and the state were required to be 'adjusted without defeating rights of either'.

Though the decision was based on facts specific to the Samatha case, the court made it clear that the principles on which its decision was based, and therefore its decision, were applicable throughout India. Since it is impossible for any state institution, including the courts, to stand categorically against modernity-globalisation or any of its shibboleths, the court also made clear that it was not declaring a 'total prohibition' on alienation of adivasi lands to non-adivasis. However, while exercising this power:

> [T]he Executive is enjoined to protect social, economic and educational interest of the tribals and when the State leases out the lands in the Scheduled Areas to the non-tribals for exploitation of mineral resources, it transmits the correlative [*sic*] above constitutional duties and obligation to those who undertake to exploit the natural resources.

The court held that as a part of the administration of the project it should be mandatory for the licencee or the lessee to set aside 'at least 20 per cent of the net profits' as a permanent fund for establishment and maintenance of water resources, schools, hospitals, sanitation and transport facilities by laying roads, etc. It was made clear that this 20 per cent allocation was exclusive of

the expenditure for 're-forestation and maintenance of ecology'.[43] Finally, the court cast a duty upon the MoEF and the secretaries of all the state governments holding charge of their respective forest departments 'to ensure that the industry or enterprise does not denude the forest to become a menace to human existence nor a source to destroy flora and fauna and biodiversity'.[44]

Consequently, an agreement dated April 1997 (i.e. just three months before the Samatha judgement) between OMC, a government of Orissa undertaking with exclusive rights to the entire mineral wealth of the state, and Sterlite India Ltd, allowing the latter exclusive mining rights over the bauxite in the Niyamgiri hills, was put on hold.[45] Notwithstanding that the Supreme Court had explicitly declared the principles laid down in the Samatha judgement to be applicable throughout India, in July 2002 a cabinet sub-committee of the Orissa government decided that the Samatha decision was not applicable in Orissa 'as adequate care has been taken to protect the tribal interests in the existing laws of the state'.[46] Immediately thereafter, the Orissa government began the first phase of compulsory land acquisition for the Lanjigarh refinery.[47]

Three petitions were filed before the Supreme Court in November 2004 against the proposed bauxite mining project, and against the proposals to divert 'forest' land for non-forest uses. The fate of these petitions are followed by a now familiar trajectory. In December 2004, the Supreme Court asked the Central Empowered Committee (CEC) to investigate the allegations made in these petitions.[48] Its report, submitted in February 2007, stated that the refinery project was given environmental and forest clearances based on 'inaccurate information', and that the decision to grant it clearances 'smacks of undue favour/leniency'. It also recommended that bauxite mining should not be allowed in the Niyamgiri hills, as it was an ecologically sensitive area.

On receiving the CEC report, and other reports detailing the numerous illegalities connected to the refinery project and the mining proposal, by both Sterlite-Vedanta and the concerned government agencies, in November 2007 the Supreme Court stayed the mining project. Meanwhile, perhaps forced by the mounting tempo of protests, the Orissa State Pollution Control Board (OSPCB) brought out a series of reports documenting air and water pollution and environmental damage caused by the refinery project. In January 2008, the Forest Rights Act (FRA)

came into force.[49] Notwithstanding all this, in August 2008, after conducting a hearing in the matter, the Supreme Court cleared the Sterlite-Vedanta proposal to mine Niyamgiri.[50]

The rhetoric of its two orders makes explicit the modus operandi of globalisation when confronted with an opposing claim based on 'rights'. Though the court's order dated 23 November 2007 did contain one line rejecting the Sterlite-Vedanta application for clearance of the mining project, the bulk of the order was a series of suggestions (dubbed 'Rehabilitation Package' by the court) by complying with which the project could be sanctioned. As was only to be expected, given the clear import of this order, Sterlite-Vedanta and OMC conveyed their 'unconditional' acceptance of the court's 'Rehabilitation Package', paving the way for the 8 August 2008 order, which was thus merely consequential to the 23 November 2007 order.

Coming straight to the nub of the matter, the 23 November 2007 order states that the 'short question' is whether 'M/s. VAL (Vedanta Alumina Ltd.) should be allowed to set up its Refinery/Project known as 'Alumina Refinery Project'. As stated above the project involves the proposal for diversion of 58.943 ha of forest land'.[51] Thereafter, laying down its perspective in the matter, the court declared that while 'adherence to the principle of Sustainable Development is now a constitutional requirement. How much damage to the environment and ecology has got to be decided on the facts of each case'.[52] Calling mining 'an important revenue generating industry', the court declared that it could not allow 'national assets' to be transferred to companies 'without proper mechanism in place and without ascertaining the credibility of the User Agency'.[53]

Having displayed its mastery of direct precision, the court, even more precisely, then chose to mix up the issues. It declared:

> It is not in dispute that in this case mining of bauxite deposits is required to take place on the top of Niyamgiri Hills. MOEF has given an environment clearance for Alumina Refinery Project. All requisite permissions have been obtained by the said applicant. The Refinery to be constructed by M/s. VAL is one million ton Alumina Refinery at Lanjigarh at an estimated cost of Rs. 4000 crores. The mining lease shall stand in the name of OMC Ltd. (State Undertaking). The agreement between OMC Ltd. and M/s. VAL indicates that it is a joint venture in which M/s. VAL is a contractor. The agreement further indicates that the material will be sold by the lessee to M/s.VAL.[54]

The order then summarised the concerns of the CEC, without jeopardising the court's own carefully formulated position on the symbiotic link between the refinery and the mining proposal. Referring to the impact on the ecology (including hydrology), wildlife and upon the Kondhs the court, however, in a few crisp sentences, overlayed its perspective upon these concerns: juxtaposing the CEC's concerns with 'a picture of abject poverty', lack of 'proper' housing, hospitals and schools. It cannot be disputed, the court stated, that people in Lanjigarh live 'in extremely poor conditions'.[55] As if to reassure that it was not acting *in vacuo*, the order then reiterated that 'M/s. VAL has obtained all necessary clearances. It now seeks clearance of the Project from this Court before it is placed before the Central Government'.[56]

The rest of the order was, essentially, the delineation of the court's plan for giving Sterlite-Vedanta what it wanted, while seeming not to do so.[57] It started with a discussion of the technical shortcomings in the Sterlite-Vedanta plea, and said that it was not 'inclined to clear the Project'.[58] The court declined to accept that VAL was a subsidiary of Sterlite India, as the 'financial statements' produced before it suggested that 'VAL is an associate company' and not a subsidiary. Thereupon, noting that the parent company of both VAL and Sterlite India, which had admittedly funded the refinery project at Lanjigarh, was Vedanta Resources, the order extracted a Reuters report, as published in an economic daily, stating that the Norwegian government's pension fund, 'one of the world's biggest sovereign wealth funds' had withdrawn its investments from Vedanta Resources (listed on the London Stock Exchange), as continuing to stay invested would have subjected it to the risk of 'complicity in present and future severe environmental damage and systematic human rights violations' by the company.[59] However, instead of holding that such a report was, at the very least, sufficient to order a thorough probe into Sterlite-Vedanta operations in India, the court was content to limit itself to expressing reluctance to handing over an 'important asset' into the hands of a company without satisfying itself of its 'credibility'. The court also expressed doubts about the seriousness of the Sterlite-Vedanta claim that it would provide permanent jobs to the adivasis, particularly those whose land had been acquired. Finally, the order cast doubt on the credibility of VAL, saying

that it did not have 'the list of assets of M/s. VAL' and wondered what would be the remedy if VAL terminated its joint venture agreement with OMC.[60]

Setting out the terms of the 'Rehabilitation Package', the primary condition, stated at the outset, was that the 'application will not be entertained if made by M/s. VAL or by Vedanta Resources'. In other (un-stated) words, the court suggested the application be moved by Sterlite India.[61] Having agreed to grant clearance, albeit to a proxy of Vedanta Resources, the court dressed up its consent in some further conditionality: that the state of Orissa should float a Special Purpose Vehicle (SPV) for Scheduled Area Development of the 'Lanjigarh Project in which the stakeholders shall be State of Orissa, OMC Ltd. and M/s. SIIL'; that the SPV should be incorporated in India; that its accounts should be audited by the Auditor General of Orissa, etc. The court also stipulated that Sterlite India would have to deposit 5 per cent of its pre-tax and interest profits 'from Lanjigarh Project', or Rs 10 crores, whichever is higher, for Scheduled Area Development.[62] Further, it ordered that money would separately be payable for 'Wildlife Management Plan for Conservation and Management of Wildlife around Lanjigarh bauxite mine and … towards tribal development'. Finally, it directed that Sterlite India should file a statement giving the number of persons who shall be given permanent employment.[63] Thus, while stating that it was dismissing Sterlite-Vedanta's application for clearance, the court simultaneously directed the company to file a statement about the list of persons it would employ 'within eight weeks'.

From the perspective of the Kondhs and others affected by the refinery and proposed mine, there could have been no more patronising an order. These people were virtually invisible from the scene, except when dusted out for particular purposes. The order was passed on the basis of an irrefutable presumption that the refinery and the Niyamgiri mine could only improve their lives. As subsequent events showed, the court was so convinced of this that it refused to even hear the lawyer who appeared for the long-term inhabitants of the area.[64] Clearly, under the current phase of globalisation the rights of the flora and fauna of a project area are more deserving of consideration and hearing than those of the people. In a sense this is logical and understandable since globalisation has destroyed and decimated much more flora and fauna as compared to people. Therefore, preservation of the

remaining flora and fauna is more important that saving people, of whom there are undisputedly too many in the world.

In accordance with the wishes of the court, Sterlite-Vedanta applied for clearance in its new avatar, which was granted by an order dated 8 August 2008. While granting clearance, the court turned down the CEC's suggestion that instead of limiting its role to 'Scheduled Area Development', the mining lease should also be transferred to the SPV, whose 'stakeholders' were directed to be the state of Orissa, OMC and Sterlite India. Though this suggestion was in accord with the judgement of the Supreme Court in the Samatha case (discussed earlier), which had declared leases of adivasi lands in favour of non-adivasi entities as illegal, notwithstanding that the title of the land was held by the government, the Niyamgiri court said that it was not acceptable that 'the State of Orissa should participate in the mining operations'. Clearly, though efforts by the executive branches of the state to nullify the Samatha judgement had come to naught, the Supreme Court was giving it a quiet burial.

Declaring that there were 'serious problems' with the CEC's suggestions, the court said:

> We cannot change leases/MoUs/joint venture agreements signed between the parties at earlier point of time which have been approved by the Ministry of Mines, Government of India, and other Authorities. The object for passing the Order dated 23.11.07 was to strike a balance between development and environmental protection. The Lanjigarh Tehsil in District Kalahandi, as stated in our Order dated 23.11.07, faces abject poverty. At the same time the area is eco-sensitive area. We have tried to strike a balance in order to subserve the principle of Sustainable Development.[65]

The court then rhapsodised over what it had accomplished by imposing its 'Rehabilitation Package' on Sterlite-Vedanta, including providing for 'implementation of proper schemes for the development of the tribal area' and jobs for displaced and affected persons. However, it reiterated, 'we cannot change the existing structure in its entirety' as that would violate the 'terms and conditions of the joint venture Agreement dated 5.10.04 between OMCL and VAL (now substituted by SIIL)'.[66] As an additional justification for rejection of the CEC's suggestion, the court pointed out that this would defeat the object of the Orissa government in leasing mining rights in the state to its wholly owned entity, namely

that OMC should 'earn revenue on its own account', conveniently ignoring the fact that the court had itself ordered that OMC should be one of the three stakeholders of the SPV.[67] The court concluded discussion on this issue by making a further series of seemingly sensible statements with very little substance. It said:

> Under the joint venture Agreement, OMCL was a lessee from Government of Orissa. We cannot modify that lease. We cannot direct the lease to be assigned by Government of Orissa to SPV as it would amount to substitution of lease earlier executed by Government of Orissa in favour of OMCL.[68]

The court deflected the next major suggestion of the CEC, concerning the manner in which price of the bauxite-alumina would be determined, by putting the onus on the CEC to revert back to it if the existing mechanism did not work properly. The CEC had suggested that since there does not exist a proper market for bauxite as almost all the production of this ore is meant for in-house consumption by manufacturers of Alumina or Aluminium, the 'price (of Bauxite) … be ascertained by reducing the normative cost of conversion plus profit from the market price of Aluminium'.[69] The court stated that 'price discovery/mechanism is a complicated exercise', and since it had adequately protected the interests of 'sustainable development' by virtue of various financial stipulations in its 'Rehabilitation Package', 'at the pre-operational stage, we need not apply the price mechanism suggested by CEC'.[70] Thereupon the court declared:

> [W]e hereby grant clearance—to the forest diversion proposal for 660.749 ha of forest land to undertake bauxite mining on the Niyamgiri Hills in Lanjigarh. The next step would be for MoEF to grant its approval in accordance with law.[71]

The single most important development between the Supreme Court's order dated 8 August 2008 and the MoEF letter of 24 August 2010, was the general election held in April–May 2009, which made Jairam Ramesh the new MoEF. On facts there was nothing to favour the Sterlite-Vedanta project, both refinery and mining. The clearances that the company, under whatever name, had received till that date were the function of two factors: Sterlite-Vedanta's ability to manipulate rules, laws and the levers of power;

and the amenability of the keepers of these rules and laws, and the wielders of these levers of power, to be persuaded to fall in line with Sterlite-Vedanta's wishes. Under Jairam Ramesh, however, violations that had been ignored till then were noticed and acted upon. Thus, notwithstanding that in December 2008, pursuant to the Supreme Courts order of 8 August 2008, the MoEF had granted 'in principle' environmental clearance for the mining project, on 24 August 2010 the MoEF passed an order staying/cancelling all clearances to Sterlite-Vedanta.

One must not assume a happy ending to this battle for rights. For one thing, victories against the run of the mill are almost impossible. For another, the battle is not yet over. At stake are billions of dollars in profit for Sterlite-Vedanta, a global company, besides the not inconsiderable investments it has already made in Lanjigarh–Niyamgiri. The instrumentalities of the state, including its justice system, stand arrayed in favour of Sterlite-Vedanta, notwithstanding stray individuals who happen to land in the right place at the right time. Since their support (to Sterlite-Vedanta) is ideological and epistemological, it is virtually impossible to impugn as mala fide, except to the extent that corporate greed (and disregard for the opinions of marginal people) makes for transgressions of the law.[72] But ministers are not permanent occupants of their berths. While there is little doubt that he will do a competent job wherever he is sent, such a change is likely to instantly reverse all the gains that the Kondhs have made during his tenure. Under modernity and globalisation only those 'rules' are acceptable which are subservient to the rule of profit, and since the Kondh rule of law is not so subservient, every effort will be made to ensure that it yields.

One can either view globalisation as the answer to the (pre-existing) problems of the world or one can view it as the cause of all those problems. The view on law-rule of law presented earlier suggests there is no way to reconcile these divergent views. But the issue is neither the dominance of the votaries of globalisation, nor the irreconcilable divergence between those who support it and those who do not. World views, howsoever dominant, have never posed the kind of problem that globalisation does, and the world has survived thousands of such views. The problem, if one may call something so all-encompassing one, is that this world view has become a 'world' order.

Modernity has provided us with insights into the manner in which civilisations rise, peak and then die out. While the civilisation is still extant, it is inevitable that the dominant ethos prevails. However, based on modernity's own version of history (albeit linear), even as one civilisation was decaying the vast hinterland that invariably surrounded all previous civilisations ensured a process of regeneration—giving rise to a new civilisation after a suitable interregnum. With its global footprint however, globalisation appears intent on leaving nothing capable of picking up the threads of civilisation when once this order has ended.

To sum up at this stage, it seems possible to argue that justice is impossible or, at least, that there are finite limits to the justice that can be achieved or dispensed, even in the modern world.[73] Further, a dispassionate observation of phenomena seems to suggest that in the real world, as distinct from the realm of theories and myths, there is a trade-off between justice and control, not just in the minds of the ruling classes but also in the minds of those that they rule.[74] Up to a point, justice 'improves' with increasing control; thereafter, the marginal utility of incremental control declines and continues to decline till levels of justice actually start diminishing. One could also state this proposition in reverse, i.e. up to a point justice improves as control diminishes but beyond that point justice is, as likely as not, liable to diminish with decreasing control. This fact is understood by all societies. That is why they tolerate (and are conditioned to tolerate) repression, oppression, manipulation and control.

Like in economics, the marginal utility curve behaves differently on paper as compared to the real world. Because each of the two utilities being juxtaposed and compared—justice and control—are extremely complex. Thus, in real life no one knows the point of equilibrium, i.e. the point at which the proportion of justice is optimised.[75] That people also have an instinctive understanding of this complementarity between justice and control is borne out by the fact that people both support control and oppose it. Since people also have no clear idea (à la Rawls' veil of ignorance) of where the point of optimality lies, they are open to being manipulated and controlled. Up to an indeterminate point, increasing control will result in increasing the number of adherents to control (because it improves justice or for any other reason), rather than increase rebellion. Beyond that (indeterminate) point of optimality it

becomes, or ought to become, counter-productive to increase control. However, in the real world the state and/or the ruling classes also control factors that modify/shift the point of optimality. Terrorism, national integrity (and threats thereto), identity, homogeneity (or threats thereto), etc. are some such factors.

It leaves only for us to examine the effect that rule of law has, when conceived as an underwriter of a notion of universality, upon modern conceptions of justice. The Roman order, on which the current world order is closely based, provided for limits to itself, explicitly envisaging a situation where its writ would not prevail. In such a situation the Roman senate would issue a *senatus consultum ultimum* (final decree of the Senate), declaring a *tumultus* (a state of disorder and unrest) as a result of an event—*maiorem quam re terrorem* (greater terror than the thing)—that, in turn, led to the proclamation of a *iustitium* (literally, standstill or suspension of the law). The explicit provision for this 'juridical void', as Agamben calls it, is proof that the Roman constitutional order was conceived of as a finite order.[76] On the other hand, the current world order has no equivalent provision: as if it was not necessary to provide for such a situation. Patently, the absence of an express provision for a state of exception points to the sense of immanence of the current order. As if its makers were convinced, over the centuries during which it came into being and was perfected, that there could be nothing beyond their 'order'.

More disturbing from the perspective of justice is the fact, as Agamben points out, that the 'state of exception' is built into the current order as a continuation of itself rather than as describing its limits. Thus, every major legal or constitutional system of the modern era has been built in justification (and provisions) for suspending the 'rule of law' (when the executive arm of the state takes on arbitrary powers, not subject to rule of law controls, or any other system of checks and balances) into its codes.[77] It is a matter of record that in a 'state of exception', there are no 'rights', and no 'justice', except what the persons wielding the levers of power of the state choose to grant or confer.[78]

Agamben argues that over the last century and a half the threshold at which a 'state of exception' would be triggered has been repeatedly lowered by almost all the major countries of the world. Given that this is also the period during which the world has been incessantly bombarded with propaganda about the

virtues of 'rule of law', the duplicity is obvious. In other words, even as the Enlightenment, and thereafter, the Age of Reason were giving birth to their finest fruit—the rule of law (reason)—they were simultaneously engaged in creating a deity more omnipotent and more ruthless than any divinity ever conceived. One does not really need to point out the enormous potential for mischief contained in the existence of such 'states of exception' in a world where the distributions of power, wealth and control are so skewed.

Equality has always been a Janus-faced monster. What makes people equal is that they are all born in the same manner, notwithstanding semantic differences à la Macbeth, and that they all die. Other than these two equalities, there is nothing equal about people. Their colour, their language, their lifestyles, their cultural practices, their beliefs, their world views, all differ from region to region, race to race, religion to religion, people to people. The absurdity and unreality of the assumptions upon which the rule of law regime is founded can be seen from the fact that—notwithstanding the empirical fact that all social organisations are based on principles of exclusion and discrimination, and have always been so—it essays to organise a globalised society on principles of inclusion: liberty, equality, fraternity. Within the paradigm of the 'commons', a popular catchphrase of the 21st century, the notion of universal commons patently belongs to 'humanism' alone, dehors any other *ism*. However, humanism, essentially a spiritual notion, has been (scientifically) hijacked by Marx, and Marxians, to support *his* thesis of a universal modernity.[79]

It is ironic that notions of equality and justice should become universal at the present moment in space and time. Colonialism universalised notions of imperialism before it did the same for notions of fraternity and justice. The so-called end of the colonial era did nothing to change this situation since many aspects of the old (pre-modern) order had been irrevocably changed in the meanwhile. Continued control over a disproportionately large percentage of the global turf by people of European descent teaches the elites of each nation on earth that if only they are brutal enough for long enough, they can achieve the same situation, albeit with respect to the marginal and deprived of their own countries, as the European races achieved in lands other than their own. A quest

for equality, or rights, or justice can only flounder upon the rocks of such an unjust world order.

The *world* stands defeated by globalisation.[80] The opponents of modernity, or globalisation, or rule of law, by whatever name one may choose to call it, stand shorn of their powers to resist, by virtue of the compromises they cannot escape. Nothing stands between complete subjugation to this regime except the poor and the marginal people of the world. Notwithstanding its remarkable flexibility, the system (with its voracious appetites) does not have an effective way of dealing with the billions of the abjectly poor and marginal who people its fringes. These people represent a 'commons' whose power can defeat the system. These 'commons' are, as yet, fragmented and leaderless but coming, as we do, from an alternate world view, it is not too much to expect that the earth, of which we are all a part, will itself orchestrate the synchronic march of these commons. Ending as I began, the following lines from *Savitri* seem apt:

> Yet some first image of greatness trembles there,
> And when the ambiguous crowded parts have met
> The many-toned unity to which they moved,
> The Artist's joy shall laugh at reason's rules;
> The divine intention suddenly shall be seen,
> The end vindicate intuition's sure technique.[81]

Notes

1. Shri Aurobindo, *Savitri*, Book 2, Canto X, p. 240.
2. Indian mythology describes four Ages (*yugs*): Satyug, Tretayug, Dwaparyug and Kaliyug. The Ages are visualised as a four-legged elephant that loses one leg with each succeeding age. In the current yug—Kaliyug—the elephant stands on one leg. The cycle ends with Pralay, which can very loosely be equated with Armageddon or Qayamat but with a difference, since Pralay is a precursor to another cycle of ages.
3. Governance here is to be understood in the broader sense of—all structures comprising a 'society' of human beings. Under this dispensation, in the ultimate analysis, justice belonged to the realms of divinity and divine intervention.
4. In other words, the establishment and the maintenance of 'order' was considered a necessary condition to the attainment of any kind (or sense) of justice. As is frequently the case, over time, the necessary condition also became a sufficient one.

5. Here 'justice' is connoted in the modern sense—seen as being deliverable in its entirety in the here and now of existence.
6. Rule of law is supposed to stand for absence of arbitrary force, a notion which, in some mysterious fashion, gets translated in our minds as absence of force. This sleight of hand is accompanied primarily by a historical identification of law with reason and legitimacy. However, both these, besides being substantial entities in their own right, are famous disguises for force, including arbitrary force.
7. Rawls 1999.
8. Being much closer to a state of pre-modernity, thinkers of the 18th and 19th centuries continued to share, in large measure, the pre-modern view of law as an instrument of control rather than of liberty or justice. They, however, misunderstood the full nature of law and, therefore, believed that once the sovereign was also made subject to the rule of law, equality, and hence, rights, would prevail.
9. Dicey 1950.
10. It would be dubious to postulate a state of partial equality-rule of law in theory, though such a state may well exist/operate in practice.
11. While such rules may actually be so, their reasonableness is never allowed to be tested against a neutral yardstick, by virtue of the fact that they have been propounded by the stronger party.
12. Vitiating the very definition of 'fair'.
13. The illustration remains valid even if it is modified to a better approximation of the real world, by proportionately increasing the numbers of the weaker party. It is a curious truth that the weak are rarely able to combine against the strong even though it is obvious that the strong would not be able to withstand the overwhelming superiority of their combined numerical strength.
14. Divinity here may be likened to a state where universal justice prevails.
15. Modernity has introduced a fundamental change in the way in which an ideal conception of law is made. This conception, even though not relevant to its direct application on an everyday basis, has an indelible impact upon the way in which the subject is taught and received.
16. All systems of law posit that people are 'better' when adhering to their particular version, but the claim of secular (and universal) improvement of individuals and collectives is unique to the modern rule of law regime.
17. Most conflicts today—both domestic and global—are intrinsically connected with such replacement.
18. The virtuousness of the 'force of law' permeates so deep into the modern consciousness that most people (except when they are at the receiving end) rarely pause to think objectively about the validity of the use of such force.
19. It is not necessarily the increasing complexity of human endeavour that is the engine for more laws. It may well be the other way around.
20. In the so called developing countries the 'force of law' generally operates upon the marginal and deprived the non-Westernised masses. It thus becomes the most visible face of the great divide between the ruling classes and the subject populations. This results in a veritable splitting of the nation into two; e.g. India and Bharat.

21. The use of the qualifier is deliberate since in Karmic terms one may still be able to salvage some meaning from these centuries past.
22. Evolution, by itself, is neutral as to the shape of the path it traverses. It has therefore been appropriated to the dominant world view, which finds it convenient to portray this path as linear.
23. An overwhelming majority of global debates fall in this category. This is understandable since the only people who enjoy credibility in the world are those who embrace the view that the monopolistic hegemony of Western epistemology is a natural consequence of its status. For a remarkable exposition on this point see Russell Means, 'For America to Live, Europe Must Die', 1980, http://www.dickshovel.com/Banks.html.
24. Rights presume plurality, and almost all of the advances in the understanding of both 'rights' and 'justice' must be seen as being generated by the dynamics of the struggle generated by this plurality.
25. Niyamgiri is a hill range, about 250 sq km in area lying between 19.33 degree N latitude and 83. 25 degree E longitude. It forms the northern most hill in the massif of the cluster of hills called the Niyamgiris. Also known as the Niyam Dongar, it runs in a southwest alignment with a maximum elevation of 1,306 m (Extracted from 'A Brief Report on Ecological and Biodiversity Importance of Niyamgiri Hill and Implications of Bauxite Mining', by Environment Protection Group [in short, EPG report], p. 3, http://www.indiaenvironmentportal.org.in/content/brief-report-ecological-and-biodiversity-importance-niyamgiri-hill-and-implications-bauxite-)
26. Bauxite deposits are situated on the upper portion of hills as 'caps'. Being porous and permeable they are good retainers of ground water, holding up to 30 per cent of their volume in water, which manifests itself in the form of perennial streams that emerge where the bauxite layers meet the underlying impermeable layers of laterite. They can thus be compared with the glaciers in the Himalayas, feeding the rivers with water during the lean season (EPG report, supra p. 23).
27. The Eastern Ghats receive much less rainfall than the Western Ghats, with large tracts falling in the 'rain shadow' of the monsoon.
28. 'Niyam' means 'rule' or 'law' in Sanskrit. 'Giri' means 'mountain'.
29. The Eastern Ghats, a chain of hills and mountains running almost the entire length of the eastern coast are one of the world's richest repositories of valuable minerals: coal, manganese, iron ore and bauxite. They also have some of India's thickest forests, with a large variety of flora and fauna: rare herbs, butterflies, birds and animals, which are home to a large number of adivasis and other forest dwellers, totalling several million people.
30. The Rapid Environment Impact Assessment (REIA) report for the Niyamgiri project says that the process employed would be 'Mechanized open cast mining ... due to low overburden thickness, high bauxite thickness and high production levels'. After stripping the land of its 'vegetation cover', the top soil will be removed, thin sections (up to 5–6 m) of bauxite will be excavated using a ripper cum dozer, while thicker sections/portions (5–10 m thick) of bauxite will be mined by drilling and blasting. The report was prepared by Tata AIG Risk Management Services Ltd, Mumbai, on behalf of M/s Sterlite–Vedanta, a multinational mining and metals conglomerate. The portions quoted here are extracted from the EPG report, supra pp. 20–21.

31. The Dongria Kondhs have lived in this region for at least several hundred years and possibly for much longer. They are stated to have all the attributes necessary to be classified as a separate tribe, including two languages that are both distinct from the official language of the state, Oriya. Apparently in recent decades their numbers have been on the decline and only about 8,000 Dongria Kondhs survive now.
32. pH is a measure of the acidity or basicity of a solution. Water is considered to be neutral, being neither acidic nor alkaline. The commonly used pH scale ranges from 0 to 14. Excess deviation from the norm (pH of 7) in either direction is extremely harmful to health.
33. About 60 per cent of the water requirement of the alumina refinery at Lanjigarh, near Niyamgiri, is for dampening the dust to prevent it from flying into the air. Despite this, within two years of the refinery achieving capacity production, villagers living near the refinery report an alarmingly high incidence of tuberculosis and other lung diseases and skin ailments.
34. For reasons that will become apparent, I shall use the euphemism 'Sterlite–Vedanta' to describe the industrial conglomerate that seeks to mine bauxite and refine it in the area. Other, more specific names will also be used, wherever appropriate. Both Sterlite India and Vedanta Alumina are part of the Vedanta Resources Group, controlled by Anil Agarwal, a London-based mining and metals magnate.
35. 'Forest land' is a term of art, meaning land defined as such in various statutes, such as the Forest Act, Forest Conservation Act, Forest Rights Act, Wildlife Protection Act, Environment Protection Act, etc. They distinguish between different kinds of forests, such as 'community forest resource', 'protected' forest, 'reserve' forest, 'biosphere reserves', national parks, etc. The process of reconciling two mutually exclusive imperatives—preservation of forests and industrial development—has given rise to a schizophrenic world view in which every kind of polluting industrial activity gets permitted on tracts of land that are not officially 'forest' land (or which have not been given the additional protection afforded by the label 'reserve', 'biosphere reserve', 'national park', etc.), but which are contiguous to (or close to) tracts that are such forests, in the belief that the pollution will be sufficiently contained within the bounds of the unprotected lands, leaving the protected forest areas unaffected.
36. No one thought it necessary to ask why, in that case, was it necessary to set up the refinery in Lanjigarh.
37. Neatly sidestepping the question of why Sterlite-Vedanta chose to posit its refinery as a viable stand-alone project, when seeking clearances from government authorities in 2003–2004.
38. Niyamgiri is stated to have about 72 million tons of bauxite. Each ton of alumina requires 3 tons of ore. Thus, a 6 million TPA would require 18 million tons of ore every year.
39. Saxena Committee report dated 16 August 2010, http://moef.nic.in/downloads/public-information/Saxena_Vedanta.pdf.
40. Even if there is no overt displacement, every stage of the process, including several stages where things merely change hands, a surplus (profit/value added)

is extracted. Under globalisation, this is as important as direct displacement for the impoverishment, marginalisation and disenfranchisement of populations.

41. *Samatha vs. State of Andhra Pradesh and Others*, 1997 (8) SCC 191.
42. So much so that concerned ministries of the Government of India drafted and circulated a 'secret' note to elicit views on ways and means of circumventing the impact of this judgement. These discussions included a proposal to nullify the judgement by enacting legislation. The move was scuttled because the note was leaked.
43. Implementation of these directions was held essential to the achievement of 'the constitutional objectives of social, economic and human resource empowerment of the tribals' and achievement of 'peace and good government' in Scheduled Areas.
44. Contrast this with the attitude of the Orissa state government officials, the district administration and the forest department. Besides an almost endless litany of lapses and illegalities committed by these officials, the Saxena Committee report (p. 55) states that the principal chief conservator of forests questioned the need for a further inquiry by the Government of India once it had granted clearance for mining operations.
45. Ultimately, this agreement was allowed to lapse.
46. Saxena Committee report; see n. 42.
47. Moving fast, Sterlite commissioned an REIA, whose report was submitted in January 2003. In June 2003, OMC signed a fresh agreement with Sterlite India on the refinery-mining project. Simultaneously, Sterlite applied for environmental clearance for its refinery cum mining project. In September 2004, the MoEF granted environmental clearance for a 1 million TPA refinery. In October 2004, OMC signed yet another agreement with Vedanta Alumina, a sister concern of Sterlite India, on the refinery mining project. Construction of the refinery began immediately thereafter.
48. The CEC is a permanent body, comprising a chairperson and several members, set up in the course of the hearing of what has come to be known as the Godavarman case (*T.N. Godavarman Thirumulkpad vs. Union of India & ors*., Writ Petition (Civil) No. 171 of 1996). Under the rubric of this case the Supreme Court (and a small bureaucracy) has become the ultimate arbiter of all issues relating to forests in India.
49. The FRA was the outcome of a long and bitter struggle by adivasis and other forest dwellers for re-establishment of their traditional rights and claims over forest lands and forest produce. It is universally seen as the partial reversal of a major colonial legacy whereby all lands to which people could not establish 'legal' title, that is, most forests, became vested in the state. The result was instant disenfranchisement of virtually a third of India's population. Despite its clear colonial, repressive imports this principle of 'eminent domain' continues to hold sway in independent India. The Land Acquisition Act 1894 is its most visible symbol.
50. The clearance was subject to 'final' approval by the MoEF.
51. By posing it thus, the court brushed under the carpet a host of awkward questions connected with the manner in which Sterlite-Vedanta managed to get clearance for its alumina refinery by posing it as a viable stand-alone project,

not connected to the proposal to mine Niyamgiri, for which the 'diversion' of forest land was required.

52. These two statements are alone sufficient to make explicit the dynamics of the equation between globalisation and rights. No mention, even, of the rights of the Kondhs and others affected by the proposals. Further, posed thus, the court is able to unabashedly acknowledge that 'development' must damage the environment and ecology. The 'Principle of Sustainable Development' then becomes the process of 'development which meets the needs of the present without compromising the ability of the future generations to meet their own needs', and it becomes the 'duty of the State' (of which the court is a part) to 'devise and implement ... (programmes for) ... Sustainable Development based on inter-generational equity'.
53. One may note the precision with which the state's priorities are set out: revenue and asset protection.
54. The first sentence is masterful in its deception. The order opened by framing the 'short question', namely 'whether VAL should be allowed to set up an Alumina refinery'. A few lines later the 'question' was transformed into a statement of 'undisputed position' about mining Niyamgiri. The next three sentences talk about the thousands of crores being invested by VAL in the 'Alumina Refinery Project'. Thereafter, the focus shifts back to the mining proposal. Clearly, the court sees mining and refining as inextricably linked. Why then did it not question the duplicity and the dishonesty in making two separate proposals?
55. Put thus, it is made clear that there can be no dispute that 'development' is in the best interests of the people who live in that area, leaving only ecology and environment to be 'balanced'.
56. Unfortunately for Sterlite-Vedanta, the last part of this sentence was sufficient to justify the MoEF's order dated 24 August 2010, stopping/cancelling clearances (see n. 42).
57. No financial dishonesty is being attributed to the court, or the bench that passed this order. The critique is of the court's perspective, which is unabashedly pro-industry and pro-industrialisation, i.e. pro-globalisation. Whenever there is a conflict—as seen by the court—between interests of the state (or its alter egos, national security, globalisation, industrialisation and the like) and those of its citizens, the court tends to side with the state. See SAFHR, 'In Search of Vanished Blood', 2008; Ashok Agrwaal, 'Law's Autonomy: A Paradigm of State Power', in *Autonomy, Beyond Kant and Hermeneutics*, ed. Paula Banerjee and Samir Kumar Das (Anthem, 2007), pp. 148–85, and other writings.
58. The limited nature of its rejection was, however, made clear in the very next sentence after this discussion, and the rest of the order was devoted to enumerating the 'Rehabilitation Package' mentioned earlier.
59. The Reuters report stated that Vedanta Resources was accused of having caused 'environmental damage and contributed to human and labour rights violations in the course of its operations' in mining and production of copper, aluminium and zinc in India, Australia, Zambia and Armenia.
60. Essentially an expression of populist concern since common sense is sufficient to suggest that this was most unlikely.

