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ARTICLE

LE DROIT FONCIER ET LA PROPRIÉTÉ PRIVÉE COLLECTIVE EN AFRIQUE DE L'OUEST FRANCOPHONE ÉTUDE À PARTIR DE L'EXEMPLE DU MALI

Alhousseini Diabate

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1

INTRODUCTION

‘Que de crimes, de guerres, de meurtres, que de misères et d’horreurs

n’eût point épargnés au genre humain celui qui, arrachant les pieux ou comblant le fossé,

eût crié à ses semblables : Gardez-vous d’écouter cet imposteur ;

vous êtes perdus, si vous oubliez que les fruits sont à tous, et que la terre n’est à personne’.

J. J. Rousseau¹

Le droit foncier est ‘l’ensemble des règles applicables aux liens susceptibles de s’établir entre les personnes, physiques ou morales, publiques ou privées, et les terres, envisagées comme des sols² ou plus largement ‘l’ensemble des règles définissant les droits d’accès, d’exploitation et de contrôle des ressources naturelles (...). C’est donc un rapport entre les hommes et les groupes sociaux, à propos de la terre et des ressources qu’elle porte’.³ Quant à la notion de propriété privée collective, perçue sous l’angle du droit légué par le colonisateur français au Mali et en Afrique de l’Ouest francophone, elle apparaît à première vue comme un véritable oxymore dont on ne peut parvenir à une définition qu’au travers d’un rappel historique.

Au commencement était une trilogie : les divinités, le feu et la hache qui engendrèrent l’autorisation des

divinités créatrices de la terre, le droit de feu et le droit de hache. Pour occuper la terre sacrée, qui demeure d’esprits et de puissances surnaturelles, l’homme doit avant tout de formuler auprès des divinités créatrices de la terre une autorisation d’occupation qui se manifeste par des rites sacrificiels. C’est en échange de ces sacrifices que les divinités créatrices accorderont à l’homme ou aux familles l’autorisation de s’installer sur la terre. Cette autorisation confère aux familles des premiers occupants un droit de feu grâce auquel elles peuvent délimiter la parcelle qui leur est octroyée en la brûlant. Par suite, les premiers occupants procèdent au défrichage effectif des terres ainsi délimitées avec l’usage de la hache pour en faire un champ de culture, d’où le droit de hache. Ainsi, au premier droit, le droit de feu, vient s’ajouter un second droit, le droit de hache.⁴

A ces deux droits, viendront s’ajouter d’autres droits, car avec l’accord des premiers occupants et surtout de leur chef de famille ou de tribu, d’autres familles pouvaient venir s’installer et procéder à leur tour à un défrichage de la terre qui leur conférerait un droit de culture, se limitant à l’usufruit du sol, moyennant le plus souvent le paiement d’une redevance. D’où deux nouveaux droits, à savoir : le droit de culture et le droit de redevance. Enfin, suite aux guerres de conquête des terres par des chefs tribaux ou religieux, un dernier droit vint couronner l’architecture du système d’appropriation des terres : le droit du plus fort occupant.⁵

Comme on peut le constater, ces différents droits étaient essentiellement des droits collectifs puisque reconnus à une famille, à une tribu, à un village, ou à une communauté déterminée. Aussi avait-elle pour traits caractéristiques l’inaliénabilité et l’impossibilité de faire l’objet d’une transaction exogène.⁶

1 Jean-Jacques Rousseau, Discours sur l’origine et les fondements de l’inégalité parmi les hommes, Blaise Bachofen et Bruno Bernardi (éd), Paris, Flammarion, (2008) 109.

2 Alain Rochegude, ‘Tendances récentes du droit de la terre en République du Mali’ (1977) 29(4) Revue internationale de droit comparé 721-746.

3 Papa Bangy Guisse, ‘le domaine national: une figure juridique complexe’ (2000) n°41 Juridis Périodique Revue de Droit et de science politique 87-100.

4 V en ce sens Bakary CAMARA, Évolution des systèmes fonciers au Mali: cas du bassin cotonnier de Mali sud Zone Office du Niger et région CMDT de Koutiala, (CODESRIA, Dakar, 2015), spécialement page 114 et suivantes.

5 ibid 114 et suivantes.

6 Guy-Adjété Kouassigan, L’homme et la terre. Droits fonciers coutumiers et droit de propriété en Afrique occidentale, (Paris, Orstom 1966) 283.

C'est essentiellement sous ces différentes formes que la propriété privée collective s'est construite au Mali comme dans l'ensemble des pays de l'Afrique de l'Ouest francophone, en se fondant sur les us et coutumes de chaque communauté, et qu'elle a tenu des siècles durant jusqu'à ce qu'elle soit ébranlée par sa rencontre avec le législateur colonial français qui va la repousser avec une défiance non masquée.

En effet, le législateur colonial français, tout le long de sa domination en Afrique, a mis en œuvre différentes initiatives visant à remplacer le régime de propriété privée collective par le régime de propriété privée individuelle qui était le sien. L'objectif premier du colonisateur était de faire passer sous le contrôle de l'État des terres qui jusque-là étaient détenues par les communautés locales en vertu de leurs coutumes. C'est ainsi qu'il s'est principalement appuyé sur la théorie des 'terres vacantes et sans maître' inspirée du Code civil. Il a aussi introduit, par le décret du 26 juillet 1932 portant réorganisation du régime de la propriété foncière en Afrique occidentale française,⁷ le mécanisme de l'immatriculation foncière. L'immatriculation foncière peut être définie comme 'une procédure administrative d'enregistrement par laquelle l'autorité compétente reconnaît l'existence d'un droit de propriété sur un immeuble géométriquement et spatialement identifié'.⁸

Les mécanismes ainsi institués et reconduits après les indépendances, vont continuellement fragiliser les conceptions traditionnelles de la propriété foncière au profit d'un régime occidental de la propriété individuelle qui véhicule l'idée selon laquelle toute chose appropriée a pour vocation d'être le monopole d'une seule personne.

Sous l'influence du Code civil français, l'idée désormais associée au droit de propriété en Afrique de l'Ouest francophone est le modèle de la propriété privée

individuelle, avec comme traits caractéristiques l'absolutisme qui s'exprime dans la trilogie des attributs du droit de propriété : l'usus, ou le droit de se servir de la chose, le fructus, ou celui d'en retirer des fruits, l'abusus, enfin, qui est le droit d'en disposer par tous les actes matériels ou juridiques de transformation, de consommation, d'aliénation, ou même de destruction. Et, l'exclusivisme qui fait du propriétaire, sous réserve du respect de la loi et des règlements, le seul maître du bien objet du droit, à même d'exclure quiconque du bénéfice des utilités de son bien.

Malmenée et éprouvée, la propriété privée collective dans sa conception traditionnelle africaine ne semble plus avoir droit de cité tant l'hostilité et la défiance envers l'idée d'une appropriation collective des biens demeure encore vivace en droit français et par ricochet en droit moderne des anciennes colonies françaises. Si l'on considère le principe de la 'personnalité juridique' qui est un principe général de droit hérité du Code Civil français, on s'éloigne a priori de toute perspective d'une propriété privée collective de type familial, villageoise, tribal ou communautaire. En effet, le droit de propriété est par définition un droit subjectif ; or du principe de la 'personnalité juridique' il résulte que seules les personnes au sens juridique du terme peuvent être titulaires des droits subjectifs ainsi que le rappelle le doyen Carbonnier 'les personnes, au sens juridique du terme, sont les êtres capables de jouir de droits ; ce sont, d'une expression équivalente, les sujets de droit'.⁹ Et en droit positif français, il n'est reconnu que deux catégories de personnes, sujets de droit : les personnes physiques et les personnes morales de droit public ou de droit privé. S'agissant des personnes morales de droit privé, le droit français ne reconnaît la personnalité juridique qu'à une catégorie limitée et sous des conditions déterminées : les sociétés commerciales et civiles, les associations, les groupes d'intérêts économiques, les syndicats professionnels et les fondations.¹⁰ Cette énumération, comme on peut le constater exclut la famille, la tribu, le village, ou les communautés.

7 Décret du 26 juillet 1932 portant réorganisation du régime de la propriété foncière en Afrique occidentale française <<http://www.alertefoncier.org/bibliotheque/d%C3%A9cret-du-26-juillet-1932-portant-r%C3%A9organisation-du-r%C3%A9gime-de-la-propr%C3%A9t%C3%A9-fonci%C3%A8re-en>>.

8 Gérard Ciparisse (dir.), *Thésaurus multilingue du foncier* (2^{ème} éd., FAO 2005).

9 Jean Carbonnier, *Droit civil*, 1/ Les personnes (21^{ème} éd., PUF 2000)11.

10 Hélène Martron, *Les droits de la personnalité des personnes morales de droit privé* (Coll. Thèses, Faculté de droit et des sciences sociales de Poitiers 2011) 300.

Effacer la propriété privée collective de la mémoire juridique en Afrique de l'Ouest francophone : voilà l'objectif inavoué du législateur colonial français. Pourtant, le droit français de la propriété n'a jamais cessé de rêver de propriété collective. Après une rupture intervenue avec différentes formes de propriétés privées collectives de l'époque féodale à la révolution française,¹¹ le rêve s'est en effet réinventé avec vigueur ces dernières décennies partout en Occident et particulièrement en France autour du concept des 'communs'.¹² Ce concept des 'communs' dont l'émergence est liée aux crises respectives frappant le Marché, l'État-nation, l'occidentalisme du droit et les excès de l'individualisme,¹³ propose des figures de propriétés répondant aux préoccupations d'ouvrir à l'usage de tous ou à l'usage d'une communauté déterminée les utilités de certains biens, ou plus fortement de conserver des ressources en voie de raréfaction et de les transmettre aux générations futures, devenues quasi-sujets de droit émergent.¹⁴

Dès lors, que cache cet oxymore ? Et surtout comment expliquer qu'une conception unitaire de la propriété foncière, réduite à la propriété privée individuelle, soit toujours dominante dans les législations des pays de l'Afrique de l'Ouest francophone, alors qu'on constate son recul dans le droit positif de l'ancienne puissance colonisatrice ? Enfin, comment revivifier la propriété privée collective pour l'étendre aux catégories de la propriété privée collective de type familial, villageois, tribal ou communautaire ?

L'intérêt des questions ainsi posées n'est pas de réveiller les vieux démons de la colonisation au Mali et en Afrique de l'Ouest francophone. Il ne s'agit pas non plus de dresser les droits fonciers traditionnels africains, dont certains aspects sont aujourd'hui surannés, contre le droit moderne hérité de la colonisation française. Dans la présente étude, il s'agit surtout, de surmonter des obstacles relevant de la technique juridique, pour esquisser un nouveau portrait du droit de la propriété foncière privée collective. L'intérêt de cette approche méthodologique n'est pas que théorique. Il est aussi pratique, dans la mesure où la propriété privée collective en Afrique de l'Ouest francophone, après maintes vicissitudes, renaît aujourd'hui de ces cendres, sous les efforts conjugués des droits nationaux et du droit international. Et, dans cette dynamique, l'étude montrera non seulement qu'il est possible de surmonter les obstacles relevant de la technique juridique grâce à des mécanismes émergents en droit international et dans les droits nationaux ; en outre, elle démontrera qu'en mobilisant des mécanismes endogènes, tels que les droits fonciers coutumiers, il est possible de revivifier la propriété privée collective. Aussi, dans cette étude qui se focalise délibérément sur le foncier rural, nous partons de l'hypothèse que le concept de propriété privée collective recouvre de nos jours des réalités variées dont certaines correspondent aux catégories de propriété privée collective de type familial, villageois, tribal ou communautaire ; et que, le renforcement de ces figures de propriétés est un des moyens les plus adéquats pour la sécurisation foncière des terres occupées par des collectivités familiales, villageoises, tribales ou communautaires et dont celles-ci tirent l'essentiel de leur subsistance.

Ainsi, à l'aide d'une analyse de la propriété privée collective sous le prisme du droit foncier dans les pays de l'Afrique de l'Ouest francophone et à partir de l'exemple du Mali, cette étude qui se place résolument dans une approche de *lege ferenda*, mettra en lumière les vicissitudes de la propriété privée collective (I) et les possibles apports des droits fonciers coutumiers à la revivification de la propriété foncière collective (II) pour esquisser un nouveau portrait du droit de la propriété foncière privée collective en Afrique de l'Ouest francophone.

11 Emile de Laveleye, *De la propriété et de ses formes primitives* (Edition originale 1891, Hachette, 2016) 582.

12 M Cornu, F Orsi et J Rochfeld (dir), *Dictionnaire des biens communs* (PUF 2017); E Ostrom, *Gouvernance des biens communs, Pour une nouvelle approche des ressources naturelles* (éd. De Boeck 2010) 1240; B Parance et J de Saint Victor (dir), *Repenser les biens communs* (CNRS éd 2014) 314; B CORIAT, *Le retour des communs, La crise de l'idéologie propriétaire* (éd. Les liens Qui Libèrent 2015)297; Etienne le Roy 'Les communs et le droit de la propriété: Entre concurrences et convergences' (2015) *Revue Foncière* n°4 ; Sarah Vanuxem, *La propriété de la terre* (Wildproject Éditions 2018)144.

13 Etienne le Roy (2015) précité 28-32.

14 Emilie Gaillard, *Génération futures et droit privé : vers un droit des générations futures* (LGDJ 2011) 692.

2 LES VICISSITUDES DE LA PROPRIÉTÉ FONCIÈRE PRIVÉE COLLECTIVE

S'il y a une institution du droit au Mali et en Afrique de l'Ouest francophone qui a subi les assauts du législateur colonial, c'est bien la propriété privée collective et particulièrement en matière foncière. Jadis, dominée par une conception selon laquelle les liens entre l'homme et la terre sont plutôt collectifs, et que le régime de la propriété foncière doit avant tout assurer la sécurité du groupe ou au moins la sécurité de l'individu dans le groupe, le droit de propriété foncière a fini par épouser la conception romaine et individualiste imposée par le législateur colonial français. Durant toute sa domination, ce dernier s'est en effet focalisé sur l'idée que l'absence ou la faiblesse des droits endogènes de propriété privée en Afrique constituent le principal obstacle à la croissance et au développement économique. Il s'est alors servi de cette idée pour remettre profondément en cause les conceptions ancestrales de la propriété foncière (A).

Toutefois, ces dernières décennies, cette conception individualiste de la propriété foncière, qui a d'ailleurs été reconduite après les indépendances, semble subir l'usure du temps. En effet, l'un des aspects les plus marquants des récentes législations foncières en Afrique de l'Ouest francophone et particulièrement au Mali, c'est l'intérêt accordé à la propriété foncière collective. Cette reconnaissance de la propriété foncière collective va dans le sens d'un renouveau, dans la mesure où elle réhabilite des figures de propriétés collectives que le droit colonial a voulu effacer de la mémoire juridique (B).

2.1 La remise en cause des conceptions traditionnelles de la propriété foncière privée collective

Dans les conceptions traditionnelles africaines 'tout ce qui est création de la nature existe dans l'intérêt de tout le monde et ne saurait faire l'objet d'un droit de

propriété privée individuelle'.¹⁵ Dans un tel contexte l'importance des liens que les communautés établissent avec la terre est donc une évidence. Mais, cette vision est remise en cause par l'héritage du droit civil français qui promeut une conception plutôt individuelle et libérale de la propriété de la terre. Cette remise en cause devient flagrante lorsque l'on observe les critères d'appropriation des terres héritées du Code civil français (1) et la vision relayée par une doctrine attachée à certains principes généraux du droit civil français (2).

2.1.1 La remise en cause par l'héritage du Code civil français

En imposant durant sa domination des critères d'appropriation de la terre, issus du Code civil, la législation coloniale française a laissé des traces devenues presque indélébiles dans les législations des pays de l'Afrique de l'Ouest francophone. Ces critères basés notamment sur la théorie des 'terres vacantes et sans maître' et sur le mécanisme de 'l'immatriculation foncière', ont en effet considérablement remis en cause les critères d'appropriation issus des coutumes des communautés locales et jadis basés sur les critères des premiers occupants et de la mise en valeur de la terre.

La théorie des 'terres vacantes et sans maître' est un héritage du Code civil français, puisqu'elle résulte historiquement des articles 539 et 713 du Code civil français. Selon l'article 539 'tous les biens vacants et sans maître (...) appartiennent au domaine public'. Et, aux termes de l'article 713 'les biens qui n'ont pas de maître appartiennent à l'Etat'. En s'appuyant sur ces dispositions, le législateur colonial a élaboré la théorie dite des 'terres vacantes et sans maître'. En vertu de cette théorie 'toutes les terres ne faisant pas l'objet d'une mise en valeur caractérisée par une emprise évidente et permanente sur le sol' étaient considérées comme des terres abandonnées et donc 'vacantes et sans maître' et devenaient de ce fait de plein droit la propriété de l'Etat.

La théorie coloniale des 'terres vacantes et sans maîtres' a été régulièrement reconduite dans les législations foncières africaines des indépendances à nos jours. C'est le cas au Mali avec l'ordonnance n° 27 du 31 juillet 1974 abrogeant la loi 61-30 du 20 janvier 1961, et son

¹⁵ Guy-Adjété Kouassigan (1966) précité 283.

décret d'application n° 143.¹⁶ L'article 4 du décret n°143 dispose en effet que 'sont considérés comme immeubles abandonnés : tout immeuble urbain ou rural resté non occupé par son propriétaire ou par un tiers justifiant d'un titre régulier ; tout terrain rural non exploité par son propriétaire ou par un tiers justifiant d'un titre régulier'. Auparavant, l'article 2 al. 1^{er} de l'ordonnance n° 27 du 31 juillet 1974 énonçait que '[s]eront considérés comme vacants et incorporés au Domaine de l'Etat du Mali par décret pris en Conseil des Ministres sans que les propriétaires puissent prétendre à une indemnité quelconque : Tout immeuble bâti ou non bâti immatriculé abandonné pendant dix années consécutives par ses propriétaires'. Les mêmes dispositions sont encore en vigueur puisque selon l'article 132 de l'ordonnance n°00-027 du 22 mars 2000 portant code domanial et foncier '[e]st considéré comme abandonné tout immeuble urbain ou rural, bâti ou non, non occupé ni exploité par son propriétaire ou par un tiers justifiant d'un titre régulier'. Enfin, aux termes de l'article 131 al. 1^{er} du même texte 'seront considérés comme vacants et incorporés au domaine de l'Etat par décision de l'autorité compétente, sans que les propriétaires puissent prétendre à une indemnité quelconque : tout immeuble immatriculé, bâti ou non, en zone rurale comme en zone urbaine, abandonné pendant trente années consécutives par son propriétaire'.¹⁷

La théorie des 'terres vacantes et sans maître', legs du Code civil français, est ainsi perpétuée par le législateur malien, à l'instar des autres législateurs des pays de l'Afrique de l'Ouest francophone.

La législation coloniale a ensuite introduit le mécanisme de l'immatriculation foncière comme procédure donnant presque exclusivement voie et vie à la propriété foncière. L'histoire de l'immatriculation foncière en Afrique de l'Ouest francophone s'appuie pour

l'essentiel sur trois textes coloniaux¹⁸ dont le décret du 26 juillet 1932 portant réorganisation du régime de la propriété foncière en Afrique occidentale française.¹⁹ La procédure de l'immatriculation aboutit à l'établissement d'un titre foncier qui est selon l'article 121 du décret de 1932 'le point de départ unique de tous les droits réels existant sur l'immeuble au moment de l'immatriculation' et qui confère à son bénéficiaire un droit 'définitif et inattaquable'.