61. Ironically, the original agreement was between OMC and Sterlite India. This was substituted by another agreement, in 2004, with VAL, since at that time Sterlite India was in the dock for illegalities and violations in connection with mining operations in Rajasthan and elsewhere in India. This fact must be deemed to be in the knowledge of the Supreme Court. So, the only reason for the court to impose this condition was the Reuters report mentioned earlier. But if that made VAL-Vedanta Resources untouchable, so should it have made Sterlite India.
62. The money would be spent by the SPV, which would be required to account for it to the CEC, who would report to the court if it found 'non-utilisation or mis-utilisation of funds'.
63. The order also included, as part of the 'Rehabilitation Package', a list of 16 'suggestions' made by the state government.
64. During the hearing on 8 August 2008, the court curtly shut up the lawyer for the Kondhs and other local people.
65. The Supreme Court can ignore what it chooses. By substituting Sterlite India for VAL, the court had indeed done precisely what it said it could not do, namely, 'change leases/ MoUs/joint venture agreements. ...' Clearly, the court itself saw this change as merely cosmetic, amounting to an exercise in window dressing.
66. Substitution of Sterlite India for VAL would not be a violation of the 'terms and conditions' only if it was accepted that the substitution was meaningless.
67. In other words, transfer of the lease to the SPV would also have enabled OMC to earn 'revenue on its own account'.
68. Conveniently ignoring the possibility of asking OMC to sign the lease over to the SPV.
69. The CEC had done its homework in the matter. It had also examined the possibility of determining bauxite price from the price of alumina, but found it 'inadvisable' because of wide fluctuations in prices quoted by different suppliers.
70. It enjoined the CEC and other concerned agencies to revert to it in case 'the annual profits before tax and interest is depressed by the pricing mechanism mentioned in joint venture Agreement dated 5 October 2004 vide clause 2.3.3(a)'.
71. The expression 'In accordance with law' is vague and meaningless. It is evident that its content is almost entirely determined by the context of its application.
72. Even then, as we have seen in the Niyamgiri case, it takes the intervention of a special person, that is, a person in a position to do something, to prevent globalisation from riding roughshod.
73. True justice is a function of the fullness of knowledge. And since it appears axiomatic that one can never have full knowledge, it is inevitable that justice (or true justice) cannot be achieved by those who live in the realm of partial (or fragmented) knowledge.
74. Like in economics, there is a marginal utility curve between justice and control.
75. This may well be the reason why all structures of governance tend to hold (and increase) control beyond that point. From a government's point of view, this can be called 'playing safe'.
76. Agamben 2005.

77. A 'state of exception' is easiest understood as a situation of 'martial law' control, or a state of 'emergency' in which the very existence of the established order is seen as being threatened.
78. The state of emergency imposed by Indira Gandhi, then prime minister of India, in June 1975, is illustrative.
79. Marxism is nothing more than one of the competing notions of modernity.
80. By 'world' here is meant all things pre-modern, or non-modern.
81. Shri Aurobindo, *Savitri*, Book 2, Canto I, p. 100.

4

Right to Information as a Means of Mass Persuasion*

Sabyasachi Basu Ray Chaudhury

One cannot perhaps be blamed if one's attention is drawn to Germany of the early 1960s in the context of certain democratic deficits in contemporary India. In 1962, Jürgen Habermas, a relatively less-known scholar, made a significant contribution to democratic theory and generated quite a sensation in the still and rather dull intellectual milieu of the post-war Germany. He focused on those features of contemporary democracy in his *Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* that the young scholar's more conservative colleagues tended to downplay at that point (Scheuerman 2008: 88).

Influenced significantly by the neo-Marxian Frankfurt School of thought, Habermas argued that contemporary democracy exhibited a number of troublesome tendencies. To him, a catastrophic fusion of state and society, unforeseen by classical liberal theory, had resulted in the disintegration of the very core of liberal democratic politics, a public sphere based on the ideal of free and un-coerced discussion. According to Habermas, mounting evidence suggested that liberal democracy was evolving towards a new and unprecedented form of authoritarianism, a mass-based

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plebiscitarianism in which the privileged organised interests (what he described as 'non-feudal' institutions fusing public and private sectors) in order to perpetuate their social and political domination. This German scholar argued that an ossified and inflexible political system, in which decisions increasingly were 'legitimated' by means of subtle forms of mass persuasion, functioned alongside a profit-hungry mass media that trivialised public life in order to thwart democratic aspirations. The autonomous 'bourgeois public sphere' of the late 18th and early 19th centuries had been jettisoned for the 'manipulated public sphere' of organised capitalism (Seheuerman 2008). Much later, Habermas (1998) reasserted many of the core concerns of his original contributions to democratic theory in his *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. If we follow these Habermasian concerns in the Indian context, it may perhaps help us to assess the significance of the access to information as an important right that strengthens democracy.

India has been a democracy since her de-colonisation in 1947 except during the period of Emergency (1975–1977). But, the bitter experiences of Emergency started creating awareness among the citizens that the mere form of democracy is not enough and its content is sometimes more important for empowering people. In that context, the enactment of Right to Information (RTI) reflects a substantial shift in the predominant view (among citizens and elites alike) of the state's role from trusted guardian to merely that of an agent of the people that requires careful monitoring of citizens. The governments so far preferred to withhold information on many occasions to cover up malfeasance or to protect themselves from political embarrassment. In this scenario, the citizens had to have the right to access that information in order to hold the government accountable for its actions (Cain, Egar and Fabbini 2003: 137).

However, access to information is a relatively new norm. It is important so that the public can be effective advocates for its causes. Many would argue that the civil society needs to know of threats and trends and understand the origins and consequences of these factors (Shiva 2006: 73–74). The latest phase of globalisation along with the global communication and the processes of informalisation has made it difficult for the governments to control information and its dissemination. The nation state often owns up short with nothing near complete closure over events within its boundaries with its more traditional geopolitical concerns for policing its territories, populations and markets (Axtmann 1996: 132).

It is argued that corporate globalisation destroys local and national economies and the livelihoods and jobs that domestic economies generate in the pursuit of corporate profits and financial growth. This creates insecurity, and insecurity and in turn, breeds fear and exclusion and provides fertile ground for emergence of politics based on narrow cultural identities and ideologies of exclusion. Representative democracy in this context becomes increasingly shaped and driven by cultural nationalism. Cultural nationalism emerges as the twin of economic globalisation (Shiva 2006).

In a way, the latest phase of globalisation has generated new opportunities as it has posed new challenges for democracy. The adoption of the laws may be one of the unintended effects of globalisation. In the 1990s, globalisation began supporting the formation of transnational networks of cooperation and information between public officials, professional lobbies and economic and financial actors for different reasons (Cain, Egar and Fabbini 2003: 138). In other words, gone is the faith in the state's paternalistic role to determine what citizens should know about government processes and policies. Politicians in many countries run and win electoral campaigns by pledging to reform the public sector, to promote a new public management, to make the government more accountable to its citizens. At the same time, citizens are challenging administrative discretion and secrecy (ibid.: 137).

A new concept of political right and political action or 'trans-border participatory democracy' appears to be emerging in some cases (Ichiyo 1993: 147–62). It asserts a universal 'right of the people to intervene in, to modify, to regulate, and ultimately to control any decision that affect them', no matter where these decisions are made. Trans-border participatory democracy offers an answer to 'the particular formation that oppressive power has taken in our time: the state-supported globalization of capital'. This leads to an expanded sense of citizenship (ibid.).

In this context, some justifiable rights overlap with cultural rights, as in the case of the RTI. Yet, how that right is exercised is dependent on cultural context. As Javier Perez de Cuellar, president of the World Commission on Culture and Development, observes in his introduction to the UNESCO report *Our Creative Diversity* (1996), 'Economic and political rights cannot be realized separately from social and cultural rights'. The new opportunities of globalisation, like RTI Act, can contribute a lot in empowering the people and in

ensuring a more participatory decision-making process. In Italy, it appears to be a formal right only and not a real opportunity. But, in other cases, the United States and France especially, citizens and groups make frequent use of the right to obtain documents that would otherwise be denied to them. Some of the informants serve whole purposes, such as reinforcing political accountability and checking corruption, but some of it serves more mundane private or commercial ends. It would be hard, if not impossible, for citizens to hold governments accountable for their action if governments controlled access to critical documents. Governments will naturally seek to suppress information that might be harmful to their electoral prospects. But, suppressing that information prevents voters from punishing bad decisions: they cannot react to what they do not know (Cain, Egar and Fabbini 2003: 138).

Here, a primary role of domestic law (particularly domestic administrative law) is to provide the infrastructure necessary for the exercise of participatory rights by citizens (Aman Jr. 2004: 14). Sometimes, this takes the form of new spaces for administrative hearings and citizen inputs. The rights of citizens go beyond rights against the state. They include the right to help shape the structures that control both the allocation and the application of power, including power exercised by the non-state actors, whether domestically or transnationally. To fulfil this role, law must provide citizens with access to the kind of information necessary for them informed judgements—whether that information is held by a public or a private entity. There is a need to create the forums necessary for the citizens to enter into meaningful political debate. These political spaces and opportunities call for going beyond traditional conceptions of representative democracy and public law principles based on clear-cut distinction between public and private or state and federal actors (ibid.). There are also devices that ensure the flow of information to the public, such as the duty to provide information, or the duty to offer reasons for decision (Benvenisti 2004: 350).

Birth of the Right

The legislative embodiment of the RTI has long been recognised as underpinning all other human rights. Article 19 of the *Universal*

Declaration of Human Rights of the United Nations (UN), signed on 10 December 1948, states unequivocally, 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers'.[1] Thus, the right to freedom of opinion and expression—from which flows the RTI—and the right to seek and receive information are unambiguous elements of a historic international law to which India is a signatory. The UN Declaration gives human rights precedence over the power of the state. While the state is permitted to regulate rights, at the same time it is prohibited from violating them.

But, much before this initiative, Sweden, one of the Scandinavian countries, could have the oldest legislation relating to public access to official documents, dating back to 1776. The right is, in fact, provided in the Constitution itself. The principle that disclosure of information is the norm unless it is withheld by specific legal provision underlies Sweden's open access regime. Another Scandinavian country, Finland passed the law on the Public Character of Official Documents in 1951. The provisions of Finland's law benefited from the country having been a part of Sweden in the 19th century. However, the public does not have a constitutional right to access information. Both Denmark and Norway passed their information access laws in 1970. In all four Scandinavian countries, citizens who have been denied information can appeal to the court. In Finland and Sweden, the appellate bodies include the ombudsman, the Chancellor of Justice and/or the Supreme Administrative Court, and in Denmark and Norway, these include the ombudsman and the ordinary courts. The US Freedom of Information (FOI) Act, passed in 1966, provided that access to documents was to be the rule rather than the exception. However, due to inherent difficulties in enforcing compliance, this Act was amended in 1974 and the onus of justifying restriction of access to a document was placed entirely on the government.

Here too, the citizen does not have to provide reason for requesting information. Some other good practices with regard to the FOI from the experiences of different countries can be summarised as follows: The UK FOI Act, 2000, makes it mandatory for public authorities to create and adapt publication schemes, which are approved by the information commissioner. The

publication scheme is a document that lays down the categories of information that a public authority is to disclose proactively.[2] The FOI (Scotland) Act, 2002, makes it mandatory for a public authority to adopt and maintain a publication scheme approved by the information commissioner, which the public authority would need to review from time to time. The nature of the publication schemes is very similar to that of the United Kingdom and includes the illustration of classes of information that the authority publishes the manner or form in which the public can expect to find each class of information, and whether the information would be available free of charge or on payment of a fee.[3] The US Department of Veteran Affairs, which processed the most number of information requests in 2005, has gone beyond the affirmative disclosure provisions of the US FOI Act (amended in 2002) and posts on its website even information that does not fall under this section of the Act, but which can be published since it is not exempt, in order to help clear the backlog.[4]

In the United States, access to information is generally governed by the FOI Act,[5] but the US Supreme Court has also interpreted the constitutional freedoms of speech and press to include a constitutional right of access to information because these protections all 'share a common core purpose of asserting freedom of communication on matters relating to the functioning government'.[6]

While this right has generally focused on public access to criminal proceedings, some justices have argued for a broader RTI.[7] The court also held that, the access may only be denied if such a denial is 'necessitated by a compelling governmental interest and is narrowly tailored to serve that interest'.[8] The US Supreme Court also noted two more things about the right of access to information, 'First, the case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information…. Second, the value of access must be measured in specifics' (Bruch and King 2002: 21–38).

The Canadian government has made it mandatory under the Canadian Access to Information Act, 1983 for its government agencies to disclose financial and human resource-related information by making this information available *suo motu* on their websites. The three areas that are disclosed proactively (subject to exemptions under the information Act and the Privacy Act) are the travel and hospitality expenses for selected government officials,

contracts entered into by the government for amounts over $10,000 and reclassification of occupied positions. In addition, information regarding grants and contributions of over $25,000 is also to be proactively disclosed.[9] The Mexican FOI Act, 2003 mandates public authorities to upload proactively disclosed information on the Internet, so that an overall picture of the authority is available. This reduces the need for individuals to file information requests regarding the general functioning of a public authority. Information that is requested by one applicant is uploaded on the website and thus made available to the general public.[10]

The South African Promotion of Access to Information Act, 2000, which extends to private bodies as well, mandates the Human Rights Commission to compile a guide on how to use the Act in each official language. The guide has to be updated every two years. Contact details of all information officers of all public authorities, including electronic mail addresses, are made available in the telephone directory used by the public. Every private body also needs to publish most of the above information (Bruch and King 2002).

In India, the access to information by the citizens has been given a legal recognition following a strong grassroots movement. Apart from certain domestic political and legal developments, the transnational networks also encouraged the civil rights activists and the NGOs to fight for the RTI and make it a legitimate right of the people in order to check corrupt practices in the decision-making process and in order to ensure political accountability at large. To be precise, in India, the movement for the RTI occurred mainly in three areas: legal pronouncements, civil society/people's movement and government action. In India, the Supreme Court has, in various judgements, held that the RTI is a part of the fundamental right to freedom of speech and expression under Article 19 (1) of the Constitution, since the right cannot be properly exercised if the people did not have the RTI. Perhaps one of the clearest enunciations of the fundamental RTI was seen in the Supreme Court ruling in the *State of U.P. vs. Raj Narain*, 1975 (4) SCC 428, in which Justice K.K. Mathew said:

> In a Government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public

> functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security…. They (the public) are entitled to know the particulars of every public transaction in all its bearing. The right to know which is derived from the concept of freedom of speech, though not absolute, is a factor, which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. To cover with veil of secrecy, the common routine business is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routine. The responsibility of officials to explain or to justify their acts is the chief safeguard against oppression and corruption.[11]

Similarly, in *S.P. Gupta vs. Union of India*, Justice P.N. Bhagwati observed:

> The concept of an open Government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosure of information in regard to the functioning of the Government must be the rule and secrecy an exception.[12]

The Supreme Court asserted:

> This is the new democratic culture of an open society towards which every liberal democracy is moving and our country should be no exception. The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1) (a). Therefore, disclosures of information in regard to the functioning of the Government must be the rule, and secrecy an exception justified only when the strictest requirement of public interest demands. The approach of the court must be to attenuate the area of secrecy as much as possible consistent with the requirement of public interests, bearing in mind all the time that disclosure also serves an important aspect of public interest.[13]

Subsequently, in 1988, the Supreme Court held that access to information, or the right to know, was a basic public right and

essential to developing public participation and democracy.[14] The same year, the High Court of Rajasthan held that the privilege of secrecy only exists in matters of national integrity and defence.[15]

Again, at the grassroots level, a series of demonstrations and public hearings were held to show how local governments had manipulated the records that affect wages and livelihoods of villagers. The most important feature that distinguishes the movement for the people's RTI in India from that in most other countries, whether of the north or the south, is that it is deeply rooted in the struggles and concerns for survival and justice of most disadvantaged rural people. The reason for this special character to the entire movement is that it was inspired by a highly courageous, resolute and ethically consistent grassroots struggle related to the most fundamental livelihood and justice concerns of the rural poor. This inspiring struggle in the large desert state of Rajasthan was led by the Mazdoor Kisan Shakti Sangathan (MKSS), as part of a people's movement for justice in wages, livelihoods and land (Mander and Joshi 1999).

In 1996, a nationwide network of senior journalists, lawyers, distinguished bureaucrats, academics and non-governmental organization (NGO) activists was formed that vigorously advocated the removal of the Official Secrets Act, 1923 and the legislation of a strong RTI Act at the Centre (ibid.). Similarly, The National Campaign for Peoples' Right to Information (NCPRI) advocated the drafting of model information access legislation for consideration by the government. The Press Council of India (PCI), under the chairmanship of Justice P.B. Sawant, presented a draft model law to the government in 1996, which was later revised and came out in the form of the PCI-National Institute of Rural Development (NIRD) draft in 1997. This draft included a broad definition of what constitutes information (any act and/or record concerning the affairs of a public body; information that cannot be denied to the Parliament or State Assembly cannot be denied to the citizen) and what constitutes the right to access that information (inspection, taking notes and extracts and receiving certified copies of the documents) (Sinha 2007: 335–58).

With the model RTI Bill having been submitted to it by the NCPRI and the PCI in 1997, the then government formed a Working Group on RTI and Promotion of Open and Transparent Government chaired by consumer activist, late H.D. Shourie. Though the Shourie

Committee draft law published in 1997 extended the scope of the Act by bringing within its purview the judiciary and legislatures, there were more points going against it than for it. It narrowed the definition of public authorities, excluding the private sector and those NGOs that are not substantially funded or controlled by the government, widened the scope of exemptions and had no penalty provisions for erring officials. However, given the rapid change in governments at that time, this bill too did not materialise as legislation.

In 2000, the centre brought out a draft FOI Bill, which was a reworked version of the Shourie Committee Draft Bill. This bill was referred to the Parliamentary Standing Committee on Home Affairs, which sought suggestions from the government, civil society groups and individuals and then made its recommendations. Though the FOI Act was passed by Parliament in 2002 and received presidential assent in January 2003, it was not notified and, as a result, was never enforced.

When the United Progressive Alliance (UPA) came into power in May 2004, the struggle for the RTI received some encouragement in the form of the National Common Minimum Programme (NCMP), which promised to make India's information access legislation 'more progressive, participatory and meaningful'. The RTI Bill was tabled in the winter session of Parliament in 2004. It was then referred to the Standing Committee on Personnel, Public Grievances, Law and Justice. The final report of the Standing Committee, which contained further amendments to the RTI Bill, was tabled in the Lok Sabha in March 2005. The RTI Amendment Bill 2005 was passed by both Houses of Parliament in May 2005, and received presidential assent in June 2005. The Act came into force within 120 days of its enactment, on 12 October 2005.

Meanwhile, several states had already begun enacting their own access to information laws. Activists did not consider these Acts very strong tools for enforcing accountability. Neither were these laws citizen-friendly. Most of them neither had proactive disclosure provisions nor strict penalty clauses nor even a wide definition of what constitutes information. In some cases, there was a long list of documents and information exempted from the laws. Tamil Nadu RTI Act, 1997; Goa RTI Act, 1997; Rajasthan RTI Act, 2000; Delhi RTI Act, 2001; Maharashtra RTI Act, 2002; Assam RTI Act, 2002; Madhya Pradesh RTI Act, 2003; Jammu and Kashmir RTI Act, 2004

(this is the only state law that has remained in use even after the enactment of the national RTI Act since Jammu and Kashmir does not fall within the purview of the central legislation).

Once the necessary enactment has been done to institutionalise the RTI, the question remains whether these laws benefit only a small section of the society given the digital divide emerging from widespread poverty, illiteracy (the question of computer illiteracy coming much later) and inequality. If so, then the very purpose of the enactment of the RTI may be defeated. Therefore, we need to examine whether these new opportunities of communication have been able to contribute significantly to the sustainability of rights in India facing a globalising world or not. If the answer is yes, how far has this been possible? In a country with high indices of poverty, illiteracy and inequality, have the RTI and similar other initiatives, in fact, given rise to a new knowledge-enriched mediating class of people representing the most downtrodden, or have they genuinely been able to empower the people and ensure the sustainability of their economic, political and cultural rights in a fast globalising, yet somewhat fragmenting world? Have the different agencies of the union and state governments in India been reasonably cooperative to extend due respect to the RTI? Or has there been some constitutive exclusion?

Empowering Common People?

For our purpose, we can examine the study conducted by the RTI Assessment & Analysis Group (RaaG) and NCPRI. Their report entitled *Safeguarding the Right to Information: Report of the People's RTI Assessment 2008*, published in July 2009, indicated that 45 per cent of their randomly selected urban respondents (from state capitals and the national capital) claimed that they knew about the RTI Act. In nearly 40 per cent of the over 140 Focus Group Discussions (FGDs) in district headquarters, at least one or more person knew about the RTI Act. However, in only 20 per cent of the over 400 FGDs organised in villages was there even a single person who knew about the RTI Act. In the rural areas, most people got to know about the RTI Act through newspapers (35 per cent), followed by television and radio (10 per cent), friends

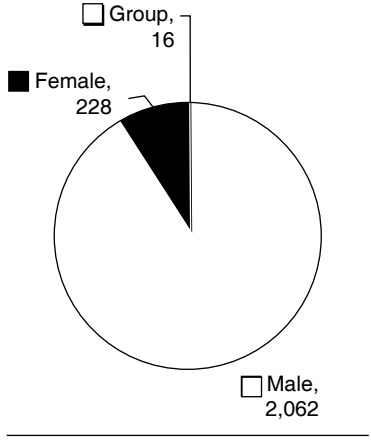
and relatives (10 per cent) and NGOs (5 per cent). Among urban applicants, nearly 30 per cent learnt about the Act from newspapers, 20 per cent from NGOs and a similar number from the TV, and almost 10 per cent learnt about the RTI Act from friends and relatives. Unfortunately, the government was not a major force in raising public awareness about the RTI Act. Disturbingly, over 90 per cent of the rural applicants and 85 per cent of the urban applicants were males. Among the rural participants, about 30 per cent of the sample applicants belonged to the economically weaker section of society, having a below-poverty-line (BPL) or *Antyodaya* ration card. Nearly 65 per cent had above-poverty-line (APL) cards.

The sample for this study comprised 10 states and Delhi, with 3 districts in each state and 8 villages in each district selected randomly. These were Assam (Dibrugarh, Karbi Anglong, Nalbari); Andhra Pradesh (Ananthapur, Nalgonda, Visakhapatnam); Gujarat (Kutch, Narmada, Mahesaha); Karnataka (Bijapur, Dakshin Kannada, Haveri); Maharashtra (Aurangabad, Yavatmal, Raigad); Meghalaya (South Garo Hills, West Khasi Hills, Ri Bhoi); Orissa (Kalahandi, Deogarh, Kendrapara); Rajasthan (Dungarpur, Jhunjhunu, Karauli); Uttar Pradesh (Azamgarh, Bijnor, Jhansi) and West Bengal (Burdwan, Cooch Behar, Uttar Dinajpur). According to this study, an estimated 400,000 applicants from the villages of India filed RTI applications in the first two and a half years of the RTI Act. Over 40 per cent of the rural respondents of that study stated that the most important constraint they faced in exercising their RTI was harassment and threats from officials. Similarly, nearly 15 per cent of urban respondents cited harassment from officials and uncooperative officials as the most important constraint.

Similarly, the profile of appellants published by in Annual Report of the Central Information Commission clearly indicated that 'during the period of 1st April 2006 to 31st March 2007, the total number of appellants was 2,306'. The majority of appellants 'were males (2,062) followed by females (228) and group (16)'.[16] The same is shown through the pie chart (see Figure 4.1).

According to the same report, the period under report witnessed exponential increase in the number of requests (171,404) received by the public authorities. It also stated that if all the ministries are taken together, the number of requests received in year 2006–2007 were seven times over previous year. Table 4.1 shows a trend regarding the RTI petitions during 2006–2007.

Figure 4.1: Overall Profile of Appellants during 2006–2007



Source: Central Information Commission 2007

Table 4.1: RTI Petitions Received during 2006–2007

Month	Opening balance	Closing balance	Receipt	Disposal	% of monthly disposal/receipt
Apr 2006	486	638	249	97	38.9
May 2006	638	847	413	204	49.3
Jun 2006	847	1,087	494	254	51.4
Jul 2006	1,087	1,310	507	284	56.4
Aug 2006	1,310	1,427	491	374	76.1
Sep 2006	1,427	1,587	485	325	67.0
Oct 2006	1,587	1,650	350	287	82.0
Nov 2006	1,650	1,863	509	296	58.1
Dec 2006	1,863	2,017	724	570	78.7
Jan 2007	2,017	2,379	721	359	49.7
Feb 2007	2,379	2,683	859	555	64.6
Mar 2007	2,683	3,251	1,037	469	45.2
Total			**6,839**	**4,074**	**55.6**

Source: Central Information Commission 2007.

Some of the findings of this report indicated that the more positive aspects of RTI included citizen empowerment, faster decision making, a boon for more honest officers, some improvement in record management; and the more negative aspects of RTI included misuse, used mainly by the elite, little impact on the decision-making process and undermined the authority of the executive. There is a perception that the RTI Act is being used mainly by the educated and the privileged. The findings of this report, however, do not support this conclusion. There is another perception that a major use of the RTI is by the aggrieved government employees who used the RTI Act to redress their grievances, particularly with regard to promotions, postings and disciplinary action. But, the findings of the report do not support this belief either.

Before 2004, it was largely the Members of Parliament and Members of State Legislatures who could question the performance and functioning of government authorities through proceedings in their respective legislatures. The Hon'ble President of India, Smt. Pratibha Devisingh Patil, said in her speech:

> The Act has, in a manner of speaking, now created a virtual 'Parliament of the People', where every citizen, through a simple method, can seek information from public authorities; and expect a response in 30 days. This has been the biggest fundamental difference that has been brought about by the RTI enactment—providing relatively easy access to information. There is no doubt that the flow of information to the citizens will help them make enlightened judgments.[17]

The President of India also said in her speech:

> Citizens exercising the right to information have substantially grown in numbers, complexion, and stature. There are many illustrative cases—physically handicapped persons getting their entitlement, women getting old age pension, students getting correct evaluation of exams and damaged roads being repaired. This speaks of the success of the RTI Act in creating conditions for free flow of information and thereby empowering the citizen.

But, in the same convention, the next day, the vice president of India started his speech with a somewhat contrarian viewpoint. He said, 'When passed in 2005, it was hailed as a revolutionary step

aimed at fundamentally altering the balance of power between the government and citizens. Four years hence, some dissatisfaction is evident and pertains to five major themes'.[18] According to him, a vast number of organisations that should have been covered under the definition of 'public authority' for being owned, controlled or substantially financed, directly or indirectly, by funds provided by the appropriate government, have not come forward proactively to be covered by the Act. They await a case-by-case ruling by the central or state information commissions to be so considered and hence covered by the Act. He further stated in the valedictory address that, 'currently, neither the Information Commissions nor the governments have ensured that all bodies that are covered by the definition of 'public authority' undertake action as listed in Chapter II of the Act' (ibid.).

Second, he mentioned:

> [V]ery few public authorities of the Central and State governments have followed the provisions of Section 4 of the Act in letter and spirit. It would be useful to review if cataloguing and indexing of records and data-sets have changed during the last four years in a manner that could facilitate the Right to Information under the Act.

He noted with concern:

> The actual disclosure of information by the public authorities is marked by inconsistency and unevenness. There has been little innovation and adaptation to capture information in government agencies and thereafter bring about suo-moto disclosure. The websites of the central and state governments also lack technical and content standardization. There is clearly a case for putting in place detailed 'RTI Act friendly' record management practices. (ibid.)

According to him:

> [A]n important lacuna has been the lack of a mandatory monitoring mechanism to look at the implementation of the RTI Act and to ensure that the Act is implemented in letter and spirit. Currently, the media and civil society groups are undertaking this task on an ad hoc basis.

He also pointed out:

> I have noticed that information on the RTI Act, including the translation of the Act itself, is not available in all the 22 languages mentioned in the Eighth Schedule of our Constitution. The website of the Ministry of Personnel, Public Grievances and Pensions has the RTI Act in only 11 languages. The web sites of most Information Commissions are not multilingual covering the official languages adopted by the appropriate governments. For example, the Central Information Commission does not have a Hindi website for dissemination of information.

He rightly said:

> Empowerment would be meaningless if it is sought to be achieved through a language that the citizen does not understand. Section 4 (4) of the RTI Act mandates that all materials shall be disseminated taking into consideration the cost effectiveness, local language and the most effective method of communication in that local area. Article 350 of the Constitution also entitles every person to submit a representation for the redress of any grievance to any officer or authority of the Union or a State in any of the languages used in the Union or in the State, as the case may be. (ibid.)

But, he hastened to add in his speech:

> The basic tenets have been implemented and the institutional structure is being utilized by citizens. The Right to Information has become an important instrumentality to our media and civil society. What we see is the beginning of decentralization and participatory governance and a citizen-friendly orientation to government. (ibid.)

The Report of National Coordination Committee on RTI Act made an appraisal of key issues pertaining to each item mentioned in the Terms of Reference. The key issues and constraints identified pertain to the following:

1. The free flow of information has been hampered by several factors. These include institutional issues, organisational issues, non-standardisation and non-compliance with basic processes and mechanisms, lack of awareness and usage of the RTI Act, deficiencies in the role and functioning of

state information commissions, limited use of information technology.

2. Lack of effective coordination and cooperation among state information commissions, as there is no worthwhile system in place for various state information commissions to share and disseminate information, case laws and best practices in the promotion of open government.
3. The limited use of technology has hindered the effective implementation of RTI. Except in a few states no effective IT systems have been established to monitor and report on the disposal of applications by public authorities. Likewise, internal systems for management of complaints and appeals by State Information Commission (SICs) are non-existent in many states. Each SIC has a different website and there is no uniformity across them on structure, content or templates.
4. While most state governments have subscribed to similar rules framed by the government of India, there are a few states which have made different rules, especially those pertaining to fees and costs.
5. The quality of records management in public authorities is very poor. In most government organisations, records are not organised systematically. The use of IT to strengthen records management systems have been implemented in very few government offices.
6. Although different states have initiated training of key officials on the RTI Act, there is great variance across states in their efforts to sensitise and train various supply side stakeholders on the RTI Act. On the demand side, the fundamental issue in this regard is awareness on RTI among the general public on which limited progress has been made.
7. The problem of delivery at the field/district level is a critical one. There is a lack of infrastructure with the public authorities at the district level which makes dissemination of information practically impossible. At the same time, the organisational and individual capacities at the cutting edge level for dealing with the RTI mandate are considerably weaker.

When there was an appeal for disclosing the assets of a judge, the Supreme Court of India took a different position. The judgement

pronounced by chief justice, Mr Justice Vikramajit Sen and Dr Justice S. Muralidhar on 12 January 2010 contained a paragraph saying:

> It was Edmund Burke who observed that 'All persons possessing a portion of power ought to be strongly and awfully impressed with an idea that they act in trust and that they are to account for their conduct in that trust'. Accountability of the Judiciary cannot be seen in isolation. It must be viewed in the context of a general trend to render governors answerable to the people in ways that are transparent, accessible and effective. Behind this notion is a concept that the wielders of power—legislative, executive and judicial—are entrusted to perform their functions on condition that they account for their stewardship to the people who authorize them to exercise such power. Well defined and publicly known standards and procedures complement, rather than diminish, the notion of judicial independence. Democracy expects openness and openness is concomitant of free society. Sunlight is the best disinfectant.

However, in the United States, the practice has been quite different recently. The Ethics in Government Act, 1978 was enacted by the US Congress; it applies to all levels of federal judges (known as 'Article III judges' since they are usually appointed for life, and cannot be removed except through a process analogous to impeachment). The enactment obliges federal judges to disclose personal and financial information each year; the sources of income, other than what is earned as an 'employee of the United States' (since judges in the United States are free to receive remuneration through writing, teaching and lecturing, provided such activity does not hinder their duties) received during a preceding calendar year, the source, description and value of gifts beyond a defined value too are to be declared. The US Congress passed what are known as 'redaction' provisions to the Ethics in Government Act, for the first time in 1998, allowing members of the judiciary to withdraw, or withhold certain information 'to the extent necessary to protect the individual who filed the report'. Redaction is permitted after the individual judge demonstrates the existence of objective factors which justify withholding of part of the information, mandated to be revealed. The US Judicial Conference (which is a statutorily created body, by virtue of Congressional law, and comprises of 13 representatives among district judges, equal representation from

Circuit [Appeal Court] judges, and two judges of the US Supreme Court, with the chief justice of the US Supreme Court as the chairman) submits reports; it also examines redaction applications, by judges, through a committee known as 'Subcommittee on Public Access and Security'. The procedure followed has been described in an article by Sarah Goldstein as follows:

> The Committee has developed a multi-phase process for reviewing judges' redaction requests and public requests for copies of judges' reports. When a member of the public requests a copy of a judge's financial disclosure report, the Committee sends a notification of the request to the judge in question and concurrently contacts the United States Marshals Service ('USMS') for a security consultation. The public request must be made on 'an original, signed form listing the judges whose reports [the requester is] seeking and any individuals on whose behalf the requests are being made'. When the Committee notifies the judge of the public request for the report, it asks the judge to respond in writing within fourteen days as to whether the judge would like to request new or additional redactions of information; however, the Committee can extend this response period if the judge so requests. If the judge does not request a reaction from his or her report at this time, the Committee staff sends a cost letter to the requester, the requester pays for the report, and the Committee then releases a copy of the report to the requester. However, if the judge requests a redaction upon receiving notification of the request for a copy of the report, the Committee staff sends the results of USMS security consultations, original requests for the judge's report, and the judge's redaction requests to members of the Subcommittee. The Subcommittee then votes on the redaction requests, with a majority needed to approve or deny the request, and the Subcommittee vote is forwarded to the Committee staff. As with reports where the judge has not requested a redaction, the staff then sends a cost letter to the requester, and the requester pays for the report. Finally, the Committee releases a copy of the report, with approved redactions, to the requester. (Goldstein 2005: 759–60)

Concluding Observations

In this scenario, the following brief observations may be worth considering. First, it seems to be clear that, at this stage, the groups and individuals have to be willing to fight for their RTI,

often taking their requests through several stages of appeal. If the political culture does not support and encourage that sort of behaviour, citizen participation will give only the appearance of having expanded (Cain, Egan and Fabbini 2003: 138).

Let us now examine three recent instances. First, it was Amit Jethava's murder. Amit was the sixth RTI activist in India to be killed in the recent times. He was shot dead on 21 July 2010 in the evening near Gujarat High Court. In his mid-30s, Jethava was gunned down by two unidentified men on a bike. The assailants had used a country-made pistol. Jethava was actively utilising the RTI to expose the corruption in the system. His death was viewed by the RTI activists as an attempt to stifle the voices trying to expose the rot in the system. Eminent activists like Arvind Kejriwal, Nikhil De, Aruna Roy and several others expressed their concern over the murder. They also offered to take up the cause of illegal mining raised by Jethava's organisation.[19]

Second, was the comment of the Union Sports Minister, M.S. Gill, on the floor of the Indian Parliament. With respect to the concerns raised in Lok Sabha by the Opposition over charges of corruption in the Commonwealth Games preparations, Sports Minister M.S. Gill on 11 August 2010 kicked up a storm in the House with his suggestion that the members should use the RTI Act to seek details of the expenditure on projects. The Opposition staged a walkout as the BJP, JD(U) and Shiromani Akali Dal said Gill had undermined the power of the House.[20]

Third, it was the position taken by the Central Information Commission (CIC) in August 2010. Slamming the government for not having an effective declassification policy, the CIC directed the Ministry of External Affairs to 'revisit' the policy and categorise records along the lines of the United States and the United Kingdom. The move came in reaction to an RTI application by Kuldip Nayar, a veteran journalist, who had asked for the records of the 1962 talks between Indian foreign minister Swaran Singh and his Pakistani counterpart Z.A. Bhutto in the wake of the India–China war. It is interesting to note that, while the Government of India denied Nayar the information, he told the Commission that Pakistan was willing to disclose papers related to the talks but not to an Indian national as there was no such agreement between the two countries. The commission also directed the government to set up a high-level committee comprising the secretaries from foreign, defence and

home departments to decide on declassifying confidential records. The decision came after a full bench of the CIC perused all eight 'top secret' files related to six rounds of talks between Singh and Bhutto during 1962–1963. Nayar had sought these documents from the MEA but his request was rejected by the ministry citing exemption clauses of the RTI Act. The CIC asked the Ministry to revisit its declassification policy with respect to information existing in the form of old documents, particularly relating to events that took place more than 20 years ago. As of now, the RTI Act allows disclosure of information which is more than two decades old, if it does not attract three exemption clauses: related to sovereignty and integrity of the country and other interests of the state, breach of privilege of Parliament or state legislature and Cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers. The panel directed the MEA to consider the 'automatic, systematic and mandatory declassification review' policy of the United Kingdom and the United States while deciding on the issue with respect to old documents of historical and international significance.[21]

Transparency is an openness with respect to knowledge and information that builds and binds trust between the institutions of governance and the citizenry at various levels of social interaction. In effect, it implies establishing the RTI as an aspect of constitutionalism, including a strong bias against public sector secrecy and covert operations.

Second, has the codification of the RTI in India simply been able to get more information out of the governmental closet or has it also made the *babu*s learn new tricks to hide the information more effectively than reveal them? Much vital information with regard to the welfare of the people is out of bounds on the pretext of official secrecy, national security and terrorist threats.

Third, there may not always be any standardised form of disclosing information. But, it is necessary to note that, unlike many other countries, India still has not been able to develop a culture of proactive disclosure of information. Perhaps the colonial hangover acts as a major hindrance to such disclosures. Therefore, a vocal minority has so far been able to get access to huge amount of information, but the silent majority of Indians is far away from that access. After all, when the state had to recognise this right under pressure from the civil society, probably the agencies of the

state did not have any idea what would really happen when the information genie would be let out of the bottle.

Fourth, on another front, as this capitalist globalisation entails more privatisation, the question remains how far this law would be effective in having access to information so far as a huge sector of the non-state actors and private enterprises are concerned. This is a crucial issue in view of the large-scale asymmetries of globalisation.

Fifth, the growing access to information has made the state more accessible in many cases. But, access to information may not necessarily lead to empowerment of the people. Empowerment is not automatically linked to free flow of information.

Finally, it is important to note that, even for having crucial information relating to governance, a right-enabling public sphere is absolutely important. A Habermasian public sphere of free and un-coerced discussion is still far-fetched. Moreover, if there is any tendency of a civil society subjecting itself to the mentalities and regimen of the state to a large extent, then even the enactment of the right enabling the access to information may not take us far. In the absence of a rational debate, simple access to information is not enough.

But, there are silver linings too. In view of the recent success of the panchayat system in different parts of the country, the people in the rural areas have started saying, 'We rule in our village and we will negotiate with government about what powers we want to delegate to them' (Shiva 2003 : 141–54). Perhaps, that way, direct democracy can do a better job of rooting out corruption, as the RTI movement has also indicated (ibid.).

In *The Order of Things: An Archaeology of Human Sciences* (1973), Foucault sketched out three different and discontinuous modalities of relation between thought and world, or epistemes, that enable the various fields of knowledge in each given era. In each era, knowledge is organised, according to Foucault, by a series of fundamental operative rules. The Renaissance or 17th-century episteme is based on resemblance, the mode by which language relates words and signatures that mark things. Knowledge consisted of relating, through interpretations, the different forms of knowledge so as to 'restor(e) the great, unbroken plain words and things'. The classical episteme of the 17th and 18th centuries consisted of representation and classification of all entities according to the principles of order and measurement. It is this episteme that

Borges caricatures in his image of the Chinese encyclopaedia, cited by Foucault as his inspiration for thinking its obverse, the heteroclite. With the rise of the modern episteme, which Foucault locates at the turn of the 18th and 19th centuries, representation is no longer adequate for the examination of concerns with life, the organic and history (Yudice 2008: 422–30).

Now, if this kind of direct democracy is to be fostered, public spheres in which deliberation on questions of the public good is held, must also be permeable to different cultures. In this context, the notion of performativity could be treated as the suitable mode, beyond instrumentality, in which the social is increasingly practised. The expediency of culture underpins performativity as the fundamental logic of social life today (ibid.). Three issues may be underlined in this context. First, globalisation has accelerated the transformation of everything into resource. Second, the specific transformation of culture into resource epitomises the emergence of a new episteme, in the Foucauldian sense. Third, this transformation should not be understood as a manifestation of 'mere politics' (ibid.). Therefore, this fourth episteme of performativity may be applied, in future, for a better assessment of the RTI in India.

Notes

1. For details see http://www.un.org/en/documents/udhr/index.shtml (last accessed on 11 April 2010).
2. For details see http://www.nationalarchives.gov.uk/recordsmanagement (last accessed on 2 February 2010).
3. For details see http://www.nas.gov.uk/recordKeeping/recordsManagement.asp (last accessed on 4 February 2010).
4. For details see http://www.foia.va.gov/FOIA_Reports.asp (last accessed on 4 February 2010).
5. USC 552 (1994).
6. *Richmond Newspapers Inc. vs. Virginia*, 448 US 555. 575 (1980).
7. In *Globe Newspaper Co. vs. Superior Court*, supra note 42, 457 US at 604. 607 (in voiding a state law that required the exclusion of the press and public from the courtroom during the testimony of a minor who was allegedly the victim of a sexual offence, the court noted that the First Amendment rights seek to 'protect the free discussion of government affairs' and thereby 'ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government').

8. Quoting *Mills vs. Alabama*, 384 US 214. 218 (1966); *Press Enterprise Co. vs. Superior Court*, 478 US 1 (1986) (holding that press has the right of access to the transcripts of a preliminary hearing of a criminal case).
9. For details see http://www.justice.gc.ca/en/dept/disclosure.html (last accessed on 10 February 2010).
10. For details see http://www.irmt.org/(last accessed on 15 February 2010).
11. AIR 1975 (197) SC 865.
12. 1981 (Supp) SCC 87.
13. *S.P. Gupta vs. President of India*, AIR 1982 SC 149, 234 (India). Please also see, *Bombay Environmental Action Group vs. Pune Cantonment Board*, WP 2733 of 1986 and Supreme Court Order re Special Leave Petition No. 1191 of 1986 (Bombay High Court, 7 October 1986) emphasising access to information for bona fide activists.
14. *Reliance Petrochemicals vs. Indian Express*, 1988 SCC 592.
15. *L.K. Koolwal vs. Rajasthan*, AIR 1988 (Rajasthan) 2, 4.
16. *Annual Report 2006–07*, Central Information Commission, New Delhi.
17. Speech of The Honourable President of India, Smt. Pratibha Devisingh Patil, at the inauguration of the Annual Convention of the Central Information Commission on 12 October 2009 in New Delhi.
18. Valedictory Address by the Honourable Vice-President M. Hamid Ansari at the 4th Annual Convention of the Central Information Commission on 13 October 2009 in New Delhi.
19. For details see http://www.dnaindia.com/india/report_activists-across-india-stunned-by-amit-jethava-s-murder_1412954 (last accessed on 15 August 2010).
20. For details see http://www.dailypioneer.com/275415/Why-ask-me-go-to-RTI-cocky-Gill-tells-Opp.html (last accessed on 15 August 2010).
21. For details see http://timesofindia.indiatimes.com/india/CIC-asks-govt-to-revisit-declassification-policy/articleshow/6306805.cms (last accessed on 15 August 2010).

5

Globalisation and Right to Information

Sibaji Pratim Basu

Introduction

Globalisation is not just an economic phenomenon. It affects all aspects of the present everyday life that depends so heavily on the worldwide flow of information and its technological/legal regimes. This, according to a host of scholars (Bell 1976; Lyotard 1984; Machlup 1962), is leading to the development of a new society, the 'information society', in which the creation, distribution, diffusion, use, integration and manipulation of information is a significant economic, political and cultural activity. In his celebrated book, *The Postmodern Condition*, Jean-François Lyotard (1984) has attempted to analyse, describe and chart the transition in Western advanced societies in terms of the new knowledge paradigm. He argues that the leading sciences and technologies—cybernetics, telematics, informatics and the growth of computer languages—are all significantly language-based and he indicates that knowledge in the form of an informational commodity will become indispensable to the productive power, where it becomes conceivable that the nation state will one day fight for control of information as they fought previously for control over territory.

Thus, the notion and function of information have undoubtedly acquired new dimensions during the last couple of decades. In this new incarnation, it also (apparently) attempts to alter radically an age-old domain of the modern state, in which the modern

'sovereign' state is considered to be the ultimate collector, custodian and user of the information available within and outside its territory. Viewed from this point, information-as-knowledge, christened as 'statistics'—the science of the state—makes the modern government possible. The things that a modern government is concerned about are:

> [M]en in their relations, their links, their imbrications with those other things which are wealth, resources, means of subsistence, the territory with its specific qualities, climate, irrigation, fertility etc.; men in their relation to other kinds of things which are customs, habits, ways of doing and thinking etc.; lastly, men in relation to that other kind of things which are accidents and misfortunes such as famine, epidemics, death etc. (Rabinow 1984)

Information of the above nature hugely enhances power in the hands of the modern state/government—making it a very efficient machine to control and serve the citizens in various ways. And the *ways* of its actions—decision making and implementation—are often guarded from the citizens. You may have the theoretical or constitutional knowledge of the complex patterns of the structures and functions of modern governments—about their administrative wings, or bureaucracies and their legal/ethical dos and don'ts—but seldom are you likely to get access to a government/semi-government document, even though that might jeopardise your life, even your existence.

It is not only the colonial and postcolonial regimes who preserve and protect their official documents under a cloak called 'secrecy', the so-called 'First World' is no exception. In the United States, a congressional committee (1956) reported that a million people in government—military and civilian—were authorised to wield secrecy stamps. In March 1957, *The Washington Post* reported that the Pentagon had recently stamped more documents secret than they had during World War II. Much of the 'secret' information consists of speeches and other public records. A cartoon by the legendary cartoonist Herbert Block (published on 13 March 1957 in *The Washington Post*) tells it all. Here we find two worried-looking officials in conversation. Holding up a file, one official says to the other, 'Well, we certainly botched this job. What'll we stamp it—secret or top secret?' (Block 1993).

Thus, the modern state stands on a juxtaposed ground. On one hand, it prefers to keep exclusive right on government documents in the name of maintaining the security, integrity, friendly foreign relations, or simply, the sovereignty of the state. On the other hand, it cannot ignore (not officially, at least) its 'democratic' compulsions of inclusion of citizens in the affairs of the state through representation and other mechanisms, and posing it to be 'accountable' to people, which again requires publicity. This desire of being accountable to citizens finds echo in the following words of Thomas Jefferson, 'The diffusion of information and the arraignment of all abuses at the bar of public reason, I deem [one of] the essential principles of our government, and consequently [one of] those which ought to shape its administration' (Jefferson 1904). This urge for 'openness' and actuality of 'secrecy'—the exclusion of citizens in the name of sovereignty and inclusion of them in the name of democracy—reflects one of the principal paradoxes of the modern ('democratic') regimes.

State Information and State Secrecy

The modern Indian state also contains the above ambivalence. Its Constitution (1950) recognises an array of citizens' rights, known as Fundamental Rights (Part III) and privileges them over other rights. While there is no specific right to information (RTI) or even right to freedom of the press in the Constitution of India, there are constitutional safeguards such as the Right to Equal Protection of the Laws and the Right to Equality Before the Law (Article 14), the Right to Freedom of Speech and Expression [Article 19 (1) (a)] and the Right to Life and Personal Liberty (Article 21). The Right to Constitutional Remedies in Article 32 backs these, i.e. the right to approach the Supreme Court in case of an infringement of any of these rights. The legal position with regard to the RTI has developed through several Supreme Court decisions given in the context of all above rights, but more specifically in the context of the Right to Freedom of Speech and Expression, which is regarded as a complementary right to the Right to Know. One cannot be exercised without the other.

However, in most of the times, even these rights along with favourable Supreme Court decisions could not ensure the disclosure

of government information. In India, it has been governed by a colonial law known as the Official Secrets Act (OSA) of 1889, which was amended in 1923. This law secures information related to security of the state, sovereignty of the country and friendly relations with foreign states and contains provisions, which prohibit disclosure of non-classified information. Civil service conduct rules and the Indian Evidence Act impose further restrictions on government officials' powers to disclose information to the public. Although a bill called The Freedom of Information Bill was passed by the Indian Parliament as the Freedom of Information Act, 2002, the OSA of 1923 did not lose its paramount importance in the eyes of the state, especially for the coercive authorities. The following incident, which drew immense public attention, will elaborate our case.

In June 2002, Iftikhar Gilani, Chief of Bureau of *The Kashmir Times*, was arrested under the OSA for possessing a paper published by the Institute of Strategic Studies, Islamabad, detailing among other things, the deployment of Indian troops in Indian-held Kashmir. The document was anything but classified—it was actually third-hand information, available on the internet, and moreover, as it had originated in Pakistan, it clearly did not qualify as an 'official secret' of the Indian government. Yet, evidence was fabricated. Intelligence Bureau officials altered the words 'Indian-held Kashmir' in the document to 'Jammu and Kashmir' to suggest it was an Indian document—to make a false case against the journalist. He was detained in Tihar Jail till January 2003, when the government withdrew the case against him, owing to rising pressure throughout the country by fellow journalists, civil liberty activists and even politicians (Gilani 2005).

In this background, a new nationwide RTI Act, 2005, generated curiosity, hopes and doubts simultaneously. People concerned were curious because they wanted to know in what way the new law would be an improvement on the previous rights (including the aborted Freedom of Information Act, 2002). They were hopeful because in the process of enacting the new law some of the eminent activists' views were taken into consideration. They were still doubtful whether or not it would be really possible to make full use of the RTI because the scope of the new law was so wide that it could be used, despite a long list of exemptions, against a host of 'public authorities', which, in most of the cases, were not ready

to shed their colonial 'know-all-divulge-none' mindset (Gandhi 2005). The mixed response on the part of the citizens and the media would not seem unwarranted if we briefly follow the history behind this Act.

Right to Information: Background and Context

The foundations for the RTI in India were laid by a judgement of the Supreme Court in 1974 in the election case of *Raj Narain vs. Indira Gandhi*, where the court, while rejecting the government's claim of privilege on the disclosure of the security instructions for the prime minister, stated as follows:

> In a government of responsibility like ours where all the agents of the public must be responsible for their conduct there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor, which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussions on public security. To cover with the veil of secrecy the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal interest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against operation and corruption.[1]

Despite such a historic verdict the government preferred to ignore it. And to cap it all, a National Emergency (1975–1977) was soon declared, which suspended major civil rights in India for 19 months. After the lifting of the Emergency, a number of civil liberty organisations and non-governmental organizations (NGOs), old and new, began to demand for enactment and effective maintenance of various social, economic and democratic rights for the citizens. According to Gudavarthy (2008), if the late 1970s had gone through the 'civil liberties phase' (in which the focus was on the 'state–civil society complementarity'), the '1980s were marked by a shift to the

second phase—the "democratic rights phase"—with a new state versus civil society framework.... Towards the end of the 1990s, the third phase—the "human rights phase"—reconstituted itself on a new civil society versus political society framework'.

The 1990s are generally identified as the decade which witnessed the end of the Cold War and emergence of a 'new world order' under the leadership of the United States and the West. New economic and technological connectivities were developed across the globe that sought to reconstitute this so-called 'new world order'. This process is popularly known as globalisation, whose success largely depends on a 'free flow' of men, money, technology and moreover, information. Backed by the might of the United States and other Western powers, many monetary and trade regimes—old and new—are trying hard to bring together the unevenly developed nation states (often against their will) under one global system. A new 'human rights' discourse/practice also developed in this period, which emphasised the existence and effective maintenance of certain 'universal' rights that stand beyond the rights granted by the national legal regimes. Serious movements for RTI also emerged in this decade of 1990s.

The RTI Act, 2005 came into being as a direct result of tremendous pressure by a number of NGOs and civil liberty organisations. Indirectly though, there was an urge on the part of the state, as well as, central governments to satisfy the international money lending institutions to carry out various humanitarian and developmental projects in the neo-liberal atmosphere of the 1990s through loans from these institutions. It was a time when 'rolling back' of the public undertakings and various welfare activities run by the government became the mantra of the men d'affaires in New Delhi. The void, especially in the field of public welfare, would be filled soon by NGOs and civil liberty groups, mostly run on foreign funds. The government too, in the changed order of neo-liberal globalisation, accepted the coexistence of foreign-funded NGOs in the welfare/developmental fields, mainly because of *(a)* paucity of funds; *(b)* conditions laid down by international agencies, which suspected efficacy and efficiency of government organisations and relied more on NGOs and *(c)* owing to their own convictions and ideological commitments. The government, at different levels, became heavily dependent on international funding and trade agencies for survival. This privileged the above

agencies to demand *transparency* of government policy, activities and accounts (Drabek and Payne 2001). In a way, the demand for RTI by the NGOs coincided with the conditionalities laid down by international agencies.

A number of social and civil liberty organisations led strong grassroots level movements in different parts of India, among which some like the Mazdoor Kisan Shakti Sanghatan (MKSS), Parivartan,[2] National Campaign for People's Right to Information (NCPRI) and Commonwealth Human Rights Initiative (CHRI) played the prominent role. And among them one must acknowledge the relentless contribution of MKSS in Rajasthan led by a charismatic IAS-turned-social worker, Aruna Roy.

Role of Mazdoor Kisan Shakti Sanghatan (MKSS)

The MKSS, a peasant-farmer's collective that inquires into the issues of governance and policy-making processes, began its journey in 1987, but 1990 onwards, one can see somewhat structured initiatives at the grassroots level. Some of the important issues taken up and which succeeded to some extent are minimum wages, right to work, right to food, RTI, etc. The genesis of the RTI movement in India lies in the public hearings or *jan sunwai*s, a unique instrument applied by the MKSS in some rural parts of Rajasthan (Roy 2005). In order to check corruption in governmental activities concerning people's welfare and development, such public hearings were organised, which were largely attended by elected representatives, government officials, local intelligentsia such as lawyers, media persons, NGOs, community-based organisations, external observers and above all the common people. The MKSS initiated a series of public hearings over rural developmental activities with the substantial evidence of data and documents by involving cross section of the society. The MKSS also initiated a series of public hearings identifying corruption, misuse and nepotism in the drought relief works and in the rural developmental activities with the substantial evidence of data and documents by involving cross section of the society. Along with the public hearings, the MKSS also organised *dharna*s for the implementation of RTI in various parts of Rajasthan such as Beawar in 1995. The demand was to press for the issue of administrative

orders to enforce the RTI of ordinary citizens regarding local development expenditure. The *dharna* witnessed an unprecedented upsurge of homespun idealism in the small town of Beawar and the surrounding countryside. A daily assembly of over 500 people took place in the heat of the tent, listening to speeches and joining in for slogans, songs and relics. Active support cut across all class and political barriers, from rich shopkeepers and professionals to daily wage labourers, and the people coming from entire political spectrum—from the right-wing fringe to left-trade unions extended vocal and enthusiastic support.

The *dharna* in Beawar also spread to Jaipur, where over 70 people's organisations and several respected citizens came forward to extend support to the MKSS demand. The mainstream press was also openly sympathetic. On 14 May 1996, the state government announced the establishment of a committee which within two months would work out the logistics to give practical shape to the assurance made by chief minster to the legislature, regarding making available photocopies of documents relating to local development works.

Another year passed and despite repeated meetings with the chief minister and senior cabinet members and state officials, no order was issued and shared with the activists, although again there were repeated assurances. In the end, on a hot summer morning in May 1997 there was another 52-day long 'epic' *dharna*, this time in the state capital of Jaipur close to the state secretariat. The struggle saw the same outpourings of public support as had been seen in Beawar a year earlier. At the end of the *dharna*, the deputy chief minister made an astonishing announcement, that six months earlier, the state government had already notified the right to receive photocopies of documents related to panchayat or village local government institutions. Nevertheless, the order of the state government was welcomed by the supporters as a major milestone, because for the first time, it recognised the legal entitlement of ordinary citizens to obtain copies of government-held documents.

Besides MKSS, Parivartan, an NGO, working in the urban slums of Delhi, also had a huge contribution towards implementation of the RTI. It played a key role in building awareness on the RTI Act and using RTI as the potential instrument for transparent delivery of services like Public Distribution System, infrastructure such as public roads and buildings and electoral reforms. It also used the

RTI in conducting the social audit in the urban areas on spending of the public investment. As part of the NCPRI, Parivartan put consistent effort for the National RTI.

However, before the introduction of the RTI at the central level, many state governments started introducing the RTI since the late 1990s. These are: Goa (1997), Tamil Nadu (1997), Rajasthan (2000), Karnataka (2000), Delhi (2001), Assam (2002), Maharashtra (2003), Madhya Pradesh (2003) and Jammu and Kashmir (2003). Among all these Acts, the Maharashtra RTI Act was considered as the model act in promoting transparency, accountability and responsiveness in all the institutes of the state as well as the private organisations, which are getting financial support from the government. However, in the Tamil Nadu Act (1997) one could find the most innovative ways of refusing the information seekers. These state Acts were the models for the preparation of a nationwide RTI Act.

Legal evolution

The efforts for the introduction of the National RTI Act should be traced to the days since 1996, when the NCPRI was founded. Besides, the international organisations like CHRI strongly advocated that the RTI be fundamental to the realisation of other rights. In response to the pressure from the grassroots movements, national and international organisations, the Press Council of India under the guidance of its Chairman Justice P.B. Sawant drafted a model bill that was later updated at a workshop organised by the National Institute of Rural Development (NIRD) and sent to the Government of India, which was one of the reference papers for the first draft bill prepared by the Government of India. For some political and other reasons the bill could not be taken up by the Parliament.

Again, in 1997, the United Front government appointed the working group under the chairmanship of Mr H.D. Shourie. The working group drafted a law, namely 'The Freedom of Information Bill', 1997. However, this Bill was also not enacted. Notably, the draft law was criticised for not adopting a high enough standard of disclosure of information.[3] The Shourie

Committee draft law passed through two successive governments, but was never introduced in the Parliament. In the interim, in 1999, Mr Ram Jethmalani, the then union minister for urban development of the NDA government, issued an administrative order enabling citizens to inspect and receive photocopies of files in his ministry. Disappointingly, the cabinet secretary did not permit this order to come into effect.

Eventually, the Shourie Committee draft law was reworked into the Freedom of Information Bill, 2000. But, according to activists, it was an even less satisfactory Bill than the draft law. The 2000 Bill was sent to the Parliamentary Standing Committee on Home Affairs, which consulted with civil society groups before submitting its report in July 2001. The committee recommended that the government address the flaws in the draft Bill pointed out by civil society. However, the government did not implement that recommendation, to the detriment of the final content of the Bill. At last, the national Freedom of Information Bill, 2000, was passed in December 2002 and received presidential assent in January 2003, as the Freedom of Information Act, 2002. However, it could not enter into force as the necessary notification was never issued by the then government (Section 31 of the RTI Act 2005 repealed the Freedom of Information Act 2002).

The failure on the part of the NDA government to implement the Freedom of Information Act, 2002, and the subsequent change in the government after the Lok Sabha elections of 2004, paved the way for a new and improved law—the RTI Act, 2005. The new coalition—led by Congress—formulated an agenda called the 'Common Minimum Programme' (CMP). One of such agenda's of the CMP was the introduction of RTI Act. The CMP clearly stated, 'The Right to Information Act will be made more progressive, participatory and meaningful'. In order to look after the implementation of the CMP, the UPA constituted the National Advisory Council. In the National Advisory Council, some of the activists like Aruna Roy and Jean Drèze, who had been deeply associated with the NCPRI, had been included. These activists consistently put the pressure on the UPA government to pass the Bill and to enact a law. In response to these efforts the Parliament passed the Bill and the president of India consented for the Act on 15 June 2005 and implementation process of the RTI Act was started since 12 October 2005.

The basics of the Act (2005)

The RTI Act, 2005, covers the whole of India except Jammu and Kashmir (Jammu and Kashmir does have its own RTI Act, which came into effect in 2002). It is applicable to all government entities at union, state and local levels. It is also defined in the Act that bodies or authorities established or constituted by order or notification of appropriate government including private bodies 'owned, controlled or substantially financed' by government, or NGOs 'substantially financed, directly or indirectly by funds' provided by the government are also covered in it. Before we explore more, certain legal terms are needed to be clarified in order to understand the 'basics' of this Act.

Appropriate Government means the central and the state governments that have the power to evolve rules about *(a)* most clauses including that of payment of fees, *(b)* the procedure for deciding appeals/complaints by the central/state information commissions and *(c)* service conditions of the central/state information commissioners. It has also responsibility for popularising as well as promoting the Act by publishing guidelines and organising training programmes, etc.

Central Information Commission (CIC) comprises a chief information commissioner and a maximum of 10 central information commissioners. The chief information commissioner heads the commission, which is an independent entity like the Election Commission of India, appointed by the President of India. It reports only to the Parliament and the President. All the above mentioned government/semi-government/government-financed NGOs and privatised organisations run under the jurisdiction of the central government (including union territories) come under the purview of the CIC.

A **Central Public Information Officer (CPIO)** works for a public authority under the central government. S/he is a link between the information seeker/citizen and the public authority. In fact, the CPIO is responsible for receiving applications and fees from the information seeker, collecting information from the section concerned with the public authority and supply the information to the applicant. The CPIO is assisted by assistant public information officers.

State Information Commission (SIC) is an independent organisation that enjoys the same powers as the CIC in respect to

entities under the state government. It is headed by the chief state information commissioners and a maximum of 10 state information commissioners appointed by the governor and is responsible to the state legislature and governor. However, unlike the high courts and the Supreme Court, there is no hierarchy between the CIC and SIC. The CIC is not an appellate authority. They only differ in terms of their separate areas of functioning.

A **State Public Information Officer (SPIO)** acts in the same manner as the CPIO in respect to a public authority under the state government.

Competent Authority comprises speakers of Lok Sabha and State Legislative Assemblies, chairpersons of Rajya Sabha and state vidhan parishads, Chief Justice of India, chief justices of high courts, President of India, governors of the states and administrators of the union territories.

Public Authority is wider than the scope of the term 'State' as defined in Article 12 of the Indian Constitution. It incorporates two distinct sets of organisations: *(a)* constituted by way of any enactment of the legislature or notification of the executive; and *(b)* all authorities that owe their existence to funds received, directly or indirectly, from any government organisation.

Information, according to Section 2 (f) of the Act, includes any material in any form including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models and data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force.

Besides, the term '**Record**' is also used to elaborate the concept of 'Information' further. It includes: *(a)* any document, manuscripts and files; *(b)* any microfilm, microfiche and facsimile copies of a document; *(c)* any reproduction of image or images embodied in such microfilm (whether enlarged or not); and *(d)* any other material produced by a computer or any other device.

Section 2 (j) of the Act guarantees the following rights to citizens as **Right to Information**:

1. Right to ask for any information from a public authority.
2. Right to inspect documents, files and records in the control of the public authority.

3. Right to ask for documents, files and records—both in the physical and in the electronic form.
4. Right to inspect any work or project or activity of the government.
5. Right to ask for samples of material used in these works or projects.

Again, Section 2 (n) clarifies that in the operation of the RTI Act, particularly in the context of the 'public authority', all persons and authorities other than the information-seeking citizen would be considered as a **Third Party**. The right to appeal against the decision of the PIO is also extended to the concerned 'third party'.

Every public authority, which comes under the purview of the RTI Act, is obliged to appoint a PIO. Any officer of the same organisation is designated and given the additional responsibility of the PIO. S/he is the link between the information seeker and the public authority. Her/his job is to receive application from the citizens, who desires to obtain any information and then provide information to them. If the request pertains to another public authority (in whole or part) it is the PIO's responsibility to transfer/forward the concerned portions of the request to the correct and appropriate PIO in another public authority within five days. In addition, every public authority is required to designate Assistant Public Information Officers (APIOs) to receive RTI requests and appeals for forwarding to the PIOs of their public authority. The citizen making the request is not obliged to disclose any information except her/his name and contact particulars.

The Act specifies time limits for replying to the request. If the request has been made to the PIO, the reply is to be given within 30 days of receipt. If the request has been made to an APIO, the reply is to be given within 35 days of receipt. If the PIO transfers the request to another public authority (better concerned with the information requested), the time allowed to reply is 30 days but computed from the day after it is received by the PIO of the transferee authority. Information concerning corruption and Human Rights violations by scheduled security agencies (those listed in the Second Schedule to the Act) is to be provided within 45 days but with the prior approval of the CIC.

However, if life or liberty of any person is involved, the PIO is expected to reply within 48 hours. Since the information is to be paid for, the reply of the PIO is necessarily limited to either denying

the request (in whole or part) and/or providing a computation of 'further fees'. The time between the reply of the PIO and the time taken to deposit the further fees for information is excluded from the time allowed. If information is not provided within this period, it is treated as deemed refusal. Refusal with or without reasons may be ground for appeal or complaint. Further, information not provided in the times prescribed is to be provided free of charge.

But the state also preserves its privilege to put limits on the Act. Section 8 of the Act makes it clear that the RTI is not an absolute right. Disclosure of information, which might prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the state, relation with the foreign state or lead to incitement of an offence, information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court are kept out of purview of the Act. Notwithstanding any of the above exemptions, a public authority may allow access to information, *if public interest in disclosure outweighs the harm to the protected interests* [Section 8(2)].

According to Section 24/Schedule 2 of the Act, the following agencies are exempted from the application of the Act: Central Intelligence and Security agencies like IB, RAW, Central Bureau of Investigation (CBI), Directorate of Revenue Intelligence, Central Economic Intelligence Bureau, Directorate of Enforcement, Narcotics Control Bureau, Aviation Research Centre, Special Frontier Force, BSF, CRPF, ITBP, CISF, NSG, Assam Rifles, Special Service Bureau, Special Branch (CID, Andaman and Nicobar), the Crime Branch-CID-CB (Dadra and Nagar Haveli) and Special Branch (Lakshadweep Police). Agencies specified by the state governments through a notification will also be excluded. The exclusion, however, is *not absolute* and these organisations have an obligation to provide information pertaining to allegations of corruption and human rights violations.

Limitations/Problems

Apart from these built-in exemptions, the Act, like many other Acts, has certain other limitations, which in turn affect the effectiveness of the Act to some extent. Let us first consider, the

issue of appointment of the central and state public information commissioners. In case of the CIC, its members are appointed by the president on the recommendation of a committee comprising the prime minister, the leader of the opposition in the Lok Sabha and a union minister, nominated by the prime minister. The prime minister heads the committee, and the process of appointment is done in a highly confidential manner—leaving no scope for public involvement or participation. Again, most functionaries of the CIC find placement because of their closeness to the government or the ruling party. The only person who can oppose the selection process is the leader of the opposition. However, her/his objections can be easily ignored since the prime minister and her/his cabinet colleague forms the majority in the committee. The same thing applies to the SICs at state levels. The members of SIC (appointed by the governor) are selected in the same confidential manner by a committee comprising the chief minister, leader of the opposition and a cabinet minister. Here too, the members of the SIC are likely to be people closer to the government and party in power in the state.

Another weakness, according to many critics, is that there is almost no power of order implementation in the hands of the CIC or SICs. If the PIO or the public authority fails to implement the orders of the CICs or SICs, the information-seeker has no alternative than to approach the high court. However, going by Section 18(3) one can form a different impression. It says while inquiring into complaints on refusal to access to information, or non-response to a request for information, or against demand of an unreasonable fee, or against furnishing of misleading/false information by a PIO or public authority, the CICs or SICs 'have the same powers as are vested in a civil court while trying a suit under the Code of Civil Procedure, 1908' (Jaipuriar and Satpute 2009).

But then, the RTI Act does not give the information commission the similar powers as enjoyed by another regulatory body like the Telecom Regulatory Authority of India (TRAI) under the TRAI Act, 1997. Section 16(2) of the TRAI Act allows TRAI, like a civil court, to review, revisit and even set aside its earlier decisions and orders. The CIC/SICs have no such power to review a decision, even if taken erroneously. As a result, an aggrieved person has no choice but to move to the high court to invoke its writ jurisdiction, if s/he seeks to revise the order of the CIC/SICs. Besides, every proceeding before the TRAI is considered as a judicial proceeding

within the meaning of Sections 193 (punishable for giving false evidence), 228 (punishable for intentional insult or interruption to public servant sitting in judicial proceeding) and 196 (punishable for using evidence known to be false) of the Indian Penal Code, 1860 and Chapter XXVI (provisions as to Offences Affecting the Administration of Justice) of the Code of Criminal Procedure, 1973. No such power is enjoyed by CIC/SICs. The only penalty that information commissions can impose on the PIOs is a levy (under Section 20 of the Act) at the rate of Rs 250 for each day of default in providing information. The maximum limit of such monetary penalty is Rs 25,000. This is an exclusive power of information commissions. No other appellate authority enjoys such power. In case of persistent non-compliance, the commissions can recommend disciplinary action against the CPIOs/SPIOs as per service rules applicable to her/him.

However, during the first three years of the operation (i.e. up to 31 March 2008) of the Act, information commissions (central or state) have disposed 50,955 appeals/complaints and among which only in case of 373 appeals/complaints penalties have been imposed on guilty officials under Section 20. Although in a case between *G. Basavaraju vs. Arundhati and Others*, the Karnataka High Court held that the penalty provisions as contained in Section 20 can also be used by the information commission (in this case the SIC of Karnataka) to get its orders complied with. It further held:

> … Courts or tribunals must be held to possess power to execute its own order.… Right to Information Act, which is a self-contained code, even it has not been clearly spelt out, must be deemed to have been conferred upon the Commission the power in order to make its order effective, by having recourse to Section 20. (Jaipuriar and Satpute 2009)

The reluctance on the part of information commissions in terms of application of Section 20 against erring officials definitely dilutes the rigour of the Act. Again, although Section 22 of the RTI Act clearly says that it would override all existing acts including the OSA, 1923, the continued existence of the OSA in its present form does have the potential to confuse the minds of the PIOs.

Another important area that has created enough confusion and criticism in recent times is the issue of judicial accountability and disclosure of assets by the members of the judiciary. Controversy

began to rise when in a recent landmark judgement, the Delhi High Court upheld a single bench order that the office of the chief justice of India (CJI) comes within the purview of the RTI Act, observing that openness is the 'best disinfectant'. In a recent article, Prasant Bhushan,[4] a well-known public interest lawyer in the Supreme Court and a member of the Campaign for Judicial Accountability and Reforms, has narrated the development of this very crucial and media-hyped story that helps us understand the strength of the RTI Act and the attitude of one of the most powerful institutions in the country towards it. The issue arose out of a RTI application filed with the Supreme Court by Subhash Agarwal, an 'untiring' RTI activist. Agarwal sought the information regarding the compliance of a 'Code of Conduct' adopted at the Chief Justices Conference in 1997, which required judges to disclose their assets in confidence to their chief justices. The PIO of the Supreme Court (endorsed by the chief justice) responded by saying that the information did not exist in the court registry. In course of an appeal before the CIC, it transpired that the Supreme Court was making a distinction between information with the CJI's office and that with the Supreme Court. The CIC rejected this distinction and directed the information officer of the Court to obtain this information from the CJI's office and provide it to the RTI applicant. This prompted the Supreme Court to file a writ petition in the Delhi High Court challenging the CIC order. The Supreme Court argued that disclosure of judges' assets to the CJI would pave the way for people seeking actual asset disclosures under the RTI Act. They claimed that asset disclosure was exempted under the RTI Act on the basis that this information was disclosed by judges to the chief justice under a 'fiduciary relationship' and that this was 'personal information having no relationship to public interest and would cause an unwarranted invasion of the privacy' of judges. The Court further claimed that the CJI was not a 'Public Authority' amenable to RTI requests under the RTI Act.