La formule a été reproduite dans les droits fonciers des anciennes colonies devenues indépendantes. Prenons encore pour illustration le cas du Mali qui a successivement reproduit le mécanisme de l'immatriculation avec l'ordonnance n°27 C.M.L.N. du 31 juillet 1974, abrogeant la loi 61-30 du 20 janvier 1961, et l'ordonnance n°00-027 du 22 mars 2000 portant code domanial et foncier. L'article 169 de cette dernière loi, à l'image des textes précédents, dispose que '[l]e titre foncier est définitif et inattaquable ; il constitue, devant les juridictions maliennes le point de départ unique de tous les droits réels existant sur l'immeuble au moment de l'immatriculation'. On retrouve la même formule dans le projet de loi soumis au conseil des ministres le 11 mars 2020.²⁰ Ainsi au Mali, malgré l'adoption de nombreux textes et les évolutions sociopolitiques intervenues, une constante demeure : l'immatriculation est la procédure aboutissant presque exclusivement à un droit de propriété intangible sur la terre. Ainsi, seule l'existence d'un lien juridique précis concrétisé par un titre foncier attestant l'immatriculation fait d'une personne un propriétaire foncier.

Il faut toutefois souligner que l'existence d'un lien juridique précis concrétisé par un titre foncier attestant l'immatriculation ne suffit pas à préserver le droit de

16 Ordonnance n° 27 CMLN du 31 juillet 1974 portant incorporation au Domaine de l'Etat du Mali des titres fonciers abandonnés pendant dix années consécutives ou acquis depuis dix ans et non mis en valeur, et Décret d'application n° 143 PG.RM du 14 août 1975, JO RM 1975, 1274.

17 Ordonnance n°00-027 du 22 mars 2000 portant Code domanial et foncier Modifié par la loi n°02-008 du 12 février 2002 JORM du 8 Juillet 2016.

18 Décret du 20 juillet 1900 portant régime de la propriété foncière en Afrique Occidentale française; Décret du 24 juillet 1906 portant organisation du régime de la propriété foncière dans les colonies et territoires relevant du gouvernement général de l'Afrique Occidentale française; Décret du 26 juillet 1932 portant réorganisation du régime de la propriété foncière en Afrique occidentale française.

19 Décret du 26 juillet 1932, précité.

20 L'article 143 de ce projet dispos que 'Le titre foncier régulièrement établi est définitif et inattaquable. Il constitue, devant les juridictions maliennes, le point de départ unique de tous les droits réels existant sur l'immeuble au moment de l'immatriculation'.

propriété foncière. En effet, le bénéficiaire du titre foncier est tenu de 'mettre en valeur' la terre immatriculée, pour conserver son droit de propriété. La règle résulte de l'article 131 de l'ordonnance du 22 mars 2000 portant code domanial et foncier au Mali qui dispose que 'tout immeuble immatriculé, bâti ou non, en zone rurale comme urbaine, acquis depuis trente ans ou plus et dont la mise en valeur est inexistante ou insuffisante' est considéré comme vacant et incorporé au domaine de l'Etat par décision de l'autorité compétente, sans que le propriétaire puisse prétendre à une indemnité quelconque.

Cette dernière disposition donne l'impression que la conception exclusivement juridique du lien entre l'homme et la terre retenue par le droit français a été abandonnée par le législateur malien au profit de la conception endogène ne reconnaissant en pratique que les liens fondés sur l'usage du sol, en quelque sorte sur la mise en valeur économique de ce dernier, et consacrés par le pacte avec les Ancêtres représentés par le maître de la terre.²¹ Mais il s'agit d'une fausse impression car l'évocation ici de la notion de 'mise en valeur' n'est rien d'autre qu'une analyse économique du droit de propriété visant à mettre la terre au service des impératifs d'un développement économique. Cela est d'autant plus vrai dans la période des politiques d'ajustement structurel (PAS) où l'Etat fait de la terre un véritable levier de développement économique. En effet, dans le cadre des PAS lancées au début de la décennie 1980, le pays à l'instar de l'ensemble des pays de l'Afrique de l'Ouest francophone, a entrepris une politique de libéralisation d'envergure dans le secteur de l'agriculture. Cette politique, qui se traduira concrètement par la libéralisation des facteurs de production, notamment la terre, fera de l'accueil des investissements internationaux dans la terre et dans l'agriculture une stratégie d'accroissement des recettes fiscales et de la production agricole. Et, pour attirer les investisseurs, l'Etat s'est inscrit dans une logique de libéralisation et de monétarisation de la terre, ce qui ne peut se réaliser sans le concept de mise en valeur des terres.²²

²¹ Alain Rochegude (1977), précité, 721-746.

²² François Collart Dutilleul et Alhousseini Diabate, 'La sécurité alimentaire et le droit à l'alimentation à l'épreuve des investissements internationaux en Afrique de l'Ouest : les risques d'une désillusion' (2016) *Revue malienne des sciences juridiques, politiques et économiques de Bamako*, N°6, pp 199 à 214.

2.1.2 La remise en cause par la doctrine attachée aux principes généraux du droit civil

Alors que la conception traditionnelle africaine met en avant des figures de propriété collective s'appuyant sur le groupe, le droit français quant à lui apparaît comme l'expression parfaite de la consécration légale de la forme individuelle d'une propriété qui ne peut être reconnue qu'à une personne (physique ou morale) dotée de 'la personnalité juridique'. Aussi, l'idée que seules les catégories de personnes dotées de 'la personnalité juridique' peuvent être propriétaires fonciers est de longue date défendue et relayée en Afrique de l'Ouest francophone par la doctrine attachée aux principes généraux du droit civil.

Cette vision qui s'oppose à l'idée qu'un groupement familial ou une communauté villageoise puisse être un sujet de droit et donc avoir la qualité de personne morale pouvant être titulaire des droits subjectifs sur la terre a été défendue pour la première fois par Malengreau.²³ Selon lui, pour qu'un groupement familial ou une collectivité villageoise constitue

une personne morale non pas fictive mais réelle, il ne suffit pas d'une participation à des traits communs, d'une union matérielle, comme celle qui découle de la parenté, il faut une finalité commune, formellement distincte de la fin individuelle de chacun des membres du groupe. Or cette finalité commune est absente des groupements indigènes fondés sur le lien de parenté.²⁴

Malengreau ajoute que 'la constitution d'un patrimoine commun, même ajouté à une solidarité économique, n'est pas une condition suffisante de l'existence de cette finalité commune'.²⁵

Ainsi, selon cette vision, l'élément constitutif de la personne morale n'apparaît pas dans le groupement

²³ Guy Malengreau, *Les droits fonciers coutumiers chez les indigènes du Congo Belge : essai d'interprétation juridique* (Mémoires, Collection in-8°, Tome XIX, fasc. 1, 260 p. 1947).

²⁴ *ibid* 58.

²⁵ *ibid* 58.

familial et la collectivité villageoise parce que les membres ne poursuivent pas une finalité commune ou un but collectif à l'image de l'affectio societatis de la société commerciale. De plus, elles ne correspondraient à aucune des catégories de personnes connues du droit civil: elles ne sont pas une personne morale de droit privé, encore moins une personne morale de droit public. Cette vision est la traduction de l'article 1832 du Code Civil français en vertu duquel l'existence d'un groupement en particulier d'une société, requiert la preuve de la représentation organisée d'intérêts collectifs appelant la protection juridique.²⁶ C'est cette exigence qui a conduit la jurisprudence française à refuser dans de nombreuses situations la personnalité juridique à des communautés ou tribus souhaitant faire valoir leurs droits subjectifs.²⁷ Cette vision est également la traduction d'un principe général du droit civil français selon lequel les droits subjectifs ne sont attribués qu'aux sujets de droit, c'est-à-dire aux personnes dont le droit objectif reconnaît l'existence en leur accordant la personnalité juridique.

Mais cette vision ne fait pas l'unanimité, elle est même remise en cause par une doctrine qui soutient de plus en plus l'idée de reconnaître des droits subjectifs à un groupement ou à une communauté déterminée.

S'opposant à l'idée défendue par Malengreau, Decottignies avait déjà défendu la thèse favorable à la reconnaissance de la personnalité morale aux collectivités notamment villageoises.²⁸ Selon l'auteur, la collectivité villageoise présente tous les critères habituellement retenus pour la reconnaissance de la personnalité morale à un groupement. Elle dispose d'un conseil composé généralement de tous les chefs de quartiers et présidé par un chef. En tant qu'organe d'expression collective et de défense d'intérêts différents de ceux des membres de la communauté, elle n'est pas dominée par la personnalité du chef. D'autre part la communauté villageoise dispose d'un patrimoine, composé de biens

qui lui sont propres, même s'il s'exerce sur ceux-ci des droits individuels : il s'agit des biens d'intérêt général comme les pâturages, etc.²⁹

Qui plus est, on ne peut être plus royaliste que le roi, car le Code civil lui-même, renferme encore des figures persistantes de propriétés collectives.

D'abord, certaines figures anciennes restent exemplaires en ce qu'elles montrent la voie d'une propriété plus inclusive, soucieuse de ménager plusieurs intérêts et pénétrée de l'idée d'une appropriation collective de la terre. Le cas des 'biens communaux' dont le régime est encore fixé par l'article 542 du Code civil est à cet égard assez significatif. L'article 542 du Code civil dispose que les biens communaux sont 'ceux à la propriété ou au produit desquels les habitants d'une ou plusieurs communes ont un droit acquis'. Le texte évoque ainsi le droit acquis des habitants à la propriété des biens communaux. En vertu de ce droit dont l'exercice est collectif, les habitants peuvent que ce soit au moyen du droit de pâturage, du droit de chasse ou bien encore du droit d'affouage, accéder aux biens communaux et en retirer certaines utilités.³⁰ Sur ce point, un auteur rappelant l'article 542 du Code Civil, affirmait récemment que si les habitants d'une commune ont un droit acquis à une propriété sur les biens communaux, cela n'est rien d'autre qu'une propriété collective.³¹ Au-delà du cas spécifique des biens communaux, nous pouvons mentionner le cas des 'droits de bandite' et 'droits de pacage', sortes de droits réels sui generis reconnus à une communauté d'habitants sur les forêts du seigneur, leur permettant de faire paître leurs troupeaux durant une certaine période de l'année et de prendre dans les forêts, toute l'année, le bois nécessaire au chauffage et à la

26 Jean-Pierre Gridel, 'La personne morale en droit français', (1990) 42(2) *Revue internationale de droit comparé* 495-512.

27 En 1976 la Cour d'appel de Paris a dénié la personnalité civile à une tribu des Nouvelles-Hébrides (Paris, 20 déc. 1976, D. 1978, 373).

28 Roger Decottignies, 'Personnalité morale en Afrique noire' (1958) *Annales africaines* 11-36.

29 Guy-Adjété Kouassigan (1966), précité. Spécialement page 101 et suivantes.

30 Fabien Girard, 'La propriété inclusive au service des biens environnementaux : Repenser la propriété à partir du bundle of rights', In Eve Truilhé-Marengo (dir.), *Regards croisés sur les objets et les pratiques scientifiques et techniques* (Cahiers Droit, Sciences & Technologies, Presses universitaires d'Aix-Marseille, 2016) 185.

31 Jacques Viguié, 'Soliloque iconoclaste d'un publiciste ingénu sur les origines de la propriété collective', In Daniel Tomasin (dir.), *Qu'en est-il de la propriété ? L'appropriation en débat* (Presses de l'Université Toulouse 1 Capitole, 2006) 167.

construction.³² Ces droits sont définis comme les droits réels 'qu'une personne physique (dite 'usager') ou une collectivité de personnes (dite 'collectivité ou communauté usagère') possède sur un fonds boisé (dit 'forêt usagère'), et qui lui permettent de percevoir, dans la limite de ses besoins, certains produits et d'en jouir dans le cadre d'une réglementation spéciale'. Ces droits qui sont encore de nos jours expressément visés par l'article 636 du Code civil et dont le régime est fixé par le Code forestier, ont conservé une certaine importance dans le cas des forêts non domaniales bénéficiant du régime forestier (c'est le cas, par ex., des forêts communales) et des forêts privées.³³

Par ailleurs, il existe encore de nos jours en droit français un grand nombre de situations dans lesquelles une masse de biens (communauté légale, indivision), un bien (tontine, œuvre de collaboration) ou une partie d'un bien (mitoyenneté, copropriété des immeubles bâtis) sont soumis à la maîtrise collective de plusieurs et non au droit individuel d'un seul.³⁴

Quoi qu'il en soit, un mouvement doctrinal émerge actuellement partout dans le monde et particulièrement en France pour proposer, à partir de la notion 'des communs', des figures de propriétés collectives répondant aux préoccupations d'ouvrir à l'usage de tous ou à l'usage d'une communauté déterminée les utilités de certains biens, ou plus fortement de conserver des ressources en voie de raréfaction et de les transmettre aux générations futures.³⁵

2.2 Vers un renouveau du droit de la propriété foncière privée collective

Ces dernières décennies le législateur malien (1), inspiré et encouragé par les mécanismes régionaux de protection des droits de l'homme(2), participe grandement au renouveau du droit de la propriété privée foncière collective.

2.2.1 le renouveau par le législateur

Ces dernières décennies ont été marquées en Afrique de l'Ouest francophone par un regain de reformulation des législations foncières. L'un des aspects les plus marquants de ces nouvelles législations est l'intérêt accordé à la reconnaissance de la propriété foncière collective. Cette reconnaissance de la propriété foncière collective va dans le sens d'un renouveau, dans la mesure où elle réhabilite des figures de propriétés collectives que le droit colonial a voulu effacer de la mémoire juridique en Afrique de l'Ouest francophone.

La première figure réhabilitée est celle de la propriété foncière familiale. Elle est même une des figures prioritairement considérées par le législateur malien dans les récentes réformes législatives, puisque selon la loi d'orientation agricole adoptée en septembre 2006,

la politique de développement Agricole du Mali a pour but de promouvoir une agriculture durable, moderne et compétitive reposant, prioritairement sur les exploitations familiales agricoles reconnues, sécurisées, à travers la valorisation maximale du potentiel agro écologique et des savoir-faire agricoles du pays et la création d'un environnement propice au développement d'un secteur agricole structuré.³⁶

Aux termes de l'article 13 de cette loi, l'exploitation agricole familiale est 'constituée d'un ou de plusieurs membres unis librement par des liens de parenté ou des us et coutumes et exploitant en commun les facteurs de production en vue de générer des ressources sous la direction d'un des membres, désigné chef d'exploitation, qu'il soit de sexe masculin ou féminin'. Selon cette loi, qui distingue l'exploitation agricole familiale de l'entreprise agricole,³⁷ afin de disposer de la personnalité morale, les exploitations agricoles

32 Fabien Girard (2016), précité 185-236.

33 *ibid.* pp.185-236.

34 Cyrille Duvert, 'La propriété collective' (2002) Petites affiches N°90 (6 mai 2002)4.

35 Auteurs précités en note de bas page numéro 17.

36 Loi n°06-045 du 5 septembre 2006 portant loi d'orientation agricole. JORM-spécial du 02 septembre 2006.

37 Selon l'Article 20 de la loi d'orientation agricole l'entreprise agricole est une exploitation agricole gérée à titre individuel ou en société et employant exclusivement une main d'œuvre salariée conformément à la législation du Travail en vigueur'.

familiales sont immatriculées sans frais auprès des services compétents de l'Etat et répertoriées sans frais auprès des Chambres d'Agriculture sur le registre prévu à cet effet.³⁸ L'article 16 alinéa 2 de la loi d'orientation agricole ajoute que 'l'immatriculation confère à l'exploitation agricole familiale la personnalité morale sans préjudice des droits de propriété foncière des tiers'. Ainsi, sous condition d'immatriculation auprès des services compétents, le législateur malien attribue la personnalité morale à l'exploitation agricole familiale.

En plus du cas de l'exploitation agricole familiale, le législateur malien a opéré une autre innovation avec l'adoption de la loi du 11 avril 2017 portant sur le foncier agricole.³⁹ Il s'agit de la propriété collective des communautés rurales au travers de l'institution d'un régime des terres agricoles des communautés rurales. En effet, la loi du 11 avril 2017 portant sur le foncier agricole institue et distingue quatre régimes fonciers agricoles au Mali: les terres agricoles de l'Etat; les terres agricoles des Collectivités territoriales; les terres agricoles des communautés rurales et les terres agricoles des particuliers.⁴⁰ Selon cette loi, les terres agricoles des communautés rurales sont toutes les terres liées au droit foncier coutumier, les espaces vitaux villageois et les terres agricoles familiales.⁴¹ L'accès aux terres agricoles des communautés rurales se fait principalement par succession conformément aux dispositions coutumières⁴² et tout ayant droit peut demander la constatation de ses droits et la délivrance d'une attestation de détention coutumière et/ou de possession foncière.⁴³ Ainsi, les communautés rurales disposent des droits fonciers sur tous les fonds de terre liés au droit foncier coutumier, aux espaces vitaux villageois et aux terres agricoles familiales. Ces droits dont la reconnaissance est concrétisée par 'une attestation de possession foncière' ou 'une attestation de détention' de droits fonciers coutumiers, peuvent être individuels ou collectifs, transmissibles par

succession et cédés entre vifs, à titre gratuit ou onéreux, dans des conditions définies par les us et coutumes et déterminées par la réglementation en vigueur.⁴⁴

Le législateur malien coupe ainsi le cordon ombilical avec le Code civil français pour consacrer des droits subjectifs aux communautés rurales. Ce faisant, le législateur malien reconnaît, au grand dam de la doctrine fidèle aux principes généraux du droit civil, la qualité de sujet de droit aux communautés rurales et subséquemment il crée en droit positif malien une troisième catégorie de personne 'la communauté rurale' dotée de la personnalité juridique. La loi du 11 avril 2017 portant sur le foncier agricole constitue de ce fait un événement marquant dans l'évolution du droit en République du Mali depuis l'accession du pays à l'indépendance.

Cette remarquable évolution du droit foncier malien s'inscrit dans une tendance contemporaine qui s'est intensifiée ces dernières décennies sous l'égide des mécanismes régionaux de protection des droits de l'homme.

2.2.2 Le renouveau par les mécanismes régionaux de protection des droits de l'homme

La Commission africaine des droits de l'homme et des peuples, et surtout la Cour interaméricaine des droits de l'homme, précurseur en la matière, participent grandement à l'élaboration d'instruments nouveaux consacrant un droit collectif sur la terre et visant spécifiquement la protection des communautés locales.