Justice Ravindra Bhat of the Delhi High Court finally delivered judgement on the Supreme Court's writ on 2 September 2009, after the Court made it clear that it would not withdraw its writ petition despite the judges' decision to put their asset declarations on the Court website. Justice Bhat emphatically rejected the chief justice's oft-repeated claim that the CJI was not a public authority and that the CJI's office was not amenable to the RTI Act. He also held that

information about whether judges had been declaring assets to the chief justice was decidedly held by the CJI and had to be disclosed to the applicant. He also rejected the Supreme Court's contention that the asset disclosures have been given by judges to the chief justice in a 'fiduciary' relationship (one of trust, like a lawyer–client or patient–doctor relationship), by holding that this information was required to be provided to the chief justice by the Code of Conduct adopted by the judges themselves.

At the same time, he held that the information was personal information of judges entitled for protection under clause 8(1) J of the exemptions in the RTI Act, unless the information officer or the CIC would come to the conclusion that the public interest in disclosure of this information outweighs the interest of privacy of the judge. However, as the applicant in this case did not ask for the actual asset disclosures but only whether judges were making them, Justice Bhat did not decide whether the public interest in disclosure of judges' assets outweighs the public interest in protecting the privacy of judges. Although the case is yet to be settled it shows the potentiality of the RTI Act and the nervousness its application can create in the minds of the people holding highest offices.

Notwithstanding the above difficulties, the RTI Act, 2005, is becoming, day by day, the most effective right that cuts across all the rights, especially the 'new' social rights that have become so important in the post Cold War times of globalisation. The rights-discourse in India, as we have noted, has entered its Human Rights phase since 1990s. Along with other rights, many pro-poor rights and movements demanding these rights also began to surface. Article 21 of the Indian Constitution had already gained a new importance after the *Maneka Gandhi vs. Union of India* case (1978). After two decades of the *A.K. Gopalan vs. State of Madras* case (1950), the Supreme Court opened up a new dimension and laid down that the procedure of the state cannot be arbitrary, unfair or unreasonable one. Thus, in the new light of interpretation, Article 21 imposes a restriction upon the state where it prescribed a procedure for depriving a person of his life or personal liberty. It assures the right to live with human dignity and free from exploitation. In the 1990s, the scope of this Article has further expanded owing to many public interest litigation cases lodged by individual citizens and human rights activists. A host of demands comprising right to food, employment, health, shelter, education, mid-day meals

at school, the maintenance of the public distribution system, land rights, forest rights, prevention of starvation deaths and coercive displacement, etc. have given the Human Rights discourse a new dimension.

It is interesting to note that the year 2005 witnessed the enactment of two radical pieces of legislations, namely the RTI Act and the National Rural Employment Guarantee Act (NREGA). The enthusiastic activists expected that the RTI Act would be considered to be an important tool to monitor the effective implementation of NREGA. The following case study was conducted by Sabar Ekata Manch (A forum of community based organisations working on Dalit Rights in Sabarkantha district, Gujarat) and Janpath (A network of voluntary organisation of Gujarat), on 16 April 2006.[5] The study was done on the basis of a report that in Balisana village of the Prantij block in Sabarkantha district, workers were receiving wages as low as Rs 3 to Rs 7 per day for their work under the NREGA scheme. Sabar Ekata Manch and Janpath did the fact-finding survey in different villages in Prantij block, where the similar facts recurred. After this, Mr Natu Barot of Sabar Ekata Manch contacted, Mahiti Adhikar Gujarat Pahel for guidance on how to acquire the muster roll and payment sheets of the works. Since this kind of information comes under the 'pro-active disclosure' category, he was advised to file simply an application asking the copy of the muster and payment sheets under the RTI Act. And his request was complied immediately. A team from Janpath and Sabar Ekata Manch visited on 16 April 2006 *Moyad* village of Prantij Taluka, where deepening work of the village pond was in progress.

When the muster rolls were studied thoroughly, it came to light that the amount calculated was based on the quantum of work which was incorrectly written in column 7 of the muster rolls instead of recording it in column 10, which ensured minimum wages to workers. These irregularities and violations were brought to the notice of media through press conference. A small video film was produced with the help of Janpath, which was screened before the media. It built due pressure on the government. The payments made afterwards were all done as per minimum wage provision. Thus, the copy of the muster rolls, obtained through the application of the RTI Act, played a key role in effective implementation of NREGA.

In another instance, in Surguja district of Chhattisgarh state, a sit-in-demonstration was launched at the local office of the irrigation

department on 17 October 2005, five days after the national RTI Act came into force. The local workers were demanding the muster rolls in relation to the construction of a *talab* (pond) under the National Food for Work Programme. A sum of Rs 3.5 lakhs was sanctioned to the irrigation department for the project, of which Rs 3.1 lakh was spent on labour, tracked in three weekly muster rolls. On the basis of the RTI Act, the workers got it at last after a prolonged demonstration.The public hearing immediately showed that the muster rolls had been fudged. Although there were 320 names on the rolls, it emerged that only 63 of the 320 names were genuine. That means that the wages of nearly 80 per cent of the labourers were misappropriated by corrupt officials. Additionally, it was found that all the thumbprints in the muster roll were false, and even in the case of genuine workers they had put their thumbprint or had signed on a different document—the *kaccha* muster roll, an informal register maintained at the worksite to record attendance and make wage payments. At the end of the public hearing, a delegation was sent to the district collector of Surguja and the evidence was presented to him. The villagers were promised that action would be taken against the culprits (Paul 2006).

RTI status in the states

During its first five years of existence, the RTI Act, despite various difficulties and shortcomings, has become a powerful tool in the hands of the citizens as well as human rights activists and NGOs. From Gujarat to Assam and other states of India's northeast, from Punjab (I have not included Jammu and Kashmir in the present study) to Kerala, throughout the length and breadth of India, people have used this Act to know almost everything related to their everyday life. From public examination systems to employment-interviews, from the status and utilisation of development works/funds by central/state/local public agencies to the projects involved in catering the 'new' social rights—the RTI has come a long way in a short span of time. The Act and its activists have disturbed the quarters of vested interests in such a dimension that the beginning of 2010 witnessed two RTI-murders within a month, in two different states: Maharashtra and Bihar.

In Pune (Maharashtra), Satish Shetty, who was running a public awareness programme for the last 15 years and who had filed scores of RTI applications which exposed irregularities in land acquisition by Sable-Waghire company and IRB Builders and promoters, was murdered on 14 January 2010. One such exposure, through Shetty's RTI application, led to the suspension of the deputy land registrar in the area. Just after a month (14 February 2010), we have the body of another activist, Shashidhar Mishra in Begusarai, Bihar. Like Shetty, Mishra too worked tirelessly to expose corruption at the panchayat and block levels. He was shot dead by unidentified men on motorcycles near his residence in Phulwaria village on the night of 14 February 2010.[6]

Success-wise, Maharashtra can claim the most RTI-effective status. But even in Maharashtra, according to a report, a whopping 11,355 second appeals were still pending with the seven information commissioners across the state till November 2009. An audit of the pending second appeals with various information commissions in the state show that the information commission in Pune has the highest number of pending cases (3,723), followed by the Aurangabad commission with 2,667 cases. Amaravati and Mumbai division (including Nashik) come in the third and fourth ranks with 1,762 and 1,126 cases, respectively.[7]

In case of Karnataka, another RTI-wise effective state, the following statistics of two months—October and November of 2009—is like this:

1. Number of cases pending at the end of October 2009 = 7,237.
2. Number of complaints and appeals received during November 2009 = 1,340.
3. Number of complaints and appeals disposed during November 2009 = 917.
4. Number of cases pending at the end of November 2009 = 7,660.
5. Number of cases heard during November 2009 = 1,684.
6. Appeals and complaints pending less than 3 months = 3,140.
7. Appeals and complaints pending more than 6 months = 4,347.
8. Appeals and complaints pending more than 12 months = 173.

[*Source*: Karnataka Information Commission]

Table 5.1: RTI Performance of West Bengal vis-à-vis Other States

Sl No.	Status of appeals, disposal till 31 March 2008	Total	Highest performing CIC/SIC	Performance of West Bengal
1	Appeals/complaints received up to 31 March 2008	87,165	22,215 (Maharashtra)	516
2	Appeals/complaints disposed up to 31 March 2008	50,955	6,227 (CIC) 6,115 (Maharashtra)	394
3	Monthly rate of disposal of cases	—	587 (Maharashtra)	18
4	Cases pending on 31 March 2008	36,480	15,988 (Maharashtra)	122
5	Penalty imposed till 31 March 2008	373	74 (CIC) 57 (Haryana)	2
6	Awarding of compensation up to 31 March 2008	576	318 (Chhattisgarh)	1

Source: Data compiled by the author based on the RaaG Report.

On the other hand, the scenario of an otherwise 'politically conscious' state of West Bengal (WB) is very dismal. The 'RTI Assessment Report' prepared by the RTI Assessment & Analysis Group (RaaG) and NCPRI[8] reflects the poor position of the state. Please see Table 5.1 for further reference.

Civil liberty organisations and activists[9] in West Bengal are voicing the following demands for a long time for a more effective and transparent functioning of the SIC (WB):

- A few more information commissioners should be appointed, and as per the location of applications the hearings are to be organised in the respective district headquarters.
- More and speedy disposal of cases/appeals is to be done immediately.
- Training and awareness programmes must be organised especially for the lower level government officials and village local self-government (panchayat) level staff.

- A comprehensive list of PIOs comprising all the government/ semi-government departments must be immediately published.
- Civil society organisations must be involved in the process.

RTI, globalisation and new information regime

Within a little span of five years, as it is evident from our study, the RTI Act has become a *right of rights* in the neo-liberal scenario of a 'globalised' India. For the time being, let us accept, like David Held et al. (1999), that 'globalisation' is an ill-defined and controversial word that captures a number of different trends, all with implications for state power. Like many 'third world' economies, India too had willy-nilly chosen the path of liberalisation, and that led to heavy banking on the foreign direct investment (FDI), even in the core sector, which was something unimaginable even in the first half of the 1980s. We have already mentioned that many international monetary agencies, on which India had to rely on, for paying off debts and huge deficits on one hand and taking fresh loans on the other, had on their part begun to impose various conditionalities, which a radical Marxist might describe as the diktat of the 'global imperialism' (McChesney 2001); from another perspective this can be called the rule-setting of a newly emerging 'Empire' (Hardt and Negri 2000).

In the backdrop of rolling back of the state-run enterprises and welfare projects on one hand and decline in the old rigour of political sovereignty on the other, increasing flow of money, technology, people and goods are taking place across national boundaries. This requires new rules of the game to be set not nationally but by international agencies. Of course, the old rhetoric of state sovereignty will be there but it has to adjust, to a great extent, with the global rules. The new global networks of power thus emphasise certain intertwined global rules—economic (including trade practices, monetary and technological/communicational exchanges), political (which highlight universal democratic rights or human rights), environmental (which especially impose various restrictions on pollution, creating industries and practices) and demographic (which seek to build a global regime for controlling migration and displacement).

We have argued earlier that the rights discourse in India attained its 'Human Rights' phase in this decade of transition (i.e. the 1990s), which also marked the end of the 'Cold War' and emergence of a *new world order*. This decade also witnessed a global rise in enactment of RTI/freedom of information laws. Although Sweden granted a public accession to government information through the Freedom of the Press Act in, as back as, 1776, it became almost a craze since the beginning of 1990s. The list[10] below records the trend in many states throughout the world: Albania (1998), Armenia (2003), Australian states (between 1982–2003), Azerbaijan (2005), Bangladesh (through an Ordinance of 2008), Belgium (2003), Bosnia and Herzegovina (2001), Brazil (1991), People's Republic of China (2008), Czech Republic (1999), Chile (2009), Croatia (2003), Ecuador (2004), Estonia (2000), European Union (2001), Ireland (1998), Israel (1998), Italy (1990), Jamaica (2002), Japan (1999/2001), Latvia (1998), Macedonia (2006), Mexico (2002), Norway (2006), Pakistan (Ordinance in 2002), Poland (2001), Moldova (2000), Romania (2001), Slovakia (2000), South Africa (2000), Republic of China/ Taiwan (2005), Thailand (1997), Turkey (2004), Uganda (2006), Ukraine (1992), the United Kingdom (2000), the United States (1966/96) and Zimbabwe (2002).

It is not astonishing that two experts of WTO and Economic Consulting Services, Inc. Washington DC in their staff working paper should focus on an issue like 'The Impact of Transparency on Foreign Direct Investment' in 1999/2001. In this study the authors, after noting the negative impact on FDI for non-transparency in government-related information, published a country-wise list (see Table 5.2) of rankings in terms of 'transparency' (Drabek and Pyne, op. cit.). The RTI movement and Act in India also coincided with this expectation of a crucial international agency like WTO. However, pointing at this coincidence does not have any ulterior motive of undermining or scandalising a path-breaking democratic movement participated in by a large number of common masses. But what any serious researcher must understand is that the RTI and many other 'new' social rights movements, and above all, the Human Rights movement, needed an *'objective'/material condition* to take their present shape. And, I argue, globalisation has provided us with this condition.

In a time of declining/undermined national sovereignty, when the welfare/protectionist policy of the 'third world' states

Table 5.2: Country Rankings According to Their Transparency

Country	Average rank	Years included in sample
New Zealand	38.0	1992–1995
Denmark	38.0	1992–1995
France	38.0	1992–1995
Netherlands	38.0	1992–1995
Finland	37.5	1992–1994
Germany	37.5	1992–1995
Norway	37.5	1992–1995
Canada	37.0	1992–1994
Japan	37.0	1992–1995
Austria	37.0	1992–1995
The United States	36.0	1992–1995
The United Kingdom	36.0	1992–1995
Korea	34.5	1992–1995
Spain	33.5	1992–1995
Israel	33.5	1992–1995
Jordan	33.5	1992–1995
Czech Republic	32.5	1994–1995
Italy	32.0	1992–1994
South Africa	31.0	1992–1995
Singapore	30.5	1992–1995
Egypt	29.0	1992–1995
Costa Rica	28.5	1992–1995
Botswana	28.0	1992–1995
Morocco	28.0	1992–1995
Chile	28.0	1992–1995
Indonesia	27.5	1992–1995
Argentina	27.5	1992–1995
Syria	26.5	1992–1994
India	26.0	1992–1993
Paraguay	26.0	1992–1995
Venezuela	26.0	1992–1995
Columbia	25.5	1992–1995
Ecuador	25.0	1992–1995

Country	Average rank	Years included in sample
Nicaragua	25.0	1992–1995
Uruguay	25.0	1992–1995
Dominican Republic	24.5	1992–1995
Philippines	23.0	1992–1995
Bolivia	23.0	1992–1995
Pakistan	21.0	1992–1995
Nigeria	21.0	1992–1994
Panama	20.5	1992–1995
El Salvador	20.0	1992–1994
Honduras	20.0	1992–1995
Zambia	19.0	1992–1993
Guatemala	19.0	1992–1995
Bangladesh	17.5	1992, 1994–1995
Sierra Leone	12.0	1992, 1994–1995
Thailand	10.0	1992–1994
Malaysia	8.5	1992–1995

Source: *International Country Risk Guide*, published monthly by Political Risk Services (PRS) (Drabek and Payne, op. cit.).

are shrinking day by day, the common/disadvantaged citizens are taking two courses of action: *(a)* negotiating with the state by resorting to claim-making dynamics of right-based politics, or *(b)* resorting to armed movements that challenge the very sovereignty of the state. From the experience of the last two decades it is now clear that, at least in India, the state has badly failed to combat the second course of movement only through over-armed coercion or by patronising counter-insurgencies. Thus, the possibilities of rights-based politics are gradually gaining ground. The RTI movement as well as the Act have generated new hopes in this direction. Nevertheless, they have also raised a host of issues that demand a keen attention of the academics as well as activists.

In the so-called new information environment, we must still inquire whether all problems of democracy are informational problems of access, distribution and source. We must also face

the prospect of a greater state and corporate surveillance, a new open-system panopticon that tracks, monitors and defines the digital self, while acknowledging that the information economy is also structured according to the logics of disinformation and misinformation creating a public 'structured ignorance' even with increasing flows of information. In this context, let us consider the instance of the newly formed Unique Identification Authority of India (UIDAI).[11]

The concept of a unique identification (UID) was first discussed and worked upon since 2006 when administrative approval for the project 'Unique ID for BPL families' was given on 3 March 2006 by the Department of Information Technology, Ministry of Communications and Information Technology. The UIDAI was constituted and notified by the Planning Commission on 28 January 2009. On 25 June 2009, the Cabinet also created and approved the position of the chairperson of the UIDAI, and appointed Mr Nandan Nilekani as the first chairperson in the rank and status of a cabinet minister. Its role is to develop and implement the necessary institutional, technical and legal infrastructure to issue unique identity numbers to Indian residents. Apart from providing identity numbers, the UID hopes to enable better delivery of services and effective governance. No government agency is supposed to interfere in the planning, implication and any process of authority of the UIDAI. The PMO will observe its progress and there is no limitation of funds. UID cards distribution will start in 2011. The cabinet committee on UIDAI has recently approved in principle the adoption of the approach outlined by UIDAI. The UIDAI works for collection of demographic and biometric attributes of residents (face, all 10 fingerprints and iris) for the project. It was also decided to include data of the iris for children in the age group of 5 to 15 years.

The UIDAI proposes to collect the data through various agencies of the central and the state governments and others who, in normal course of their activities, interact with the residents. These entities are described as 'Registrars' of the UIDAI. Examples of such registrars at the state level are the departments of rural development (for the Mahatma Gandhi National Rural Employment Guarantee Act) and public distribution and consumer affairs. At the central level these entities could be banks, LIC and oil marketing companies. The UIDAI claims that it is primarily

aimed at ensuring inclusive growth by providing a form of identity to those who do not have any identity. Nowhere in the world has such a project on such a large scale ever been implemented. And, as expected, the UID programme of biometric identification of the entire population has been opposed vehemently by a number of individuals as well as social and civil liberty organisations for the potential violation of the rights to equality, dignity, privacy, expression and the right not to be discriminated against.[12] This new programme also poses a theoretical as well as practical challenge to the basic concept of the RTI movement and the Act because the latter presupposes citizens' access to information related to various (albeit limited) government/semi-government documents, the former is a renewed effort towards concentration of classified information relating to almost every aspect of the life of the citizens in the hands of the state. It is, however, doubly a matter of concern because the way the UID programme seeks to usurp and control a host of 'sustainable' rights is really unprecedented. In essence, the RTI has been portrayed as the basic right on the basis of which further claims can be made for 'sustainable' rights. But the upcoming UID programme will further tilt the already lopsided information regime in India towards the government, allowing its minute surveillance of the lives of citizens and the governance of their 'sustainable' rights, even in the times of globalisation.

Notes

1. *State of U.P. vs. Rajnarain*, AIR 1975 SC 865, para 74.
2. For details see http://infochangeindia.org/index2.php?option=com_content&do_pdf=1&id=2927 (last accessed on 24 February 2010).
3. See, *India Together*, Bangalore (India), September 2004, http://www.indiatogether.org/2004/sep/rtk-asserting.htm (last accessed on 25 February 2010).
4. C.C.C. No. 525 of 2008, Karnataka High Court.
5. For details see http://www.solutionexchange-un.net.in/emp/cr/res12050601.doc (last accessed on 1 March 2010).
6. Kaumudi Gurjar, 'Start a CBI Inquiry into Satish Shetty Murder,' Date: 2010-01-18, *The Mid-Day*, Pune, 16 January 2010; www.mid-day.com/news/2010/jan/180110 (last accessed on 24/03/2010) and Shoumojit Banerjee, 'In Bihar, Death for RTI Activist who Knew Too Much', *The Hindu*, 2010-02-21. http://www.hindu.com/2010/02/21/stories/2010022162271800.htm, (last accessed on 25 February 2010).

7. *The Times of India*, Mumbai, 11 January 2010, also available at http://www.isidelhi.org.in/hrnews/isidownload/Nhrc/Rti/RTI-2010.pdf on p.5 (last accessed on 27 February 2010).
8. The RaaG Report is available online at http://www.downtoearth.org.in (last accessed on 26 February 2010).
9. For details see http://www.ngoadda.org (last accessed on 26 February 2010).
10. For details see http://commons.globalintegrity.org/2009/03/freedom-of-information-comparative.html (last accessed on 27 February 2010).
11. For details see http://uidai.gov.in (last accessed on 11 May 2010).
12. For details see http://mizoramexpress.com/index.php/2010/04/citizens-against-uid (last accessed on 11 May 2010).

Section III

Globalisation and Labouring Lives

6

Labour Out-flow and Labour Rights*

Swati Ghosh

In development policy discourse, there is a general consensus that circular or seasonal migration is a 'win-win' model of human mobility. Circular migrants maximise return and minimise cost for both sending and receiving economies. For receiving governments circular migration is a way for importing low-skilled labour without having to incorporate them in the social fabric. For sending economies they provide a regular source of remittance without permanent loss of skill/brain/care services. For the migrant worker, however, circular migration is a survival strategy when economic opportunities do not respond favourably at home. Moving between the host and the sending economies offers an opportunity of social and economic mobility for the migrant. But the rhetoric of an all-benefit situation arising out of circular migration, nevertheless, stops short in the face of labour rights and well-being. Circular migration strikes a high personal cost for the migrant, which is for most of the time unnoticed and labour invested in earning a bare living unprotected.

The plight of migrant workers is a difficult issue. Economic migrants are often misunderstood. They are easy targets of politicians and media and a constant threat to host societies as potential troublemakers. In international law, migrant workers and their families share a common feature with refugees. At work, they

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are at a great risk—from 'dirt, degradation and danger'—which is hardly reported. Cross-border migrants are taken to be non-citizens without formal membership of the country where they work. They face prejudice of the state and abhorrence of the people where they are temporary residents. They complement local labour in times of up-swing and substitute for the residual low-unskilled jobs reserved for them that local labour with elastic supply can afford not to do. In times of recession, they are dropped from the labour market losing their job in the first instance. Although migrant labour is employed at low wage, their commitment and work ethic in enhancing productivity is often more cost saving for the employer.

Social and economic desperation at the place of origin, most of the time, renders them to be pushed out as migrants. They bring remittance back to the economy of origin but have little say in how the money's worth is to be realised beyond personal needs. The structural frame of the local economy that promotes out-migration is not always eager to incorporate the drifter. Out-migrants are generally excluded from the government schemes meant for indigenous population who is yet to find an earning career. Hired mostly for unskilled and mundane work in the host economy, migrant workers do not acquire the opportunity to develop new skills. Even if they adapt new skills, they are rarely able to put them to good use in the less-technologically advanced place of origin when they return.

Circular migration is a flow and not a one-off event. The migrant, therefore, belonging to the transitory position, lacks visibility, unlike the permanent migrant. They receive less protection in the place of work than many vulnerable groups, even though they often outnumber them considerably. Because of the repeated to and fro movements from origin to destination, there is always an underestimation of their numbers. They are often missed out from the welfare agenda of the policy makers since most of the times policies are based on people residing in one place. Without access to basic entitlements they remain excluded at home because of physical absence and at destination due to non-belongingness to the alien economy. They remain on the periphery of society with few citizen rights and no political voice in shaping decisions that impact their lives and work.

Circular Migration in India

International and inter-state movement of workers taking place for short/temporary duration in a repetitive pattern over the years is known as circular migration. In India, this is the dominant form of mobility for the poor and the historically disadvantaged communities such as the lower castes and tribes and is undertaken primarily for employment. The inter-state census data of 2001 shows that 309 million persons are migrants based on their place of last residence which constitutes about 30 per cent of the total population of the country. During 1991–2001, the number of migrants by place of last residence in India grew by 34.7 per cent (Census of India 2001). There are roughly 100 million circular migrants contributing around 10 per cent of the national GDP in India (Human Development Report 2009). The 55th NSS Round (1999–2000) covered short-duration migration for employment (greater than 60 days or more) for the first time and estimated the volume of temporary migrants to be roughly 1 per cent or 12.6 million of the population. But various microstudies and village studies would estimate the number to be nothing less than 30 million (Deshingkar 2006). Of the various types of circular migration, rural–rural and rural–urban types are significant patterns of mobility whereby rural poor can make for a living unavailable at their place of origin.

Some sectors develop specific migration streams from certain poor villages to the agricultural and industrial areas in search of employment. People move from agriculturally backward regions to highly productive Green Revolution areas during the season of peak demand for labour. The National Commission on Rural Labour in India (NCRL 1991) estimates more than 10 million circular migrants from the rural areas alone, of which around 4.5 million are inter-state and around 6 million intra-state migrants. The Commission points out that there are large numbers of seasonally migrant workers who move out of the rural economy to work in better paying farm and non-farm occupations to improve their lot. Small informal sector manufacturing draws circular migrants from both the rural and urban areas where production is largely home-based and takes place within households of the city slums. Domestic work, rickshaw pulling, street-food selling and various personal services in the towns and cities are provided by migrants.

The Human Development Report of 2009 has shown that in India the major migrant-employing sectors are construction, textile, small industry, brick-making, stone quarries, salt-panning, fish and prawn processing and hospitality services. Migrants are poorly endowed with limited access to physical, financial and human capital. In India, the first destination for all out-migrants is always the relatively more developed neighbouring states; among the far-off destinations within India, Maharashtra, Gujarat and Haryana rank higher up in the list. Uttar Pradesh and Bihar are the two largest sending economies followed by Orissa, Rajasthan and Jharkhand. Rural–rural migration still dominates and accounts for 53.5 million of migrants and rural–urban accounts for 20.5 million (NSSO 2001). Most of the migrants have little or no education and are engaged as unskilled workers. The recruitment of migrant labour is still organised through contractors in brick fields, plantation and construction work, where debt-bondage mechanism predominates to initiate a circular movement at an interval that coincides with the fluctuations of labour demand.

Classical push factors that mark the bulk of inter-state migration to take place are: long-term draught situations, hilly and dry land cultivation, land fragmentation and poverty and debt. Aridity and low productivity of land historically motivated men to move out and even today it is one of the significant causes of temporary migration in India. It is reinforced by fragmentation of agricultural land for over generations, ultimately leading to permanent drift and short-term mobility either of the whole family or some of its members to distant places in search of jobs. Besides, debt-induced migration had always been and still is the most important factor for circular migration for poor Indian households.

With economic reforms in the 1990s, new push-pull factors are emerging in the economy. Global competition in its 'race to the bottom' and in the outsourcing of production to smaller firms has resulted in flexibilisation of the labour force. The price of informal labour has declined and a greater number of casual, contract and irregular jobs have been created. Cross-border migration has emerged as the most easily available pool of cheap labour. In India, the effects of structural adjustment measures can be easily read as the causes that have instigated short-term migration in the recent past. In the agricultural sector, two direct economic measures that have had their influence on the rural economy to

push people out of agriculture and to look for short-term non-farm activities in other regions can be identified. They are: *(a)* increase in production cost due to reduction of subsidies and *(b)* de-restriction of transport that allows inter-state import of cheaper products.[1] Further, national institutions which govern the labour markets are rendered less effective by internationalisation of markets—or creation of 'regulatory deficit' according to Campbell—that has created a deficit or gap between labour standards and actual labour market situations. The loss of national autonomy regarding 'rolling back' of welfare benefits and withdrawal of subsidies has influenced employment of labour and work conditions negatively. Labour in general and particularly informal labour has to live with enhanced risk and loss of well-being generated in the process. In this situation, circular migration is the natural consequence of structural requirement in modern industrial economies across national boundaries. Strong incentives to migrate and also continue with local employment are not mutually exclusive possibilities adopted simultaneously to diversify risks. Migration has emerged as a mechanism of unemployment insurance in absence of social security. To protect families from risk the less-poor section is also taking up migration to provide a self-insurance against income loss.

The first aspect of migration that is important today with regard to well-being is the identification of factors leading to circular movements initiated in recent times. Second is the aspect of opportunities and constraints specific to the different groups of migrants, and last, the aspect of assessing the differences between promised labour standards and the hard reality of the migrants in their home and host economies. We have organised the chapter to look into the three aspects related to the upsurge of circular migration in two informal economic activities emerging in recent times. With West Bengal as the sending economy, we have identified migration corridors that have links to the global markets and are opening up job opportunities for skilled labour of the state. We find that short-term migrant workers, less reluctant to bargain, are readily accepting the new opportunities to seek a route out of poverty. The outsourced production and work contracts render them insecure and vulnerable but with higher incomes. Well-being and labour rights are highly compromised. While the policy makers are involved in bridging the gap between labour standards and labour distress the notion of 'decent work' proposed by ILO gains

currency. Bearing this perspective, we look into the nature and extent of 'regulatory deficit' that is affecting the specific groups of circular migrants from Bengal and deserves immediate attention of the policy makers.

Migration in West Bengal

Kolkata has been a destination for migration from different parts of India since the early colonial period. With the process of industrialisation and urbanisation from the beginning of early 19th century, economic migration was a significant phenomenon, both for the poor people of the districts as well as the neighbouring states of Bengal. As the city grew, labour from the hinterland—largely from Bihar, Uttar Pradesh and Orissa—crowded in. Permanent migrants settled down in the migrant-friendly city and over time became part of the formal and informal sector workforce. Seasonal migrants worked in the jute mills, brick kilns and small manufacturing industries. In the ILO city study on Kolkata, Harold Lubell had pointed out in 1974 that of the only two big industries that continued to persist in Bengal, the Hooghly jute mills engaged migrant workers of Bihar and Uttar Pradesh in large proportions and the Howrah engineering works depended more on local Bengali workforce. It was not surprising that the seasonal migrant workers in the small slum industries of the unorganised sector kept circulating between the origin and destination, conveniently shifting from agriculture to industry, to earn a regular income. But that the migrant labour of the large-scale industries such as textile (Mumbai) or jute (Kolkata) maintained a strong rural link and in a pattern that matched the labour recruitment procedure of the two industries, did not escape the notice of the labour historians. The rural root of the industrial working class in India and their observance of community-culture at the place of destination have been explored with due attention and excellence (Chakrabarty 1989; Chandavarkar 1998).

The economic migrant preferred to live at the place of work. While jute lines—the labour quarters—sheltered the migrant wage-workers of the jute industry, the street-food sellers, leather workers and petty traders for whom migration was a survival strategy lived

in the city slums and used their rooms also as a work unit. The spatial configuration of low-income accommodation of the *basti* population in Kolkata reveal distinct migratory streams that have developed over time, so much so that people of the same village and district can be identified to have followed the same route into the community clusters of the city-slums for over 100 years (de Haan 1994). The casual construction workers or the seasonal workers of the brick fields continued to live in temporary make-shift kind of arrangements at the worksite that remained largely isolated from the local settlements. However distinct they were, compared to the mobility pattern of other seasonal workers who crowded into the city life for a short while, they occupied a specific place in the migratory map of the city in their repeated to and fro movement over centuries.

In-migrants have always been accommodated within the Bengali populace without much resistance or objection. They constitute 24.68 per cent of the total population in West Bengal (NSSO 1993). Undocumented in-migrants constitute and contribute towards a significant portion of the informal labour market in West Bengal, but it is difficult to estimate their numbers or their contribution in exact terms due to scarcity of data. Gumla and Palamau districts of Jharkhand are highest senders of seasonal migrants to West Bengal who work largely in the brick fields and road construction (Jharkhand News 2008). In 1999–2000, the districts of Madhubani and Gopalgunj in North Bihar respectively sent 7.02 and 12.65 per cent of their migrants to West Bengal (Karan 2003). West Bengal receives 40 per cent of the Bangladeshi in-migrants in India whether engaged in illegal cross-border trade or as 'sweat labour' in road and irrigation construction work or as domestic maid in middle-class homes (Afsar 2008). Bangladeshi in-migrants constitute around 2.7 per cent of the labour force in West Bengal. The notion of '*deshe gechhe'* as left for the village for nearly a month-long break from work for a Bihari and Oriya worker, or '*asha-jawa*'—coming and going of the Bangladeshi cross-border migrant—are popular cultural connotations that mark the respective nature of circularity that ranges from a few days to a few months of absence for the in-migrant.

Ben Rogaly et al. (2001) have traced the pattern of circularity of agricultural labour in West Bengal in recent times which is intra-district and largely debt-induced. The features of seasonal

migration facilitating surplus accumulating production for the employer in the agriculturally advanced districts have been wonderfully depicted in their study. The patterns of in-migration from the less-developed districts of Purulia and Murshidabad in times of peak demand to high productive green revolution areas of Bardhaman are two outcomes of inequality. The instance of withdrawing migrants from the labour force for pressurising the employers to change the terms of contract in favour of the workers, taken up by the more organised group of out-migrants of Purulia, has also been cited in their study.[2]

Recent Trend

West Bengal has been a migrant-receiving economy for a long time. In the last 20 to 25 years, there has been a new dimension in the pattern of circular migration which is not a stray movement of just a few but a steady flow of skilled workers in considerable numbers and across regular routes, out of the state. This is relatively a recent phenomenon. West Bengal playing the role of a migrant-sending state in terms of highly skilled professionals and migrant-receiving state for unskilled labour is still the prevalent model. It is already an established fact that the highly educated and qualified professionals are leaving West Bengal to relatively faster growing areas in the country and abroad (Maharatna 2003); what is new is that skilled labour too is migrating out of the state, not in search of jobs but for better earnings to more developed urban economies. Out-migration from peri-urban districts of the state is becoming a significant trend for the skilled and semi-skilled workers of the informal sector for whom short-term migration is an alternative source of earning against income risks arising from irregular employment at home. The steady flow of women migrants from the informal economy of Bengal who leave their home to work as domestic help in the upper-middle class homes of Delhi, Bengaluru, Mumbai and other metropolitan cities has already been documented. In fact, West Bengal ranks as the largest 'feeder state' of domestic helps in Delhi (Deshingkar 2006; Neetha 2004). This movement of unskilled women from the rural and semi-urban districts of West Bengal has been identified as 'poverty-induced' migration. Single women work

as domestic servants and send remittances regularly to support their families back at home. Studies show that either it is planned migration of the married and elderly women through known and established contacts in the city (Mukherjee 2001) or migration of single unmarried women often landing up unaware to work as housemaids permanently uprooted from the origin through various clandestine arrangements of intermediaries. At present, the number of single women working as domestic help is increasing and the steady flow out of the state has acquired certain new characteristics over time such as migration through institutionalised agencies, contract-migration, etc.

In this chapter we would rather focus on male skilled artisans whose out-migration from West Bengal is emerging as a distinct feature in the last two decades. Such type of short-term circular migration has largely escaped the official statistical records which primarily focus on out-migration of women with marriage as the primary reason followed by male out-migration in high-paid jobs. While out-migration of labour from the other states is usually marked to be predominantly male, West Bengal has gained male population and lost female population through migration (Chaudhury 2003). Out-migration of skilled labour observed recently does not show strict masculine trend and is rather unprecedented in West Bengal.