La Commission africaine des droits de l'homme et des peuples est un organe de recours en cas de violation des droits de l'homme par les États africains. En février 2010, dans l'affaire des Endorois c Kenya,⁴⁵ elle a rendu une décision devenue emblématique dans les annales de la jurisprudence relative à la propriété foncière collective en Afrique, parce que, pour la première fois,

38 Art. 17 de la loi d'orientation agricole, précitée.

39 Loi n°2017- 001/ du 11 avril 2017 portant sur le foncier agricole au Mali, JORM du 21 Avril 2017.

40 Art 4 de la loi n°2017- 001/ du 11 avril 2017 portant sur le foncier agricole.

41 Art 12 al. 2 de la loi n°2017- 001/ du 11 avril 2017 portant sur le foncier agricole.

42 Art 19 de la loi n°2017- 001/ du 11 avril 2017 portant sur le foncier agricole.

43 Art 34 de la loi n°2017- 001/ du 11 avril 2017 portant sur le foncier agricole.

44 Art 38 de la loi n°2017- 001/ du 11 avril 2017 portant sur le foncier agricole.

45 Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) c Kenya (2009), Commission africaine des droits de l'homme et des peuples, n° 276/03, 49e sess, 27e rapport d'activité [Endorois c Kenya].

elle s'est prononcée sur une question relative à la personnalité juridique d'une communauté en lien avec la terre.

En l'espèce, l'Etat kényan avait expulsé dans les années 1970 des tribus d'éleveurs proches des Masaïs, les Endorois, de leurs terres ancestrales situées dans la province de la Vallée du Rift pour y aménager une réserve faunique et des complexes hôteliers bâtis sur les rives du lac Bogoria. Après plusieurs procédures infructueuses devant les juridictions nationales, la communauté Endorois, soutenue par deux ONG déposa une plainte devant la Commission africaine des droits de l'homme et des peuples. La communauté alléguait entre autres la violation d'un droit de propriété collective sur leur terre ancestrale résultant du déplacement des membres de la Communauté Endorois.⁴⁶

Faisant suite à cette requête, la Commission a tout d'abord retenu d'une part, que 'la possession traditionnelle a des effets équivalents à ceux d'un titre de propriété octroyé par l'Etat et donne le droit d'exiger une reconnaissance officielle et un enregistrement de la part de l'Etat' et d'autre part, que

les membres de la communauté autochtone ayant involontairement quitté la terre de leurs ancêtres ou qui en ont perdu la possession en conservent le droit de possession et de propriété, même s'ils ne disposent pas de titre légal, à moins que les terres n'aient été transférées légalement à des tiers de bonne foi, et le cas échéant, ils conservent des droits de restitution de ces terres ou de terres équivalentes.⁴⁷

Enfin elle conclut, en s'appuyant, tant sur la spécificité de la charte africaine qui consacre les droits des peuples que sur les définitions de la propriété élaborées en

droit international, que les Endorois sont des peuples autochtones 'statut leurs permettant de bénéficier de la charte africaine protégeant les droits collectifs'.⁴⁸ Ainsi, la Commission africaine des droits de l'homme et des peuples a explicitement reconnu aux communautés Endorois un droit de propriété foncière collective.

Cette décision de la Commission africaine des droits de l'homme et des peuples s'inscrit dans la droite ligne de la jurisprudence de la Cour interaméricaine des droits de l'homme, devenue l'instance juridictionnelle la plus dynamique en matière de reconnaissance et de protection des droits collectifs fonciers des communautés locales. Parmi ses nombreuses décisions,⁴⁹ une des affaires récentes retiendra plus particulièrement l'attention : affaire Saramaka c. Suriname.⁵⁰

L'affaire a opposé le peuple Saramaka à l'Etat du Suriname suite à l'octroi par celui-ci de concessions forestières et minières sur les terres ancestrales des Saramakas.⁵¹ Les Saramakas sont en effet des descendants d'esclaves africains déportés vers la colonie néerlandaise du Suriname dans la seconde moitié du XVII^e siècle. Par traité avec la couronne hollandaise en 1762, ils avaient obtenu la liberté et l'autonomie sur une large portion de forêts tropicales. En 1997 le gouvernement du Suriname a octroyé à des multinationales des concessions forestières et minières sur plus de 13 millions d'hectares se trouvant en terres traditionnellement occupées par les Saramakas,

46 Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) c Kenya (2009), Commission africaine des droits de l'homme et des peuples, n° 276/03, 49^e sess, 27^e rapport d'activité [Endorois c Kenya].

47 *ibid*, Commission africaine des droits de l'homme et des peuples, (2009), n° 276/03, 49^e sess, 27^e rapport d'activité [affaire Endorois c Kenya].

48 *ibid*, Commission africaine des droits de l'homme et des peuples, (2009), n° 276/03, 49^e sess, 27^e rapport d'activité [affaire Endorois c Kenya].

49 Entre autres : Caso de la Comunidad Mayagna (Sumo) Awas Tingni c. Nicaragua, 31 août 2001, Arrêt sur le fond, Série C, n° 79 ; Caso de la Comunidad Moiwana c. Suriname, 15 juin 2005, Série C, n° 124 ; Comunidad Indígena Sawhoyamaya c. Paraguay, 29 mars 2006; Health Services and Support – Facilities Subsector Bargaining Assn. c. Colombie-Britannique, [2007] 2 R.C.S. 391 ; Comunidad Indígena Yakye Axa c. Paraguay, 17 juin 2005, Série C, n° 125.

50 Cour interaméricaine des droits de l'homme, affaire Saramaka People v. Suriname, 28 novembre 2007.

51 OTIS Ghislin, 'Les réparations pour violation des droits fonciers des peuples autochtones : leçons de la Cour interaméricaine des droits de l'homme' (2009) Recherches amérindiennes au Québec 39(1-2) 99-108.

contraignant ces derniers à déguerpir de leurs terres ancestrales. Par suite, les Saramakas ont déposé une plainte auprès de la Commission interaméricaine des droits de l'homme afin d'obtenir la protection de leurs droits fonciers collectifs. La demande a ensuite été transmise à la Cour interaméricaine des droits de l'homme. Devant la Cour, l'État du Suriname faisait valoir qu'une telle propriété commune n'existait pas dans la législation nationale et qu'il ne pouvait donc pas reconnaître aux Saramakas un droit que cette législation ne prévoyait pas. Il faisait valoir également que s'il devait reconnaître un tel droit original au Peuple Saramaka, ce serait discriminatoire pour le reste de la population du pays.

Dans son jugement rendu le 28 novembre 2007, la Cour a conclu que le peuple Saramaka possède un droit sur le territoire qu'il occupe dans la forêt tropicale de l'État du Suriname et que l'État du Suriname doit non seulement reconnaître l'existence de la personnalité juridique de ce peuple, mais doit garantir la possibilité pour les Saramakas d'exercer des droits collectifs sur leur territoire. La Cour fonde sa décision sur l'article 21 de la convention américaine, qu'elle interprète à la lumière des décisions des Comités d'application des deux Pactes internationaux (relatifs aux droits civils et politiques, et aux droits économiques, sociaux et culturels) pour retenir que

les membres du peuple Saramaka forment une communauté tribale protégée par les normes internationales de droits de l'Homme qui protègent le droit de propriété collective sur les territoires qu'ils utilisent et occupent traditionnellement, droits fondés sur l'utilisation et l'occupation ancestrales de leur terre et des ressources nécessaires à leur survie physique et culturelle.⁵²

La Cour interaméricaine des droits de l'homme consacre ainsi explicitement un droit foncier collectif au profit des communautés locales.

3

LA REVIVIFICATION DE LA PROPRIÉTÉ PRIVÉE COLLECTIVE PAR LE RECOURS AUX DROITS FONCIERS COUTUMIERS

La notion de droits fonciers coutumiers désigne 'un ensemble de prérogatives ou d'avantages reconnus aux individus ou groupes d'individus par les normes coutumières ; en d'autres termes, les droits réels détenus par les individus ou les groupes d'individus en vertu des normes coutumières'.⁵³ Ces dernières décennies, ces droits fonciers coutumiers ont fait l'objet d'une attention particulière de la part du législateur partout en Afrique de l'Ouest francophone. Au Mali notamment, plutôt que de rester cantonné dans un droit écrit dont les principes généraux sont restés figés à l'époque coloniale, le législateur a fait le choix de recourir aux droits fonciers coutumiers pour revivifier la propriété collective fondée sur la possession coutumière des terres. En même temps, poussé par la société civile, par des organisations paysannes et des populations, qui ne supportaient plus de subir les conséquences du mépris de leurs droits fonciers coutumiers, le législateur n'a eu d'autres choix que de revaloriser la propriété collective fondée sur les droits fonciers coutumiers. C'est ainsi que le recours aux droits fonciers coutumier a permis de redonner vie à une propriété foncière collective (A) dont il est intéressant de souligner les singularités (B).

3.1 Le recours aux droits fonciers coutumiers

Longtemps méprisés, les droits fonciers coutumiers sont depuis quelques années mobilisés par les législateurs nationaux pour la revivification de la propriété foncière. Avant de s'interroger sur la nature juridique des droits reconnus au travers de la valorisation des droits fonciers coutumiers au Mali (2)

52 Saramaka People v. Suriname, précité, (Inter-American Court of Human Rights Case of the Saramaka People v. Suriname Judgment of November 28, 2007).

53 Gerti Hesseling, Moussa Djire et Barbara Oomen, 'Le droit en Afrique : expériences locales et droit étatique au Mali', (Afrika-Studiecentrum, 2005) 294.

nous insisterons d'abord sur la tendance contemporaine à la reconnaissance des droits fonciers coutumiers en Afrique de l'Ouest francophone (1).

3.1.1 La tendance à la valorisation des droits fonciers coutumiers

Avant d'insister sur cette récente tendance à la valorisation des droits fonciers coutumiers, notons que le législateur togolais a anticipé cette question à travers son ordonnance du 6 février 1974 fixant régime foncier et domanial,⁵⁴ puisque déjà à cette date il a opéré la reconnaissance des droits fonciers coutumiers. Aux termes de l'article 2 de cette ordonnance, '[l]l'Etat garantit le droit de propriété aux individus et aux collectivités possédant un titre foncier délivré conformément à la loi. L'Etat garantit également le droit de propriété à toute personne ou collectivité pouvant se prévaloir d'un droit coutumier sur les terres exploitées'. Ainsi, à travers l'alinéa 2 de cette disposition, le législateur togolais consacre clairement la reconnaissance des droits fonciers coutumiers.

Pour les autres pays, il faut véritablement attendre les débuts de la décennie 1990 pour voir cette tendance se confirmer.

Le législateur nigérien fut le premier à amorcer cette nouvelle tendance. En effet, dès l'année 1993 avec l'adoption de l'ordonnance du 2 mars 1993 portant principes d'orientation du Code rural, le législateur nigérien a inscrit en lettres d'or les droits fonciers coutumiers dans son droit positif. L'article 8 de cette ordonnance, qui élève le droit coutumier au même rang que le droit écrit, dispose que 'La propriété du sol s'acquiert par la coutume ou par les moyens du droit écrit'. L'article 9 de la même ordonnance précise que 'la propriété coutumière résulte de : l'acquisition de la propriété foncière rurale par succession depuis des temps immémoriaux et confirmée par la mémoire collective ; l'attribution à titre définitif de la terre à une personne par l'autorité coutumière compétente ; tout autre mode d'acquisition prévu par les coutumes des terroirs'. Et l'alinéa 2 de cette disposition d'ajouter que 'la propriété coutumière confère à son titulaire la

propriété pleine et effective de la terre'.⁵⁵ On ne peut mieux proclamer la reconnaissance des droits fonciers coutumiers.

A son tour, le législateur béninois s'est inscrit dans la logique de reconnaissance légale des droits coutumiers en 2007 avec la loi n° 2007-003 portant régime foncier rural en République du Bénin⁵⁶ et en 2013 avec la loi n° 2013-01 portant code foncier et domanial en République du Bénin.⁵⁷ Avec ces textes, le législateur béninois bascule les terres 'objets de droits établis ou acquis selon la coutume et plus largement les pratiques et normes locales'⁵⁸ dans les 'terres privées' (au même titre que les terrains immatriculés), et crée un nouveau statut juridique pour ces parcelles, le 'certificat foncier'.⁵⁹ Ainsi, il reconnaît et confirme les droits fonciers coutumiers qui débouchent sur la délivrance d'un certificat de propriété foncière.

Encouragé par les précédents nigérien et béninois, le législateur malien s'est inscrit dans un processus de reconnaissance des droits fonciers coutumier, commencé en 1986⁶⁰ et surtout en 2000 avec le Code domanial et foncier et achevé en avril 2017 avec l'adoption de la loi portant sur le foncier agricole. Déjà en 2000, la reconnaissance officielle des droits fonciers coutumiers a été clairement établie par l'article 43 du

⁵⁴ Ordonnance N° 12 du 6 février 1974 fixant régime foncier et domanial, J.O.R.T du 16 mars 1974.

⁵⁵ Ordonnance n° 93 - 015 du 2 mars 1993 portant principes d'orientation du Code rural au Niger. <<http://www.droit-afrique.com/upload/doc/niger/Niger-Code-1993-rural.pdf>>.

⁵⁶ Loi 2007- 03 du 16 octobre 2007 portant régime foncier rural en République du Bénin. <<https://legis.cdij.bj/index.php/loi-n-2007-03-du-16-octobre-2007-portant-r-gime-foncier-rural-en-r-publique-du-b-nin>>.

⁵⁷ Loi n°2013 01 du 14 janvier 2013 portant Code foncier et domanial en République du Bénin modifiée par la loi n°2017 15 du 26 mai 2017. <<https://www.droit-afrique.com/uploads/Benin-Code-2013-domanial-et-foncier-MAJ-2017.pdf>>.

⁵⁸ Art. 7 de la loi 2007-003 portant régime foncier rural en République du Bénin.

⁵⁹ Philippe Lavigne Delville, 'La réforme foncière rurale au Bénin. Émergence et mise en question d'une politique instituante dans un pays sous régime d'aide' (2010) *Revue française de science politique*, (Vol. 60), p. 467-91.

⁶⁰ Code domanial et foncier, Loi n° 86-91/AN-RM du 12 juillet 1986 <https://www.globalprotectioncluster.org/_assets/files/field_protection_clusters/Mali/files/HLP%20AoR/Mali_Land_Tenure_Code_1986_FR.-pdf>.

Code domanial et foncier qui confirme les droits fonciers coutumiers exercés individuellement ou collectivement sur les terres non immatriculées en précisant que 'nul individu, nulle collectivité ne peut être contraint de céder ses droits si ce n'est pour cause d'utilité publique et moyennant une juste et préalable indemnisation'. De même, l'article 44 du Code domanial et foncier indique que ces droits fonciers coutumiers peuvent, à la suite d'une enquête publique et contradictoire, faire l'objet d'un titre opposable aux tiers qui constate l'existence et l'étendue de ces droits. À la suite du Code domanial et foncier, le pays a adopté le 11 avril 2017 la loi portant sur le foncier agricole.⁶¹ Tout comme le texte précédent, cette loi consacre la reconnaissance des droits fonciers coutumiers et institue un régime des 'terres agricoles des communautés rurales' comprenant les terres agricoles liées au droit foncier coutumier, les espaces vitaux villageois et les terres agricoles familiales. Et l'article 44 de cette loi d'ajouter que 'tout détenteur coutumier de terre agricole peut demander la constatation de ses droits et la délivrance d'une attestation de détention et /ou de possession foncière'.

Enfin, le législateur burkinabé à son tour décidé de reconnaître les droits fonciers coutumiers⁶² avec l'adoption de la loi du 16 juin 2009 portant régime foncier rural.⁶³ Comme le souligne Ouedraogo, c'est à travers la notion de 'possession foncière rurale' que le législateur burkinabé a tenté de progresser vers une reconnaissance des droits fonciers coutumiers.⁶⁴ Le législateur burkinabé définit la 'possession foncière rurale' comme étant 'le pouvoir de fait légitimement exercé sur une terre rurale en référence aux us et coutumes fonciers locaux'.⁶⁵ Aux termes de l'article 44

de cette loi 'tout possesseur foncier rural dont la preuve de la possession a été établie conformément aux dispositions de la présente loi bénéficie de la délivrance d'une attestation de possession foncière rurale par le maire de la commune concernée.' L'alinéa 2 de cette disposition ajoute que 'l'attestation de possession foncière rurale est un acte administratif ayant la même valeur juridique qu'un titre de jouissance tel que prévu par les textes portant réorganisation agraire et foncière au Burkina Faso'.

Il faut toutefois souligner que d'autres législations répugnent à redonner à la propriété privée collective son lustre d'antan. C'est notamment le cas de la loi sénégalaise sur le domaine national qui a pour ainsi dire mis de côté les droits coutumiers.⁶⁶

Qu'à cela ne tienne, la reconnaissance légale et la valorisation des droits fonciers coutumiers sont ainsi devenue une réalité dans de nombreux pays de l'Afrique de l'Ouest francophone.

3.1.2 La nature juridique des droits reconnus au travers de la valorisation des droits fonciers coutumiers

La loi du 11 Avril 2017 portant sur le foncier agricole au Mali énonce à son article 30 que 'les droits réels sont reconnus sur les terres agricoles, dans les formes et conditions définies par la réglementation en vigueur' et l'article 34 de la même loi ajoute que 'tout détenteur coutumier de terre agricole peut demander la constatation de ses droits et la délivrance d'une attestation de détention et /ou de possession foncière'. Dès lors, de quels droits réels s'agit-il? Et quelles sont la nature et la portée juridiques des attestations de détention coutumière et de possession foncière, comparées au titre foncier défini de longue date comme étant le document juridique garantissant un droit de propriété définitif et inattaquable?

On pensera à l'usufruit qui est un démembrement du droit de propriété, un droit réel qui s'exerce sur la chose d'autrui. On explique qu'il procède d'une répartition des éléments constitutifs de la propriété : à l'usufruitier, l'usus et le fructus ; au nu-propriétaire,

61 Loi n°2017-001 du 11 avril 2017 portant sur le foncier agricole au Mali.

62 Hubert MG Ouedraogo (2011), 'De la connaissance à la reconnaissance des droits fonciers africains endogènes', Études rurales, 187 p.79-93.

63 Loi no 034-2009/AN du 16 juin 2009 portant régime foncier rural au Burkina-Faso. <<https://www.ecolex.org/details/legislation/loi-no-034-2009an-du-16-juin-2009-portant-regime-foncier-rural-lex-faoc095496/>>.