The recent trend of single male migrants moving out of the state shows that it is usually the young skilled labour of the informal sector opting for new avenues of employment. It is interesting to note that it is from the relatively economically better positioned districts of West Bengal—Hooghly and Howrah—located within a maximum distance of 40 km from Kolkata that skilled workers are migrating away. Their destinations are Mumbai and Delhi. The cities with higher income potential are providing better job opportunities to the skilled labour of Bengal who are not destitute in any sense and can earn a fairly minimum living staying at home. Further, these migrants are joining the lowest tier of informal production chains of industries with large domestic and global market and yet the job provides them with a chance for horizontal and vertical mobility. The skilled out-migrants from Bengal are recruited as piece-rate workers for the numerous subcontractors of the global production chain without any formal status at work or a job contract. Though the work they perform is no less exploitative

Table 6.1: Distribution of Respondents by Type and Location of Informal Industries in the Districts of Howrah and Hooghly

Informal industry	Location/district	Number of respondents
Embroidery and zari work	Arambag, Hooghly district	**24**
Gems and jewellery work	Domjur, Howrah district	**36**
Total	**Two**	**60**

Source: Primary survey.

and insecure as any informal sector job, but economic and social mobility generated for the individual worker becomes the main motivating factor for out-migration.

This is a study based on two migration streams of skilled labour, that has gained momentum in the last 20 years, one in Hooghly and the other in Howrah district in West Bengal. The study includes interviews of 60 out-migrants, 36 in Domjur area of Howrah and 24 in Arambag area of Hooghly district, as provided in Table 6.1. As is evident from the study, the regular flow of migration from Domjur is linked to the gold jewellery industry of Mumbai and the migration flow from Arambag is directed to the embroidery and zari work in the garment industry of Delhi. Apart from interviews of the workers, information from the family members of the migrants left back in the villages, members of the community, eminent persons of the area and block development offices and secondary data have been used as required.[3]

Case Studies

Out-migration from Hooghly

In the Arambag block of Hooghly a regular stream of out-migrants move out to work as labourers in the embroidery and garment industry of Delhi. This pocket is in the Harinkhola and Shahbag-Imamgunj, Batanal and Arandi I and II Gram Panchayat areas. Hooghly is largely an agricultural area with few small industries such as handloom weaving, poultry and food processing. The

thriving jute mills and the automobile industry of the past have streamlined their workforce. Rice, jute, potato and vegetables are the major crops of the district. But traditional agriculture can no longer sustain the increasing population who are shifting away from agriculture to casual employment. Adverse land–man ratio, large family size and high cost of production have failed to provide regular income to the increasing number of workers of the present generation. Without a steady income in agriculture along with indebtedness, their only option is to work as casual labour in various non-farm activities. Arambag is primarily a rural block where rice, potato and sugar cane are cultivated, all of which have high costs of production. With no large-scale industry, poultry and animal husbandry could have provided casual employment for the agricultural labourers, just as it had been in many other pockets in the locality, but the poor Muslim workers of Shahbag-Imamgunj had no access to poultry farming. Possibly the already saturated poultry and farm business with its rigid trade union activities did not allow further entry of casual wage workers. Instead of joining the pool of casual construction workers or rickshaw pullers with further irregular and insecure income, the Muslim workers, chose to develop their traditional skill in needle work and tailoring and adopted home-based machine embroidery work.

They started working for the small entrepreneur-cum-middleman known as the *ostagor*, who organises production of machine-embroidered saris in the locality contracting out small orders to individuals. The *ostagor* is proficient in the craft and has money to invest. Production is home-based. Each family owns a metal frame for mounting the cloth which is embroidered. The contractor or the *ostagar* supplies materials, designs and machines for zari/silk embroidery. Payment is at piece-rate. The *ostagor* procures order for the supply of zari and embroidered cloth from the businessmen in the wholesale market of Barrabazaar in Kolkata and collects the pieces from individual *karigar* or worker in the village. The *karigar* has no direct access to the market. An alternative to bypass the *ostagar* would mean selling the product in the wholesale market. But in the wholesale market most of the time his payment is deferred and he has to make a deposit of Rs 20,000 for each piece with the buyer before he can procure a supply order for the next lot. It is easier for him to depend on the *ostagar* for work assignments and payments which is more or

less regular. Saris with little embroidery work fetch from Rs 70 to Rs 100 per piece, medium work is priced between Rs 100 and Rs 150 and intensive embroidered ones range from Rs 400 to Rs 600 per piece. On an average, three little-embroidered or two medium or one intensively worked sari can be completed per week per family. The highest wage a worker can obtain is Rs 2,400 per month. But volume of work locally available is not sufficient for a steady income throughout the year.

While working for the local subcontractor, the informal workers develop links with the Delhi embroidery garment industry. With about two years of apprenticeship in local home-based production the worker learns the skills required and aspires for a better livelihood to work under a bigger subcontractor in the garment industry of Delhi who provides a higher wage. Although Muslim workers from Bengal, already proficient in machine embroidery, are easily accommodated in times of peak demand, volume of work available in embroidery and zari work is irregular. Demand for skilled labour is therefore seasonal and circular migration is best suited for the purpose. The Muslim skilled labour of Arambag take this chance to out-migrate, initially alone and later with their families. Women and young boys could very well be absorbed during boom season, although at a cheaper wage rate. A migration corridor thus develops between the hub of India's fashion industry in north India and Hooghly in West Bengal.

Migration to Delhi for embroidery and zari work is an opportunity for earning higher income for the workers of Arambagh. The hand-embroidered sari and other cloth materials fetch exorbitant prices in the national and international markets. At Sundernagari in the east of Delhi and Shahpur Jat area in south Delhi the informal production units of the lowest end of the global garment chain are located. The migrant workers are employed by the myriad subcontractors and petty contractors as and when they procure supply orders from the bigger proprietors from the other end of the supply chain that serve European and US retail garment companies. Delhi alone accounts for nearly 60 per cent of Indian garment exports (Ramaswamy and Davala n.d.). Work is organised through a network of subcontracting and ultimately produced by the numerous informal workers in the small and congested workshops. Migrant labour works at piece-rate at a lower price than what local labour demands and this prompts skilled workers

from UP, Bihar and Bengal to crowd in where various tasks are available for each of them.

Muslim women of Arambag who initially had merely accompanied their husbands to the new destination take up part-time jobs in the industry to earn an additional amount of money. While male members are assigned to do machine embroidery with computerised designs supplied by the contractors, the women workers are allotted the needle work part of the job. It is customary in north India that machine jobs are offered to men, even if it is embroidery. The general perception for employing women in hand-embroidery, apart from nimble finger is that women are less-skilled and ill-suited for machine expertise. The piece-rate wage is therefore low for women workers who earn something between Rs 3,000 to Rs 3,500 per month. For men, the income is around Rs 5,000 to Rs 6,000 per month which is almost double the amount received at home. Besides, the boy child of the family also gets to learn the skill and earn around Rs 1,000 per month during the stay and within a few years learns the nitty gritties of the trade to get back home and organise a fresh team of out-migrants coming to Delhi during the peak production season.

Gold jewellery in Howrah

Howrah, the 'industrially developed' district in West Bengal, with foundries, locomotive, small engineering and paint industries that still survive today, cannot provide sufficient jobs in factory production. The once glorious engineering industry of Howrah barely survives. Agriculture still sustains a small section of the rural population and the people of the semi-urban areas have no option but to seek jobs in the informal industries. One such area is Domjur block of Howrah in the vicinity of Kolkata. Among the different informal industries such as furniture, wig, garment, etc., the jewellery industry of the region is particularly significant because of the skill and dexterity of the local people in making gold ornaments which flourished in the area since long time back.

In the Domjur area, a significant proportion of the population presently engaged in non-farm activities is characterised by poor socio-economic conditions and a deliberate shift away from

agriculture. In Domjur block, Salat Gram Panchayat I and II and Bankra Gram Panchayat I, II and III are particularly distinct for craft work in gold jewellery, gem polishing and imitation jewellery. The local gold jewellery industry offers the highest income to skilled and semi-skilled workers to the extent of Rs 4,000 per month on an average. There is a local market for gold ornaments with 25 to 30 relatively big and established units and numerous micro-production units that work with skilled labour of the locality. These shops of the local jewellery market serve as retail counters for the own-account production units employing as many as five to seven casual workers in each workshop. The existing employment in the industry has been estimated to be around 45,000 (Sengupta 2009), but only few workers have more than 180 days job, and the remaining much lower than 180 days. This includes the skilled, semi-skilled, apprentices and other casual workers associated with the trade.

Primary survey reveals that the Baruipara area of Domjur in Howrah district, which had traditionally been a pocket of betel leaf cultivators, has become an area of out-migration that sends workers to Mumbai and Vadodara. The younger generation of the cultivator families are no longer depending on agriculture as a part-time employment but have taken up wage-work in gold industry. Skilled artisans from the Wadipur, Keshabpur, Rudrapur, Tulagarh, Deulpur and Kolra villages are migrating to Mumbai for the sake of earning a high regular income which is rarely available at home. Two major reasons responsible for the shift from agriculture to informal industry can be identified. One is that the highly competitive betel leaf production is seasonal. It is a perishable commodity that needs constant care during production and has high storage cost. Small farmers are unable to bear the cost and risk from its cultivation and are choosing to shift from agriculture to a steady income flow from wage-work in industry. The other is that extensive land fragmentation renders income from betel leaf cultivation as too little to sustain a large joint family. Although the betel leaf is a commercial crop, male members alone are allowed to work at the *paan boroj* according to social convention. Had all family members participated in cultivation, or had land not been fragmented, it could have fetched a high return.

As an alternative, hoping to earn better wages, circular migration has surfaced from Domjur to Zaveri bazaar in the Bhuleswar area

of south Mumbai. It is short-term migration of workers involving a period of 11 months to two years. Skilled *karigar* establishes links with the industry that has a big domestic market and is the largest gold exporter in India. There are around 15,000 Bengali *karigar*s in the sweatshops of Zaveri bazaar 'who make sure that Mumbai remains the largest exporter of gold jewellery in India' (Katakam 2001). Exports of gold jewellery from Domestic Tariff Area (DTA) in Mumbai amounted to $266 million or 41 per cent of the exports of the entire DTA in the country (Gem and Jewellery Export Promotion Council 2001 quoted in Katakam 2001b).

There are around 1,500 units in Bhuleswar that are registered under the Shops and Commercial Establishment Act, 1961, but the sweatshops are run in informal and clandestine ways. The workshops are housed in residential rooms owned by goldsmiths or small entrepreneurs of the informal jewellery industry in three or four story *chawl*s. The near-100-sq ft rooms double as workplace for crafting of jewellery and live-in quarters for labourers. An out-migrant worker from Domjur works for 12 hours a day in Mumbai. The conditions of work remain no less severe in Zaveri bazaar, but the global linkage fetches a higher return for the migrant at the destination than at the place of origin.

In the initial years, a worker earns around Rs 9,000 per month in Mumbai, which increases with experience to the tune of Rs 12,000 to Rs 14,000 per month. At home the worker at most fetched a sum of Rs 3,000 to Rs 3,500 per month and a skilled and experienced worker earned a maximum of Rs 4,500 to Rs 5,000 after spending a life time in the industry. Besides, a rigid division of labour practised at home with each worker getting to learn only a part of the whole process that is split in at least six to seven steps is more flexible in the host economy. A worker who is accomplished in all the split tasks could acquire a command over the process and find a better job prospect in the hierarchical network of the industry. Those specialised in the art of smelting of gold as well as deft in carving out intricate designs are paid highest wages. Opportunity of acquiring skill is high, with experienced and skilled workers often huddled together with new-entrants in the small sweatshops to work as a team for the *seth* or the employer. Experience of working in the jewellery production units of Zaveri Bazaar also enhances economic mobility. A worker who could make a fortune out-migrating from Mumbai to Gulf countries

such as Bahrain, Qatar or Dubai, fetched a sum of Rs 22,000 to Rs 25,000 per month.

Once the migration route has been established, hundreds of workers from the villages of Domjur area leave for work in Zaveri bazaar in spite of the hardships at the destination. They are little educated and young, mostly in the age group of 14 to 20 years. They send remittance after the first phase of migration and when they return they bring back cash, apparels and electronic goods from Mumbai. Working in the film city of India also earns them a higher social status back at home. A better wage and promise of a Mumbai lifestyle act as pull factors that have a strong snow-balling effect. When a worker leaves for his next trip, he is usually accompanied by a few others from his village. The remittance from out-migration has changed the socio-economic condition of the villages in the Domjur area. In the last 20 years, most of the houses with one or two male migrants to Mumbai have been restructured into brick-walled, one or two storied buildings from the previous *kaccha* structures. Motorcycles, television and refrigerators are common gadgets in the households. Girls are observed to be completing school education with the hope that it would ultimately lead to a low amount of dowry to be paid at their marriages. Possession of cell phones has to some extent reduced the psychological cost of living in a far-off land for a long duration for most of the migrants in recent times.

New Features

The two streams of migration from West Bengal that we have identified are not distress migration, where the poorest is in desperate need to move out, singly or with family. Neither are the two labour-sending areas typically poor and agriculturally backward. Circular migration is more a better remunerative option for the migrants and less a livelihood strategy of the last resort. The movement of skilled labour at both the places did not vary with agricultural seasonality but depended on fluctuations in demand for the respective products in the global export markets of gold jewellery and embroidered garments. Such migration flow remains unaffected by policies that aim to provide rural employment such as

the National Rural Employment Guarantee Programme (NREGP) in their districts. Our study shows that both the migration streams have been able to escape poverty without participating in the employment opportunities created in the rural economy through NREGP. Other case studies confirm the trend when they observe that in certain pockets of West Bengal, out-migration has emerged as a way of accumulating a useful lump sum, rather than simply a surviving strategy (Rogaly and Coppard 2003 in Deshingkar and Anderson 2004).

In contrast to direct push factors, the migrants, we find, are pulled by higher economic growth at destinations. This pull of the 'agglomeration economies' (Human Development Report 2009) develops in the cities with better opportunities of communication and infrastructure and leads to increasing returns obtained through clustering of skills and talents.[4] As a result, specialisation enhances skills. Linkage effect boosts up local economy. Further employment opportunities emerge that pull more migrants. In situations such as this, we find certain migration routes developing between sending and receiving economies where a few contiguous villages or blocks in Domjur or Arambag send skilled workers/artisans through specific channels of contact. The migration streams swell up along definite rail routes, connecting two relatively developed areas of the country.

However, the role of the middleman in organising group migration of such skilled labour is limited. The former pattern of labour movement where the *aarkathi* or *thekedar* took the responsibility to supply labour, often through the debt-bondage system is not prevalent for skilled contract labour migrating to get employed in the export market. New recruitment is most of the times through skilled and experienced workers and travel costs are borne by the migrant family. From both Domjur and Arambag, supply of seasonal labour is maintained directly through the migrants who entered the market earlier.

The migrants of Domjur and Arambag did not come from the very poor dalit families. It is a mixed crowd, although predominantly from backward and minority communities with large joint families and little education. For them, out-migration was not an escape or 'exit choice' as it is with the historically disadvantaged groups of Scheduled Castes and Tribes who migrate outside villages to work with dignity and freedom, away from

the rigid caste hierarchies of the villages. For the skilled labour, migration provided an alternative source of finance for improving their standards of living. Migration for them makes possible investment in cultivation, buy livestock, lease-in land, repair house and arrange for expenditure towards dowry. Consumption and creditworthiness of migrant families increase. Remittance sent by migrants protects their families from risk of irregular income and opens up the opportunity for economic mobility.

Indebtedness on account of dowry, marriage, illness, etc. is still the most significant cause of circular migration and a large part of the remittance is spent on repayment of loans. Remittance provides for better house, better access to food, health and education of children and enables faster escape out of poverty which is more prominently visible in Domjur than in Arambag. In Domjur, all male members of a family, starting at an early age, left for Mumbai. The period of stay was longer and urge to earn higher income was evident in their being dispossessed from land completely (except the *bastu* land). On return, past middle age they planned to invest in the local jewellery industry as an *ostagor* and not in agriculture. In Arambag the migrants often owned a piece of cultivable land with some members of the family still involved in agriculture. Support of larger family enabled short-term migration, initially of single male members and later with wife and children, to fall back upon in times of no work. For them migration helped to diversify risk and remittance acted as a buffer against income loss arising from crop price fluctuations.

Subhuman Conditions of Work

The overall condition of work for the migrant workers is extremely exploitative with no legal recognition as workers, job security, old age pension, health insurance or provident fund in both the industries. The subcontract system involves long hours of work and no implementation of the minimum wage norm. Embroidery work adversely affects the eyes of the workers and blurred vision due to long hours of work is not uncommon. Embroidery workers who work on large frames also get other problems from the peculiar crouching posture in which they sit for long hours including

soreness of back, shoulders and knee joints. Gold, diamond and precious and semi-precious stone polishers inhale the dust of the stones and the smell of acids, causing respiratory problems.

In the congested *chawl*s of Zaveri bazaar the *karigar*s mostly sleep on lofts, with no ventilation. The building owners have used every inch of space to construct more and more rooms. Even areas under the flights of stairs are rented out for workshops. Since the *karigar*s work with valuable materials, the rooms have doors of grill and wood. Some workshop owners allegedly lock the workers inside the rooms at night. At the workplace, inflammable substances are stored in the room; cooking materials are kept alongside sulphuric acid, nitric acid and other hazardous chemicals needed in jewellery making. Sometimes food is cooked in the corridors as the rooms are crowded with personal belongings, equipment and tools (Katakam 2001b). Anupama Katakam reports about an accident from which 24 *karigar*s died:

> Some workshop owners allegedly lock the workers inside the rooms at night. The victims of the June explosion had not been locked up, but the sheer narrowness of the passageways and the highly inflammable nature of the substances stored in the room made escape impossible for them. The workers were unwilling to speak about the accident.

The sweatshops of Zaveri Bazaar in Mumbai account for a major portion of India's gem and jewellery export, but workers toil and live here in risky conditions. Added to this, they face the threat of displacement. 'Almost all the karigars are from West Bengal's Howrah and partly from Medinipur districts, best known for their fine craftsmen. The younger they are, the more nimble their fingers. This makes it easier to train them'. The unorganised workforce of Zaveri Bazaar has been driven by extreme poverty to work under harsh conditions. The *karigar*s will not speak out about their working conditions because the Seth would easily find replacements for them (Katakam 2001b).

Most of the production units in Shahpur Jat village in Delhi's south side are small, unregistered units that function with no legal backup. The contract work being seasonal, production is dismantled when there is no work. Located in a crowded area, working conditions are poor with little lighting and inadequate ventilation.

In its investigative report detailing on textile factories of Shahpur Jat village in south Delhi that produced garments for the global market, *The Observer* mentioned that children less than 10 toiled in conditions 'close to slavery' from dawn to late evening in dimly lit rows of garage like tailoring units 'flowing with excrement from a clogged toilet' (McDougall 2007). This was followed by the largest police raid rescuing 77 boys in the age-group of 8 to 14 years embroidering saris and wedding clothes in dingy rooms of the small workshops of embroidery factories, 14 of whom came from West Bengal and the rest from Bihar, brought to notice by journalist Dan McDougall.

One of the most controversial industries that thrive on child labour across the subcontinent is zari work and intricate embroidery that has become immensely popular in American and European fashion stores, reports Dan McDougall in *Ethisphere* (2008). Sweatshop owners prefer to employ children because their thin, nimble fingers can work quicker on intricate ethnic designs. By the time the youngsters reach their mid-teens, their fingers and hands often are badly damaged and their eyesight weak from long hours of tedious work in dark rooms. Their growth is often stunted by years of sitting in uncomfortable, hunched positions at the bamboo-framed workstations. Child workers have no fixed hours of work, nor is there any trade union to fight for their cause. 'For those children "lucky" enough to get paid, the combined wages of five unskilled child workers is less than that of a single unskilled adult'. Woeful tales of torture, sexual abuse, unhealthy working conditions and cruelty by employers are only part of the hellish narratives of these child workers: The fight against child labour is becoming increasingly dangerous, says Bhuwan Ribhu, a lawyer and activist for The Global March Against Child Labour. 'It is an impossible task to track down all of these terrible sweatshops and factories employing children, particularly in the garment industry, when you need little more than a basement or an attic crammed with small children to make a healthy profit', Ribhu said.

A sequel to the high incidence of child labour in the industry is the use of women labour at discriminatory wages. Work itself is casual and informal and women work as invisible home-based workers. Very often they do not know who the principal employer is and supplies order to the agent of the petty contractor. Much of their

work consists of sewing, button stitching and hand-embroidery. For them payment is often delayed and products rejected. Most of the women in the garment industry are home-based workers. Since they work from their homes, they often do not perceive themselves as workers but as mothers and wives, while the employer ends up making more profits by paying lower wages as well as saving the cost of operating a workplace like rent, electricity, water, equipment and other maintenance costs. Additionally, they regularly suffer from health hazards like backaches and failing eyesight.

The most alarming aspect of their work was their decreasing piece-rates. Sheba Farooqui (2009) reports in *People's Democracy* from a survey on home-based women workers in Delhi, most of who were members of migrant families:

> While the piece rates for 43.01 percent women have remained the same over time, only 16.06 percent had experienced an increase in piece-rates. As high as 40.93 percent women claimed that their piece rates had decreased, i.e., they were compelled to do the same amount of work at a lower rate. For example, the rate for making embroidered stuffed toys has decreased from Re 1 per piece to 75 paise per piece, the rate for zardozi embroidery on suits from Rs 80 per suit to Rs 50 per suit, the rate for making frocks for dolls from 30 paise per frock to 25 paise per frock, the rate of making bead coasters for export purposes from Rs 9 per coaster to Re 1 per piece, etc. Yet, most of these women also claimed that they could not object to this reduction because they feared antagonising their contractors and losing their work.

In unorganised production of embroidery and zari or gold jewellery work, the end jobs are farmed out to numerous workers, largely migrants, who mostly remain invisible. Ensuring basic worker's rights in the global chain organised through subcontracting or home-based production is nearly impossible. The worker rarely gets to interact with the principal agent. When payment is piece-rated, there is no clearly established employer–employee relationship and usual labour laws covering wage-workers are not applicable, 'often *de jure* and almost always *de facto*' (Mukhopadhyay 1994).

Apart from work conditions, there is the constant fear of closure of units. Any attempt to organise the workers is followed by job loss for the worker or the units are closed down and relocated somewhere else.[5] Frequent closure results in the return of the

migrant worker back to the place of origin and remaining without work for several months. Today, home-based workers, especially in export-oriented units, are bearing the brunt of the global economic crisis. They are facing shrinking work availability on the one hand and a progressive reduction in piece-rates on the other. The cut-price stores in the West can only reduce prices by ordering in bulk, which is no less exploitative. But along the chain of suffering and exploitation added insecurity grabs the workers when bulk orders get cancelled or products are rejected:

> The key thing India has to offer the global economy is some of the world's cheapest labor, and this is the saddest thing of all: the horrors that arise from Delhi's 15,000 inadequately regulated garment factories, some of which are among the worst sweatshops ever to taunt the human conscience, are unspeakable and largely unreported. (McDougall 2008)

Contract and home-workers are therefore the least protected section of the working class with neither a clearly defined work day nor clear norms regarding their labour. The workers subsidise capital costs of exports by using their space, water, electricity and family time and yet cannot claim any health, maternity, education, old-age and retirement benefits. The contribution of home-based work is not part of official statistics and hardly any allowance is made on home-based work. A vast majority of workers are making substantial contributions to exports but their entitlements in national resources are negligible. The relevance of domestic policy in the days of rolling back of the state and a complete reliance on markets cannot be underscored. The question is how to regulate the flexible labour market's outcomes in a globalised economy.

International Labour Organization

Protecting workers against the risks of loss of earning capacity was part of the International Labour Organization's (ILO) agenda when it was created in 1919, and a series of conventions and recommendations were adopted to that end since then. These first-generation standards were geared towards social insurance and protecting specific groups of workers against an initial list of

risks (medical care, sickness, unemployment, old-age, employment injury, family, maternity, invalidity and death). Since World War II, the ILO has played a significant role in promoting international labour standards. In 1944, the conference of Philadelphia adopted the Declaration of Philadelphia, which restated the fundamental aims and purposes of the ILO regarding labour standards. Several rubrics have been used to describe labour standards such as fair labour standards, minimum labour standards, basic or core labour standards, etc. Several factors have also been attributed to non-observance of labour standards, such as unfair trade and labour practice, state of underdevelopment, absence of work place cooperation and so on (Mishra 2001). Labour standards protect workers in various sectors. They include freedom of association, equal pay for equal work, safe working conditions, abolition of forced labour, provision of social security, protection of migrant workers, elimination of sexual harassment of women workers and others. These international labour standards were formulated, and few of them were amended several times between 1919 and 1978 and through tripartite arrangements between employers, workers and state, ILO tried to legislate and execute labour standards in the member countries.

The world summit on social development held at Copenhagen in March 1995 tried to establish the basis for a minimum level of 'social protection' by creating an international consensus on fundamental minimum labour standards. Since its inception, ILO has adopted 181 legally binding conventions and 188 recommendations aimed at improving labour standards across the globe. It includes Declaration on Fundamental Principles and Rights at Work, which changed the normative context with respect to social security. This was followed by a list of four principles concerning the fundamental rights—the second generation standards. The four categories of rights are:

1. Right to freedom of association and collective bargaining
2. Elimination of forced labour
3. Elimination of child labour
4. Elimination of discrimination in matter of occupation and wages

There are seven important conventions (Convention nos 29, 87, 98, 100, 105, 111 and 138). These conventions are also known as social clause, labour clause, social concerns, etc. These are the

instruments in the hands of ILO to improve the living and working conditions of the working class in the 'third world'. But this list sanctioned by WTO does not include social security or even protection of health at work.

In face of globalisation, ILO's response is precisely the *Decent Work Agenda*. The word 'work' is used in a wider sense than employment or a job. Work includes not only wage employment, but also self-employment and home-working. This includes the wide range of activities in the formal and informal economy. It includes women and men in the home, factory and street. It reflects a broader notion of participation in the economy and the community. The Decent Work Agenda has four main dimensions:

- Work and employment
- Rights at work
- Social security and protection
- Representation and dialogue

The *employment* goal is best expressed as adequate opportunities for productive and meaningful work, in decent conditions, with fixed working time and work intensity, the need for a living income, the possibilities for personal development all included. The second dimension concerns *basic rights at work*. These have been expressed in the ILO's core labour standards: freedom of association, freedom from discrimination, freedom from forced labour and freedom from child labour. These rights are widely flouted in informal production systems. The third dimension concerns *social security*. Much work is insecure, either because it is irregular or temporary, because income varies, because it is physically risky or vulnerable to disease and eviction.[6] The fourth dimension concerns *representation and dialogue*. The ways in which people's voices can be heard are a crucial aspect of decent work.[7] It is through social dialogue that widespread support for the other three dimensions of decent work may be built (ILO 2000).

Each of these four dimensions of decent work is closely interconnected. They contribute jointly to societal goals such as social integration, poverty eradication and personal fulfilment. The problem with the Decent Work Agenda is that it is applicable to different development situations. It may be argued that all

dimensions of decent work, barely offer benchmarks which can guide progress, and against which progress can be measured.

If there is a uniform level of decent work to be achieved, how to decide what is decent in each situation? And how can this concept be applied in the extremely varied levels of development? Two important points have been suggested by Rodgers (2001). The first is that decent work has a floor, but no ceiling. The second is that the term 'decent' embodies universal rights and principles, but reflects the values and possibilities of each society so that the threshold advances. Some would argue against universality on the grounds of infeasibility—that rights are meaningless without the means or the agents to enforce them—and for many, the notion of universality is incomplete, workers of the informal sector are always already under-represented, if not totally excluded from meaningful social dialogue.

Bearing in mind the founding role played by ILO in the history of labour law, this agenda is fiercely criticised—where trade in goods is subject to a 'hard' law and the fate of men to a 'soft' law. The rhetoric of the decent work agenda further reveals that apart from labour rights related to child labour and gender equality, the fundamental social and labour rights could neither be incorporated in the rigid World Bank programmes, nor could their implementation be made statutory for the member countries.[8]

Besides, the most significant point is that the international labour laws that guide the formulation of labour standards in most countries are typically restricted either on the basis of establishment size or formal registration under some state legislation and are thus applicable only to the organised workforce. Looking at India's record in adhering to international labour conventions, we see that India has a commendable record of ratifying some 37 ILO conventions. But what is particularly revealing is which of the conventions have not been ratified. These include certain critical key human rights and labour policy conventions, as follows:

87: Freedom of Association and Protection of the Right to Organise
98: Right to Organise and Collective Bargaining
105: Abolition of Forced Labour
122: Employment Policy
129: Labour Inspection (Agriculture)
138: Minimum Age

Interestingly, the most important stated reason for the non-ratification of these conventions is that these laws are not easily applicable to the informal sector, with its unclear and changing employer–employee relations, hidden work premises, imprecise number of workers and temporary work contracts that are often not written down. In this grand tautology, a large majority of workers are not covered by protective laws because they are a part of the unorganised sector and they are unorganised because they cannot be brought under protective cover. Hence, the need for a national policy which will bring contract and home-based workers under some legislative form and give them access to benefits and basic rights.

State Response

There is a compelling argument for a domestic policy that safeguards the interests of the unprotected workers by recognising their worker status, bringing working conditions under the ambit of labour laws and providing social security. After independence, India has adopted various labour policies in order to improve working conditions of workers in the unorganised sector. But the problem is that in India, two counter claims run parallel regarding the impact of globalisation on labour. One is that globalisation requires dilution of the labour standards, since rigid labour laws impede efficiency and profitability of the corporate sector. The argument is that any obstacle to competitiveness drives away capital to other attractive places in their perpetual race to the bottom and hinders not only foreign investment and growth in the country but also blocks the employment opportunities that could have been created in course of time. The other claim affirms that in pursuit of capital and growth, labour rights and livelihood of the people are under assault. The state, with its international trade mandates, cannot but play an indifferent role to restrict flexibilisation of the labour market. In effect, the strategy of rolling back of the welfare policy reduces the bargaining power of labour and enhances insecurity.

We find that in the current wake of the dubious situation, the government with its electoral commitments has come up with

certain recommendations to reform labour laws. First, in 2001, in its Report on Task Force, the Planning Commission of India and again in 2002, the Second National Commission on Labour (SNCL) formulated recommendations. The Task Force has pointed out the various problem areas in the labour legislation where immediate reforms are needed. It focuses on the three main Acts and their features and has suggested changes. The three main Acts that are the cause of contention are the Industrial Disputes Act (1947),[9] the Contract Labour (Regulation and Abolition) Act (1970)[10] and the Trade Union Act (1926).[11] But these legislations are all about the formal sector labour force. There are also various labour laws for workers in the unorganised sector but implementation is mostly ineffective. Until now, Child Labour Prohibition and Abolition Act, 1986; Bonded Labour System (Abolition) Act, 1976; Maternity Benefits Act, 1967; Equal Remuneration Act and other labour laws have not been implemented effectively in order to cover the workers in the unorganised sectors.[12] Some of the issues where policy could make a difference have been elaborated in the Draft National Policy on Home-based Workers (2000) put together by the Indian Planning Commission. These include making home-based work socially secure and improving their health and safety which is related to the nature of their work. The problem is that circular migrants, such as those in embroidery or jewellery work, are not included as regular home-based workers. Being seasonal workers at destination, their entitlements often falls short of the bare minimum that is provided to the local home-based worker. The status of unorganised and seasonally migrant worker doubles their vulnerability.

In December 2008, The Unorganised Sector Workers Social Security Act was passed by both houses of Parliament. The Act goes no further than accepting in principle that social security should be provided to unorganised sector workers. No new schemes have been announced and no specific financial allocation has been made (Farooqui 2009) to do away with the nature of vulnerability of home-based workers, not to speak of the migrants. The Act is no more than a statement of intent and leaves the task of formulating social security schemes to state governments and subsequent union governments. The migrant worker's lot within the unorganised sector is left unattended either way.

Exclusion and Inclusion

In India, two forms of policy response with regard to migration have been identified at the national level (Deshingkar 2009). The first is to increase rural employment with the idea of stemming migration and second is an indifferent position in making migration enabling. Policies that aim to increase rural employment, such as NREGP, or policies that aim to reduce poverty through rural construction or irrigation schemes, such as Jawahar Rozgar Yojana (JRY), in effect intends to reduce out-migration of the rural jobless people. But those who migrate for higher wages than that available at home are seldom attracted by short-term employment provisions of these schemes.[13] The second set of policies adhering to the position of 'non-response' towards migrants arises because economic benefits of migration are never recognised and migrants are seen as a menace that overburdens urban economies. Therefore, access to public services, sanitation, housing, health and education for children are restricted for the migrant population. Basic entitlements such as ration cards for subsidised food and fuel are lacking. Illegal housing and lowest tier jobs are reserved for migrants. Exploitative and discriminatory work conditions wait for the cheap, flexible and non-unionised migrant workers.

The migrants in most of the cases are under the clutches of the contractors—the *aarkathi* or the *thekedar* or *mukkaddam* as they are popularly known in different places—who provide them with job opportunity, debt-advance and wage-payment. The contractors are almost never registered with the government, although they are required to do so under the Inter-state Migrant Workmen Act (ISMWA) of 1979. The Act also makes it mandatory for contractors to provide workers with food, decent accommodation, crèche facilities, minimum wages and access to health care, which is ignored as inessential paperwork that need not to be pursued in reality. Activists and researchers of labour laws say that it is extremely difficult to prosecute agents of one state in another state when there is a violation of law. Although it is well-known that the ISMWA has not been properly implemented, there is no political commitment to improving this situation. The lack of political interest can be explained from the fact that seasonal migrants are

for most of the times not a part of the electoral constituency that can effectively influence the results anywhere within the country. They are at the destination and origin temporarily, and as they shift between the two alternately, they rarely have voting rights or powers from any other modes of organised negotiations that would be of consequence for politicians and industrialists.

Besides, migrant workers are not always aware of their rights. Although, according to the Directive Principles of State Policy of the Indian Constitution, the state is required to secure for the citizens, right to an adequate means of livelihood, equal pay for equal work for both men and women, protection against abuse and exploitation of workers, protection of their health and protect children against exploitation, right to form association, right to freedom, cultural and educational rights, etc. However, in reality migrants receive 'partial citizenship' rights. They are often discriminated against non-migrants, having to live under the threat of eviction and harassment of the police. On account of their being migrants they are more exposed to sexual abuse as well as infectious diseases. There are no strong trade unions of migrant workers in the unorganised sector. The bargaining power of these migrant workers is almost non-existent.

Effective support structure is necessary for circular migrants. The Human Development Report (2009) grounds migration on the bedrock of basic rights and freedoms and concludes by highlighting six core policy recommendations to overcome barriers to migration. These include, opening entry channels for more workers, especially those with low skills, ensuring human rights of migration and access to social services, protection from discrimination, lowering the cost of migration as well as easing internal migration within countries. The surprising assertion in the Human Development Report 2009, 'being able to decide where to live is a key element of human freedom' but appears as a 'bolt from the blue' (EPW 2009) rather sceptically. The argument is that most governments view migration negatively—an unwelcome event caused by underdevelopment and violence and as a source of trouble, poverty and joblessness. In India, 'we witness this most clearly in the treatment and representation of Bihari migrants or international Bangladeshi aliens' (p. 5). Thus, mere endorsement from an influential body like the United Nations is not sufficient in this regard and we have to keep our fingers crossed until reality shows a line of hope with

regard to the position of the migrants. Recognition of migrants as an important force in economic development policy and securing the rights of a migrant are the foremost steps to be taken. This is to be followed by proper enforcement of the legislations that already exist, such as the Inter-state Migrant Workers Act, the Contract Labour Act and the welfare norms of several labour laws ensuring 'complete citizenship' rights for a migrant.