64 Hubert MG Ouedraogo (2011) précité, Études rurales, 187 p.79-93.

65 Article 6 de la loi no 034-2009/AN du 16 juin 2009 portant régime foncier rural au Burkina-Faso.

66 Loi N° 64-46 DU 17 Juin 1964 relative au Domaine national (J.O. 3692, p. 905).

l'abusus.⁶⁷ En effet, l'attestation de détention coutumière et de possession foncière ont pour traits communs de se distinguer du titre foncier, qui demeure, en droit positif malien, le document juridique garantissant un droit de propriété définitif et inattaquable et qui offre à son titulaire tous les attributs de la propriété à savoir l'usus, le fructus et l'abusus. Aussi, relevant du régime des terres non immatriculées, ces différents documents reposent sur l'idée d'une relation de fait entre un individu ou une collectivité et la terre. Cette relation correspond, en droit privé des biens, au mécanisme de la possession. Or en droit privé des biens, la possession n'est pas synonyme de propriété ainsi que nous le rappelle le doyen Carbonnier pour qui la possession n'est que 'la maîtrise de fait, le pouvoir physique exercé sur une chose, que ce pouvoir de fait coïncide ou non avec le pouvoir de droit, avec la propriété'.⁶⁸ Aussi, le titulaire du droit sur la chose d'autrui n'est pas propriétaire de la chose mais seulement du droit qui porte sur elle, il possède un jus, un droit incorporel.⁶⁹

Dès lors pour la collectivité d'usufruitiers, la nature des droits reconnus peut être assimilée soit à un droit de superficie, soit à un droit d'usage privatif ou dans une certaine mesure à un droit de propriété. Le droit de superficie s'exerce sur les zones de transhumance, de pâturage, de pêche et sur les points d'eaux. Sur ses zones, les éleveurs et les pêcheurs peuvent se voir reconnaître un droit d'usage prioritaire, mais le droit d'usage prioritaire n'exclut pas l'exercice des us et coutumes communs aux éleveurs et aux pêcheurs en matière de gestion et d'exploitation des zones de pâturage et de pêche, notamment l'accès des tiers aux points d'eau, le droit de parcours et de pacage et de pêche.⁷⁰ L'exercice de ces droits de superficie renvoie à

la distinction faite par le droit moderne et qui détermine trois types de catégories de choses : la chose appropriée (*res propriae*), la chose commune (*res communis*) et la chose sans maître (*res nullius*). Les droits de superficie correspondent à la catégorie des *res communis*, car comme le dit le doyen Carbonnier 'il y a des choses qui par leur nature répugnent à toute appropriation'. Concrètement, cela signifie qu'il y a une forme d'universalité des droits d'usage sur certaines zones (zones de transhumance, d'élevage, de pêche, et points d'eaux) et aussi certaines ressources renouvelables (herbes, poissons, espèces animales chassées, les arbres, les fruits et leurs produits).⁷¹

Quant au droit d'usage privatif il s'exerce collectivement par les membres de la communauté sur les terres agricoles des communautés rurales qui comprennent tous les fonds de terre détenus par les communautés en vertu d'une attestation de possession foncière ou d'une attestation de détention de droits fonciers coutumiers dûment établis. Ce sont les terres des communautés rurales liées au droit foncier coutumier, les espaces vitaux villageois, et les terres agricoles familiales. Le droit d'usage privatif confère donc à un groupe déterminé un droit de jouissance exclusif sur la terre et les ressources de leur terroir. De ce fait, le droit d'usage privatif est plus qu'un droit de superficie. Mais est-ce à dire que le droit d'usage privatif confère droit de propriété ? Il semble que non car si la communauté a un droit d'usage et de jouissance exclusif, l'Etat reste bel et bien maître et propriétaire de la terre. La règle résulte d'une part, du principe de domanialité qui fait de l'Etat le maître des terres sur l'étendue du territoire national, et d'autre part, du décret 1955 par lequel le législateur colonial confirmait les droits fonciers coutumiers à condition qu'ils aient une existence de fait et s'exercent sur des terres non immatriculées et appropriées selon les règles du Code Civil.⁷² En définitive, le droit d'usage privatif renvoie pour plusieurs raisons à la notion d'usufruit dont il est le diminutif.⁷³ Ainsi que l'énonce l'article 578 du Code civil français '[l]usufruit est le droit de jouir des choses dont un autre a la propriété, comme le propriétaire lui-même, mais à la charge d'en conserver la substance'.

67 Marc Nicod, 'La quasi-propriété de l'usufruitier ou la propriété usufructuaire', In Daniel Tomasin (dir.), *Qu'en est-il de la propriété ? L'appropriation en débat* (Presses de l'Université des sciences sociales de Toulouse, 2006) 197-202.

68 Jean Carbonnier, *Droit civil, les biens-monnaie, immeuble, meuble* (Presses Universitaires de France, 19 éd. Paris, 2000) 398.

69 Frédéric Zenati-Castaing, 'La propriété, mécanisme fondamental du droit', In Daniel Tomasin (dir.), *Qu'en est-il de la propriété ? L'appropriation en débat* (Presses de l'Université des sciences sociales de Toulouse, 2006) 243-9.

70 Article 42 de la loi 11 avril 2017, précitée.

71 Papa Bangy Guisse (2000), précité, 87-100.

72 Art. 3 du décret de 1955, précité.

73 *ibid* Décret de 1955.

Toutefois, dans la durée et avec l'effet du temps, l'usufruitier peut accéder à la pleine propriété de la terre. C'est alors l'hypothèse de l'usucapion que le législateur malien évoque, en des termes quelque peu confus, à l'article 29 de la loi sur le foncier agricole qui dispose que

dans les affaires de revendication en détention coutumière ou de possession de terres agricoles, notamment la propriété et des droits qui en découlent, la possession de la terre non immatriculée ou non enregistrée est acquise par l'exploitant après vingt (20) ans d'exploitation continue et régulière sans contestation, ni paiement d'un quelconque droit ou taxe.⁷⁴

L'usucapion permet ainsi à celui qui possède une terre, sans titre ou avec un titre même précaire, d'accéder à la pleine propriété au bout de vingt ans, dès lors qu'il est établi que la possession de la terre a été continue et non interrompue, paisible, publique, et non équivoque.⁷⁵

3.2 Les singularités de la propriété foncière collective

Les droits reconnus aux membres de la collectivité, relativement aux ressources communes, présentent des singularités bien marquées tant entre les membres formant la collectivité (1) qu'entre ceux-ci et les tiers (2).

3.2.1 Singularités inter partes de la propriété collective

A l'intérieur du groupe chacun des membres dispose de droits dont la jouissance harmonieuse n'est possible qu'à travers la recherche d'un équilibre entre intérêts individuels et intérêt collectif, mais aussi par la protection du bien commun.

Les dispositions de la loi d'orientation agricole relatives aux exploitations agricoles au Mali précisent que 'les membres d'une exploitation agricole sont égaux en droit et en devoir'.⁷⁶ De même, les dispositions de la loi du 11 Avril 2017 portant sur le foncier agricole relatives à la transhumance, à l'élevage et à la pêche, reconnaît aux éleveurs et aux pêcheurs les mêmes droits sur les ressources naturelles situées sur leur terroir d'attache.⁷⁷ Ces dispositions consacrent ainsi des droits d'usages concurrents au profit de chacun des membres du groupe. Ces droits d'usages s'exercent dans les terres des communautés rurales liées au droit foncier coutumier, les espaces vitaux villageois, les terres agricoles familiales, les zones de pâturage, et les zones de pêche, zones dans lesquelles l'on note purement et simplement un droit naturel des populations locales à la terre et à ses ressources. En effet dans ces zones les populations locales y ont un accès libre sous réserve de ne pas en abuser et de ne pas porter atteinte aux droits des autres. Chaque membre de la communauté a les mêmes droits sur la terre et ses ressources qu'un autre membre de la même communauté.

Les membres de la communauté ne disposent pas que des droits sur la terre et les ressources communes, ils ont également chacun l'obligation de préserver et d'entretenir le bien commun. L'article 17 de la loi d'orientation agricole précise à cet égard que 'les membres d'une exploitation agricole familiale, qu'ils soient de sexe masculin ou féminin, ont l'obligation d'œuvrer à la rentabilité économique et sociale de l'exploitation'. Toutefois, la loi met à la charge du Chef d'exploitation l'obligation de promouvoir des pratiques de gestion participative et des mesures incitatives au sein de l'exploitation.

Enfin, en cas de différends liés à la jouissance des droits ou à l'exercice des devoirs, les parties doivent recourir à la médiation de la Délégation locale de la Chambre d'Agriculture avant tout recours juridictionnel.⁷⁸ Cette mesure vise surtout à préserver la cohésion du groupe invité à explorer les mécanismes non juridictionnels.

74 Loi n°2017- 001/ du 11 avril 2017 portant sur le foncier agricole au Mali, JORM du 21 Avril 2017.

75 Cass. 3e civ., 12 oct. 2011, n° 11-40.055 : JurisData n° 2011-021586.

76 Art. 19 de la loi d'orientation agricole, précitée.

77 Art. 41 et 42 de la loi du 11 Avril 2017 portant sur le foncier agricole, précitée.

78 Art 19 al 2 Loi d'orientation agricole, précitée.

3.2.2 Singularités erga omnes de la propriété foncière collective

A l'égard des tiers la propriété foncière collective présente des singularités qui sont autant de limitations dans les capacités des membres du groupe à opérer individuellement des transactions portant sur les terres communes.

Dans le cas de l'exploitation agricole familiale, le législateur encourage la collectivité des propriétaires à se choisir un représentant unique afin de faciliter la gestion des biens tant en ce qui concerne les rapports entre eux qu'avec les tiers. Ainsi de l'article 14 de la loi d'orientation agricole, il ressort que le chef d'exploitation 'représente l'exploitation dans tous les actes de la vie civile'. Le chef de d'exploitation est donc la seule personne dont la mission est de gérer et conserver les biens communs de la collectivité et de la représenter à l'égard des tiers.

Mais dans d'autres situations, le législateur impose des mécanismes impliquant l'ensemble des membres de la famille ou de la communauté. C'est le cas notamment de toute transaction sur les terres objet d'une détention ou d'une possession collective. L'article 17 de la loi du 11 Avril 2017 portant sur le foncier agricole dispose que 'toute transaction sur des terres, objet d'une détention ou d'une possession collective, est soumise à l'autorisation préalable du Conseil de Famille concerné. Ledit Conseil de Famille est composé de tous les ayants droit. L'autorisation, recueillie à l'effet de l'alinéa 1^{er} du présent article, est consignée dans un procès-verbal de réunion, dont copie est jointe à l'acte de transaction'.

Enfin, avec un décret du 4 avril 2018 le législateur malien a institué les commissions foncières villageoises et de fractions.⁷⁹ Elles sont composées de représentants des autorités coutumières, des agriculteurs, des éleveurs, des pêcheurs et des groupes de femmes et de jeunes. Avec l'institution de ces commissions, dont l'un des principaux buts est de mettre les populations locales au centre des prises de décisions relatives à la gestion

des terres agricoles de leurs terroirs, toute acquisition massive de terre par un tiers ne peut être faite sans l'accord des dites commissions. L'objectif est de protéger les communautés rurales contre les accaparements des terres par des prédateurs fonciers.

4 CONCLUSION

Le point de départ de cette étude était de comprendre, à partir de l'exemple du Mali, la place qu'occupe la propriété privée collective en droit foncier des pays de l'Afrique de l'Ouest francophone.

L'étude a révélé que la propriété privée collective était connue des sociétés africaines avant leur rencontre avec le colonisateur français. Elle était même de loin la plus importante des formes d'appropriation de la terre. Mais la rencontre avec le législateur colonial a ébranlé cette forme de propriété pour lui substituer la propriété privée individuelle fondée sur la conception romaine et occidentale. Cette conception a perduré dans les législations des Etats indépendants et a continué de fragiliser la conception de la propriété foncière africaine basée sur l'appropriation collective de la terre.

Mais après maintes vicissitudes la propriété privée collective renaît de ses cendres particulièrement en droit foncier malien. Poussé par la société civile, les paysans et la population, et encouragé par les mécanismes régionaux de protection des droits de l'homme, le législateur malien a entrepris ces deux dernières décennies des réformes d'envergure pour élaborer des instruments nouveaux visant spécifiquement la protection des communautés locales. Ainsi, au Mali des figures de propriétés collectives que le droit colonial a voulu effacer de la mémoire juridique ont été réhabilitées. Les droits fonciers coutumiers sont aussi de plus en plus mobilisés pour renforcer la propriété foncière fondée sur la possession coutumière des terres et redonner vie à la propriété privée collective.

Toutefois, le tableau d'ensemble n'est pas reluisant car encore de nos jours de nombreux pays de l'Afrique de l'Ouest francophone répugnent à redonner à la propriété privée collective son lustre d'antan. Pourtant,

⁷⁹ Décret n°2018-0333/p-rm du 4 avril 2018 fixant la composition et les modalités de fonctionnement de la Commission foncière villageoise ou de fraction. JORM du 13 avril 2018.

la récurrence des conflits fonciers partout en Afrique de l'Ouest francophone liée à une insécurité foncière grandissante dont l'une des causes est justement la méconnaissance ou la faible reconnaissance de la propriété foncière collective des communautés rurales, appelle à une plus grande valorisation de la propriété privée collective.

ARTICLE

DEMOCRACY IN THE FORESTS: THE GOVERNANCE THAT IS TO BE

C.R. Bijoy

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1

INTRODUCTION

Forest governance in India is in transition; from a colonial regime that hegemonised vast areas post independence to finally a democratic forest governance regime, amidst the push of neoliberal forces, in at least over half of India's recorded forest area. The Ministry of Environment, Forests and Climate Change (MoEFCC) reckoned in 2009 itself that 'The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 assigned rights to protect around 40 million ha of community forest resources to village level democratic institutions. The fine-tuning of other forest-related legislations is needed with respect to the said Act'.¹ Six years later, another study² confirmed this figure, with 32.198 million ha located within village boundaries as reported in the State of Forest Report, 1999³ and at least another eight million ha in the northeastern States. FRA became operational 13 years ago in 2008.

The preamble of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) declared that the law is to rectify the 'historical injustice to the forest dwelling Scheduled Tribes and other traditional forest dwellers who are integral to the very survival and sustainability of the forest ecosystem', a result of not adequately recognising 'forest rights on ancestral lands and their habitat during the colonial period as well as independent India'. The unprecedented nationwide

eviction drive triggered by the 3 May 2002⁴ MoEFCC order alleging that as 'approximately 12.50 lakh ha of forest land is under encroachment', 'all encroachments which are not eligible for regularisation should be summarily evicted in a time bound manner, and in any case not later than 30th September 2002' resulted in evictions from 152,400.110 ha between May 2002 and March 2004⁵ of about 3 lakh forest dwellers. The nationwide struggle triggered by this culminated in the FRA.⁶ MoEFCC conceded that there has been 'historical injustice' due to the government's failure to recognize the traditional rights of the tribal forest dwellers which 'must be finally rectified'.⁷

2

FOREST GOVERNANCE: THE RISE OF THE MEGALITH

Forests, a state subject, got elevated in stature and importance when brought under the concurrent list in 1976 by the 42nd Amendment to the Constitution. 'Forests' and 'Protection of wild animals and birds', embedded within the Ministry of Agriculture, came to their own when the full-fledged Ministry of Environment and Forests was constituted in 1985. Climate change was added to its portfolio in 2014. The MoEFCC is to protect and conserve the country's natural resources – its biodiversity, forests and wildlife – and control pollution.

Built upon the colonial edifice, the Indian Forest Act 1927 and a plethora of state level legislations, rules and executive instructions, the forest bureaucracy expanded its dominion over wildlife through the Wild Life (Protection) Act 1972 (WLPA), and over forest diversion through, the Forest Conservation Act 1980

1 Ministry of Environment, Forest & Climate Change (MoEFCC), Government of India (GoI), 'India Forestry Outlook Study' (2009) Asia-Pacific Forestry Sector Outlook Study II, Working Paper No. APFSOS II/WP/2009/06, 75-76 <<http://www.fao.org/3/am251e/am251e00.pdf>>.

2 Rights and Resources Initiative, Vasundhara and Natural Resources Management Consultants, 'Potential for Recognition of Community Forest Resource Rights Under India's Forest Rights Act: A Preliminary Assessment' (Rights and Resources Initiative, Washington, DC 2015)14, 17.

3 Forest Survey of India (FSI), MoEFCC, 'State of Forest Report 1999' (2000) 19.

4 Letter from Inspector General of Forests to all states and UTs, No 7-16/2002-FC (3 May 2002).

5 Lok Sabha, 'Starred Question No 284: Regularisation of Encroachments on Forest Land' (16 August 2004).

6 CR Bijoy, 'Forest Rights Struggle: The Making of the Law and the Decade After' (2017) 13 (2) Law, Environment and Development Journal 73-93.

7 IA No 1126 in IA No 703 in Writ Petition (C) No 202 of 1995 dated 21 July 2004.

(FCA). The Compensatory Afforestation Fund Act 2016 (CAFA) followed to manage the funds in lieu of forest destroyed through forest diversion to create tree plantations in an equivalent area of revenue land, and if not available, then twice the area in degraded forest land.

The monopoly of MoEFCC over 'forests' came to an end on 17 March 2006 when the Government of India (Allocation of Business) Rules, 1961 was amended⁸ designating MoEFCC to 'be responsible for overall policy in relation to forests, except all matters, including legislation relating to the rights of forest dwelling Scheduled Tribes on forest lands' and transferring 'all matters including legislation relating to the rights of forest dwelling Scheduled Tribes on forest lands' to the Ministry of Tribal Affairs (MoTA). With this, MoTA became the nodal ministry for FRA. MoEFCC decision-making since 2006 is limited to only those where forest rights do not feature or are not impinged upon, in which case, the advice of MoTA prevails. Forestland diversions, forest land-use change through afforestation and forest conservation for keeping a forest area inviolate are all matters clearly pertaining to both forest and forest rights, their respective laws read together, and both ministries.

Yet, MoEFCC issued the draft 'National Forest Policy'⁹ in 2018 ignoring MoTA and FRA in policy formulation and when, by its own reckoning, over half the forests would fall within the realm of Gram Sabha governance. MoTA, asserting its authority, communicated its objections.¹⁰ Continuing its belligerent march, the MoEFCC proposed an

amendment in 2019¹¹ overhauling the Indian Forest Act 1927, which the Ministry hastily disowned a few months later when faced with widespread opposition for its draconian provisions¹² unheard of in a democracy.¹³

Parallely, retired Forest officials and hard-line conservationists challenged FRA in various High Courts¹⁴ and the Supreme Court¹⁵ in 2008, challenging the authority of the Parliament to enact such a law which the Court declined to concede, and the constitutional validity of FRA which the Court is yet to hear. Inexplicably departing from the issues before it, the Court, in February 2019,¹⁶ directed the finalisation of the list of 'rejected claims' instead, conflating these with the criminal offence of 'encroachment' and ordered their eviction from forest lands.¹⁷ This has been kept on hold¹⁸ with the States conceding flawed implementation, and therefore all the rejected claims required review for FRA compliance.

8 GoI (Allocation of Business) Rules 1961 (as amended up to 5 February 2019) 54, 151.

9 The draft National Forest Policy is plantation-centric investment-seeking forest management through privatisation of forests under private-public participation to increase tree cover and productivity for industrial and other needs.

10 Kumar Sambhav Shrivastava, 'Tribal Affairs Ministry Opposes Centre's Draft National Forest Policy for its "Privatisation Thrust"' (Scroll.in, 17 July 2018) <<https://scroll.in/article/886708/thrust-on-privatisation-tribal-affairs-ministry-opposes-centres-draft-national-forest-policy>>.

11 Proposed Indian Forest (Amendment) Act 2018 (7 March 2019).

12 Nitin Sethi and Kumar Sambhav Shrivastava, 'Modi Government Plans More Draconian Version of Colonial-Era Indian Forest Act' (The Wire, 21 March 2019) <<https://thewire.in/rights/modi-government-plans-more-draconian-version-of-colonial-era-indian-forest-act>>.

13 Press Information Bureau, GoI, 'Government Clears Misgivings of Amendment in the Indian Forest Act 1927. Rights of tribals & Forest Dwellers to be Protected Fully: Shri Prakash Javadekar' (15 November 2019) <<https://pib.gov.in/PressReleasePage.aspx?PRID=1591814>>.

14 Subsequently transferred to the Supreme Court.

15 For a brief on the Court Cases, see <<https://forestrightsact.com/court-cases/>>.

16 Campaign for Survival and Dignity (CSD), 'Centre Again Totally Silent in Anti-FRA Case, Supreme Court Asks for Reports on Forest Rights Act' (13 February 2019) <<https://forestrightsact.com/2019/02/13/centre-again-totally-silent-in-anti-fra-case-supreme-court-asks-for-reports-on-forest-rights-act/>>.

17 CSD, 'Centre's Silence Means Millions May Face Eviction Threat After Supreme Court Order on Forest Rights Act' (20 February 2019) <<https://forestrightsact.com/2019/02/20/centres-silence-means-millions-may-face- eviction-threat-after-supreme-court-order-on-forest-rights-act/>>.

18 CSD, 'SC Puts Eviction Order on Hold: Centre Finally Does Its Job After Nationwide Protests and Anger' (28 February 2019) <<https://forestrightsact.com/2019/02/28/sc-puts-eviction-order-on-hold-centre-finally-does-its-job-after-nationwide-protests-and-anger/>>.

Meanwhile the recorded forest area increased to 7.67 million ha covering 23.34 per cent of the land area from 59.8 million ha in 1949. This includes reserved forests, protected forests and land classified as 'unclassified forests'. However, only 21.67 per cent land area reported actual forest cover. The area under protected area regime¹⁹ of National Parks, Wildlife Sanctuaries, Conservation Reserves and Community Reserves is 16,501,259 ha covering 5.02 per cent of the total land area (or 21.52 per cent of the forests). National Parks with no rights (as all rights are vested in the State government under WLPA) increased from 5 in 1970 to 101 covering 4,056,403 ha, and the Wildlife Sanctuaries with restricted rights increased from 62 in 1970 to 553 covering 11,975,697 ha. The ban on rights in the former and their restriction in the latter are no longer legally valid as FRA overrides these provisions with full recognition of rights, except hunting, on all forestlands. Conservation Reserves, uninhabited government land but accessed by people, increased from 4 in 2007 to 86 covering 385,825 ha while Community Reserves which include private land increased from 7 to 163 covering 83,334 ha during the period.

Carved from within the National Parks and Wildlife Sanctuaries are the high priority Tiger Reserves, an administrative category since the launch of Project Tiger in 1973 with 9 reserves of 911,500 ha, that increased to 31 reserves of 2,925,202 ha in 2007 when it became a statutory category with the 2006 amendment to the WLPA 1972.²⁰ Tiger Reserves have rapidly increased to 50 covering 71,027.10 ha of which 56.80 per cent area is the Critical Tiger Habitat (CTH) or Core Area which is to be kept inviolate. Of the recorded 2,808 forest villages, 334 are located within these CTHs.²¹ The remaining 30,686.98 ha is the Buffer Area. Clearly FRA has not prevented the increase in recorded forest area, nor the Protected Area but has redefined forest governance regime in completely new ways, a total departure from the colonial exclusionary

governance approach to an inclusive democratic governance.

3 FOREST GOVERNANCE: THE TIDE TURNED

FRA was applicable to all States and Union Territories (UTs) except the then State of Jammu & Kashmir, but now made applicable with the bifurcation of the State into two UTs, Jammu & Kashmir, and Ladakh, by the Jammu and Kashmir Reorganisation Act, 2019.²² With this, FRA is now applicable to all the 28 states and 8 UTs without any exception. However, Nagaland under Article 371 (A) and Mizoram under Article 371(G) of the Constitution require their respective State Legislative Assemblies through resolutions to extend the application of any Act of the Parliament related to land and its resources to apply to these States. FRA falls within the ambit of these provisions. As on August 2020, only 20 States and 1 UT reported FRA implementation.

3.1 FRA Implementation Status: Non-implementing States and UTs

The stated official reasons for not implementing FRA²³ in 8 states and 7 UTs, viz. Arunachal Pradesh,²⁴ Haryana, Manipur, Meghalaya, Punjab and Sikkim,²⁵ and the UTs of Andaman & Nicobar Islands, Chandigarh, Daman & Diu, Delhi, Jammu & Kashmir,²⁶ Ladakh and Puducherry are not tenable.

22 Jammu & Kashmir legislative assembly did not enact a law similar to FRA.

23 Ministry of Tribal Affairs (MoTA), Monthly Progress Report, August 2020 (2020) 6-8. Punjab, Haryana, Chandigarh and Delhi are not reporting.

24 Arunachal Pradesh government affidavit dated 9 August 2018 to the Supreme Court in WP(C) No 109 of 2008.

25 Sikkim Government affidavit to the Supreme Court dated 7 April 2018 in WP(C) No 109 of 2008.

26 FRA made applicable to the UTs of Jammu & Kashmir and Ladakh on 9 August 2019 through the Jammu and Kashmir Reorganisation Act 2019; FRA included as item 97 of Fifth Schedule to the Act.

19 Environment Information System (ENVIS) Centre on Wildlife & Protected Areas, Wildlife Institute of India, 'Protected Areas of India' <http://wiienvis.nic.in/Database/Protected_Area_854.aspx>.

20 The Wildlife Protection (Amendment) Act 2006 (WLPA 2006) (IND).

21 Lok Sabha, 'Unstarred Question No 816: Village in Forest Areas' (2018).

Without the clear informed declarations by the concerned Gram Sabhas,²⁷ the statutory authorities under FRA to determine forest rights, whether located inside or adjoining the recorded forest areas, the reports from the concerned governments alone cannot be taken as final.

All these states and UTs, except for the UT of Lakshadweep, have recorded forest area. All of them, except Lakshadweep and Puducherry, also report forest as land use in many of their villages (see Table).

Of the eight northeast States, only Assam and Tripura are implementing FRA; the remaining are not. Both Nagaland²⁸ and Mizoram have not extended FRA to their respective States. Mizoram resolved to extend FRA from 31 December 2009 on 29 October 2009, notified into force on 3 March 2010, but then backtracked and revoked this on 19 November 2019.²⁹ Nagaland is yet to decide. Of these northeast States, except for Manipur and Sikkim where Scheduled Tribes (STs) constitute a third of the population, all the others are overwhelmingly tribal majority states and forested. Despite over three-fourth of Mizoram being actually forest, its recorded forest area is below a third. The 'unclassified forests', a part of the recorded forest area, though not notified as reserved or protected forest, constitute the bulk of the forest with Nagaland at a high 97.29 per cent followed by Meghalaya (88.15 per cent), Manipur (67.63 per cent), Arunachal Pradesh (60.38 per cent), and Mizoram (20.53 per cent).³⁰ These traditionally community-controlled forests are de facto enjoyed, and continue to be enjoyed unreservedly by communities, a political consequence of their past history of assertion of autonomy. Sikkim is the only State in this region that does not have unclassified forests. However, all these States also have notified forests, the least in Nagaland and the most in Mizoram which might also be accessed by people. All these states without exception report villages using a significant percentage of forestlands (See Table).

The legal fact since a quarter of a century ago is that the 'unclassified forests' too are 'forests' where all the laws pertaining to forest are applicable. This resulted from the 1996 Supreme Court ruling in the Godavarman case that the term 'forest land' in Section 2 of the FCA 'will not only include "forest" as understood in the dictionary sense, but also any area recorded as forest in the Government record irrespective of the ownership'.³¹ The legal ambiguity of 'unclassified forests' now stood clarified though the ground reality has not yet changed.³² The inclusion of 'unclassified forests' in the definition of 'forest land'³³ in FRA along with undemarcated forests, existing or deemed forests, protected forests, reserved forests, Sanctuaries and National Parks reflect this new legal reality. Further, the argument that people anyway enjoy rights, customarily or through state laws, is not a substitute for not complying with FRA. FRA included a specific provision for the northeast, namely 'rights which are recognised under any State law or laws of any Autonomous District Council or Autonomous Regional Council or which are accepted as rights of tribal under any traditional or customary law of the concerned tribes of any State' in the list of forest rights.³⁴ As community lands, including unclassified forests, are increasingly diverted for various infrastructure projects, not being brought under the relevant laws would make these forestlands ineligible for compensation or resettlement leading to increased disaffection and conflicts. This is so when the States assert its eminent domain over the lands resorting to the use of either FCA or land acquisition laws, or even when the community actually gives prior informed consent.

3.2 FRA Implementation Status: Implementing States and UTs

Performance in implementing FRA can be determined only from the extent to which the objectives of FRA are achieved. The preamble of the Act unambiguously states its goal: To recognize and vest the forest rights

27 FRA, s 2(g) read with 2(p).

28 Nagaland government affidavit dated 16 April 2018 in the Supreme Court in WP(C) No 109 of 2008.

29 Ishan Kukreti, 'Mizoram Revokes Forest Rights Act' (Down to Earth, 20 November 2019) <<https://www.downto-earth.org.in/news/forests/mizoramrevokes-forest-rights-act-67829>>.

30 FSI, 'India State of Forest Report 2019' (2019) 4.

31 TN Godavarman Thirumalpad v Union of India & Ors (1997) 2 SCC 267.

32 CR Bijoy, 'Forest Rights in the North East. Inching towards Exclusion' (2019) 54(45) Economic & Political Weekly 17-19.

33 FRA, s 2(d).

34 *ibid* s 3(1)(j).

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. It declares its operative part: FRA is an Act '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'.

The performance of States and UTs in implementing FRA can be determined only from the extent of forestlands recognized and titled to the habitations concerned. This area is the 'Community Forest Resource' (CFR) defined as the 'customary common forest land within the traditional or customary boundaries of the village or seasonal use of landscape in the case of pastoral communities, including reserved forests, protected forests and protected areas such as Sanctuaries and National Parks to which the community had traditional access'.³⁵ This area vested in the Gram Sabha is what the Gram Sabha, as the statutory authority under FRA, is 'to protect, regenerate or conserve or manage'³⁶ by exercising its power³⁷

- to protect wildlife, forest and biodiversity,
- to protect adjoining catchment area, water resources and other ecologically sensitive areas,
- to ensure preservation of their habitats from destructive practices and
- to regulate access to the community forest resources.

The CFR area³⁸ includes the area recognized as individual forest rights of the members of the Gram Sabha,³⁹ and as community rights,⁴⁰ fully or partially as the case may be.

Institutional mechanism: FRA provides an institutional mechanism consisting of the Gram Sabha

and its Forest Rights Committee to determine the rights, a Sub-Divisional Committee to examine the Gram Sabha decisions for their compliance with the law and the District Level Committee to finally approve and issue the title of rights to the individuals and to the Gram Sabha while incorporating them in the record of rights.

FRA stipulates that two-thirds of the Forests Rights Committee members of 10-15 are to be STs if there are STs and a third of them shall be women. Half of the six-member Sub-Divisional Committees and District Level Committees are nominated by the concerned District Panchayat who are STs, preferably forest dwellers, of whom one is to be a woman or forest dwellers if there are no STs. The State Level Monitoring Committee is to have three STs nominated from the State Tribal Advisory Council of whom one is a woman, and in its absence, nominated by the state government. The Gram Sabha decisions require 50 percent quorum of whom a third are to be women.

The transparent open access democratic bottom-up process of this multi-institutional structure with complementary roles is a distinct departure from the all too familiar opaque hierarchical undemocratic centralized command and control decision making. The Gram Sabha is to constitute a committee⁴¹ to execute its decisions to protect, conserve and manage the CFR area that falls within its jurisdiction and develop a Gram Sabha approved management plan. This plan is to be incorporated into the Forest Department's forest working plan.⁴² The State Level Monitoring Committee is to monitor the implementation. The number of villages that have completed this process fully marks the culmination of FRA implementation and the commencement of forest governance as envisaged by FRA.

Despite over a decade of operationalisation, this indicator of FRA performance, is completely missing, i.e. democratization of forest governance by establishing Gram Sabha as the legal authority to govern forests.

Potential CFR Area: MoEFCC had indicated that 'around 40 million ha of community forest resources

35 *ibid* s 2(a).

36 *ibid* s 3(1)(f).

37 *ibid* s 5.

38 *ibid* s 3(1)(i).

39 *ibid* ss 3(1)(a), (f), (g), (h), (m) and 4(8).

40 *ibid* s 3(1)(b)-(e), (g), (h), (j)-(l).

41 FRA, r 4(1)(e).

42 *ibid* r 4(1)(e), (f).

to village level democratic institutions' are to be transferred to about 1.79 lakh villages (See Table). FSI State of Forest Report 1999 reports 32.198 million ha and Census 1991 records 32.348 million ha as forestland inside revenue boundaries in villages. These exclude forestlands in Arunachal Pradesh, Manipur, Meghalaya, Mizoram, and Sikkim, and the UTs of Jammu & Kashmir, Ladakh, Puducherry and Lakshadweep. Census 2001, on the other, records 30,241 million ha, but excludes data from Arunachal Pradesh, Manipur, Meghalaya, and Mizoram and the UTs of Lakshadweep and Puducherry. These forestlands within village revenue boundaries when added to the figures for (a) the forestlands falling outside the village revenue boundaries over which communities have claim and (b) the missing data of the states and UTs not accounted for in these estimates, makes the MoEFCC estimate of 40 million ha a very conservative estimate of the minimum potential CFR area.

As of August 2020,⁴³ FRA recorded 5,252,328.17 ha, just 13.1 per cent of this minimum potential area and 6.84 per cent of recorded forests. Of this, 67.84 per cent or 3,563,385.77 ha is community rights, while the remaining (1,688,942.17 ha) is titled to individuals.

The Table provides the State and UT wise potential number of villages, the minimum potential CFR area,

area recognised under FRA and corresponding percentage performance in the descending order. In the absence of better data, this at best is a crude indicator of performance. The area that is recognized or mandatorily to be recognized as CFR rights is not known. Very few CFR rights are recognized; where recognized, it is not reported separately but merged with community rights area which are partially or fully part of CFR area. Moreover, community rights may overlap with each other. While CFR area is the forestland within the traditional or customary village boundaries, the community rights pertain to accesses to various resources within this CFR area, and sometimes outside it as well. Therefore, the area recognized as community rights is not CFR area; in reality the total area is considerably lower than reported. Nor is it known how many villages have received CFR titles. Given all these limitations, Chhattisgarh, Gujarat, Maharashtra, Tripura and Madhya Pradesh are the top five performers, while Andhra Pradesh, Telengana and Odisha are in the middle category and the rest have hardly implemented FRA. In terms of percentage of the State's forest area recognised under FRA, Tripura, Gujarat, Maharashtra and Chhattisgarh tops the list, while Telengana, Madhya Pradesh, Andhra Pradesh, Odisha, Jharkhand and Uttar Pradesh are in the middle category, and the rest are laggard.

Status of FRA: Performance by Area and Claims

S. No	State	Forest Rights							
		Potential No of Villages ⁴⁴	Potential area ⁴⁵ (ha)	Area recognised (ha) ⁴⁶	Percentage recognition	Claims under FRA			
						Number of claims	Titles distributed	Claims rejected	Claims disposed off
All India		179,230	40,000,000	5,252,328.17	13.1	4,253,089	1,85,911 (46.69%)	1,755,705 (41.28%)	3,741,616 (87.97%)
1	Chhattisgarh	9,727 (2001)	1,003,195 (2001)	1,165,999.23	116.23	890,240	423,218 (47.54%)	461,590 (51.85%)	884,808 (99.39%)
2	Gujarat	4,815 (2001)	1,255,856 (2001)	530,524.38	42.24	190,056	94,283 (49.61 %)	62,256 (32.76%)	156,539 (82.36 %)
3	Maharashtra	16,610 (2001)	3,613,880 (2001)	1,266,499.90	35.05	374,716	172,116 (45.93%)	45,525 (12.15%)	217,641 (58.08%)

⁴³ Available as on December 2020, see MoTA (n 23) 3.

⁴⁴ Villages with forest land within village boundary are as per census 2001; where not available, the figures from 'State of Forest Report 1999' are provided. Adapted from Rights and Resources Initiative (n 2)14, 17.

⁴⁵ *ibid.*

⁴⁶ MoTA (n 23) 3.

4	Tripura	652 (2001)	540,912 (2001)	186,266.11	34.44	200,973	127,986 (63.68%)	68,657 (34.16%)	196,643 (97.85%)
5	Madhya Pradesh	18,953 (2001)	3,230,528 (2001)	923,732.47	28.59	627,453	257,964 (41.11%)	358,767 (57.18%)	116,731 (98.29%)
6	Andhra Pradesh ⁴⁷			280,422.06		181,508	98,049 (54.02%)	75,927 (41.83%)	173,976 (95.85%)
7	Telangana	5,616 (2001)	2,596,732 (2001)	305,270.16	22.56	186,679	94,360 (50.55%)	83,757 (44.87%)	178,117 (95.41%)
8	Odisha	28,777 (2001)	2,302,706 (2001)	360,422.31	15.65	636,805	446,013 (70.04%)	147,698 (23.19%)	593,711 (93.23%)
9	Jharkhand	16,452 (2001)	1,994,387 (2001)	104,066.87	5.22	110,756	61,970 (55.95%)	28,107 (22.67%)	90,077 (81.33%)
10	Uttar Pradesh	16,649 (2001)	1,535,232 (2001)	56,516.80	3.68	93,644	18,555 (19.81%)	74,945 (80.03%)	93,500 (99.85%)
11	Kerala	320 (2001)	911,299 (2001)	14,041.08	1.54	44,249	26,430 (59.73%)	12,703 (28.71%)	38,503 (87.01%)
12	West Bengal	10,124 (2001)	630,135 (2001)	8,735.66	1.39	142,081	45,130 (31.76%)	96,587 (67.98%)	141,717 (99.74%)
13	Rajasthan	9,441 (2001)	2,579,446 (2001)	24,574.09	0.95	75,855	38,110 (50.24%)	36,299 (47.85%)	74,409 (98.09%)
14	Karnataka	7,450 (2001)	2,659,318 (2001)	19,817.16	0.75	281,349	16,073 (5.71%)	180,956 (64.32%)	197,029 (70.03%)
15	Tamilnadu	1,808 (2001)	1,582,693 (2001)	3,483.24	0.22	33,988	6,387 (18.79%)	11,742 (34.55%)	18,129 (53.34%)
16	Himachal Pradesh	9,079 (2001)	1,390,704 (2001)	1,921.35	0.14	2,903	164 (5.65%)	47 (1.62%)	72 (2.48%)
17	Goa	137 (2001)	84,031 (2001)	35.15	0.04	10,136	25 (0.25%)	47 (0.46%)	72 (0.71%)
18	Uttarakhand	6,536 (2001)	691,488 (2001)	0	0	6,665	155 (2.33)	6,510 (97.67%)	6,665 (100%)
19	Bihar	NA	438,598 (2001)	NA	NA	8,022	121 (1.51%)	4,215 (52.54%)	4,336 (54.05%)
20	Assam	3,693 (2001)	253,683 (2001)	NA	NA	155,011	58,802 (37.93%)	NA	58,802 (37.93%)
Union Territories									
1	Dadra & Nagar Haveli ⁴⁸	61 (2001)	21,132 (2001)	NA	NA	5,317	2,535	NA	NA (at least 2,535)

47 Telengana became a separate state only on 2 June 2014.

Pre-2014 Andhra Pradesh data includes Telengana.