In the meanwhile, the NGOs in association with local and state governments are coming up with ideas of extending support to the numerous circular migrants in India (Bird and Deshingkar 2009). The following is the list of measures that have already been attempted and implemented to some extent successfully by different agencies in different contexts of employment of migrant workers which may be followed in other cases as well to bring immediate relief to the workers:

- Issue of identity cards to ensure safety and accessibility rights for migrant workers at the place of work by the employer (as in Madhya Pradesh, Rajasthan).
- Issue of mobile ration cards at the place of destination, even for a regular circular/seasonal migrant (as in Rajasthan).
- Skill training at destination to access stable jobs and increase employability (as in Madhya Pradesh and NGO mediated in Rajasthan).
- Assist children to continue education—arrangements of on the job site-centres for education and/or seasonal home-stay with local families (NGOs in Orissa, Uttarakhand, Gujarat and Maharashtra).
- Insurance service and money transfer to help migrants manage remittance, safely and with little transaction cost (NGO, Orissa).

Notes

1. Research by Ghosh and Harriss-White (2002) shows that as an outcome of the mentioned effects, in Birbhum and Bardhaman districts of West Bengal, paddy producers are facing heavy losses as prices have fallen sharply by over 50 per cent since 1999 because cheaper paddy is being allowed to enter from Bihar, Jharkhand and Orissa where distress sales were occurring.

2. The agricultural labour in Purulia could pressurise the employer with their out-migrating trends in creating labour shortage in times of high demand. This led to favourable change in the terms of contract for their recruitment while the migrant labour in Murshidabad travelling unsolicited in groups to get hired faced great uncertainty. If the Murshidabad group could reach the recruiting area on a day with high employer–employee ratio, only then they would be in a better bargaining position (Rogaly and Rafique 2003).
3. We have refrained from quoting the few respondents who were available during the period of survey. Most of the respondents, being out-migrants, were away from home and the corresponding information was provided to us by family members and neighbours.
4. Domjur is in fact identified as one of the clusters in eastern India with potential for growth and promotion of employment opportunities by the Growth Pole Programme of the National Commission for Unorganized Sector Enterprise Development, Government of India, 2009.
5. Only SEWA could organise about 500 home-based workers at Sundernagari in Delhi, making a direct payment to the women workers at a higher piece-rate by eliminating a few subcontractors in the process.
6. ILO estimates suggest that only a fraction of the worlds' workers have truly adequate social protection. Over 3,000 people die every day as a consequence of work-related accidents or disease. Social security can be achieved in a variety of ways—through formal social insurance systems which provide for contingencies such as illness, unemployment or old age; through informal mechanisms of solidarity and sharing; through investment in workplace safety and through labour market institutions and policies which protect workers against fluctuations in employment—legislation or collective agreements to discourage layoffs, for instance, or training systems which offer routes back into the labour market. The effectiveness of these systems varies widely.
7. For workers, the classic route to representation and dialogue is through trade union organisation, but if decent work is to include work beyond wage labour, it will often encompass other forms of organisation, at the community level or of the self-employed workers. The organisation of small and informal employers is equally important too (ILO 2000).
8. ILO does not enjoy a formal observer status at the WTO. For critique of ILO's Policy, see Kaufmann (2007).
9. In 1976, a special chapter (Chapter V-B) was introduced in the Industrial Disputes Act which made compulsory prior approval of the government necessary in the case of layoffs, retrenchment and closure in industrial establishments. The inclusion of Chapter V-B and its consecutive amendments was construed as causing rigidity in the labour market.
10. With respect to the Contract Labour Act, the Supreme Court ruling (1972) says that if the work done by a contract labour is essential to the main activity of an industry, then contract labour in that industry should be abolished. It was this ruling that creates dispute. The workers claim, if contract labour is abolished they should be absorbed in the firm, while the employers think that this law affects flexibility in case of outsourcing or in hiring unskilled labour.
11. The Trade Union Act introduced in 1926 legalised trade unions, but there is no nationwide law that recognises trade union and also there is no compulsion

for the employers to enter into a collective bargaining. So even though there is a right to form an association or form a trade union, it is not mandatory for an employer to recognise it.

12. To give an example, The Abolition of Bonded Labour Act (1976) did not go beyond addressing forms of agrarian bondage. But new forms of labour bondage can also be found in rural or urban based industries like rice mills, small-scale carpet workshop, gem processing, etc. In all these cases, labour bondage is a feature of the employment modalities of vulnerable segments of the workforce in the informal sector of the economy and so far has remained ineffective (Breman 2008).
13. NREGP promises 100-days' wage labour per adult member of a rural household for unskilled work.

7

Negotiating Rights: The Case of a Special Economic Zone

Ishita Dey*

Introduction

The emergence of the special economic zones (SEZs) in India needs to be contextualised within the broader understanding of the global economic restructuring in general and liberalisation of the Indian economy in particular. The shift from 'fordist' mass production to 'post-fordist' networked flexible production created new links across the globe. Under the flexible production, 'transnational production networks' were instrumental in shaping the new economy. One of the consequences of the transnational networks is the proliferation of the outsourcing industry in the developing countries. This clearly shows a shift in the notion of 'global capital' and 'labour services'. 'While in the early phases of globalization, the manufacturing jobs moved from "industrialized economies" to

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"low cost locations in the third world"; now it is primarily service jobs that are migrating …' (Upadhyay and Vasavi 2008: 12).

The shift of production processes to 'third world' developing economies, be it the manufacturing jobs in the early phase or the service-oriented jobs in the later phase, is primarily due to availability of cheap labour which reduces the cost of production. Most of the labour-intensive industries have adopted the sub-contract process to cope with competition and higher cost of labour. The governments of the developing countries further supported this initiative through instituting legal mechanisms for newer economic zones, free trade zones, export processing zone (EPZ) or SEZs:

> Governments in the USA and Western Europe also took action to facilitate relocation of production, modifying their tariff provisions to provide for duty-free re-entry of goods assembled abroad from parts and components exported from the developed country. Governments of Third World countries set up Free Trade Zones, and provided a wide range of incentives for firms to locate in them. (Elson and Pearson 1981: 90)

In other words, 'economic globalization in the relentless pursuit of market freedom-has brought about important changes in the state of "stateness"' (Ong 2005: 83). Aihwa Ong in her analysis of the economic success of the new Asian tiger countries in Southeast Asia (Indonesia, Malaysia, Singapore and Thailand) shows how the economic interactions have led to the 'state's flexible experimentations with different forms of sovereignty' (ibid.: 84). Using the model of 'graduated sovereignty'[1] she demonstrates how these states 'have responded to global market forces with a particular mix of governing practices and military repression' (ibid.: 85).

India's stint of 'governing practices' with separate economic spaces initially began with EPZs and later SEZs. The need for creating 'economic zones' and to declare them 'public utility services' with no index of security schemes for the workers shows that the main aim of the neo-liberal state 'is to create a "good business climate" and therefore to optimize conditions of capital accumulation no matter the consequences for employment or social well-being' (Harvey 2006: 25). Thus, when we talk of rights in SEZ, Harvey (2003) reminds us that we need to remember 'rights cluster around two dominant logics of power: that of the territorial

state and that of capital'. In this chapter, through a case study of the functioning of the Falta SEZ in West Bengal (a former EPZ), I examine the ways in which 'techniques of state and governance for differential administration of localities in the interest of accumulation' affect labour rights (Samaddar 2008).

In the first section, I begin with a historical background of the Special Economic Zone Act to illustrate how the creation of a zone leads to a new set of political institutions, which results in changes in existing institutions of the state such as tax and customs departments, labour laws, etc. In the second section, I provide a brief background of the transition of Falta EPZ to Falta SEZ. In the third and fourth sections, I discuss how 'the resurgence of accumulation' is not only by dispossession[2] but also through strictly administering and control of surplus labour in the zones.[3] The surplus labour in the zone reveals an increasing use of contract workers with a high rate of deployment of female workforce in the plastic units of the zone. The various techniques of control over the surplus labour (be it the contract workers or the female workers) will reveal the differential treatment on one hand and the spaces for negotiation on the other. The fifth section discusses two forms of articulation of labour rights: first, how the existing union outside of Falta SEZ has participated in articulating the worker's grievances in Falta SEZ and how globally designed labour policies like IKEA could bring about accountability among the producers and the buyers. The concluding section reflects on the changing nature of 'labour rights' in the context of the differential use of location and citizenship rights.

Background and Context—Special Economic Zones (SEZs)

The history of the SEZs in India dates back to the setting up of export processing zones in India. India set up its first EPZ in 1965 in Kandla followed by Santacruz EPZ in 1973. These EPZs did not enjoy fiscal and custom incentives like the SEZs and foreign direct investment rules and regulations were also strict. The Tandon Committee Report in 1981 argued that free trade zones would generate export, if they are exempted from various controls and regulations in place.

Following this recommendation, four EPZs came up in 1984 in Noida (Uttar Pradesh), Falta (West Bengal), Cochin (Kerala) and Chennai (Tamil Nadu). Another EPZ was set up in Vishakhapatnam in 1989 (Shalti Research Group 2008). Post liberalisation, in 1991, the Export-Import Policy (1997–2002) introduced a new scheme from 1 April 2000 to revamp and restructure the production sites for export-oriented services in the form of SEZs. After five years, on May 2005 the Parliament passed the SEZ Act, which received Presidential assent on 23 June 2005. After extensive consultations, the SEZ Act 2005, supported by SEZ Rules, came into effect on 10 February 2006, providing for drastic simplification of procedures and for single window clearance on matters relating to central as well as state governments.

The SEZ Act 2005 consists of eight chapters and has three defining features: first, it outlines the process of setting up of SEZs in Chapter II and III; second, it deals with the functioning of SEZs and third, it outlines the benefits enjoyed by the developers and functioning units of SEZs. The major thrust of the SEZ Act 2005 is targeted at the investors, as the preamble to the Act states that 'An Act to provide for the establishment, development and management of the Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto'.

The shift to 'market-oriented' policies is evident in the way elements of privatisation, financialisation, management and manipulation of crisis and state redistributions are couched in the SEZ Act 2005. According to David Harvey (2006), the neo-liberal economic policies have resorted to 'accumulation by dispossession' through the four elements of privatisation, financialisation, management and manipulation of crisis and state redistributions. These four elements form the key process of setting up and functioning of SEZs. The SEZ Act 2005 states that the 'Special Economic Zone may be established under this Act, either jointly or severally by the Central Government, State Government, or any person for manufacture of goods or rendering services or for both or as a Free Trade and Warehousing Zone'. This very clause shows how these zones are being created to generate 'export-oriented' growth through private developers. In other words, the state-guided development under private investment and infrastructure is evident in the above provision. The role of the development commissioner justifies the financialisation, management and

manipulation of crisis implicit in the neo-liberal policy as this act suggests. The development commissioner appointed by the Government of India will be responsible for 'speedy development of the Special Economic Zone and the promotion of exports there from' (Clause 12 [1]) apart from guiding the entrepreneurs and monitoring the performance of the developers. Fourth element of state redistributive measures is evident in the Clause 50 where the state government is allowed to make amendments to the state tax laws and levies.

Clause 50–the state government may, for the purposes of giving effect to the provisions of this Act, notify policies for developers and units and take suitable steps for enactment of any law:

1. granting exemption from the state taxes, levies and duties to the developer or the entrepreneur;
2. delegating the powers conferred upon any person or authority under any state Act to the development commissioner in relation to the developer or the entrepreneur.

The SEZ Act 2005, according to Naresh Kumar Sharma (2009), has introduced a strange phenomenon. He argues 'instead of the firms competing with each other, as suggested in economic theory the states are competing with each other in a sort of rush to the bottom, by promising cheap land, tax incentives and other facilities to attract companies to set up SEZs' (ibid.: 19). In similar lines, S.N. Tripathy (2008) brings to our attention how the state governments of Andhra Pradesh, Gujarat, Karnataka, Madhya Pradesh and Maharashtra have proposed to seek relaxation in some provisions of the central laws so as to facilitate the setting up of SEZs and Special Enclaves in their respective states. These proposals broadly relate to regulating the working hours, empowering the development commissioner to fix minimum wages, making provisions for allowing women workers to work night shifts, etc.

In fact, a comparative analysis of the amendments in legislations in West Bengal, Maharashtra, Andhra Pradesh and Madhya Pradesh reveal certain interesting features. Both Maharashtra and West Bengal have declared units and establishments in SEZs as 'public utility services' under the Industrial Disputes Act, 1947.[4] According to Industrial Disputes Act, 1947, 'public utility service' means:

1. any railway service or any transport service for the carriage of passengers or goods by air;
2. any service in, or in connection with the working of, any major port or dock;
3. any section of an industrial establishment, on the working of which the safety of the establishment or the workmen employed therein depends;
4. any postal, telegraph or telephone service;
5. any industry which supplies power, light or water to the public;
6. any system of public conservancy or sanitation;
7. any industry specified in the [First Schedule] which the appropriate government may, if satisfied that public emergency or public interest so requires, by notification in the Official Gazette, declare to be a public utility service for the purposes of this Act, for such period as may be specified in the notification.

Both Gujarat and Maharashtra governments allow the units to submit annual reports to the development commissioners instead of periodic updates regarding the guidelines and provisions enacted in the labour legislations:

1. Factories Act, 1948
2. Payment of Wages Act, 1936
3. Employees State Insurance Act, 1948
4. Workmen's Compensation Act, 1923
5. Maternity Benefit Act, 1961
6. Payment of Bonus Act, 1965
7. Minimum Wages Act, 1948
8. Child Labour (Prohibition and Regulation) Act, 1986

Both Uttar Pradesh and Maharashtra have declared that The Contract Labour (Regulation and Abolition) Act 1970 will not be applicable in units of SEZs. Amendments related to trade union activities are evident in the provision of setting up of trade unions as sanctioned in the Maharashtra SEZ Act. None of the existing laws related to trade unions like The Trade Unions Act 1956, the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act 1947, the Bombay Industrial Relations Act

will be applicable in the SEZs and the tenants in the zone shall be permitted to form trade unions, subject to the following conditions:

1. Not more than one trade union can be set up for each unit in the zone.
2. Such union shall have not less than 50 per cent of the workmen employed by such tenant as its members.
3. All the members and office bearers of a trade union shall be employees of the unit for which the trade union shall be set up.
4. Finally, the development commissioner (DC) can register trade unions according to the above mentioned criteria and the process of registration shall be as prescribed by the Regulations.

In Andhra Pradesh, Section 18 of the Minimum Wages Act is non-applicable in SEZs, which allows the employers scope not to maintain records of the working hours or any particulars of the people employed in the units of the zone. Last, the environmental clearance certification procedure in Maharashtra and West Bengal is different. In Maharashtra, the development commissioner supervises the environmental clearance certification and the West Bengal government has listed 29 projects which require clearance from the Ministry of Environment and Forest, India, but in cases where the Ministry delegates the power to the commissioner, the development commissioner may grant such clearance.

The SEZ Act has not only facilitated differential governing of spaces through fiscal relaxation and encouraging competition among states to attract foreign investments but has also redefined state responsibility towards labouring citizens. The concept of 'equal' citizenship is almost non-existent and the pressures of globalisation on the political system as we have seen has produced differentiated practices of 'citizenship' entitlements. In the case of SEZs, the developer is privileged over the rights of the labour violating the international human rights standards which are otherwise guaranteed in the state legislations.

According to the SEZ Act 2005, 'Every person, whether employed or residing or required to be present in a Special Economic Zone, shall be provided an identity card by every Development Commissioner (DC) of such Special Economic Zone, in such form and containing

such particulars as may be prescribed'. The governance structure of SEZs is a clear departure from the democratic process of governance; where the development commissioner and the SEZ authority have the power to address matters which under other circumstances would have been addressed by the panchayats/ municipal bodies. This bureaucratisation of governance clearly demarcates these zones of exclusivity in terms of citizenship rights, particularly from the vantage of participatory nature of citizenship rights propagated by the state policies preceding SEZs in India.

C.R. Bijoy (2008a) argues that the model SEZ policy advocated by the central government for the state governments states that:

> The State Government will declare SEZ as an Industrial Township and if necessary, relevant Acts would be amended so that SEZ can function as a governing and autonomous body as provided under Article 243(Q) of the Constitution (Item 10). In line with this, and because local governance is in the State List (List II of Seventh Schedule of the Constitution), various state policies on SEZs such as those in Andhra Pradesh, Gujarat, Jharkhand, Karnataka, Kerala, Madhya Pradesh, Orissa, Rajasthan, Tamil Nadu, Uttar Pradesh and West Bengal envisage the notification of these zones by the governors of the respective states as 'industrial townships' under Article 243Q of the Constitution. This exempts them from the provisions of Part IX of the Constitution, which provides for elected local governments, that is, municipalities. Instead, an industrial township authority is constituted having the same powers and duties as a municipal body with nominees from the developer and the state government, with powers including licensing, the provision of infrastructure and planning. The developer constructs the zone and, effectively, controls the local government.

The states have amended the respective municipal acts to allow autonomous self rule of SEZs. SEZs in West Bengal under the West Bengal Municipal Act 1993 will be regarded as 'Industrial Township' and special autonomous rule of the township is guaranteed through the following Section:

> Notwithstanding anything contained in clause (b) of sub-section (1) of section 385B of the West Bengal Municipal Act 1993, every industrial township so declared under sub-section (1), the concerned

> authority shall also perform the functions of an Industrial Township Authority as specified in the West Bengal Municipal Act, 1993.
>
> Upon the publication of such notification, the provisions of the West Bengal Town and Country planning and Development Act, 1979, and the rules, regulations, notifications, if any, framed ere under, shall have no application in the area of a Special Economic Zone.

Similarly, Maharashtra has declared SEZs as 'industrial townships' and the SEZ authority comprises of chairpersons (nominated by the developer), two members to be nominated by the developer, one member from the tenant and one member nominated by the development commissioner. The term of office of these members is for five years. In case of West Bengal, the members of the SEZ Development Authority are development commissioner, two members nominated by the developer, two members nominated by the state government and the chairperson of the committee is usually the development commissioner. The role of the development commissioner is extremely crucial, as he is responsible for bringing in industrial units to SEZs, for issuing various clearance certificates to the SEZ units and acting as the labour commissioner.

Thus, the central SEZ policy and state amendments completely negate the power of the local governance bodies like the municipalities and panchayats, in case of a SEZ area. By declaring SEZs 'industrial townships', there is a tendency to view 'industrial growth centres' as epicentres of urbanisation that will create tensions and fragmentation as evident in the Nehruvian era through creation of satellite industrial centres in different pockets of the country. The pattern of industrial urbanisation adopted during the Nehruvian era was through 'state' and 'private' capital[5] but the laws of the land were uniform. In case of SEZs, the laws have been amended to create 'special' enclaves with 'special' political measures to secure economic growth. The 'special' political measures include complete absence of democratically elected governments to control SEZs which may be of various sizes.

Is citizenship becoming limited and further bounded with newer notions of territoriality through SEZs as the development commissioner, developer and the government enjoy responsibilities not only in the setting up of the zone and creating a favourable business climate for 'private' capital but also to maintain local

governance. The collapse of the two has led to 'centralization of power' and according to Gopalakrishnan (2007):

> [I]t is complimented at the legal level by the power of the Central government to repeal or modify any law that it wishes. Read together, this amounts to building a structure of governance where every arm of the state, be it police, judiciary, public services, local government, or regulation, are all brought under the control of the Development Commissioner, the Developer or the Central government. The schemes of separation of powers and division of responsibility, not to mention democratic accountability, are entirely ignored.

Falta EPZ to Falta SEZ

Falta EPZ was established by the Government of India in the year 1983 vide Ministry of Commerce Resolution No. 14/13/82-EPZ dated 29 September 1983. The zone covering three revenue villages, namely Akalmegh, Nainan and Simulberia in P.S. Diamond Harbour, District 24 Parganas (South) was established at a distance of about 55 km to the south of Kolkata business district on the eastern bank of the river Hooghly.[6] The study on Falta SEZ by Shalti Research Group (2008) indicates that the government started acquiring land for the Falta EPZ from 1984. The land was acquired according to the provisions of the century old Land Acquisition Act of 1894 [Notification No. S.O 782 (E), 25 October 1984]. A committee was set up to oversee the rehabilitation package for families ousted as a result of the acquisition process. The main livelihood of the people prior to setting up of Falta Free Trade Zone was cultivation and fishing. The primary occupation of the majority of the people of South 24 Parganas are agriculture based apart from those who work at the manufacturing industries. The committee consisted of the District Magistrate Ranu Ghosh, Sabhadhipati of the Zila Parishad, Sk. Mostafa, a member of Akal Megh Gram Panchayat. They promised: *(a)* a job per family, *(b)* housing with civic amenities, *(c)* free electricity for the households and *(d)* necessary arrangements to ensure a better standard of living for these inhabitants. The committee divided the displaced population in two categories. The persons whose residential lands were acquired for Falta EPZ were

designated as Category A. Families who lost their cultivating land due to Falta EPZ (P.W.D. Road) came under Category B. Initially, most families received Rs 12,000 as monetary compensation and later the Gram Panchayat and administration decided that families who would settle in the model village (now called Highland) would be given 6 decimal/8 decimal/10 decimal of land according to the previous landholdings.[7] Reports indicate the discrepancy between the promises of compensation and the rehabilitation package people received. The zone started functioning in 1984. Subsequently, Falta EPZ was converted into SEZ vide Ministry of Commerce & Industry Resolution No. 6/8/99-EPZ dated 13 December 2002.

Falta SEZ and surrounding areas can be divided into two sections: *(a)* Sector I and Sector II and the entire area spreading up to 280 acres is under central government; and *(b)* Sector III, IV and V (Falta Growth Centre) is around 400 acres.[8] As soon as one reaches Nainan More the billboards indicate two different industrial zones; Falta SEZ and Industrial Development Centre being developed by the West Bengal government. Big bill boards of Falta SEZ can be seen at regular intervals from Majherhaat, Thakurpukur, Dostipur, Nainan More on the way to and from Kolkata. Falta SEZ is located at a distance of about 55 km from Kolkata in South 24 Parganas district. It is situated in Mouza Bisra (J.L. No.1).

Falta SEZ comprises the northern portion of two villages, namely, Nainan and Gazipur covering Sector I and Sector II. Gross area of Falta SEZ is 280 acres (of which 87 acres have been acquired and 193 acres have been transferred from Calcutta Port Trust). In addition, more than 80 acres land acquired for rehabilitation of affected areas (Shalti Research Group 2008). It is the largest SEZ in Eastern India and one of its kinds as it is a multi-product SEZ.

Methodology

The study is based on interviews with workers, management representatives and contractors inside and outside Falta SEZ from August 2009–October 2009. Extensive interviews and focus group discussions with workers and union leaders in Shramik Bhavan in local CITU office were undertaken during the course of the study.

All the workers (skilled, unskilled and others) carry an identity card which is issued by the DC Office within the zone. In other cases, the DC Office, Ministry of Industry and Commerce Office, Kolkata, issues a visitor's pass on receipt of an application and purpose of visit. Mr Arun Kumar Bit, development commissioner of the Falta SEZ, granted permission for field work of 10 days (20–30 October 2009) to visit the units. The DC Office issued a gate pass which was to be shown at the time of entry and exit from Falta Sector I Gate/ Falta Sector II Gate. The local DC Office is managed by Mr A.C. Ghosh, Site-In-Charge.

Selection of Units: Currently, 78 units of Falta SEZ are exporting products. On the basis of the functioning export units data sheet submitted to Kolkata office, I selected to meet representatives from 23 units with approximately equal representation of garment units, plastic units, engineering units, textile units, tea units and others. The units that I visited are:

1. Engineering Unit: Cresmac Foundry Private Limited, Kansan Technosystems Private Limited and Patton International Limited.
2. Food and Agro Industries: Sonitpur Agro Industries (P) Limited.
3. Plastic/Rubber: MCD Nitrile India Private Limited, Krypton Industries Limited, Precision Polyplast Private Limited (earlier known as Promising Estates & Traders Private Limited), Transworld Business Corporation, Jai Bharat Plastics.
4. Sports and Leather: Deltmal Safety shoes.
5. Textile: Kariwala Green Bags (Unit-III) of Kariwala Industries Limited, Kariwala Towers, Acknit Knitting Limited, Eastern Silk Industries Limited, Cheviot Company Limited, MNR Exports, Sarat Exports, Vsft Quilts and Pillow Private Limited.
6. Others: Linc Pen & Plastics Ltd (Pen), Gupta Infotech (Compact Fluorescent Lamp Emergency Light GLS Lamp), Hi-tech Information & Marketing Pvt. Ltd (Mica Chips/Mica Waste).

The main objective of the study was to understand the rights enjoyed by the skilled and unskilled workers of the zone. The

interviews were unstructured. The interviews with the management representatives focused on the following areas:

1. Number of workers
2. Number of permanent workers
3. Number of contract workers
4. Division of workers in the production line
5. Number of paid leave for permanent workers
6. Number of paid leave for contract workers
7. Wage payment process
8. Security measures for the workers
9. Training for workers
10. Working hours
11. Facilities for the workers

Interviews were conducted with the unskilled workers outside as well as inside the zones. The interviews with the workers focused on issues and concerns, process of recruitment, working hours, division of work, wages and holidays. Similar concerns were raised with a focus group discussion with select contractors where process of recruitment, work allotment, production targets and wage payment processes were discussed.

Flexible Accumulation, Contract Work and Rights in Perspective

In Falta SEZ, the 'flexibilistaion' of employment relations led to greater use of irregular and informal workers within the formal sector alongside downsizing of permanent worker (Mazumdar 2007: 38).The flexibilisation of employment takes place at two levels; first through enhanced flexibility where the same worker is used for different tasks and second numeral flexibility, which refers to the ability of firms to adjust the aggregate quantity of labour used in production more easily and quickly, in response to fluctuations in demand for individual products, through greater use of overtime, part-time employment and temporary workers (Atkinson 1985). Flexible accumulation according to David Harvey (1988) rests on:

> A startling flexibility with respect to labour processes, labour markets, products, and patterns of consumption. It is characterized by the emergence of entirely new sectors of production, new ways of providing financial and business services, new markets, and, above all, greatly intensified rates of commercial, technological and organizational innovation. (p. 8)

Drawing from Harvey, Gertler argues that in the fordist era the emphasis was on mass production of standardised goods made by highly unionized and highly paid labour and dedicated rigid machines; the post-fordist era of specialised production is marked by flexible machines and flexibly deployed (and in most cases non-unionized workforce). This is evident in the shift of labour policies from EPZ to SEZ.

Industrial Disputes Act 1947 has been one of the effective legislations to safeguard labour rights as the Case No. VIII-203/2001, an industrial dispute between M/s Antartica Limited at EPZ, Falta and five workmen shows. The case of five workmen as the Third Industrial Tribunal Award by Hon'ble Judge Shri S.N. Sarkar in his report states a case concerning refusal of employment:

> The case of 5 workmen in short is that Smt. Snehlata Mondal, Smt. Menoka Adhikari, Smt. Abeda Bibi, Smt. Saida Bibi and Smt. Namita Safui under reference were working with the company since 1997 as unskilled labourers doing the job of cleaning, packing, and unloading job of printing materials to the company. They used to get Rs 1,040 plus overtime amounting to Rs 1,300 p.m by signing in wage register. As they approached the management for increase of wages and introduction of other legal benefits in the month of January 2001 the management refused their employment w.e. from 10.02.2001 and they were not allowed to resume their duty from that date. Accordingly they approached the Labour Commissioner through union for settlement.

The company in the first place tried to portray the workers as working on 'no work no pay basis' and they were working on daily rate basis and they do not qualify to the terms and conditions of Section2 (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein.

There were constant attempts to establish that the workmen were not regular employees of the company, whereas the workmen could provide evidence of attendance register of Exit 1 and identity card at Exit 2. Both documents bear the seal of Antartica Ltd. The photocopies of attendance register proved that they have been working since 1997, which entitles them to Section 25 F of the Act before termination. The award clearly states that 'it is well settled that the status of the employee has no relevance in the context of the applicability of Section 25 F of the Act'. It further states that 'the provisions of Section 25 F are to be complied with by the employer in case of retrenchment of workmen irrespective of the fact that the workman is permanent or temporary or causal or daily wage earner'.[9] The company in this case was directed to reinstate the aforesaid workmen but certain significant issues regarding management of workforce springs up. One of the reasons behind the termination cited by the company was the irregular nature of demand of the job owing to decreasing export, and the workmen were offered as and when opportunities cropped up. Most of the workers in Falta SEZ today will be familiar with this labour management discourse. Second, the constant attempt to negate any direct relationship with the workmen to reinstate that the workmen were not regular employees reflects the advantages of the company to hire labourers on contract basis where they are not directly accountable and the basic premise of the employer–employee relationship is invisible as the worker in most cases do not know for whom is s/he producing or who is the consumer.

For instance, in Sarat Exports, 56 workers were involved in making shirts to be exported to United States. They have been trained on-site to work on rotation basis in every phase of the production process. The production process involves cutting, collar band pasting, stitching line, buttons, mending, checking, pressing, packaging and shipment. None of the workers have a clear picture relating to the consumers of the product. The workers are paid on piece-rate basis which varies from Rs 14–30. The workers have been hired directly by the company and hence they are not alienated from their direct employer/producer. As Bimal Sen,[10] management representative of Sarat Exports clearly points out, 'I did not allow labour contractors to enter this place. The moment I would allow a contractor within the factory premises the wage payment process would be a complex network'. In this case, there is a clear indication

of the pitfalls of contract-based work as the worker has no direct relationship with the employer in terms of wage payment process or wages he receives. Similarly, the company will have no control over the wage payment process once the company makes payment to the contractor.

In Sarat Exports, the workers join work at 10 am and continue till 6 pm. If there is work overload, they continue working as the company has made accommodation arrangement within the factory premises. The workers usually receive a weekly payment of Rs 1,200–1,600. The workers are paid on the basis of piece-rate which varies from Rs 14–30. Most of the workers have been working for more than six to seven years. There is a worker who carries stuff who is called 'Labour Boyman'. He receives wage on a daily basis. Around 10–12 workers come from local villages while most of the workers come from other districts. Uttam Das,[11] an employee with Sarat Exports, has been working for six to seven years. He earns Rs 3,500 per month. 'I stay here from Monday to Saturday. By Saturday evening most of us go back to our respective native places and return on Monday.' Here, the production process is based on enhanced flexibility because of the absence of any heavy machinery. MCD Nitrile India Private Limited is another company which does not hire contract workers. According to D.K. Adak, factory manager, 'the owner of the company is against contract work'.[12] MCD Nitrile India Private Limited like Krypton Industries has witnessed Falta's journey from EPZ to SEZ. There are 11 permanent workers and 3 casual workers. The casual workers are engaged in jobs such as moulding and finishing, and one of them is also a sweeper. There are two work-shifts; 6 am–2 pm; 2 pm–10 pm and minimum wage is Rs 85 per day. On the other hand, Krypton Industries, one of the oldest companies of Falta SEZ, has 52 staff members and Mr Biswajit Bhattacharjee, management staff, emphasises that 'in Krypton there are no contract labourers, casual labourers and no child labour'.[13] Krypton Industries has a notice near the main gate mentioning non-employment of child labour by order of DC. While there are few industries which do not hire contract workers, the factory managers often have cited the low cost of labour and easily available labour as some of the reasons for preference of factories in SEZ.

For instance, Acknit Industries Limited, manufacturer of industrial gloves for automobile and electronic countries, is a classic

example of flexibilisation of machinery. S.K. Chakraborty,[14] the works manager of Acknit Industries, emphasised that the entire production process is mechanised and a machine has the capacity to produce 90 gloves at a time which are then checked and stitched by contract workers (mostly women) who sit in circles to do the finishing job. In this case, the highly specialised mechanisation in gloves production is responsible for one supervisor managing five or more machines at a time. The highly mechanised production with minimum changes in infrastructure has been one of the successes of flexible specialisation. As Piore and Sabel (1984) pointed out that efficiency in production lies in adapting the equipment according to changing tasks, 'With computerized technology, the equipment (the hardware) is adapted to the operation by the computer programme (the software): therefore, the equipment can be put to new uses without physical adjustments–simply by reprogramming' (Piore and Sabel 1984: 160 in Thursfield 2000: 31). Flexibilisation of production system has reorganised work patterns and labour demands. It has led to a decrease in the use of unskilled labour force in the production process, and the pattern of dependency on unskilled labour force in Falta SEZ in the checking and finishing departments of production processes in textile units and assembling work in engineering units is a testimony to the change in work patterns. The unskilled contract workers in Linc Pen & Plastics Limited are mostly employed in the assembling process under supervision of skilled worker.[15] Similarly, in Patton International, contract workers are employed in the assembling and packing work.[16] Flexibilisation of production systems have been responsible for increased dependency on contract workers in the zone, as small to large batches of goods are customised for exports depending on the demands. Hence, the scale of employment of contract workers is constantly fluctuating. This has been responsible for flexibility in labour markets 'through introduction of new forms of labour regulation–outsourcing, subcontracting, putting–out and "home work" strategies-and hiring of large numbers of temporary, part-time and seasonal workers; production arrangements…' (Inda and Rosaldo 2002). The employment scenario and labour management perception in Falta SEZ bears evidence to this. According to the annual report of 2008–2009 of Falta SEZ, there are approximately 7,000 contract workers in the zone apart from the permanent skilled and unskilled workers and managerial employees (please see Table 7.1).

Table 7.1: Employment Status in Falta SEZ

	Male	Female
Managerial	206	5
Skilled	598	–
Unskilled	1,769	1,310
Total	2,573	1,315

Source: Annual Report of 2008–2009, Falta SEZ.

In Acknit, 60 female contract workers and 40 male contract workers were working in the factory premises on 20 October 2009. The age group of the workers is between 22 to 58 years and production demands are such that 26 days of guaranteed work are there for the contract workers. The company has entered into an arrangement with two labour contractors and workers are paid on a piece-rate basis, as it is much higher than the minimum daily wage fixed by the DC's office. The control over surplus labour in the Falta SEZ according to most of the management employees is relatively easier than controlling the labour force in factories outside of zones.

According to Jaynaddin Seth (a labour contractor by profession),[17] there are almost 200 labour contractors in the zone. 'I have been in this business since 1996 but still I feel that contract labour is a bad system. Labour control and labour management deprives the labour and reduces the accountability of the manufacturer towards the labourer'. Jaynaddin Seth supplies labour to some of the plastic units. Prabir Pramanik of KP Construction started out as civil contractor and now supplies labour to five industries: Babaria, Jai Bharat, MNR Exports, Gupta Infotech and Infinity. The workers working under them receive the wage by 10th of every month and the workers receive their wages from KP Construction office.

The proliferation of contract workers reflect the state support of 'no work; no pay' regime. The contractual workers suffer from various problems. Many a times the contractual worker receives his wages from the contractor's office. Apart from Eastern Silk Industries and Hi-tech, the wage payment process usually does not take place in the factory premises. Each factory has its own regulations regarding the attendance and preparation of worksheet based on which workers receive wages. Two systems are currently in place: in some cases, the worksheet is prepared by the contractors based on which the contractors receive the cheque and pay the

wages of the workers in their office; and second the worksheet is prepared by the company and the contractors pay the wages in presence of factory management. The contract worker is entitled to receive hourly payment in case of non-availability of eight hours' work. The contract workers usually receive refreshment expenses/ refreshment in cases of overtime along with extra wages. Since the basic premise of contract work is 'no work; no pay', as one of female employee with Plastolene pointed out 'for us, any holiday is a loss specially if we have missed out on opportunities due to festivals. It would be great if we could get work for 30 days'.[18] The contract workers are under constant pressure to perform because of the availability of 'surplus' labour.