48 Dadra and Nagar Haveli affidavit of 11 April 2018 in WP(C) No 50 of 2008.

Not implementing									
States									
1	Haryana	92 (2001)	10,546 (2001)	0	0	0	0	0	0
2	Punjab	399 (2001)	39,815 (2001)	0	0	0	0	0	0
3	Arunachal Pradesh	2,367 (2001)	NA	0	0	0	0	0	0
4	Manipur	1850 (1999)	NA	0	0	0	0	0	0
5	Meghalaya	3927 (1999)	NA	0	0	0	0	0	0
6	Sikkim	305 (1999)	66,428 (2001)	0	0	0	0	0	0
Union Territories									
1	Andaman & Nicobar Islands	144 (2001)	31,010 (2001)	0	0	0	0	0	0
2	Chandigarh	6 (2001)	180 (2001)	0	0	0	0	0	0
3	Daman & Diu	5 (2001)	525 (2001)	0	0	0	0	0	0
4	Delhi	16 (2001)	4,733 (2001)	0	0	0	0	0	0
5	Jammu & Kashmir		659,532 (2001)	0	0	0	0	0	0
6	Ladakh	1,872 (2001)		0	0	0	0	0	0
7	Lakshadweep	0	0	0	0	0	0	0	0
8	Puducherry	0	0	0	0	0	0	0	0
Not applicable									
1	Nagaland	669 (2001)	63,136 (2001)	Not applicable	Not applicable	0	0	0	0
2	Mizoram	683 (1999)	NA	Not applicable	Not applicable	0	0	0	0

NA: Not available

Demarcation of the area that constitutes the jurisdiction of the Gram Sabha, which ought to have been the first step in the implementation of FRA, is missing or at best relegated as the last step if at all.

Claims: Significantly, the claims-centric narrative is made the official mainstream FRA performance narrative as though FRA is about submitting applications, their processing, approval and issue of titles when FRA is about demarcating area to be brought under the governance of the villages.

As of August 2020,⁴⁹ 87.97 per cent (3,741,616) of the 4,253,089 claims have been disposed off, 41.28 per cent (17,557,05) rejected and titles issued to 48.69 per cent claims (1,985,911) leaving just 12.03 per cent claims pending. Of the 20 states implementing FRA, Uttarakhand disposed off all the claims, while 12 states are slated to dispose off all claims with above 80 per cent disposal of claims. Another 5 States are in the

⁴⁹ MoTA (n 23) 10.

middle category having disposed off 30 per cent to 70 per cent claims; only 2 are laggard. Yet FRA implementation is widely considered to be quite poor due to high rejections, and drastic reduction in the area recognized and titled when compared to what were claimed and approved by the Gram Sabha.

The claims of the Other Traditional Forest Dwellers (OTFD) have almost been totally ignored. The popular belief that this is a tribal rights law notwithstanding, the proof of three generations of residence in the region equated to 75 years prior to 2005 (before 1930) instead of actually three generations that Gram Sabhas can easily vouch being the problem. OTFDs, besides non-tribals, also include Adivasis not included in the ST list, or those included but not in the area where they reside (area limitation). The FRA stipulation that the titles for individual rights are to be 'in the name of both the spouses in case of married persons', a major step at gender justice, has not been taken notice of as important in FRA performance.

The States informed the Supreme Court in the ongoing challenge to FRA that large number of claims was wrongly rejected⁵⁰ raising the specter of tardy FRA implementation.

The 10 States that have disposed off above 90 per cent of claims are also the ones that have the highest rejection rate, ranging from 97.67 per cent in Uttarakhand to 34 per cent in the case of Tripura. Odisha is the odd State with 23.18 per cent rejections when 93.25 per cent claims are disposed off. Bihar, Karnataka and Tamilnadu in that order have rejected more than half of the claims they have disposed off. Jharkhand, Gujarat and Maharashtra have relatively lower rejection rates.

50 Debayan Roy, 'Eight States Tell Supreme Court they Wrongly Rejected Claims of Tribals Over Forest Land' (The Print, 13 September 2019) <<https://theprint.in/judiciary/eight-states-tell-supreme-court-they-wrongly-rejected-claims-of-tribals-over-forest-land/291041/>>.

4

FOREST GOVERNANCE: LOCATING THE BREACH

Implementing a law successfully requires dealing with two critical factors. The first is locating and addressing those that run counter to the very intent of the law itself in order to create a conducive environment to implement the law. The second is addressing the impediments observed to implement the law smoothly.

MoTA held a number of regional and national review meetings and consultations.⁵¹ State and non-state actors have identified and assessed implementation problems.⁵² Studies have critically examined the law and its interpretations, its application and issues arising from them.⁵³ MoTA has been issuing directions, clarifications, guidelines and advisories⁵⁴ besides amending FRA Rules in 2012,⁵⁵ all of which dealt with a plethora of misinterpretations and

51 Ministry of Tribal Affairs, 'Archives' <<https://tribal.nic.in/archiveFRA.aspx>>.

52 eg Council for Social Development, New Delhi, 'Summary Report on Implementation of The Forest rights Act' (2010); MoEFCC and MoTA, 'Manthan: Report of the National Committee on Forest Rights Act' (2010); Community Forest Rights-Learning and Advocacy Process (CFR-LA), 'Promise and Performance: 10 Years of the Forest Rights Act in India' (2016); T Haque, 'Securing Forest Rights and Livelihoods of Tribals: Challenges and Way Forward' (2020) National Institute of Rural Development and Panchayati Raj, SRSC Policy Paper – 2/2020 <http://nirdpr.org.in/nird_docs/srsc/srsc310820n.pdf>.

53 eg Geetanjoy Sahu, Tushar Dash and Sanghamitra Dubey, 'Political Economy of Community Forest Rights' (2017) 52(25-26) Economic & Political Weekly 44-47; Neema Pathak Broome, Nitin D Rai and Meenal Tatpati, 'Biodiversity Conservation and Forest Rights Act' (2017) 52(25-26) Economic & Political Weekly 51-54.

54 MoTA, Forest Right Act (2006-20) <<https://tribal.nic.in/fra.aspx>>.

55 MoTA, Notification dated 6 September 2012 <<https://tribal.nic.in/FRA/data/FRARules.pdf>>.

misinformation⁵⁶ and clarifying some of the ambiguous terms and provisions. The obstructions to FRA implementations can be broadly categorized into:

- (a) Institutional resistance: Resistance from the forest bureaucracy, from MoEFCC to that of the local forest officials, Revenue Department abrogating responsibility and disinterested Tribal Department;
- (b) Misinterpretation of and ambiguity in some provisions in the law: Most have been addressed while some such as demarcation of habitat rights of Particularly Vulnerable Tribal Groups and Critical Wildlife Habitats are in progress;
- (c) Institutional issues in the structure and functioning of the Gram Sabhas, Forest Rights Committees, Sub-Divisional Level Committees, District Level Committees and State Level Monitoring Committees: This includes wrong constitution, lack of awareness and training, malfunctioning and nonfunctioning, lack of monitoring and supervision, non-allotment of resources, and weak functioning of the nodal institutions, MoTA and the State Tribal Department;
- (d) Application of the law: Violations, misapplication or non-application of the provisions of the law, incompleteness and delays in processing;
- (e) Litigations:⁵⁷ Challenge to the constitutional validity of FRA and the eviction order of claimants whose claims are rejected now kept on hold by the Supreme Court; numerous cases related to the application of FRA such as violations of specific provisions, non-implementation, wrong implementation or

56 See Lovleen Bullar, 'The Indian Forest Rights Act 2006: A Critical Appraisal' (2008) 4(1) *Law, Environment and Development Journal* 20-34.

57 Shomona Khanna (ed), 'Compendium of Judgements on the Forest Rights Act 2007-2015' (MoTA 2015) <<https://tribal.nic.in/FRA/data/CompendiumofJudgementson-FRA.pdf>>.

challenges to implementation at the lower courts;

These are to be seen within the context of colonialism, post-independence continuance of colonial forest regime transforming the forested region into an internal colony⁵⁸ brimming with repression, violence, displacement and struggles.⁵⁹ FRA culminated from a nationwide democratic struggle to decolonize and establish democratic governance. However, neoliberalism attempts 'to supplant the fledgling democratisation of forests by a virtual coupe with State assistance for the takeover of forests and its governance to serve the interests of capital, the business, and investors'.⁶⁰ This specifically takes the form of -

- (a) forest diversion for infrastructural development and development projects - mining, energy, irrigation and dams, quarrying etc.
- (b) afforestation for carbon sequestration aimed at the global carbon market boom in the future once country obligations are in place, and
- (c) the leisure industry's march into the protected areas with recreation, entertainment, sports, and tourism products for the burgeoning affluent with the tiger singularly targeted depopulating Critical Tiger Habitats for creating inviolate area.

All of these are executed by MoEFCC and the forest bureaucracy who de facto also control the forest rights recognition process given their hegemony over the forests. MoTA and the state tribal departments, though the nodal institutions to implement FRA, are

58 K Siripurapu and others, 'The Political Ecology of Forest Rights Act, 2006 - Internal Colonialism, the Main Challenge for Democratic Decentralization of forest resource governance in India' (2016) <<https://www.researchgate.net/publication/294420766>>.

59 CR Bijoy, 'Forest Rights Struggle: The Adivasis Now Await a Settlement' (2008) 51 *American Behavioral Scientist* 1755.

60 CR Bijoy, 'The Forest Rights Struggle and Redefining the Frontiers of Governance: Dismantling Hegemony, Restructuring Authority, and Collectivising Control' in Varsha Bhagat-Ganguly (ed), *The Land Question in Neoliberal India - Socio-Legal and Judicial Interpretations* (Routledge 2020) 75-100.

the weakest in the administrative hierarchy involved with FRA.

4.1 Forest Diversion

4.1.1 Diversion for Non-forestry Purposes

Under pressure from the rights holders,⁶¹ MoEFCC issued an advisory in 2009⁶² to the States listing the mandatory requirements for any proposal to be eligible for forest diversion for non-forestry purpose under the FCA. The Gram Sabhas within whose jurisdiction the forest area that is proposed to be diverted is located are to certify the completion of FRA and consent to the forest diversion. The State Government is to certify the completion of FRA; that diversions for development facilities,⁶³ and the rights recognition of Primitive Tribal Groups (Particularly Vulnerable Tribal Groups or PVTGs) and Pre-Agricultural Communities⁶⁴ including habitat and habitation rights are completed; that the project proposal for diversion is placed before Gram Sabha and consent obtained with 50 per cent quorum. These are to be attached to the proposal along with a letter from each of the concerned Gram Sabha indicating that all formalities/processes under the FRA have been carried out. However, this advisory was not incorporated as amendments to FCA Rules until years later.

The Supreme Court in *Orissa Mining Corporation Ltd. vs. Ministry of Environment & Forest & Others* ruled in 2013⁶⁵ that full implementation of FRA and Gram Sabhas' consent for forest diversion were mandatory amongst others to consider the proposal itself. With 12 villages denying consent, this proposal was shelved. The Court reiterated that the 'Gram Sabha is also free to consider all the community, individual as well as cultural and religious claims'. The Supreme

Court affirmed MoTA Guidelines of 2012⁶⁶ reproducing it in paragraph 49 of the judgement thus: 'In case, any evictions of forest dwelling Scheduled Tribes and other traditional forest dwellers have taken place without settlement of their rights due to such major diversions of forestland under the Forest (Conservation) Act, 1980, the District Level Committees may be advised to bring such cases of evictions, if any, to the notice of the State Level Monitoring Committee for appropriate action against violation of the provisions contained in Section 4(5) of the Act'.

Since operationalisation of FRA in 2008 to 2019, 399,411 ha⁶⁷ have been diverted for non-forest activities according to e-Green Watch of MoEFCC. The Ministry provided far lower figure of 251,727.22 ha⁶⁸ in the Rajya Sabha based on data available at Parivesh⁶⁹ of MoEFCC which now is updated as 253,179.66 ha.⁷⁰ All the 20 States and 1 UT implementing FRA have diverted forests during this period. Of the non-implementing 8 States and 7 UTs, forest diversion took place in Arunachal Pradesh, Haryana, Punjab, Manipur, Meghalaya and Sikkim and in the UTs of Andaman & Nicobar Islands, Chandigarh, Daman & Diu, and Delhi. Punjab stands out with about a fifth of its forests being diverted. In the two states where FRA is not made applicable, forest diversion took place in Mizoram during the brief period 2009 to 2019 when

61 Bijoy (n 6) 85.

62 Letter from Sr. Assistant Inspector General of Forests to all states except J&K, and all UTs (3 August 2009) <[http://forestsclearance.nic.in/writereaddata/public_display/schemes/981969732\\$3rdAugust2009.pdf](http://forestsclearance.nic.in/writereaddata/public_display/schemes/981969732$3rdAugust2009.pdf)>.

63 FRA, s 3(2).

64 FRA, s 3(1)(e).

65 *Orissa Mining Corporation Ltd v Ministry of Environment & Forest* (2013) 6 SCC 476.

66 Letter from MoTA to all state governments except J&K, and all UTs (12 July 2012) <<https://tribal.nic.in/FRA/data/Guidelines.pdf>>.

67 e-Green Watch, MoEFCC, 'FCA Projects, Diverted Land, CA Management: State-Wise Summary of FCA Projects' <http://egreenwatch.nic.in/FCAProjects/Public/Rpt_State_Wise_Count_FCA_projects.aspx>.

68 Rajya Sabha, 'Unstarred Question No 2445: Diversion of Forest Lands' (2020).

69 This 'single window hub' of MoEFCC 'automates the entire tracking of proposals' for all clearances by the environment ministry including forest clearance, see MoEFCC, 'List of Proposals submitted Online by User Agencies' <<http://forestsclearance.nic.in/OnlineReport.aspx>>.

70 This includes 17,480.86 ha diverted for defence projects and another 2,746.40 ha not uploaded in addition to the 232,952.4 ha in the site. See CR Bijoy, 'How Land Diversion Laws Threaten Forests and Forest Dwellers' (IndiaSpend, 25 September 2020) <<https://www.indiaspend.com/how-land-diversion-laws-threaten-forests-and-forest-dwellers/>>.

FRA was made applicable but not implemented, while no diversion took place in Nagaland. There was nil diversion in Jammu & Kashmir, Ladakh and Puducherry. There are no forestlands to divert in Lakshadweep. Most have diverted less than one percent of their recorded forest area during this period. Goa, Himachal Pradesh and Uttarakhand have diverted more forestland than they recognised under FRA.

Considering widespread non-recognition of CFR areas and the studies reported,⁷¹ most diversions are in gross violation of FRA, MoEFCC advisory of 2009 and the Orissa Mining Corporation judgement of the Supreme Court. The District Collector is to ensure FRA implementation and obtain prior informed consent from the Gram Sabhas, and certifies compliance with these conditions. The District Level Committee under FRA, headed ironically by the same District Collector, is to inform the State Level Monitoring Committee if any evictions of forest dwellers have taken place without settlement of their rights due to diversions of forestland under FCA where the District Collector is complicit. This conflicting interest and role placed on the District Collector vitiates both the laws.

Contrary to the law, MoEFCC permitted Himachal Pradesh in 2012⁷² to submit forest diversion proposals with a District Collector's certificate stating that there are no FRA claims, though factually incorrect,⁷³ on the basis of the State government's false argument that forest rights have been settled long back under the colonial government. In 2013⁷⁴ MoEFCC exempted

linear projects like construction of roads, canals, laying of pipelines/optical fibres and transmission lines etc. unless PVTG's recognised rights are affected, from obtaining Gram Sabha consent despite forest rights not falling within its purview and FRA not providing any exemption whatsoever. MoTA affirmed this in 2014⁷⁵ and clarified that 'no agency of the Government has been vested with powers to exempt application of the Act in portion or in full'.⁷⁶ In 2014⁷⁷ MoEFCC exempted the application of FRA on forests notified less than 75 years prior to 13 December 2005 in villages with no STs for purpose of forest diversion requiring only the District Collector's certificate certifying this as such. When forests are notified is simply not relevant; FRA only requires that non-tribal forest dwellers prove their residence in the region for 75 years prior to 2005.⁷⁸ MoTA reiterated⁷⁹ that FRA 'does not provide any scope to any executive agency for any kind of relaxation of the applicability' of the FRA, that this 'conveyed a message that the Government is against fair implementation of the Forest Rights Act' and 'this is not desirable in the interest of peace and governance in forest areas'. Following in the footsteps of MoEFCC, the Ministry of Mines issued a circular on 5 January 2017 misinforming all the State governments and UTs that MoTA is not 'insisting on FRA compliance for grant of lease' but instead it is enough that conditions for FRA compliance be incorporated into the mining lease deeds for forest clearance by MoEFCC. This violates both FRA and the 2009 MoEFCC order.

FCA Rules amended in 2014⁸⁰ incorporated the 2009 MoEFCC forest diversion order entrusting the District

71 eg Mridhu Tandon and Rakesh Singh, 'Analysis of Forest Diversion in India, 2019, January-June' (2019) 3(1) Legal Initiative for Forest and Environment <https://thelifeindia.org.in/upload/files/LIFE%20-%20Forest%20Diversion%20Recommendation%202019%20%28Jan-June%29_%20Web.pdf>.

72 Letter from Assistant Inspector General of Forests to Principal Secretary (Forests), Himachal Pradesh (20 September 2012) <[http://forestsclearance.nic.in/writereaddata/public_display/schemes/1876895711\\$guideline%20%20sept%202012.pdf](http://forestsclearance.nic.in/writereaddata/public_display/schemes/1876895711$guideline%20%20sept%202012.pdf)>.

73 Himachal Pradesh issued 164 titles out of 2,903 claims for 1,921.35 ha, see MoTA (n 23) 3.

74 Letter from Assistant Inspector General of Forests to all states and UTs (5 February 2013) <[http://forestsclearance.nic.in/writereaddata/public_display/schemes/666873934\\$Diversion%20of%20forest%20land05022013.pdf](http://forestsclearance.nic.in/writereaddata/public_display/schemes/666873934$Diversion%20of%20forest%20land05022013.pdf)>.

75 Letter from Director, MoTA to all states and UTs (7 March 2014) <<https://tribal.nic.in/FRA/declarations-Clarifications/25PositionoflawagainstMoEFCC-circular-dated3rdAug2009dated07March2014.pdf>>.

76 Letter from Deputy Secretary, MoTA (21 October 2014) <<https://tribal.nic.in/FRA/declarationsClarifications/22Guidelinefordiversionofforestlandfornon-forestpurposedated21Oct2014.pdf>>.

77 Letter from Director, MoEFCC to all states and UTs (28 October 2014) <[http://forestsclearance.nic.in/writereaddata/public_display/schemes/1717277111\\$Guideline.pdf](http://forestsclearance.nic.in/writereaddata/public_display/schemes/1717277111$Guideline.pdf)>.

78 Letter from the Under Secretary, MoTA to all states (9 June 2008) <<https://tribal.nic.in/FRA/declarations-Clarifications/Clarification.pdf>>.