The constant availability of surplus labour from neighbouring villages in Falta SEZ also has its impact on fixation of minimum wages in SEZ. The minimum wages of the unskilled labourers in Falta SEZ was revised in 2006 when Shri M.L. Dutta, Assembly Committee of Commerce & Industry, Government of West Bengal, visited the Falta SEZ and expressed dissatisfaction over the non-payment of minimum wages. The chairman of the said committee pointed out that the minimum wages for agriculture labour is Rs 68 per day whereas the unskilled labourers are receiving Rs 55 per day which needs immediate revision. The meeting organised by Export Promotion Council for EOUs and SEZ units on 14 June 2007 decided that the unskilled labourers should be paid Rs 68 per day, effective from 1 May 2007 for unskilled labourers working at Falta SEZ.[19] It was also decided that all units in Falta SEZ will be requested to obtain labour licence and daily wages of a machine man would increase by Rs 5 per day. In a Memorandum No. 1 (39)/2007/546 issued by Ministry of Commerce and Industry, Falta SEZ, it was clearly stated an unskilled worker working in the zone is entitled to receive Rs 68 per day which may be made by weekly or monthly basis. If the wages are paid on a monthly basis it should be paid by 10th of every month.[20] The wages were revised and currently an unskilled labourer is entitled to receive Rs 81 per day from 1 July 2009.[21] Though none of the memorandums override the ruling of the minimum wages of the State Labour Department, still there is a disparity in the wage payment of unskilled workers in the zone. The minimum wages that an unskilled worker in the zone is entitled to receive is lower than the daily average wage of Rs 84 (approximately) guaranteed under National Rural Employment Guarantee Act. Currently unskilled workforce (male

and female) receive Rs 81 per day, the semi-skilled workers receive Rs 97 per day and machine operators and supervisors receive a minimum of Rs 110–120 per day depending on their work experience and workload.[22]

Apart from the above mentioned ways of controlling and management of labour in Falta SEZ, the right to abstain from work or protest is curbed through the SEZ Act by declaring it as public utility services. The workforce of a 'public utility service' is expected to follow certain guidelines as stated in the Industrial Disputes Act of 1947. The guidelines relating to labourers of public utility service regarding prohibition of lockouts are:

> 22. Prohibition of strikes and lock-outs-(1) No person employed in a public utility service shall go on strike in breach of contract—
> (a) without giving to the employer notice of strike, as herein-after provided, within six weeks before striking; or
> (b) within fourteen days of giving such notice; or
> (c) before the expiry of the date of strike specified in any such notice as aforesaid; or
> (d) during the pendency of any conciliation proceedings before a conciliation officer and seven days after the conclusion of such proceedings.
>
> [*Source:* Industrial Disputes Act, 1947]

Flexibilisation of production process and structural changes of work has been responsible for increasing use of female workers, as employers continue to seek more flexible, docile and cheap labour with increasing global competition (Razavi and Vivian 2002). The reasons and deployment of women workers in export-oriented industries are various and since almost 60 per cent women contract workers contribute to the export industries Falta SEZ, it is significant to understand the causes and preference of women workers in the zone.

Nimble Fingers at Work—Feminisation of Unskilled Workforce

The employment status, as in November 2009, within Falta SEZs indicates that 14,956 people are employed within the zone.

According to official sources,[23] almost 60 per cent of the contract workers are women.

- No. of permanent male staff members: 2,284
- No. of permanent female staff members: 157
- No. of temporary male staff members: 4,261
- No. of temporary female staff members: 6,837
- No. of construction labourers: 1,417

Apart from these, according to the union representatives and official sources, there are approximately 4,000–5,000 workers who have been hired on a contractual basis. Globalisation has been responsible for shift of manufacturing jobs to the neo-liberal economies like India and elsewhere through the creation of SEZs where workers are absorbed on a contract basis with a no-work-no-pay regime which relieves them from accountability towards basic rights of the workers. One of the increasing trends of the free trade zones is feminisation of labour force susceptible to various vulnerabilities and risks. Dina Siddiqi (2000) in her study on garment industry shows how feminisation of workspace and 'gendered division of labour within the factory reveals a profound cultural irony'. Though most of the professional tailors in Bangladesh are men, the preferred workforce within the factory are women, particularly in the sewing section as 70 per cent of the work in the garment industry is concentrated around sewing; this section of the production process has to be 'cheap', hence the concentration of female workforce in this section is high. Studies also revealed that more the number of female operators, lower are the costs of production. Similarly, in Mexico the zones (known as '*maquilandora*') are located near the Mexico–US border where there is no bar on recruitment on foreign employers but 'hourly labourers' have to be Mexicans have reportedly employed 60 per cent female workforce in its industries (Palit and Bhattacharjee 2008: 13).

Neo-classical economists along with others argue that 'trade liberalization can facilitate labour intensive, pro-poor growth capable of "including" hitherto "excluded" social groups' (Razavi and Vivian 2002). One of the oft-cited cases is the dependence on female labour in export-oriented manufacturing activities. Open

trade regimes have led to the shift of manufacturing jobs and transformation of labour force with particular reference to increased participation of women in export-oriented industries, both in countries with a history of relatively high involvement of women in the labour force and in countries with historically low female labour force participation. The reasons for employment of women in world market factories as Elson and Pearson (1981) argue cannot be justified on the lines that jobs are sex-stereotyped, as capitalist firms will be forced to select their labour force and constitute their division of labour on the basis of profitability, not ideology. In other words, they argue that probably employing female labour is cheap and their high productivity must be responsible for reproducing a sexual division of labour and 'the net result being that unit costs of production are lower with female labour' (ibid.: 92).

The feminisation of workforce in Falta SEZ is based on three assumptions. First, gendered division of labour; second, lack of organisational capacity and third it goes beyond ideology; 'it is a material process which goes on not just in our heads, but in our practices' (ibid.: 94). Every unskilled worker in Falta SEZ is entitled to receive a minimum wage of Rs 81 per day from 1 July 2009. While every worker is entitled to receive Rs 81 as the minimum wage, the labour contractors I have interviewed during the course of my field trip revealed that the minimum wage they have been paying the female workers is Rs 81 per day and minimum wage for male workers is Rs 81, but men would not work for less than Rs 92 per day and the nature of work varies.

The demand for female workforce is based on the assumption that women are 'naturally more docile and willing to accept tough work discipline, and naturally less inclined to join trade unions, than men; and to be naturally more suited to tedious, repetitious, monotonous work' (ibid.: 93). As one of the management representatives from Deltmal Safety shoes point out, 'Women are more reliable; no *unionbaji* for women.… Absenteeism is high among male workers. They are young. They will say that let's drink and enjoy and skip work'.[24] Despite the increasing number of unskilled women workforce, there is no significant union leadership from women. Tapas Das, a local CITU union leader, points out that, women in recent years have come together in meetings, marches and rallies. It is a positive sign. While it might be true considering the huge presence of women workers in a protest rally outside of

Gate No. 2 of Falta SEZ on 24 October 2009 to protest against the death of a 32-year-old woman working for MNR Exports on her way back home when she was hit by a road carrier.[25] But instances like these cannot justify women's participation in union activities. Most women I interviewed pointed out that though they are aware of union activities and at times join rallies, it still is a 'male' job. They feel 'shy'. Reflections of female unskilled workers working in *Plastone* in an interview on 29 October 2009, '*Jerokom kaaj kori sherokom maine pai.… Barir kaajer shonge taal miliye afternoon shift tai bhalo*' [I get paid according to the work we do … afternoon shift is the most feasible option as I can balance my household chores].

In Falta SEZ, women workers are employed in plastic units, particularly in the sorting section. As the factory manager of Precision Polyplas[26] says, this task requires immense patience and it is a soft-skilled job. Women are employed in almost all soft-skilled jobs particularly which requires immense concentration and patience. Most of these jobs are done in a sitting position which is a familiar physical posture associated with 'women's work' in rural domestic households. Are women recruited in export-related industries because women are familiar with these jobs in their domestic space? While some activities like sorting, sweeping and dusting are part of domestic duties, often unskilled women are hired in the electronic export industries.

Repetitive and monotonous work like the finishing line of Deltmal Safety shoes or that of checking, packing and wiring in the CFL Bulb industry is usually done by women. These tasks are often couched and explained through the gendered division of labour derived from essentialist interpretations of men's and women's natural abilities, whereas these abilities are socially acquired (Jayasinghe 2003: 191). Bhanumati Mondal has been working in the zone for seven to eight years. She has two sons and her husband works in the zone. He works for Bisra Mazdoor Society, which contracts work of loading and unloading trucks and carriers in the zone. She joined work when her husband was ill and was bedridden for two and a half years. She is thankful that plastic units do not require educated workforce. She says she has been able to repair her house after working in the zone. Most women preferred to work in the afternoon shift from 2 pm–10 pm as they could cook the lunch, do the household chores and then come to work. Most of the women were unaware about crèche facilities within the zone and

none of them bought food from the canteen as it was time taking. Women working in Falta SEZ have developed their own survival strategies. Women coming from distant areas like Saharahaat have hired auto-rickshaws who charge Rs 330 per month to ferry them from their homes to the entry gate of the zones. They have to report to their respective contractor at least half an hour before their respective 'shift' begins. One of the major problems faced by women while commuting is scarcity of buses after their afternoon shift. One of the workers complained that one day the company had made them work for four hours and after tiffin hours (around 6 pm) they asked women to leave as they completed their work. It was difficult for women who commute on monthly arrangements of shared autos to spend extra money on returning from work. They said the company should have told them while reporting and they would have made alternative arrangements.[27] Local women prefer working in SEZs as it is a more secure workspace if one can manage at least 20 working days compared to being an agricultural or domestic servant as a former worker with Acknit who now helps her husband in his business points out that when you work in SEZ you do not have to worry for eight hours about what is happening in your home. Your life is much more organised whereas when you do outside work, '*Kaajer kono shesh nei aar keu kono mulyo day naa*'[28] [there is no end to work and often the work has no monetary value].

The preference for young women in Falta like any other export industry is a common practice. Haleema and Ujjwala Das,[29] age 50 years, point out:

> [T]he company prefers young women workers to old workers as we are slow; we cannot use our hands as fast as they can. The problems that we face are often we come and we realize that there is no work and we have to go back. We end up paying Rs 11 for our travel.

The demand for a young workforce is evident in Padmashree Vohra's[30] reflection, who comes from Nainan village to work in the Sonitpur Tea Promoters. She walks for 20 minutes to reach Falta SEZ. She gets out by 8.20 am so that she reaches her workplace by 9.00 am. Similarly, Pakija Khatun and Firoza Khatun,[31] both 16 years old, have been working in the plastic industry for two years. They walk down from Highland. They carry their own tiffins to

save money. Aloka Majhi[32] has been working in Kariwala Green Bag for four years. She comes from Rampurnagar under Mullickpur Panchayat after cycling for one hour fifteen minutes. She earns a monthly wage of Rs 3,500. She is happy with the work culture and the money she earns. She says if the demand of work is constant then she can earn a decent living. She works in the stitching line of the production process.

The feminisation of workforce in Falta SEZ and the presence of women in certain industries, plastic units, stitching line, mending line and checking line of various textile and leather units indicate a pattern of gendered perception of 'male' and 'female' skill in employment of labour force. Thus, SEZs have managed to control surplus labour not only through contract work but also because of feminisation of workforce. Feminisation of work in Falta SEZ has created a reserve army of labour, for the 'unskilled' work in factories which require 'nimble' fingers for flexibilised production.

Scope for Rights–Local and Global

The workers in the zone are unionised under CITU and Trinamool Congress. Both these unions have their offices outside Gate No. 1 and 2, respectively. According to the CITU pamphlet distributed during the 'Labour Convention' on 31 October 2009, the union emphasises that West Bengal is exceptional as it has allowed workers to unionise and in case there is a lockout in the factory within five years or if the factory has failed to pay the workers their dues, they would be entitled to receive Rs 1,000 per month and a bonus of Rs 1,000 during Durga Puja. The party pamphlet cites the case of carbon composide factory where the workers had been working for 12 years, and when the factory shut down the workers did not receive their gratuity and other allowances. They filed a case in Calcutta High Court and the High Court order was to sell off the factory. The factory was sold off at Rs 35 lakhs, which was not sufficient to pay the workers their dues. Each worker was entitled to receive Rs 120,000 each, as the workers according to High Court order were entitled to receive Rs 12 lakhs (inclusive of gratuity and provident fund). The factory authorities had deducted amount to be remitted to Provident Fund (PF) for the past 12 years.

The factory authorities submitted the deducted money to the PF for six years only. Under the given circumstances, each worker has received Rs 2,400 and an additional allowance of Rs 1,000 per month from the Government of West Bengal.

The unions have been active to demand for monetary compensation in times of accidents and injury in various industries in SEZs through demonstrations outside the SEZ. While on one hand the trade unions continue to act as pressure groups, it is also important to look into other forms of claim making and rights negotiation in the neo-liberal framework. In Falta SEZ, one of the units Vsft Quilts and Pillows Private Limited have to follow their buyer IKEA's IWAY Standard: Minimum Requirements for Environment and Social & Working Conditions when Purchasing Products, Materials and Services. The surveillance mechanism that IKEA has set for its supplier is cross checked by surprise social audit exercise where the worker is interviewed on-site in absence of management staff.

The very first chapter titled 'IWAY Must' outlines prevention of child labour, forced and bonded labour and prevention from severe environment pollution, safety hazards and maintenance of transparent and reliable system of working hour and wages and provision of accident insurances that the supplier must comply with before IKEA enters into a contract. Chapter Nine of the document highlights the wages, benefits and working hours of the workers at the IKEA supplier. There is a strong emphasis on maintenance of records regarding the payrolls and attendance with detailed information on leave and working hours at the time of employment with appropriate breaks for meals and other breaks. The supplier should also have a canteen for the workers at the premises. Vsft strictly follows the guidelines and it also reflects that the pressures of global market can work in creating transnational labour safeguards to avoid exploitation of workers in SEZs/EPZs. The company management indicated that because of stringent IKEA guidelines, fire drills and safety awareness programmes are held at regular intervals during the work hours. The safety guideline notices in English and Bengali are pasted at close proximity to each of the production line. What is interesting to note here is that at the very entrance of the factory the following legislations in Bengali and English have been pasted on the notice board: Contract Labour (Regulation) and Abolition

Act 1970, Factories Act 1948, West Bengal Factories Rules 1958 and Payment of Wages Act 1936. At the time of the fieldwork there were around 50 permanent staff members and approximately 150 contract labourers working under three contractors who work mostly as helping hand and in the stitching line of the production. Shyampada Bera works for Vsft Quilts as a contract worker. He has earlier worked in factories outside SEZ. He comes to Falta cycling for one hour fifteen minutes. Unlike his colleague Alok Mondal, a company employee, he is not entitled to lunch in the canteen. He gets his own tiffin. Vsft Quilts and Pillows has to follow a labour guideline set by their buyer–IKEA. Certain basic facilities like access to drinking water, clean washrooms, fire safety aids and regular fire drills are common for both contract and permanent workers. Both Shyamapada Bera (contract worker) and Alok Mondal (a permanent employee) enjoy these facilities. On the other hand, a contract worker has no paid leave unlike the permanent employee. One of the policies of the IKEA IWAY Standard is to ensure that workers are not prevented from associating freely. Workers are also encouraged to participate in the collective bargaining process. Various other firms like MNR Exports within the zone are in favour of worker's association for wage negotiation.

What we see is that rights negotiation is undergoing a change in the context of the SEZ. In this context, it is important to note that while firms in the zone recognise the significance of accountability towards the labourers, unionisation is associated with a syndrome outside of the purview of SEZ. The enclosed spaces of SEZs are seen as safe spaces where the demands of the workers can be easily negotiated. While IKEA policies are ways of safeguarding labour accountability, it is important to explore whether corporate social responsibility mechanisms are newer ways of dealing with claim-making processes. In case of India, one has witnessed the increase and proliferation of policies instead of legislations in matters of governance and the economic governance and rights are being re-formulated through corporate social responsibility; a specialised agency of resolving rights claims. In this context, the significance or the threat of a political subject becomes more evident. The 'political subject', the labourer is no more being deprived but is also being channellised to form associations/groups, which does not clash with the economic interest, where the influence of 'outside' forces would be less.

While on one hand international human rights instruments such as The Universal Declaration of Human Rights (UN 1948), Fundamental Principles and Rights at Work (ILO 1998) are effective ways of creating a universal standard, the shift in 'rights' claims and denial of political agency of the state in certain 'economic' territories opens up crucial questions regarding the way the state is managing 'populations' through governance strategies where rights can be accessible in certain areas, where the state makes an effort to connect to the citizens through e-governance, upload draft copies of policies for civil rights groups, involve citizens in dialogue process in legislations, in other words at least some token participatory planning is granted to the citizens. In cases of SEZs, the measures are to devise its own laws of rule, own laws of controlling the power axis where the political subject is reduced to a mobile capital controlled, replaced at the will of the owner and where the state that ensured the 'rights' in other circumstances ceases to interfere through its own rights demanding mechanisms—the Special Economic Zone Act.

Notes

1. Aihwa Ong (2005) in her study highlights two aspects of graduated sovereignty: first, the differential treatment of segments of population and second, state–transnational network where some aspects of state power and authority are taken over by foreign corporations located in special economic zones.
2. David Harvey (2006) uses the phrase 'accumulation by dispossession' to illustrate the continuation and proliferation of accumulation practices that Marx had treated as 'primitive' or 'original' during the rise of capitalism.
3. Ranabir Samaddar (2008) argues that the process of primitive accumulation in India in the first decade of the 21st century was aided and facilitated by:

   > [T]he existence of surplus labour and the administrative strategy of creating the special economic zones as spaces of exception to the 'normal' process of capitalist accumulation and development. In this differential use of space for accumulation, we have one more secret of the durability of the unorganised state of labour. This durability is made possible through techniques of state and governance for differential administration of localities in the interest of accumulation, and these techniques are made possible precisely because of globalisation within a national context. (p. 24)

4. See Annexure 7.1: The Government of West Bengal Labour Department IR Branch, No. 1459-IR. EIL/1A-11/98.

5. For example, Jamshedpur and Modinagar.
6. 2009 Annual Report Falta SEZ, http://fsez.gov.in/annual_report.html (last accessed on 14 June 2010).
7. A family living in a separate mess, and having a separate kitchen, was treated as a unit for this purpose.
8. Translated from 'Falta Shilpanchaler Panchish Bochchorer Biboron', in *Falta Shilpanchaler Convention*, CITU, 31 October 2009.
9. Third Industrial Tribunal Award, Order No 2026-I.R./I.R./13L-03/2001, 12 January 2003. Government of West Bengal, Labour Department, I.R. Branch, Kolkata.
10. Interview with Bimal Sen, management representative, Sarat Exports, 27 October 2009, within the factory premises.
11. Interview with the author on 27 October 2009.
12. Interview with the author on 26 October 2009.
13. Interview with the author on 20 October 2009.
14. Interview with the author on 20 October 2009.
15. Interview with management representative at Linc Pen & Plastics Limited office in Falta SEZ, 22 October 2009.
16. The information is based on interview with management representative on 22 October 2009 in Patton International Office, Falta SEZ.
17. Interview with the author on 27 October 2009.
18. Interview with Asha (name changed as the interviewee requested anonymity).
19. Minutes of the meeting organised by EPCES held in 'Conference Room' of FSEZ, Falta on 14 June 2007, EPC/ERO/M-MWAGES-MTG/07-08, dated 25 June 2007.
20. Memorandum on fixation of minimum wages of unskilled labourers in FSEZ with effect from 1 May 2007, No. 1 (39)2007/546, 8 May 2007.
21. Memorandum on fixation of minimum wages of unskilled labourers in FSEZ with effect from 1 July 2009, No. 1 (39)/2009/1442, 26 June 2009.
22. The information is based on an interview with Prithyish Majhi of SN Enterprises and pamphlet distributed on the occasion of "Falta industrial zone labour convention", 23 October 2009. Venue: Shramik Bhavan, Gate No. 1.
23. For details see http://fsez.nic.in/glance.html (last accessed on 20 February 2010).
24. Interview with management representative (requested to maintain anonymity), 24 October 2009.
25. The information is based on interview with Tapas Das, CITU member, on 26 October 2009.
26. Interview with the author on 22 October 2009.
27. Group discussion with workers under SN Enterprises within SEZ, 27 October 2009.
28. Interview with a former worker on 21 October 2009. She and her husband own a tea shop outside the zone.
29. Interview with Haleema and Ujjwala Das, 27 October 2009.
30. Interview with Padmashree Vohra, 28 October 2009.
31. Interview with Pakija Khatun and Firoza Khatun, 26 October 2009.
32. Interview with Aloka Majhi, 21 October 2009, within SEZ.

8

Globalisation, Rights and Economics: Jean Drèze in Conversation with Ranabir Samaddar

[In this interview, the noted economist Jean Drèze reflects on some of the concerns and themes raised in this volume. The interview was taken by Ranabir Samaddar]

1. As an economist, how do you look at the question of globalisation and rights?

Let me first point out that what we call 'globalisation' is actually a very lopsided process of selective global integration, driven by privileged interests. For one thing, globalisation tends to be reduced to specific aspects of economic globalisation, such as the liberalisation of international trade and investment. For another, even within that framework, there are double standards of all kinds. For instance, capital mobility is actively promoted, but not labour mobility; and intellectual property rights are high on the agenda but not pollution rights. As for global concerns such as environmental protection, human rights and world peace, they are off the agenda.

This lopsided process, associated with an enormous growth in the concentration of power, is hostile to people's rights in many ways. For instance, labour rights are hard to defend in a world where capital is mobile but labour is not—this is textbook, mainstream economics. Similarly, the growing hold of corporate interests on public policy often undermines active social policies, including attempts to legislate economic and social rights. The enactment of India's National Rural Employment Guarantee Act

(NREGA), for instance, was fiercely opposed by the corporate sector.

Having said this, effective resistance to these trends calls, at times, for global action of another sort. For instance, the globalisation of arms trade (virtually monopolised by the five permanent members of the Security Council) is certainly a nasty aspect of economic globalisation. But the answer is global disarmament, not a return to autarchy in arms manufacturing. Similarly, realisation of human rights, including economic and social rights, needs to be seen in a global perspective. The answer to imperialist globalisation is global solidarity.

2. Is your work on the right to food more a social work than the work of an economist? In this context, please tell us a little bit about the economy of food rights.

The first question is quite revealing, because it suggests that there is something odd about an economist being involved in 'social work', as you call it. And it is true that this is not what economists normally do. Economists usually work for people who pay them, i.e., governments, universities, corporations, the business media, and so on. But it is not that economics is irrelevant to social action, on the other hand, it is quite the contrary. Thus, economists could do a lot more to make themselves useful to the general public—call it 'social work' or what you like.

About the economy of food rights—it is not a well-researched subject. The word 'rights' does not even belong in a standard economics curriculum, except in the term 'property rights'. So economists are not particularly well placed to think about rights. But economic analysis (not necessarily by professional economists) can certainly help to understand food rights issues. For instance, the 'entitlements approach' to famine analysis, developed by Amartya Sen, drew attention to the importance of focusing on entitlements rather than food availability. This is a common-sense observation, but it can be of great help in ensuring that discussions of food rights rest on solid foundations. Similarly, economic analysis can help us to think more clearly about the overall effects (often called 'general equilibrium' effects) of food interventions, beyond their immediate impact. To illustrate, the design of a sound Public Distribution System (PDS) involves thinking about its effects on prices, production and distribution. Economics alone cannot tell us

how food rights are best protected, but it certainly has something to contribute.

3. You have travelled extensively into the poorer regions in India and, possibly more than any other economist, have seen the problem of insecurity in common life. In what ways have these experiences shaped your role as an economist?

I don't know about my 'role', but these experiences have certainly influenced my understanding of the world we live in. All occupations have their 'professional biases', and that applies in particular to economists. Learning economics can be very enlightening, but without critical thinking, it can also generate blinkers. For instance, the word 'class' is virtually taboo in mainstream economics, not to speak of 'class struggle'. Yet class conflict is a pervasive aspect of Indian society, which must inform any sensible discussion of development issues. Similarly, economists are trained to think about property as 'endowments', i.e., something more or less god-given, without reflecting on the struggles and violence that lie behind the acquisition, preservation and property. When you go out in the wild world, especially in areas like rural Bihar or Jharkhand, these conflicts loom large. So my outlook has been heavily influenced by these experiences, mainly in the direction of a better recognition of the workings of power in society. These matters are fairly well understood by the average rickshaw-walla, because he is at the receiving end of the structures of power. But when you have a PhD in economics, it takes a little while to learn them, or rather to unlearn what prevents us from understanding them.

4. Given your earlier work on famines, can we say that a strong public distribution system coupled with a strong food security policy will dispel that threat altogether?

Famines are relatively easy to prevent, except in war situations (most recent famines were associated with armed conflicts). In India, a strong public distribution system would be enough to avoid famines, as you point out. So would an effective system of relief works. But preventing famines is not enough—chronic hunger also has to be eliminated, and that is much harder. Only

one or two countries in the world have a higher proportion of underweight children than India, according to the latest Human Development Report. In a functioning democracy, this situation would be recognised as a national emergency, with dramatic effects on policy priorities. Funds and energies would be mobilised to ensure that every child is healthy and well-nourished. This is not rocket science: it requires simple interventions like antenatal checkups, breastfeeding support, timely vaccination, growth monitoring, supplementary nutrition, sanitation arrangements, and so on. Countries like China and Sri Lanka, that were much poorer at the time, have done that decades ago, and so has the state of Kerala in India. So it's not that we don't know what to do, but ensuring that these issues receive adequate attention in this elitist and increasingly business-driven political system is another matter.

5. You speak of hunger and public action. We have read your writings and your collaborative work with Amartya Sen. Do you think food riots are a form of public action?

I don't see any reason to exclude food riots from the ambit of public action. The fact that they may be illegal does not make them illegitimate. Surely the right to life can, in some circumstances at least, override the right to property.

6. You are a member of the National Advisory Council (NAC). Your work, meaning both individual and collective work of the Council, may have had an impact on government policies, but do you think the work of the Council has broadened the sense of rights? We are asking this because there is an opinion that government policies in the process of granting rights often 'governmentalises' rights.

I don't think that the NAC's work is so far-reaching as to 'broaden the sense of rights'. It did succeed, in some measure, in expanding the scope of some important economic and social rights in India, particularly the right to information and the right to work. But these were sporadic advances, going much against a general tendency of restriction and suppression of people's rights.

As for the 'governmentalisation' of rights, I think that if we are talking about legal rights then this has to involve the agency of the government in one way or another. But it's not a matter of

government agency alone. Indeed, if the realisation of economic and social rights were left to the government, they would not get very far. It also involves public action, including, at times, public action in opposition to the government. Indeed, quite often the government undermines the very rights it has legislated, as we are seeing today in the context of minimum wages for NREGA workers. So I think that popular mobilisation still has a very important role—the NAC is certainly no substitute for that.

7. How do you combine your three roles—as an economist, as a public advocate of food rights and as a member of a high profile committee meant to advise the government?

I would not put these three roles on the same footing. In the third, I find myself a reluctant actor because of all the dilemmas and frustrations involved in engaging with state institutions.

For the rest, I think that these roles, in principle, complement each other relatively well, at least for someone who has always been interested in research from the point of view of public action. They can also be seen as different forms of learning, again complementing each other and helping to avoid the respective blinkers that often develop in these different pursuits. But there are also tensions at times. For instance, public action involves being part of collective processes and endorsing collective positions that may not exactly correspond to one's own views. This can lead to difficult situations, for instance when one has to defend these positions in public. That would be a dilemma for anyone, but perhaps particularly so for a social scientist who is used to the freedom of expressing his or her individual views. However, in my experience these tensions are relatively minor compared with the rich learning that comes from being involved in different fields of research and action.

POSTSCRIPT

Rights after Globalisation

Ranabir Samaddar

Politics in the Wake of Global Changes

We are now in a time of hard choices. Globalisation has made the emergence of new global constellations of territory and authority possible, implying obligatory searches by these solidarities for new friends and new enemies. The state of the state is also in question now. The new Right says in a neo-Nazi vein that liberalism by itself cannot save the state, it must couple considerations of security with liberal principles of state functioning. And once again, the new Left says that the fact that this is a time of hard choices means that liberalism has failed, and politics needs new principles to spring back to life to combat the new constellation/s of territory, authority and power. Constitution, legality, juridical principles and arguments over the threshold of tolerance of illegalities and semi-legalities—all are under review in this situation. The Right is concerned over the expansion of the area of popular claim making, and views it as a sign of the weakness of the state; the conventional Left does not know how to handle the situation. Naturally, representation and governmental power, these two, have become the hottest property towards the resolution of claims.

The present and the future of democracy are being reshaped in this milieu. The re-engagement with democratic theory and practices takes place in a conjuncture when societies and cultures are also being reshaped in a manner by the latest phase of capitalism. Places are changing; time is being recompressed in different manners. The extent of the crisis can be gauged from the fact that besides some human groups being allowed to die

en masse after the global system has ensured that they have no choice left (AIDS and the politics of drugs), the trinity of structural reforms, invasion and concerted coercion are now systematically making countries permanently subservient to a great power or the global system. Race, public health and security—these are the three principal areas where the political crisis as a consequence of globalisation manifests itself. Therefore, we have everywhere the idea that law must fill in the void, strengthen the state and not allow it to 'abandon itself to society'. This perspective helps us understand how the politics of rights is responding to the current moment of globalisation. Yet this is not all. The Indian experience of the rights movement raises a series of specific questions originating from the encounter between a post-colonial polity and globalisation.

In an earlier essay titled 'Rights and Flags' (2007), I had briefly taken stock of the 'rights revolution' in the country under the impact of independence and the subsequent decades. It is time now to concentrate on the specific changes of today. Clearly, certain things stand out as specifics of today's situation. I shall put the characteristics of the changed scenario in three sections: scenario A, the 'pure' economic scenario; scenario B, the political economy scenario and scenario C, the present 'economy' of politics. Let us briefly see the changes in scenario A:

- Foreign direct investment is increasing at a phenomenal rate; with that, limits on foreign investment are being withdrawn, including in crucial sectors like banking, insurance, petroleum, power, etc.
- Big Indian businesses are growing and diversifying into newer areas.
- The strategic companies in the public sector are also doing well.
- The corporate sector is growing phenomenally, with the overall economy growing at 8–9 per cent rate per year; yet this growth is accompanied by inflation, or we can say that part of the growth is inflation-induced; thus, high prices are robbing a huge chunk of population of living means or increasingly being deprived of the latter.
- With diversification of foreign trade, increasing foreign investment, external investment of Indian big businesses in

many non-traditional sectors and World Bank–ADB–IMF–Japan–UK linkages for almost all infrastructure development activities, India is globally linked as never before.

- At the same time, agriculture is moving slowly; some say it is in a crisis.
- Similarly, labour force is increasing in number, if at all, very slowly, with the unorganised sector's condition remaining at a depressed level.
- Farmers' deaths/suicides epitomise the permanently depressed conditions of certain areas of the country and sections of the population.
- Poverty reduction has not shown any connectivity with global investments in the country.
- A huge army of surplus labour composed mainly of rural and urban destitute—part working, part moving, part starving—is the counterpart of the much more talked and visible middle class; also, in an incalculable way, huge numbers of people are being deprived of the only asset they have, namely land, for corporate and infrastructure development, and are joining this destitute army of labour.
- Private investment in the social sector is increasing, bound by the same global market and investment logic, while public investment as ratio is decreasing.

The first five features are clearly the result of development induced by globalisation, and it does not matter if the latter five features are either the consequences of the first five (in sense of linkages and public policies on taxation, budget, development, investment, spending, etc.) or have nothing to do either positively or negatively with the first five. The fact is that these two sets co-exist under global conditions, and there is no indication that the first five can cope with the second five features. Let us now see scenario B, i.e., political economy:

- India has now a corporate sector of economic, political and social life; its presence is felt, and overwhelming; we can say that this sector represents the big bourgeois–international monopoly linkages underwritten by the political elite and the top security and intelligence brass of the country.

- The corporate sector is ever more connected with public relations, media, glitz and the economy of conspicuous consumption.
- The re-industrialisation to the extent it is happening in India comes after (in some cases accompanies) large-scale de-industrialisation, as for instance, in three major industrial areas of the country—Maharashtra (Mumbai and other cities/the textile sector), Gujarat (Ahmedabad and few other centres/textile sector) and West Bengal (Kolkata, Howrah, other nearby districts and north Bengal/jute, cotton, small engineering, heavy engineering and tea), leading to large-scale unemployment, starvation deaths, suicides and flesh trading.
- More and more labour is in the unorganised sector, and de-unionised; and the agricultural labouring class is increasing, but often without work; inflation without concurrent growth in employment is pushing more people into this section of population.
- White-collar workers are increasing in both numbers and ratio.
- Connectivity is the main asset.
- Small and marginal peasants/farmers are at the receiving end of many things—uncertain markets, high cost of inputs, little of land reforms, little industrialisation in the interior and less and less work in the villages.
- Cities are the present and future with two cities in one—the city of millions of homeless and often workless, and the city of the urban rich, the technocrats, the service sector bosses and the middle class.
- Expenditure on issues of defence, security, science establishment, intelligence, crowd control, suppression of unrest and rebellions gets support across boards and opinions.
- Finally, substantial sections of dalits, indigenous population, minorities and women form the core of India's working population as well the most impoverished section of this population.

Politically, then what do all these mean? Can we say that along with the deep economic impact of globalisation, there is a similar political landscape marked by this particular time? Here is scenario C:

- The ascendancy of the executive is overwhelming. On one hand the features of the situation are: detailed governmental management of poverty, capital formation, urban growth, development of infrastructure, social justice, communal relations and the detailed and the gigantic process of electoral democracy (three times vote, parliament, bureaucracy, etc.) and on the other hand the situation is marked with increasing emphasis on security, with all that it entails, namely, more curbs on civil rights and livelihood options of the poor.
- Politically, there is a strong consensus on 'globalisation' across the entire parliamentary spectrum of Right to the Left, centre to the states.
- At the same time, the opposition to this strong organised consensus in official politics about globalisation—brought about by the governmental management of economic policies—is also nationwide, scattered and unorganised at times, emerging often in the form of fragmented, spontaneous and unconventional demands, movements, collectives, initiatives and coalitions.
- These two faces of current politics are not situated as mutual exclusives; often soldiers and commanders of one army deflect to another; there are several links between the proponents and opponents.
- Insurgency is a widespread phenomenon; it seems that insurgents will never win state power, but at the same time insurgency will never be crushed out of existence; insurgency represents the extreme other of the situation of conformism, constitutionalism, reckless bourgeois growth and abysmal poverty.
- The Indian sovereign is no individual or a single institution; but this sovereign represented by the Indian state holding exceptional powers to decide on matters of emergency (occasioned by rebellions, insurgencies, unrest, civil strife, etc.) has managed to forge a strong conservative republican image of power, which Hannah Arendt would have loved to see coming into being.
- This strong, conservative, republican power has as its core an upper-caste Hindu ethic—combining traditional bio-political techniques of maintaining distance and purity with

modern bio-political techniques for population management aiming at curbing desires of the dangerous kind.

- The battle for dignity has entered its second phase. It means that the Dalit movement now grapples with deeper issues of justice (dignity as justice); also, they are grappling with issues of power involved in attaining dignity and justice. On the other hand, the movements of the indigenous people for rights of land, forest, minimum wage and other means of livelihood are at a low ebb having lost support of the national middle class, and the majority of the Muslims still search for political alternatives to attain dignity and survival means.
- The practical evolution of the fundamental rights as guaranteed by the Indian Constitution points out the transformation of certain constitutionally–legally recognised rights to survival rights;
- It means that amidst all these, the area of claim making has widened incomparably; the link between rights and justice is now more clear than ever; popular claims over issues and resources hitherto thought to be out of people's bounds are being made—and if anything has a clear causal relation with globalisation and sectional affluence, then it is the widening area of claim making taking legal, semi-legal and illegal forms.
- The result—on one side law seems to be the new terrain where the next round of battle for freedom and justice will be fought, possibly the governments also want it; on the other hand and precisely because of the official stress on legitimacy, there is demand that sovereignty be shared among autonomous units. The centrality of law faces its own pluralism. It faces popular politics, the latter emerging as a form to gain autonomy.

Obviously I have missed out on many features of the current situation—as we can conceive them in the form of these three groupings. We can conceive of more groups, we can conceive of more features in a group and we can certainly think of several connections between not only these three groups but individual features also, raising the possibility of the existence of new features. This taxonomical exercise can be taken as a purely heuristic one. Yet one thing is clear. Development in the form of fast economic growth

forms the core of today's nationalist imagination; and achieving this growth in the political framework of parliamentary democracy has caught the nationalist imagination as a challenge. Together they, by which I mean development and democracy, form the new political theology for India in this age of globalisation. Even though I am terming this as the new political theology, theologies are, to recall Schmitt, grounds for pushing politics in the background, precisely because theology is made possible through consensus, and therefore marginalises politics in the sense of contentions over nature of power, target of power, realities of inequalities, powerlessness, etc.—all of which become non-issues as crucial epistemic questions of public life.

Therefore, when we see the differential impact of globalisation not only in the economic sphere but in social and political spheres of the country also, we need to ask about the specifics of this impact on social diversity. For instance, *(a)* globalisation has not promoted dialogues; on the contrary, in recent years the rise of Hindu fundamentalism precisely in areas of so-called growth has been clear. It has led to neo-racist situations, where Muslims have been repeatedly subjected to numerous outbreaks of violence, the most horrible being the massacre in Gujarat in 2002, in which the state at all levels aided and abetted mass killings and rapes; *(b)* likewise, we need to inquire into the current juridical discourse on the country's Constitution which we were told earlier provides an admirable foundation for a society based on mutual respect, pluralism and the protection of basic rights for all; *(c)* similarly, how far can democratic politics in the form of continuous legitimisation of collective forms of claim making accommodate competitive pressures unleashed by economic liberalisation? To put in the conventional language, the issue is: Can Indian democracy, under conditions of globalisation, alleviate poverty and deliver greater equality at a juncture when market forces are increasingly dominating the allocation of resources? *(d)* or, we can ask, what is now the fate of 'civil society' groups, which had flourished in the 1970s and 1980s, particularly in the wake of 1989, and now find themselves increasingly under pressure of the neo-liberal policies espoused by various multilateral agencies to become involved in market relations more and more? What are the achievements of civil society groups in India? Are they capable of taking on activities that are normally the responsibility of the state? Similarly, what

is the impending fate of the political parties as organs of claim making and mobilisation? *(e)* finally, is the global dictation of country's development making a significantly adverse impact on the enduring capacity of its democratic institutions?

In sum, we are asking for the lessons of the 'democratic developmental' experience. Does India's experience herald an alternative model of development? What lessons can one learn from the Indian experience?

The Regime of Developmental Democracy

To answer these questions, at least some of these, we need to see where the country stands in terms of the evolution of the technologies of rule. After all, democracy was operating here not in a void, but in the framework of a specific kind of rule marked by specific technologies of governance. In my earlier work, *The Materiality of Politics*, I showed (particularly in the first volume, *Technologies of Rule*) how *(a)* a specific variety of constitutionalism to which I gave the name, 'colonial constitutionalism' that specialises in reproducing colonial relations of dominance, suppression of dialogues and promotion of legal absolutism in the name of establishment of rule of law, *(b)* use of terror, *(c)* continuous reorganisation of territory and the people, *(d)* reinvention of its security architecture and apparatuses and finally *(e)* the combination of all these in a paternalistic mode of power that makes care and protection in lieu of a rights framework the sign of its rule—these five features form the specific structure of governance in the framework of which Indian democracy operates (Samaddar 2007b).

Let us continue this discussion and see what it entails in terms of the interplay of democracy and development. One of the landmarks of both development and democracy, better developmental democracy, is the care by the government, in this case the Indian government, for human life, social (life) security arrangements, increasing governmental guidelines for every aspect of life, an appropriate population policy (in terms of number, composition, spread, sociocultural characteristics, etc.)—in short, the power of the developmental mode and discourse over democracy, also the

democratic stake in the paradigm of development. We can clearly see from the Indian instance how developmental democracy produces a specific form of bio-power and governmentality, which in turn influences the nature of democracy itself. The image of democracy that I provide in the accompanying essay on rights is one of contentions, emergence of forms of collective claim making, which determine the relations of these collectives with their rulers. Development provokes in an increasing degree collective claim making as the core of popular politics; yet, as I shall show here, the particular forms of claim making are influenced and conditioned by the way people are ruled and the particular way sovereign power and governmental power combine to rule people. We must therefore understand today's specifics of ruling power.

As we know, Michel Foucault almost without preparing his readers for the turn in his thinking had suddenly suggested an idea nearly 40 years ago in *The Will to Know* (*History of Sexuality*, volume 1) that subsequently opened up for us new lines of inquiry into conditions of modern democracies, and the relation of democracies to strategies of rule. He had titled the relevant chapter as 'Right of Death and Power over Life'. In six dense pages he had argued that while one of the privileges of sovereign power had been the right to decide life and death, a right that the sovereign needed when he felt himself threatened from enemies without and within, today wars bloodier than ever are waged not in the name of the sovereign, but in the name of the existence of everyone:

> [E]ntire populations are mobilized for the purpose of the wholesale slaughter in the name of life necessity…. It is as managers of life and survival, of bodies and the race, that so many regimes have been able to wage so many wars, causing so many men to be killed. (Foucault 1976 [1998])

These wars are meant to control, reinforce, optimise and exercise power at the level of life. Later, in course of several essays he had developed the idea of power being exercised at the level of life not only through war, in fact increasingly less through wars and violence, but through various life controlling and monitoring means and techniques. The aim of these has been to integrate life with an efficient system of control over society. One of the principal means of such an aim has been to influence the mechanisms of life, such as birth, mortality, morbidity, public health, education,

food pattern, etc., by investing more and more governmental technologies in conditions of life. Life thus emerged as 'a political object' and claims emerged over 'right' to life, to one's body, to health and in general to the satisfaction of one's needs. If this gave rise to 'bio-power', within this field of bio-power, bio-politics emerged as specific strategies and contentions over the place of body in politics, of collective human life in the production of forms of knowledge, regimes of authority and practices of physical intervention to make life desirable, legitimate and efficacious. Bio-politics, as Foucault showed in *Discipline and Punish*, at the end of day meant the physicality of politics. Nearly 40 years later, faced with this conundrum of development and democracy, and in trying to find out the effects of the combination of the two, we need to go back to some of these insights. Only then we shall be able to see for ourselves what these life controlling aids emerging out of the combination of development and democracy have produced in terms of new forms of power and new forms of subjugation.

We may ask: the result? The contested field of development and democracy is more crucial and enigmatic than ever. There are several competing truth discourses on both development and democracy, and several locations giving birth to an array of authorities considered competent to speak that truth. All claims to developmental democracy speak for life, all speak of collective existence in the name of life, health and well-being; they are as if different bio-social collectives, characterised and known in terms of categories of identity, such as race, ethnicity or gender. Therefore, life must be known in terms of certain collective identities, which the individuals can bring to work on their own selves. From the way truth discourses on life have emerged out of the regime of developmental democracy, we can also say that claims in relation to certain forms of authority have to refer repeatedly to practices of the self, in the name of the individual or collective life (in the next section I propose to work on this abstract formulation with a detailed instance). Thus, Gandhi remains the eternal moderniser of the nation; Tagore is the eternal ethical–aesthetic voice in a regime of contentious development and the final collective life that must be replenished through developmental democracy is that of the nation. In short, developmental democracy attempts to reorient all kinds of politics to bio-politics that represents a form

of power meant to regulate social life from its collective interior. In a way, thus, while development produces for democracy more choices at one level, the fundamental structure of society becomes one of control (as distinct from one of discipline)—control of life mechanisms, which becomes now possible precisely through the existence of development and democracy.

Thus, with development, bio-power, as a mode of power is strengthened, because developmental issues affect the society at the level of life; and democracy is the framework that forces development to reinforce bio-political issues. Even though Foucault did not put the issue exactly in this way, when he discussed the related questions at length in *Society Must Be Defended*, the historical phenomenon, which he was seeking to grasp was precisely this. Thus, the issues he raised there, say of birth rate and the intervening policies; issues of illness routinely prevalent in a particular population group and the resultant question of public hygiene, medical care, issues of old age, insurance mechanisms and finally of race (the last frontier to be overcome by democracy) as the final bio-political issue impacting geopolitics, culture, environmental politics, etc., are all connected to the modern story of development, in this case certainly India's development. Development and democracy strengthen police functions, regulations, welfare, various administrative functions and through them the state. But this is not all. If we take the cue from Foucault who as if in a long jump suggests in the same book, and something he never pursued later, then the final moment of bio-politics arrives in form of racism, which is inscribed in the body of the state, whose raison d'être increasingly becomes governing the people, that is to say a state whose fortune is now inextricably linked with democracy. Race becomes one of the basic mechanisms of power of a regime, which is now obsessed with life-level issues. Development in this way influences ethno-cultural choices in the form of providing fictive biological choices. Thus, riots, segregation, construction of different borders and boundaries, new rules of exclusion and inclusion, operation of bloodlines in politics, new forms of affective ties and kinship, not only accompany development and mark democracy, but they also predicate the modes of subjectification and the possibilities of freedom. Freedom, to place the issue brutally, depends now on choices made available by various rules and regulations all of which can be sourced back to the state. The issue

can be clearly understood through two prominent developments in the politico-social sphere in the last 20 years.

First is the co-existence of neo-racism and development in today's India. As noted earlier, we have now truly a corporate sector in India whose members are tied to each other through hundred and one forms of monetary, matrimonial, commercial, organisational, bureaucratic, political and other alliances. There is widespread consensus in the political class—tied to the corporate sector in visible and invisible forms—on the new nationalism that the state in India has forged over the years, which is neo-Hindu, anti-Dalit, anti-minority, anti-immigrant, anti-autonomy and anti–self-determination, and the politico–social–cultural boundaries of this developmental new nationalism, at the same time preserving parliamentary democracy, bent upon developing the country, that is 'catching the world'. The numerous boundaries of exclusion, drawn in varying ways—primarily in the country's 'developed areas'—are destined to harden, as they are hardening now each and every moment, indeed as I write these lines, and what we witness in India today is the co-existence of nationalism and neo-racism, as a consequence of the process whose features I have just described briefly. Therefore, both urban and rural settlements become more and more monolithic in composition, riots reorganise the urban space almost everywhere in the major towns, and battles for homelands hot up, as in the entire Northeast.[1] I have analysed part of this process in the last chapter of the first volume of *The Materiality of Politics*.[2] In this combined regime of neo-nation and neo-racism, the figure of the terrorist stands as the object of hate, the terrorist who appears as an immigrant. The immigrant, coming from outside to India from Bangladesh or the Northeast, or from a destitute part of India to its great metropolises, is a danger to public health also.[3] Crime detection techniques and public health statistics are reinforcing the racist stereotypes. Independent India in the course of last 30 years has massively biologised, impacting the existing patterns of domination. The Indian can be now racially described. Soft and effeminate from the outside, but strong within, supporting a strong but benevolent and patriarchal state (the *mai-baap sarkar*), the tolerant Hindu but merciless on intolerant fundamentalists of other faiths, the great adviser to all woes on earth, and conducting a policy of enlightened self-interest—this is now the ideal Indian. This is not classical racism, but a new variety,

product of global modernity and development, which is produced from bio-politics—one closely linked to developmental democracy, its theology and practices.

Second, is the sudden spurt in the nation's capacity in the wake of development to reform and reinvent its strategies. Reproduction of dominant politics takes place in this way. The Indian state as a result is greatly experimenting, reminding us of Bismarck's regime and many other regimes of authoritarian modernisation—with the difference of course that the democratic framework is characteristic of Indian politics, though the Indian framework is buttressed with regular authoritarian interventions (in Punjab, the Northeast, Kashmir, Chhattisgarh, Andhra Pradesh, West Bengal and elsewhere—several times and occasions). We must study therefore the dynamics of reproduction and the composition of the reproduced mode of domination. Clearly, the way power is exercised today is not what it was in 1947 or 1957, or 1967, or even 1977. There is now to a great degree micromanipulation of the details of our democratic life. As deep technologies take root, the culture of dialogue weakens and recedes, government strengthens and suppression of dissent increases. Thus, it is dangerous to protest the current developmental wisdom, namely that peasantry needs to be expropriated; small landed property and small agriculture must be sacrificed at the altar of corporate business, technologies must abolish workers, their stations and stages of labour; certain varieties of food items must vanish and certain others must now be introduced; certain garments have to go, certain others have to come, certain seeds or cultural items must vanish or wither and the genetically modified seeds industry or the culture industry must now occupy the place and finally the acceptance of Victorian famine-like conditions must reappear as the companion to globalisation. To map the choices now being made by the nation to attain development means to map the bio-political possibilities or deficits of each choice induced by international capital, marketing strategies pursued by their hack writers, campaigners and intellectuals, who are the carriers of intellectual property rights, as well as new links between life choices and extant forms of knowledge production and geo-politics, with the consequent increase in already massive inequalities in even basic healthcare. With globalisation-induced development, we are thus subjected to a regime based on a specific form of bio-power and find ourselves as actors in pre-ordained

bio-politics that closes options of life choices save the ones made from above. Yet, and perhaps not strangely, the pressing demands are also being made at the level of life (quality of life, mode of living, conditions of life reproduction, security of life, new experiments with collective life dynamics, etc.), dragging in issues that conventionally were thought to be outside of life anxiety issues (say, dignity, education, information). These are challenges that pose serious tasks for critical thought today; they dictate that we enlarge our analytical toolkit with regard to society and politics under democratic conditions, overwhelming governmental regulations, developmental theology—all of which have combined to produce a particular form of bio-power, which on the one hand orients life-concerning choices to the available global ones only, and on the other hand produces resistance probably for the first time at the absolute level of banal life, that is to say life appearing as the first ray of the sun to the collective mind. Development, democracy, bio-power and collective resistance—these form the quartet of our time.

The Bio-political Subject of Rights and Resilience

I want to chronicle a story here—that of the Mumbai bar dancers—which is known to the newspaper readers of Mumbai, but probably not known so much to serious readers of social science books. The story began in 2005 and continued for some years thereafter. In a sense, the bar dancers' story still continues. It is a story of subaltern globalisation; the renewed game of the body; the inherent contests in which law plays its role and the ambiguous roles of the state, democracy and the discourse of development.

The government of Maharashtra, a state in India, banned dance bars from 15 August 2005. The proposal to ban dance bars triggered widespread opposition, and not only from the few lakhs who stood to lose their jobs. Many prominent public figures, including lawyers and activists, took up cudgels for the bargirl. They insisted that work was a fundamental right of those facing the axe. But the deputy chief minister and home minister of Maharashtra, the person behind the ban decision, argued that dance bars were dens of crime and 'anti-national activities' and had to be controlled.[4] Following the ban, protests erupted from various sides (social workers, bar

dancers, rights activists, lawyers, some political groups, owners of bars where dances were performed and others), while voices in support of the ban from conservative political sections, vast sections of middle classes, villagers of substance and property, some media groups, etc., were equally strident. Newspapers reported that the crime rate increased in the city after the ban took place, at least the police was reported to be apprehensive that many dance bar waiters were turning to crime, since their source of livelihood had been affected by the bar ban. Crime syndicates reaped the harvest as gang lords on visiting a dance bar would select the potential recruits, some of whom turn to loot and burgle, and would be later promoted as recruiting agents for more dance bar waiters. One report said:

> Cops admit the spike in Bombay's crime graph is linked to the thousands of waiters and stewards that have lost their jobs following the dance bar ban. Till last July 30, 189 robberies were registered. In the same period this year, 218 robberies have been registered—a jump of 20 per cent. While there were 21 cases of dacoities last year till July end, in the same period this year, 29 cases have been registered. 'We had arrested one Rajesh Gowda a few days ago who was a waiter earlier but became a robber subsequently', Police Inspector from Crime Branch said.[5]

The controversy continued nonetheless. A report previously cited also mentioned that the high court squashed an 'obscenity case' against a Nagpur dance bar. It ruled that the obscenity at the dance bar 'didn't cause any annoyance to anyone'. Another setback to the proposal came with the National Human Rights Commission (NHRC) seeking comments of the Maharashtra government on its reported decision, and star MPs Sunil Dutt (now deceased) and Govinda vociferously protesting against the proposed clampdown. The report asked, 'What is the truth behind the issue? Who are the affected people? Where do "bar girls" come from? What is the economics of dance bars? What are the existing laws?' And then it went on by adding:

> Most bar owners offer security to the girls and provide safe transport to return home after work, which ends at 1 or 2 am. Many bar dancers are married and have children. The clients come from all strata of society. Of late, there have been more college students,

> young corporate adventurers and even schoolboys who bribe and get in whenever they can…. As Madhur Bhandarkar's award-winning film *Chandni Bar* showed, bar dancers are often brought to the city by relatives who exploit their youth to make money. Men sexually abuse some. The condition of such girls is often pitiable. Many are the sole breadwinners of their families if the husbands are alcoholics or absconders. There are also girls who voluntarily work in dance bars for money. It is possible that bars could be meetings places of crime lords, corrupt officials and exploiters of women.… Those speaking for this industry say that there are 75,000 dance bar girls, whose jobs are under threat. This will cause a major employment problem for this large section of people whose families depend on the incomes of the girls for their livelihood. The government, however, says that the number is highly exaggerated and actually there are only 11,000 women employed in bars.… Even today, on the Foras Road, Grant Road and Opera House there are homes of dancing and singing girls which are crowded with men from very respectable families who are called Sheths in Bambaiya language. Many Bollywood films showcase this lifestyle where landlords, goons, criminals and dacoits have dancing girls perform before them. The states of Bihar, Uttar Pradesh and Madhya Pradesh too are known for this tradition….

And then it concluded by quoting government officials who reportedly said:

> [T]he diktat is easier to write than implement. The law, even if passed, will be extremely difficult to implement. 'There is confusion as to which bars will have to be closed if discos, pubs and other places can operate. How will the segregation take place? There is immense opposition to the law and both bar owners, dancers and their supporters will fight the battle. The law has to be drafted carefully'.[6]

In any case, the Bombay High Court on Wednesday set aside the law banning dance bars in Mumbai on 13 April 2006. The court gave eight weeks' time, during which the cancelled licences of the dance bars could be reissued. It also gave the state government time to appeal against the order if it wished to. Justice F.I. Rebello and Justice R.S. Dalvi heard petitions filed by the Association of Hotels and Restaurants (AHAR), Bhartiya Bar Girls Union and NGOs like Forum Against Oppression of Women and Majlis. The legal distinction between 'prohibited establishments' and 'exempted establishments' drew criticism from the Bench. According to the Act, the government prohibited performance of any kind in an

'eating-house, permit room or beer bar'. However, provisions were made to exempt performances in 'theatres, registered sports clubs, three starred hotels and above' or any other establishment which the state government deemed to be significant for tourism promotion. The Bench noted:

> Considering that the object of the legislation is to prevent dances that are obscene and hence derogatory to women's dignity, and to prevent exploitation of women, we find there is no nexus between the classification and the object of the Act…. If women, other than as dancers, can work in prohibited establishments and that does not amount to exploitation, we do not see how it becomes exploitation when women dance to earn their livelihood.

Referring to Article 19 (6) of the Constitution, the high court said the amendment to the old Bombay Act was a restriction that 'prevents bar owners from organising the same or similar dances as in the exempted establishments and bar dancers from performing dances other than those which are restricted'. The Bench held that such a restriction was 'unreasonable, not in public interest and consequently void'. Referring to studies by the Tata Institute of Social Sciences and Research, and the Centre for Women's Studies at SNDT University, Justice Dalvi said only a small percentage of bar dancers were minors, and he directed the two organisations to hold inquiries and said, 'In case of illegal employment of a minor in a dance bar, the matter must be reported to a police station for action against the bar owner and to rescue and rehabilitate those children'.[7] Presently the case lies with the Supreme Court for a final verdict.

Meanwhile what did the bar dancers feel? Even in alternative jobs as waitresses? Here is a contemporary report:

> The strobe lights have been turned off. But that was a good two years ago. Now, Nikita and Kavita seem comfortable in the dim lights as they make their way around tables at a rundown bar in Ghatkopar, a Bombay suburb. The bulb sways and you catch the loud make-up as Nikita, a waitress at the bar, pours out another peg for a drunk, leering customer.
>
> 'I don't like this job, but we have to earn our living', says the 16-year-old. It is the job Nikita settled for after the Maharashtra government banned dance bars two years ago. The ban, thought to be tactless and insensitive, left an estimated 75,000 bar girls

jobless. Some like Nikita and her aunt, 25-year-old Kavita, found jobs as waitresses and many others turned to prostitution. Activist Varsha Kale, who has been fighting for lifting the ban, says 26 bar dancers killed themselves after the ban. The number is misleading, she says, because some of the suicides weren't recorded. The ban brought their world crashing down.… '(Earlier) Money kept coming in and we were well off', says Kavita. The girls came home to good food and the younger children at home went to schools. But after the ban, everything changed—no films, no good food; just awful, miserable faces at home. 'We used to get lavish tips from customers at the dance bars. But now, we hardly get tips', says Nikita.

Nikita's mother, Pinky Madiwal, a 32-year-old former bar dancer, fears for her daughter's safety. 'Being a waitress is risky. Our customers at dance bars never misbehaved with us. We usually dance on a special platform or raised dais, at a good distance from the customers'.

The catcalls and wolf whistles sometimes brought the house down, but the girls were safe. But it's difficult being a waitress, says Kavita. 'We have to be wary of unruly customers. It can be tough, waiting at a table and putting up with all the verbal and physical advances'.

At 32, Pinky is already a grandmother. Her eldest daughter Neelu, 19, also a bar dancer, recently gave birth to a daughter. Pinky's youngest daughter Neha, 11, is too young to work. 'She used to go to school when we were dancing. But after the ban, we pulled her out of school', says Pinky.

'Those days were different. We earned anything between Rs 500 and Rs 2,000 a day. In dance bars, for the kind of tips we got, the maximum we had to do was to disclose our cell phone number. But as waitresses, for Rs 100 tip, we have to put up with touchy-feely people. I don't like it', says Pinky.

Nikita chips in. 'Customers want to get naughty by giving a measly tip of Rs 10.' The lure of quick money has pushed some of the girls into the flesh trade. 'At dance bars, it was entirely up to us if we wanted to go out with a customer. Now girls are forced into it as they don't have an alternative', says Pinky.

Bar dancers have few alternatives. One of the reasons is that most of them are illiterate and poor. With huge families back home waiting for the girls to bring money, they are desperate enough to take on any job that comes their way.

'It's hard to shake off the stigma. People don't give us jobs', says Pinky. So distraught was Pinky that she decided to write a book on the pain and suffering she went through. The 400-page book

written in Hindi talks about Pinky's life as a bargirl and the bleak days after the ban. Pinky recalls that the ban was so sudden that they thought it would be a temporary phase and that it wouldn't last more than a few days. For now, the case is still pending before the Supreme Court after the Bombay High Court lifted the ban last year.

Yet, it was not pure lament. Some bar dancers decided to fight elections to make their case strong. The British newspaper *The Independent* reported:

> The once famous dance-bar girls of Bombay are planning to stage a comeback—by standing as candidates in local elections next month. Their platform is simple: to overturn the citywide ban on their work and reopen the clubs where they used to perform.…
>
> It is believed to have put some 75,000 dancers out of work, and now the girls are intent on fighting back. They are to meet tomorrow to decide whether to form their own political party or stand as independent candidates in municipal elections. There was major controversy when the state government decided to close the bars. It accused them of 'corrupting the youth' and being barely disguised brothels, and the bar girls of being prostitutes—accusations the dancers and bar owners deny. They say they were performers and there was no sex involved.
>
> The truth lay in between. Certainly to visit the dance bars you would not think they were brothels. The audience may have been made up entirely of men, but the dancers were fully dressed in long shimmering lengh skirts, and beyond the odd exposed midriff there was no flesh on view. The dancers were rarely prostitutes. Some were purely dancers, but their dubious reputation came from many who worked as a form of courtesan. They would encourage relationships with regular visitors and agree to meet them outside. The relationship was financial: they would milk the men for expensive gifts—a mobile telephone, a television, even a better flat. But they would rarely sleep with a man until they had had a relationship for several months.[8]

A BBC report brought out more clearly the dynamics of the politics of the body entering now official politics. The report said:

> Jobless bar dancers in the Indian city of Mumbai (Bombay) say they will fight forthcoming municipal elections to gain a foothold in government.…

'We had no voice anywhere so we felt that we needed to have some sort of representation in the state's municipal corporation and the legislative assembly.…

'We plan to fight these elections with all our might and try to get in as many candidates as possible'.…

The president of the Indian Bar Dancers' Association, Varsha Kale, says many bar dancers have expressed a desire to enter politics and fight for themselves as well as others.

She says this was a positive step, but warned that the dancers may not taste victory in this round.

'There is very little time (before elections) and many of the former bar girls have been jobless for a very long time. So the kind of time and power required to win elections is not there', she says.

Ms Kale, however, says given more time the dancers will certainly win positions of power.[9]

If this is how the internal dynamics of the politics moved on, were there other significant dimensions of politics to strike attention? Here the bar dancers' story becomes linked with more fundamental processes—of subaltern globalisation, law, trafficking, protests by human rights activists, the incorporation of the body in the banal politics of democracy and the issue of political subjectivity. Let me refer to a fascinating address by the feminist jurist Flavia Agnes on these aspects. She wrote:

An important feature of a rally organized by bar owners against police raids in Bombay on 20 August 2004 was the emergence of the bar dancer. A large number of girls with their faces covered were at the forefront of the rally holding up placards with blown up pictures of semi clad Bollywood stars. It was a statement questioning the hypocritical morality of the state and civil society. This image became the motif for the media for the following year when the controversy around the bar dancer was raging…. During the discussion with the bar dancers, it emerged that while for the bar owners it was a question of business losses, for the bar girls it was an issue of human dignity and right to livelihood. When the bars are raided, it is the girls who are arrested, but the owners are let off. During the raids the police molest them, tear their clothes, and abuse them in filthy language. At times, the girls are retained in the police station for the whole night and subjected to further indignities. But in the litigation, their concerns were not (of course) reflected…. As far as the abuse of power by the police was concerned, we were clear. But what about the vulgar and obscene display of the female body for

> the pleasure of drunken male customers, which was promoted by the bar owners with the sole intention of jacking up their profits? It is here that there was a lack of clarity…. An NGO, Prerana, which works on anti-trafficking issues, had filed an intervening application, alleging … that bars are in fact brothels and that they are dens of prostitution where minors are trafficked. While the police had raided the bars on the ground of obscenity, the intervention added a new twist to the litigation because they submitted that regular police raids are essential for controlling trafficking and for rescuing minors. The fact that the police had not abided by the strict guidelines in anti-trafficking laws and had molested the women did not seem to matter to them…. Suddenly the dancer from the city's sleazy bars and shadowy existence had spilled over into the public domain. Her photographs were splashed across the tabloids and television screens. She had become the topic of conversation at street corners and market places; in ladies compartments of local trains and at dinner tables in middle class homes. Every one had an opinion and a strong one at that. In her favour or more likely, against her; saint or sinner … worker or whore … spinner of easy money and wrecker of homes or victim of patriarchal structures and market economy? The debate on sexual morality and debasement of metropolitan Bombay seemed to be revolving around her existence (or non-existence)….[10]

The ban and the contest brought out some uncomfortable questions, scarcely discussed in politics of civility. Can the state impose arbitrary and varying standards of vulgarity, indecency and obscenity for different sections of society or classes of people? If an 'item number' of a Hindi film can be screened in public theatres, then how can an imitation of the same be termed as 'vulgar'? Films, television serials, fashion shows and advertisements—all these industries use women's bodies for commercial gain. Then why the ban on bars, which in any case employs women as waitresses, who will mingle with the customers more than the dancers (confined to the dance floor). If the anti-trafficking laws had not succeeded in preventing trafficking, how could the ban on bar dancing prevent trafficking? 'The "morality" issue had won. The "livelihood" issue had lost … in this era of liberalization and globalisation,' Flavia Agnes noted in the same address. During the entire period of controversy, the world of the bar dancer lay beyond controversy, also beyond the gaze of the feminist activists campaigning their cause. The bar dancer carefully guarded her world. Only now and then would it spill over more as a defiant statement. So while the

world was exposed to one aspect of their lives, which had all the problems—of parenting, poverty, pain and police harassment—this was only a partial projection, an incomplete picture. The other part consisted of constant negotiation of their sexuality, the dizzy heights they scaled while they danced draped in gorgeous chiffons studded with sequences, oozing out female erotica and enticing their patrons to part with a generous tip.

But this was not all to it. Jurist Flavia pointed out another angle, more significant than the morality angle but connected to it, namely, the issue of women migrants who had flocked to the profession of bar dancing. In the midst of this increasing 'public' vilification of bar girls, on 26 August 2005, around 85 bar dancers working as waitresses were arrested. While the arrested bar owners, managers and male staff were released on bail the very next day, the women driven to penury could not pay the amount of Rs 15,000 and were languishing in prison cells. They formed yet another layer of bar dancers. They were recent migrants, and extremely poor, and hence still in custody as they lacked even the basic support structure in the city. They did not have any friend or relative in Mumbai, or any identification like a ration card or voter card. They were recent migrants. Most girls spoke Bengali; some admitted to being Bangladeshis while others denied. All of them stated that they hailed from Kolkata and most had Hindu names. In their profession, they had however taken on names of famous stars from Bollywood or television serials, thus completing the circle of invisibility of their lives. They claimed that they came to the city through some networks, and initially were brought to work as domestic maids but were later introduced to bars where they worked as waitresses or dancers. There was no coercion or force in getting the women to work at the bar. They all stated that while the work was marked by indignity and humiliation, they had no option than going back to the bars to dance, once the ban was lifted and they were released.

Here was then one face of subaltern globalisation, or the other face of development, the face represented by trafficking, an extremely complex issue. Here the issue was not one of an organised trafficking network connected to the bars, or of compulsion, other than the dancers' own economic compulsion. As Flavia reported, the women arrived at some sort of arrangement with the friends who had got them the bar work. Most paid the friends a daily

amount, generally Rs 100 each for food and lodgings. The women were not in any way controlled by the bar owners. They lived separately, got daily payments, travelled to and from their rooms.

Migrant workers were common among bar dancers. Police in the midst of the controversy cracked down in many places and labelled these as 'flushing out operations'. They arrested quite a few, mostly former bar dancers, impoverished, illiterate, mostly Muslim and predominantly Bengali speaking. Castigated as 'illegal immigrants', they would now languish in prison cells until they produced papers to prove their claim to Indian citizenship. A lowly placed person in society, the bar dancer, living on the edge of life, had challenged the state. The state machinery was wiser. The girls were not arrested under the newly amended Bombay Police Act but under the Foreigners' Act with no avenues open for bail or release. The only option ahead was now deportation. Media was not far behind in playing up issues of national security, possibility of terrorist links, unguarded borders, Islamic fundamentalism, etc. The story has not ended, and we can go on. But I think the material is enough to draw conclusions in the light of the previous discussion on the links between globalisation, democracy and the state.

Clearly, with the other face of globalisation appearing increasingly dark, the need is to critically examine the intersections of migration, trafficking, labour, exploitation, security, women's rights, sexuality and human rights, and thus any analysis of the complexity of the transnational female migrant must extend beyond the confining parameters of the current concepts of democracy. What does democracy do, we may ask in this context, with the migrant women with its own puritanical value-based policies based on gender-bias and other assumptions about the proper role of women? For men and women do not reach the same destinations. Men may reach the fair-play norm regulated labour market of the host countries, but women may reach the dark underside of the labour market, consisting of nursing, domestic work, bar dancing, prostitution and daily labour in the sweatshops. Democracy has no answer to this great divide—the divide between the labour market and its underside, between law and illegal existences, sexuality and values, citizens and aliens and regulated constitutional politics and the universal desire of the subject to claim autonomy through politics. Globalisation only accentuates these divides and the democratic deficit in coming to terms with what one can call the

'underside of globalisation' or as some prefers to term, 'subaltern globalisation'. Democratic law and policies have universally failed in coping with the dark underside. The combination of sexual conservatism and the construction of a woman as the symbol of national and cultural authenticity have proved deadly. Indian democracy, or by that token, all other democracies have no answer to the question of as to why the human participants of globalisation be treated any differently and differentially, when the flow of capital and goods encounters no borders. This is the epochal change (I referred to in the beginning) to which conventional democratic politics or theory has no satisfactory response than recourse to national or imperial logic.

Through this narrative I have tried to show different aspects of the regime of developmental democracy, namely the dynamics of consensus building, the claim-making forms and their boundaries, the underside of globalisation-induced development, the politics of the body as the core of modern mass politics, the role of women as the ultimate proletariat of this developmental process and finally the emergence of the resilient subject questioning the legitimacy of the regime of developmental democracy.

Notes

1. The governmental anxiety of this role of riots as reorganising space is evident in the Communal Violence Prevention Bill (2007), which admits the massive impact of riots in terms of humanitarian consequences and consequences in terms of the violation of the right to live and home.
2. *The Materiality of Politics*, Volume 1, Chapter 5, 'Stable Rule and Unstable Population', pp. 189–248.
3. I am indebted to my colleague Paula Banerjee who has campaigned at length on the connection between the 'travelling security threat' and the 'travelling public health threat' in form of AIDS, especially in the context of the Northeast.
4. 'The Maharashtra Government's move to ban dance bars has created a furore. At issue is the livelihood of five lakh people, including dancers, owners and bar hands, in this Rs 1500-crore unorganised industry, besides the dangers of moral policing'—A Report by Vimla Patil, *The Tribune*, 30 April 2005.
5. *Mumbai Mirror* cited in www.dancewithshadows.com/society/dance-bar-crime.asp. (accessed on 14 August 2007).
6. A Report by Vimla Patil, *The Tribune*, 30 April 2005.
7. 'High Court Quashes Ban on Dance Bars', *The Hindu*, 13 April 2006.

8. 'Bombay's Bar Girls Fight for Their Jobs on Political Stage', report by Justine Huggler, *The Independent*, 6 January 2007.
9. 'Indian Bar Dancers to Seek Office', A report by Monica Chadha, BBC News, Mumbai, http://news.bbc.co.uk/2/hi/south_asia/6233995.stm. (accessed on 14 August 2007).
10. Flavia Agnes, 'The Bar Dancer and the Trafficked Migrant—Globalisation and the Sub-altern Existence', Inaugural Lecture at the Fourth Annual Winter Course on Forced Migration, 1 December 2006, Kolkata (mimeo), for the abstract of the lecture, see the report of the Course online at www.mcrg.ac.in.

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