79 MoTA, DO No 23011/18/2014-FRA (12 November 2014).
80 MoEFCC, Notification dated 14 March 2014.

Collector with completing the recognition and vesting of forest rights, obtaining Gram Sabha consent for the proposed forest diversion and forwarding them to the Conservator of Forests recommendation. With this, the District Collector's compliance certificate replaced the actual original list of certificates from the Gram Sabhas in the proposal. Rather than completing the FRA implementation and obtaining Gram Sabha consent, the focus turned to the manufacture of the District Collector's certificate within the time frame stipulated by FCA Rules.⁸¹ The Rules were further amended in 2016⁸² elaborating what the District Collector is to ensure. MoEFCC further clarified in 2019⁸³ that 'as per FCA Amendment rules 2016, compliance under FRA is not required for consideration of 'in-principle approval', instead FRA compliance is required only for final and formal approval (Stage 2).⁸⁴ MoTA countered⁸⁵ that 'this would prove to be a *fait accompli*' and 'it has not been endorsed to MoTA who is the competent Ministry relating to FRA' while also pointing out that this would be an offence. MoEFCC, quick to harmonise FCA when it comes to forest diversion for non-forest activities, within days of enactment of Mineral Laws (Amendment) Act, 2020⁸⁶ that permitted continuance of 'all valid rights, approvals, clearances, licenses and like' vested with the previous lessee to the new lessee for a period of two years, notified that this would include forest clearances under FCA.⁸⁷

When the Gram Sabha is the authority under FRA to protect and manage the forests under their jurisdiction, MoEFCC attempted to negate the law through amendments to the rules of an earlier law (FCA) to obfuscate the paper work by pressuring the bureaucracy to manufacture certificates to fulfill a timeline. Provisions in law cannot be overruled or negated by amending rules. This open defiance indicates the MoEFCC's determination not to give up its hegemonic control over the forest despite FRA, under the belief that allegiance with the dominant economic interests would provide a cloak of protection.

4.1.2 Diversion for Compensatory Afforestation

Compensatory afforestation⁸⁸ was introduced through an amendment to the Forest (Conservation) Rules 1981 in 1992,⁸⁹ and replaced by FCA Rules in 2003. This came into focus in the proceedings in the TN Godavarnan Thirumulpad vs. Union of India & Ors. Loss of forest was to be compensated by securing an equal area of non-forest land and, if not available, then double the land in degraded notified forests. This was to be afforested through tree plantation and regeneration of forests using compensatory afforestation fund created by extracting the monetary equivalent from the user agency, the net present value, for loss of biodiversity content and environmental services, ranging from Rs. 4 to 10.43 lakh per hectare (2008). Scientific, biometric and social parameters based site-specific value taking into account its bio-geography is used to arrive at the monetary value. The Supreme Court insisted that this fund be operated through a statute. Accordingly the Compensatory Afforestation Fund Act, 2016, and Rules, 2018 were put in place. The law covered not just compensatory afforestation, artificial regeneration (plantations), and assisted natural regeneration, but also forest protection, infrastructure development, wildlife protection and other related activities, relocation of villages from Protected Areas and rejuvenation of forest cover on non-forest land

81 Within 30 days for forest land up to 40 ha, 45 days for 40-100 ha and 60 days above 100 ha, see FCA Rules 2014, r 3(g).

82 MoEFCC Notification dated 6 February 2017.

83 Letter from Deputy Inspector General of Forests to all states and UTs (26 February 2019) <[http://forestsclearance.nic.in/writereaddata/public_display/schemes/1191986937\\$26_2_19_FRA%20reg.pdf](http://forestsclearance.nic.in/writereaddata/public_display/schemes/1191986937$26_2_19_FRA%20reg.pdf)>.

84 'Frequently Asked Questions (FAQs) Related to the Forest (Conservation) Act, 1980', 3 <<http://forestsclearance.nic.in/writereaddata/Frequently%20Asked%20Questions.pdf>>.

85 Letter from Under Secretary, MoTA to Deputy Inspector General of Forests (5 April 2019) <<https://tribal.nic.in/fra/data/ComplianceoftheSTnOOTFDRecognition-ForestRightsAct2006regarding05042019.pdf>>.

86 The Mineral Laws (Amendment) Act 2020 (IND).

87 Letter from Assistant Inspector General of Forests to all states and UTs (31 March 2020) <[http://forests-clearance.nic.in/writereaddata/public_display/schemes/1045037159\\$guidelines%20dated.pdf](http://forests-clearance.nic.in/writereaddata/public_display/schemes/1045037159$guidelines%20dated.pdf)>.

88 Soumitra Gosh and others, 'Compensating for Forest Loss or Advancing Forest Destruction? A Study of Compensatory Afforestation in India,' (2019) World Rainforest Movement <<https://wrm.org.uy/wp-content/uploads/2019/09/WRM-Compensatory-Afforestation-in-India-2019.pdf>>.

89 Forest (Conservation) Rules 1981 (as amended up to May 1992).

falling in wildlife corridors. There was no reference to FRA though governance over half of the recorded forests are now under Gram Sabha jurisdiction and not the forest bureaucracy for which the actual demarcation of area was in progress. The Fund rose from Rs 1,200 crores in 2006 to Rs.74,824 crores⁹⁰ by October 2019 of which Rs.65,377.77 crores were released to the States by August 2019.⁹¹

FCA empowered the State governments to appropriate forestland without any reference to forest rights, and non-forest lands, mostly the commons over which people have customary rights, for compensatory afforestation using funds regulated under CAFA. To speed up forest diversion, MoEFCC ordered the State governments in 2014⁹² and again in 2017⁹³ to pre-identify non-forest land and degraded forestlands for creating land bank for compensatory afforestation. Over 2.68 million ha were identified in Andhra Pradesh, Chhattisgarh, Madhya Pradesh, Jharkhand, Odisha, Tamilnadu, Rajasthan, and Uttar Pradesh.⁹⁴

The 2009 procedure for forest diversion for non-forestry activities in compliance with FRA got watered down to a mere formality of District Collector's certificate. The diversion of double the forest area in degraded forest for compensatory afforestation is done without any FRA compliance. MoEFCC has not

rectified this blatant anomaly. The Forest Department entrusted with afforestation, and those entrusted with FRA implementation, the State Tribal Department, State Level Monitoring Committee, and District Level Committee are required to monitor this. FRA and compensatory afforestation guidelines are violated resulting in forcible land grab.⁹⁵

The 'serious shortcomings in regulatory issues related to diversion of forestland, the abject failure to promote compensatory afforestation, the unauthorised diversion of forestland in the case of mining and the attendant violation of the environmental regime' and the Forest Department's lack of planning and implementation capacity reported by the Comptroller and Auditor General of India⁹⁶ are other gaping discrepancies on the ground.⁹⁷

Of the 82,817.789 ha diverted⁹⁸ for compensatory afforestation during 2008 to 2019,⁹⁹ 25.95 per cent or 47,435.56 ha was degraded forestland while the remaining was revenue land, presumably village commons that communities might be customarily accessing for various needs but without a law to recognize rights as FRA. In the absence of FRA compliance in FCA for compensatory afforestation, these forest diversions can safely be concluded to be in contravention of FRA.

90 Rs 66,298 crores by March 2019, see Lok Sabha, 'Unstarred Question No 3938: Compensatory Afforestation Fund' (2018); Rs 8,526.35 during 2018-19 up to 31 October 2019, see Lok Sabha, 'Unstarred Question No 3150: Compensatory Afforestation Management and Planning Authority' (2019).

91 Rs 14,418 crores till 31 March 2018, see Lok Sabha, 'Unstarred Question No 3938' (n 90); Rs 3,523.59 crores during 2018-19 and Rs 47,436.18 crores in August 2019, see Lok Sabha, 'Unstarred Question No 3150' (n 90).

92 Letter from Director, MoEFCC, Forest Conservation Division to all states and UTs (8 August 2014) <[http://forestsclearance.nic.in/writereaddata/public_display/schemes/686571466\\$guide.pdf](http://forestsclearance.nic.in/writereaddata/public_display/schemes/686571466$guide.pdf)>.

93 Letter from Assistant Inspector General of Forests to all states and UTs (8 November 2017) <[http://forestsclearance.nic.in/writereaddata/public_display/schemes/553905943\\$11%20423%202011.pdf](http://forestsclearance.nic.in/writereaddata/public_display/schemes/553905943$11%20423%202011.pdf)>.

94 Bhasker Tripathi, 'As States Create Land Banks for Private Investors, Conflicts Erupt Across India' (The Wire, 19 September 2017) <<https://thewire.in/banking/states-create-land-banks-private-investors-conflicts-erupt-across-india>>.

95 For instance, 17 cases from eight States along with other reports in 'Compensatory Afforestation', see 'Analysis of Findings' (Compensatory Afforestation, 2018) <<https://indiacaf.wixsite.com/mysite/findings>>.

96 Comptroller and Auditor General of India, 'Executive Summary: Compliance Audit on Compensatory Afforestation in India (Report No 21 of 2013, GoI 2013) x.

97 Kumar Sambhav Shrivastava, 'Ghost Plantations: The 17 Million Hectare Hole in India's Green Cover' (Ecogise.in, 6 July 2016) <<https://www.ecogise.in/2016/07/06/ghost-plantations-the-17-million-hectare-hole-in-indias-green-cover/>>.

98 e-Green Watch, MoEFCC, 'e-Green Watch of MoEFCC is a "completely transparent, reliable and accountable" "integrated system" "accessible to all stakeholders and public at large"'. See <http://egreenwatch.nic.in/Public/About_Iccmes.aspx>.

99 e-Green Watch, MoEFCC, 'Details of Diverted Forest Land, Land (Degraded Forest, Non Forest) Received for CA, and Area Being Covered Under Plantation' <<http://egreenwatch.nic.in/ProgressReporting/Public/FCAProjectsPlantationReports.aspx>>.

All the FRA implementing States and UTs have diverted forestlands for compensatory afforestation except Kerala. Diversion of degraded forestland continued year on year since 2008 peaking in 2010. Of the 6 States and 7 UTs not implementing FRA, Haryana, Punjab, Arunachal Pradesh, and Sikkim and the UTs of Chandigarh and Delhi have diverted forestlands. Manipur has not diverted forestland (though diverted non-forest land) and no compensatory afforestation has been carried out in Meghalaya, and in the UTs of Andaman & Nicobar Islands, Dadra & Nagar Haveli, Daman & Diu, Jammu & Kashmir, Ladakh, Lakshadweep and Pondicherry. Amongst the two states that have not extended FRA, Nagaland did not carry out any compensatory afforestation while Mizoram diverted forestlands.

MoEFCC, referring to e-Green Watch, confirmed that 'a significant percentage of data being uploaded...is either incorrect or incomplete'.¹⁰⁰ It also pointed out the non-uniformity of data related to diversion and compensatory afforestation available at e-Green Watch portal and Parivesh.¹⁰¹

4.2 Inviolable Areas

WLPA provides for extinguishing all rights¹⁰² in National Parks and curtailment of rights in Wildlife Sanctuaries.¹⁰³ FRA overrides these provisions, and recognises and vested rights except hunting, on forestlands including National Parks and Wildlife Sanctuaries. With this, the recognition and full exercise of traditional rights became part of the protected area regime. The WLPA Amendment Act 2006,¹⁰⁴ four months before FRA was enacted, incorporated the provisions of Critical Wildlife Habitat (CWH)¹⁰⁵ of

FRA into Core or Critical Tiger Habitat of WLPA 2006 amendment.¹⁰⁶

With FRA Rules scheduled to be notified on 1 January 2008, the National Tiger Conservation Authority (NTCA) of the MoEFCC constituted under the WLPA 2006 amendment, in an act of defiance, issued an order to the Chief Wildlife Wardens on 16 November 2007¹⁰⁷ for submitting proposals for Tiger Reserves by 29 November 2007, within barely two weeks. 31 Tiger Reserves were notified swiftly securing 2,925,202 ha, ironically disregarding even Sec.38 V of WLPA under which these are defined, demarcated and notified.¹⁰⁸ In many cases, the existing core and buffer area were simply notified together as Critical Tiger Habitat (CTH) without any Buffer Area.

The Tiger Reserve notification requires the demarcation of its CTH and the Buffer Area. The CTH area is identified based on the 'scientific and objective criteria...to be kept as inviolate for the purposes of tiger conservation',¹⁰⁹ to be protected from being harmed by limiting access and regulating human activities to prevent irreversible damage. Where the forest dwellers are unable to coexist with the tigers by any means whatsoever, then they are to be voluntarily relocated and rehabilitated on mutually agreed terms and conditions without adversely affecting their rights¹¹⁰ providing 'livelihood for the affected individuals and communities'¹¹¹ and 'secure livelihood' at that.¹¹² Neither WLPA nor FRA mandates relocation from CTHs just because the CTHs are to be made inviolate. This consultative process is to be carried out by an expert committee¹¹³ who examines the scientific evidence of irreversible damage to wildlife from human activities,¹¹⁴ consults with 'an ecological and social scientist familiar with the area'¹¹⁵

100 Letter of Inspector General of Forests to all states and UTs (10 August 2020) <[http://forestsclearance.nic.in/writereaddata/public_display/schemes/292754865\\$11_-79_2020_FC_1_sw.pdf](http://forestsclearance.nic.in/writereaddata/public_display/schemes/292754865$11_-79_2020_FC_1_sw.pdf)>.

101 MoEFCC portal for online submission and monitoring of the proposals seeking Environment, Forest, Wildlife and CRZ Clearances from Central, State and district level authorities.

102 Wildlife Protection Act 1972 (WLPA), s 35(3).

103 *ibid* s 24.

104 WLPA 2006.

105 See FRA, ss 2(a) and 4(2).

106 See WLPA, s 38V(4)(i) and (5).

107 National Tiger Conservation Authority (NTCA), MoEFCC, 'Compendium of Guidelines, Advisories & Orders' (NTCA January 2020) vol 2, 76-77.

108 CR Bijoy, 'The Great Indian Tiger Show' (2011) 46(4) Economic & Political Weekly 36-41.

109 WLPA, s 38V(4)(i).

110 *ibid* s 38V(5).

111 *ibid* s 38V(5)(iv).

112 FRA, s 4(2)(d).

113 WLPA, s 38V(4)(i).

114 WLPA, s 38V(5)(ii) and (iii); FRA, s 4(2)(b) and (c).

115 WLPA, s 38V(5)(ii).

and demarcates the CTH with the mandatory informed consent of the concerned forest dwellers and Gram Sabhas on the irreversible damage by their activities as well as their inability, if any, to co-exist by any other means with the tigers in that area. The Buffer Area is to be demarcated along with the demarcation of CTH where the forest dwellers can coexist along with the recognition of their livelihood, developmental, social and cultural rights.¹¹⁶ Invariably, all these are swept aside at the altar of expediency.

Tiger Reserves have now increased to 50. It required the Supreme Court to order notification of Buffer Area within three months in 2012 when, contrary to the law, only CTHs were notified in 10 States.¹¹⁷

NTCA rather than ensure that Tiger Reserves are notified as per WLPA including recognition of all rights as per FRA in all Tiger Reserves, instead issued a ban on rights recognition in 2017¹¹⁸ in all CTHs citing the absence of MoEFCC guidelines for establishing CWH¹¹⁹ under FRA. Neither is NTCA authorized to issue such an order, nor was it legal as FRA does not exempt Tiger Reserves in its application. This had also become a bone of contention when the National Commission for Scheduled Tribes took it up with NTCA, but to no avail. This ban was withdrawn only 2018¹²⁰ when MoEFCC notified the Guidelines for determination and notification of Critical Wildlife Habitats within National Parks and Sanctuaries, 2018.¹²¹

CWHs are to be notified in National Parks and Wildlife Sanctuaries¹²² just as CTH but with a significant difference. Once notified, CWH 'shall not be subsequently diverted by the State Government or the Central Government or any other entity for other uses'.¹²³ CTH can be and is diverted under WLPA.¹²⁴ MoEFCC, statutorily mandated by FRA to determine and notify CWHs, drafted CWH guidelines in 2007 and again in 2011, but did not comply with FRA and hence withdrawn amidst opposition.¹²⁵ MoEFCC has neither notified any CWH nor ensured rights recognition which should have been done prior to the notification of Tiger Reserves. Instead, relocation is pursued with vigour. As on 12 July 2019, there were 57,386 families in 50 Tiger Reserves¹²⁶ of which 18,493 families in 215 villages¹²⁷ have been relocated 'voluntarily' despite their protests under the now legally untenable Rs.10 lakh package per family Centrally Sponsored Scheme of Project Tiger.¹²⁸ The funds available for compensatory afforestation are also now available and used for 'voluntary relocation'. The widespread promotion of the falsehood that 'inviolable' means removal of human habitations and denial of access, instead of evolving ways to prevent harm to the area and its protection, is a violation of WLPA, FRA and Right to Fair Compensation and

116 *ibid* s 38 V (4)(ii).

117 The 10 States were Andhra Pradesh, Arunachal Pradesh, Bihar, Jharkhand, Karnataka, Maharashtra, Rajasthan, Tamil Nadu, and Uttar Pradesh. See *Ajay Dubey v National Tiger Conservation Authority & Ors* (2012) 13 SCC 779.

118 Letter from Assistant Inspector General of Forests to all tiger range states (28 March 2017) <<https://tribal.nic.in/FRA/declarationsClarifications/CRTigerHabitats28032017.pdf>>.

119 FRA, s 4(2)(f).

120 Letter from Assistant Inspector General of Forests to all tiger range states (12 March 2018) <<https://tribal.nic.in/FRA/declarationsClarifications/Conferrin-rightsCriticalTigerHabitatsOfTigerReserve12032018.pdf>>.

121 Letter from Deputy Inspector General of Forests to all tiger range states (04 January 2018) <<https://tribal.nic.in/FRA/declarationsClarifications/CWHGuidelines-04012018.pdf>>.

122 FRA, s 2(b).

123 *ibid* s 4(2)(f).

124 Prerna Singh Bindra, 'India's Fast-Tracked Wildlife Clearances Threaten Last Wild Areas, Water Sources and Hasten Climate Change' (IndiaSpend, 22 September 2018) <<https://www.indiaspend.com/indias-fast-tracked-wildlife-clearances-threaten-last-wild-areas-water-sources-and-hasten-climate-change/>>.

125 Ishan Kukreti, Shruti Agarwal, 'Critical Wildlife Habitat Guidelines Issued; NTCA Order Superseded' (Down To Earth, 17 August 2018) <<https://www.downtoearth.org.in/news/governance/critical-wildlife-habitat-guidelines-issued-ntca-order-superseded-59934>>.

126 Lok Sabha, 'Unstarred Question No. 3405: Tiger Projects' (2019).

127 Ishan Kukreti, 'Tigers and Tribals: Conservation Project Displaced 18,493 Families in 48 yrs' (Down to Earth, 9 October 2020) <<https://www.downtoearth.org.in/news/wildlife-biodiversity/tigers-and-tribals-conservation-project-displaced-18-493-families-in-48-yrs-73732>>.

128 For instance in Achanakmar and Bhormadeo in Chhattisgarh, Kanha and Panna in Madhya Pradesh, Sariska and Ranthambore in Rajasthan, Tadoba and Melghat in Maharashtra, Simlipal in Odisha and Kaziranga in Assam and Mudumalai in Tamilnadu.

Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (LARR) as well which brought forest rights under FRA within its ambit.

To conclude, FRA violations have become the norm when such violations by any official is an offence¹²⁹ for which the concerned Gram Sabha¹³⁰ is to issue notice through a resolution to the State Level Monitoring Committee giving sixty days to take action against the offender. Further, dispossession from or interference with forest rights of STs and Scheduled Castes as defined under FRA is an offence under the 2016 amendment to the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. Unaccustomed to being in authority and exercising powers, the Gram Sabhas are yet to internalize that by law they are no longer the servile subjects of the State when it comes to forests under FRA; similarly the bureaucracy too is yet to reconcile that they are no longer the masters of the forests. The general impunity from prosecution for violation of laws that the bureaucracy enjoys adds to the lawlessness.

5

THE WAY FORWARD

FRA has already recognized and vested forest rights on forest dwellers. The law only provides for recording them and demarcating the geographical contours of this non-centralized democratic forest governance structure. Forests are no longer the exclusive preserve of the State and its forest bureaucracy but of the Gram Sabhas in over half of the India's forests. The disregard, antipathy and resistance to this historic path-breaking Act of the Parliament exacerbate the conflicts that put conservation and livelihoods in peril. There is no way that the clock can be set back fully or even partially as the tide has turned.

Institutional actions by MoTA: Issue directions,¹³¹ clarifications, guidelines and advisories with regard to

the law and its provisions on the implementation issues that is by now well-known and reported. A decisive shift away from a claim-centric monitoring and assessment to village-centric community forest resource rights demarcation and governance.

Institutional reforms in the structure under FRA: Operationally, the Sub-Divisional Level and District Level Committees are headed by the Revenue Department¹³² whose jurisdiction does not extend to the forests. But the Forest Department's writ holds sway over the forests despite the domain of forest rights is not with them but with the Tribal Department since 2006 and that over half the forests is now under the jurisdiction of the Gram Sabhas and their institutions. The Tribal Department representative could be re-designated to head the Sub-Divisional and District Level Committees and the forest department representative made the ex-officio member. This would require amendment to the existing FRA Rules.

Legal reforms: Community Forest Resource areas are to be constituted as a 'new category of forest area' as directed by MoTA in 2015¹³³ and reflected appropriately in all forest related legislations. The responsibility of ensuring FRA implementation and informed consent of the Gram Sabhas for forest diversion for non-forestry activities and for compensatory afforestation under FCA could be transferred to the tribal department representative from the District Collector through amendment in the FCA Rules. Forest diversion is to fully comply with the provisions of the LARR 2013 compensating those affected and/or rehabilitated including share of the compensation in monetary terms to the affected family for the loss of community rights if any. Forest rights under FRA explicitly fall within the purview of LARR.¹³⁴ Even though it is mandatory to comply with LARR, suitable amendments to the FCA Rules

129 FRA, s 7.

130 *ibid* s 8.

131 *ibid* s 12.

132 FRA, rr 5 and 7.

133 Letter from Under Secretary, MoTA to all states (23 April 2015) <<https://tribal.nic.in/FRA/declarationsClarifications/GuidelinesregardingvestingofCFR230420-15.pdf>>.

134 LARR, ss 3(c)(ii), (r)(ii), (x)(ii) and 42(3).

need to be carried out to make it even more explicit. Denotify all Tiger Reserves that have not complied fully with WLPA and FRA; FRA compliance and consent provisions while notifying Tiger Reserves under WLPA¹³⁵ and for voluntary relocation need to be elaborated. Compliance with LARR when forest rights are acquired is again mandatory for voluntary relocation from CTHs under WLPA and CWHs under FRA and therefore brought into the Rules as rights are acquired by the State.

Parallely, the larger economic forces of neoliberalism are to be politically resisted to contain their expropriation, especially for their accumulation of capital through dispossession which could take the form of state facilitated or acquiesced outright resource grab with or without legal cover to that of the much eulogized tripartite agreements between the extremely unequal parties: the government, private and local community. The challenge is also in understanding and using FRA as was conceived originally by the struggle that led to FRA formulation: for the greatest public good, justice and long term intergenerational equity.

¹³⁵ s 38(v) inserted by the WLPA 2006 amendment deals with Tiger Reserves.

ARTICLE

SUBJECTIVITY IN THE LOGIC OF ZAMBIA'S ENVIRONMENTAL IMPACT ASSESSMENTS (EIA) PROCESS: THE BEDROCK OF CONTROVERSIAL EIA APPROVALS

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1

INTRODUCTION

1.1 Brief Background

The motivation to undertake an analytical scrutiny of the EIA rules in Zambia derives from the controversial decision to approve the establishment of a large scale open-pit mine (the Kangaluwi Copper Mine) in the Lower Zambezi National Park. This matter raised a lot of controversy and a public outcry that also made international news headlines.¹ Environmental organizations like Worldwide Fund for Nature (WWF) Zambia, Civil Society Organizations (CSOs), a host of individual environmentalists and high profiled Zambian citizens, drawing upon their Constitutional rights,² led a public campaign against the development. A group of individual activists even attempted to halt this development through litigation in what became a protracted court case which was thrown out by the Lusaka High Court on a technicality.³ By the time of writing this article, the appeal against the High Court dismissal was also thrown out by the Court of Appeal.

On behalf of the Lower Zambezi Tourism Association, an evaluation report was published in which a number of flaws were identified in the approval of the mining project, inter alia, critical legislative and policy gaps in the evaluation, approval and management of mining within protected areas in Zambia.⁴ The comments and opinions that characterized the public protest against this development revealed a number of sentiments; some Zambians have interpreted the approval as an act of political interference in the regulatory business of the

Zambia Environmental Management Agency (ZEMA), CSOs have accused government of prioritizing economic development at the expense of environmental protection, while others see the controversial decision as a capacity weakness on the regulator's part – describing the Zambia Environmental Management Agency (ZEMA) as a lion that roars but does not bite.

Meanwhile, some legal scholarly experts have called for a review of the EIA rules particularly owing to a number of omissions, mistakes and errors inherent in the rules.⁵ While this paper considers the said omissions, errors and mistakes as part of the broad array of challenges in Zambia's EIA process, the narrow focus of analysis in this paper is on the form and character of the rules, the subjective regulatory culture created by the rules in practice, and the controversial approval system that emerges out of this subjective regulatory culture. The authors propose that, the mischief of regulatory subjectivity in the current rules should be cured or they may be carried forward in the proposed new set of EIA regulations. Such a perpetuation would be likened to pouring old wine in new skins.

The Lower Zambezi case is neither the first nor the last case of the sort exemplifying such controversies. It features in the introduction herein only because the case raised the highest level of controversial EIA approvals ever seen in Zambia; and as such, it becomes the first case in which the approval was legally challenged in a protracted litigation to the height of the Court of Appeal. This paper is not a case commentary on the Lower Zambezi case, which, by the time of writing this article had been dismissed on appeals technicalities, for the second time, but this time by the Court of Appeal. Nothing in this paper should be construed as advancing an argument in support of, or in antagonism to, the development of large-scale open-pit mining operations in a national park. Rather, the paper attempts to analyze the root of such controversies and further demonstrate that such controversies in the EIA approval system will be

1 Cecilia Jasmine (The Mining Intelligence), 'Zambia Scraps Plans to Build Giant Copper Mine in National Park' <<https://www.mining.com/zambia-scraps-plans-to-build-giant-copper-mine-in-national-park/>>.

2 The Constitution of Zambia (Amendment) Act No. 2 of 2016, Art 256.

3 Vincent Ziba and Five others vs the Attorney General and Mwembeshi Resources Limited (2019) HCZ 2014/HP/A006.

4 Kelly Leigh, Evaluation Report: Kangaluwi Open-pit Copper Mine in the Lower Zambezi National Park (Lower Zambezi Tourism Association, November 2014) 4.

5 Proceed Munatsa, 'The Law and Practice of Environmental Impact Assessments (EIAs) in Zambia: Strengths and Weaknesses' (2015) VI (6) International Journal of Politics and Good Governance 1-9, 8.

inevitable for as long as the current subjectivity in the rules subsist.

The analysis proceeds in the first part to explain the statutory foundations of EIAs in Zambia. More than just a mere descriptive narrative of this foundation, the paper analyzes how the culture of regulatory subjectivity is bred right from the statutory foundations of EIAs. In the second part, the paper delves into the gist of the matter to undertake a critical examination of the substantive EIA rules themselves, the pre-authorization mechanism and the subjective regulatory culture that emerges out of this mechanism in the practice of EIAs. That public participation is a crucial part of the approval process, the third part involves analysis of the different values of public participation in EIAs from a Constitutional, statutory, regulatory and case law perspective. In essence, the paper attempts to demonstrate how the subjective clash of values in the EIA process impairs public participation. The paper concludes with a reiteration of its *locus classicus*; that EIA controversies and the contested approvals that flow from the process are themselves symptomatic of the subjectivity in the EIA rules.

In theory, the EIA rules are ostensibly comprehensive with respect to their object and scope. This aspect of EIA administration in Zambia was lauded as a strength in the legal scholarly analysis by Proceed Munatsa in 2015.⁶ But with a much deeper focus on the form of the rules mirrored against actual EIA practices on the ground, it is found that these rules create a highly subjective approval system bereft of objective scientific standards of regulation. In effect, Munatsa rightly observes that EIAs in practice are not as 'effective' as they are ostensibly presented on paper.⁷ Effectiveness in the context of this analysis is in reference to the extent to which EIAs in Zambia can enforce the precautionary and prevention principles of environmental law within the object of environmental management.⁸

As such, the paper proposes that the subjectivity in the approval system can be cured through standards

⁶ *ibid* 7.

⁷ *ibid* 8.

⁸ Two of the functional principles of environmental management upon which the Environmental Management Act, 2011, is founded.

that set scientific criteria for decision-making rather than a reliance on opinion-based comments and value-based judgements. The authors hope that the proposed new set of EIA regulations will cure the mischief of subjectivity in the current rules if not to overhaul them completely. Specifically, the authors hope the proposed new set of regulations will reflect the standard-based system envisioned by the then Environmental Council of Zambia (ECZ) some twenty years ago;⁹ i.e. (i) the need to develop sector-specific guidelines for preparing EIAs;¹⁰ (ii) the need to continue improving professional competence of personnel involved in undertaking EIAs;¹¹ (iii) the need for legislation to ensure economic and political independence in EIA assessments;¹² (iv) the need to review the quality and level of public participation especially in deriving management options;¹³ (v) the need to develop a set of priority indicators based on environmental physical, chemical or biological measures,¹⁴ and (vi) the need for the regulations to incorporate a review stage in the EIA process, during which independent experts give their point of view in respect to the EIA of any project,¹⁵ and (vii) the need for the ECZ and authorizing agents to initiate review and monitoring of projects that have entered implementation stage.¹⁶

2 SUBJECTIVITY IN THE STATUTORY FOUNDATIONS OF EIAs IN ZAMBIA

2.1 Environmental Management Act 2011

The spirit of EIAs in Zambia derives from the general object of the Environmental Management Act No.12 of 2011 (herein truncated as EMA); to promote

⁹ ECZ, *State of the Environment in Zambia 2000* (Environmental Council of Zambia, Lusaka 2001), 150-151.

¹⁰ *ibid* 152.

¹¹ *ibid* 152.

¹² *ibid* 152.

¹³ *ibid* 152.

¹⁴ *ibid* 153.

¹⁵ *ibid* 153.

¹⁶ *ibid* 154.

integrated environmental management, to protect and conserve the natural environment and to promote sustainable management of natural resources.¹⁷ EIAs are also conceived as tools for prevention and control of pollution and environmental degradation.¹⁸ EIAs are designed to provide an avenue for public participation in environmental decision-making and access to environmental information while establishing baselines for environmental monitoring and auditing.¹⁹ It is within this logic that EIAs in practice are designed to be an enforcement and implementation mechanism for the precautionary and prevention principles of environmental law; the two principles which, if effectively enforced and implemented, guarantee the safety of the public from negative effects of development projects in attaining the right to a safe, clean and healthy environment.²⁰ Essentially, the precautionary and prevention principles are directing principles with an objective to realize the right to a safe environment, failure to which, they become political slogans for achievement of ambiguous policy goals.²¹ The precautionary and prevention principles are defined in Article 255 of the Constitution of Zambia as;

Where there are threats of serious or irreversible damage to the environment, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation [the precautionary principle];²² origin, quality, methods of production, harvesting and processing of natural resources shall be regulated²³

A much more elaborate definition of the principle of prevention is enacted in the EMA as:

Adverse effects shall be prevented and minimized through long-term and integrated planning and the coordination, integration and co-operation of efforts, which consider the entire environment as a whole²⁴

While scientific certainty and/or a lack of it underpins the precautionary principle, planning and decision-making underpins the principle of prevention. Should the determination of environmental risk using scientific certainty and/or a lack of it, and should the planning and decision-making upon which environmental risk management is based be subjective and controversial matters, the effectiveness of the precautionary and preventative principles in practice becomes contestable. Ordinarily, therefore, EIA rules are expected to enforce a scientific based approval system in order to cure subjectivity that may come with determination of environmental risk and the planning and decision-making that are attendant to it. Inevitably, scientific certainty, planning and decision-making such pivotal elements in the enforcement of the precautionary and prevention principles that the entire EIA process and practice revolve around the two elements.

As such, in section 29, the law prohibits undertaking any project that may have an impact on the environment without written approval of the Zambia Environmental Management Agency (ZEMA – herein referred to as the Agency).²⁵ The legal form of the term ‘may’ have an impact signifies the uncertainty that comes with prediction and determination of environmental risks in practice. It throws, especially, the application of the precautionary principle into subjective political, economic, ecological and cultural contestations.²⁶ This can be evinced from the effect of the provision in practice that that the law does not necessarily prohibit projects but only prohibits them if they do not have written approval. As such, the approval itself must be based on an accurate or scientifically sound basis of predicting and determining environmental risks. The safeguard, therefore, comes with the stringency of conditions set out in the approval

17 The Environmental Management Act No.12 2011, preamble.

18 *ibid* preamble.

19 *ibid* preamble.

20 *ibid* s4.

21 Nicolas De Sadeleer, *Environmental Principles: From Political Slogan to Legal Rules* (Oxford University Press 2002) 255-256.

22 The Constitution of Zambia (n 2), Art 255(c).

23 *ibid* Art 255(j).

24 The Environmental Management Act No.12, 2011, s6 (b).

25 *ibid* s29 (1).

26 De Sadeleer (n 21) 256.

according to the second part of subsection 1 of section twenty-nine.

Subsection 2 makes the regulatory instruments clear; the approval must come in form of a license or permit in which conditions are stipulated dictating how to proceed with the approved project. These conditions are the hallmark of EIA regulations to be analyzed further in the proceeding discussion. But in subsection 3, the Agency may delegate its approval functions to an appropriate authority. In theory, the delegated authority holds the scientific expertise to be relied upon in deciding the matter under review. The practice, however, is different. Meanwhile, the legal form of subsection 4 demonstrates the foundation of subjectivity in this approval:

The Agency shall not grant an approval in respect of a project if the Agency ‘considers’ that the implementation of the project would bring about adverse effects or that the mitigation measures may be inadequate to satisfactorily mitigate the adverse effects of the proposed project.

The logic of subsection 4 implicitly posits that proposed projects do not come with an inherent risk of adverse effect on the environment. But this risk is inherently associated with how the project is planned to be implemented. As such, environmental risk lies with the implementation of the proposed project and not with the nature and scope of the project itself. This is already a subjective matter from ecological, economic, political and cultural perspectives of the many Zambians who may be interested in, and affected by, a proposed development project. This should explain the phrasing of the foundational section 29 in which the law prohibits undertaking any project that ‘may’ have an impact on the environment without written approval of the Agency. Essentially, project approval is based on how the Agency ‘considers’ the implementation design of a proposed project, and not necessarily the scientific certainty that can be gleaned from the nature and scope of the project itself against a particular environment. This premise became an important basis of legal argument in the EIA case of Zambia Community Based Natural Resource Management Forum and other vs the Attorney General and Mwembeshi Resources Limited - as the second defendant successfully argued that: ‘[t]here is

no law that prevented a party from being issued with a mining license before completion of an EIA. What was forbidden was to commence mining operations before the EIA.’²⁷

From the foregoing legal argument, the project proponent only needs to prove, in pre-approval theory, that their practices vis-à-vis project operation will be conducted in such a way that it significantly reduces or eliminates the risk of causing adverse effects on the environment during its operation. From regulatory ethos, the prediction and determination of whether a proposed project ‘may’ have adverse effects on the environment is subjective if not based on scientific certainty. Ordinarily, EIA regulations, being a set of detailed rules enforcing the statutory object in practice, are expected to cure the subjectivity wrought in the statutory legal text.

As was rightly held by the judge in the case cited, EIAs are widespread public interest matters.²⁸ They inevitably provoke public conflicts of interests, contestations and grievances especially after approval. As such, the judge held that this was enough reason to believe that such matters needed to be determined on their merits.²⁹ Reference to ‘merit’ in this case hinged on the plausibility of scientific certainty regarding the reality of a causal link between the proposed project activities and the negative effects such activities would cause on the complainants, the surrounding communities and on the environment in general.

Recognizing the public-interest nature of EIAs, legal drafters saw it fit to provide, in subsection 5, a procedural right to any persons aggrieved with the granting or refusal to grant an approval under the law to, within fourteen days of that decision, lodge an appeal in accordance with Part X. The part X appeal system revolves around three processes; firstly, the aggrieved may apply to the board of the Agency for review of the decision or direction within thirty days;³⁰

27 Zambia Community Based Natural Resource Management Forum and Five others vs the Attorney General and Mwembeshi Resources Limited, 2014/HP/A.006, April 2014, pg 15.

28 *ibid* 8.

29 *ibid* 12.

30 The Environmental Management Act, s112.

secondly, and given that the board may dismiss the application for review under section 113, the aggrieved may appeal to the Minister who also may dismiss or consider the appeal, and the Minister may also refer the application or appeal back to the board;³¹ and thirdly, any person not satisfied with the Minister may appeal to the High Court of Zambia.³²

Problems begin when the Minister fails, for whatever reasons, to settle grievances against an EIA approval, and refers the matter back to the board of the Agency who, in the first place, may have given an unsatisfactory verdict which prompted the aggrieved persons to appeal to the Minister. Secondly, the process becomes controversial when the Minister disregards the scientific findings and recommendations of the person(s) assigned to conduct an inquiry. Rightly so, the law makes it clear that such inquiry findings and recommendations are not preemptory and cannot be binding on the Minister.³³ In essence, the Minister is not under an obligation to heed the findings or recommendations of the inquiry notwithstanding the fact that this may be an expert-based scientific inquiry. The legality of this provision was interpreted literally and upheld by High Court stating that '[t]he Minister of Lands is not bound by findings and recommendations of the person conducting the inquiry when determining an appeal or review'.³⁴

On the one hand, there is a legally weak caveat safeguarding the Minister's potential abuse of statutory powers by directing that the Minister shall have regard to the purpose of the Act in determining any application for review. But on the other hand, the Minister shall not be bound by the expert opinion expressed in the inquiry recommendations. The Ministerial discretion to disregard expert recommendation sits at odds with the precautionary principle whose bedrock is scientific certainty and/or lack of it in decision-making. In practice, therefore, the Ministerial discretion to disregard expert scientific inquiries, findings and/or recommendations shuts the fulcrum of scientific certainty, planning and decision-making in the enforcement and

implementation of the precautionary and prevention principles of environmental law. The exercise of this ministerial discretion in practice strangles the precautionary principle at its birth. As such, it turns the EIA process into a subjective, controversial and highly contested system on the part of those that do not agree with the Minister - the very reason why matters are escalated to the High Court of Zambia, in the hope that the courts will cure the subjectivity in the EIA approval. Yet the courts must adjudicate these matters by reference to the very statute that originate the subjectivity.

While section 29 of the EMA generally provides and defines the normative culture of EIAs in Zambia, section 30 empowers the Minister to make regulations for the effective administration of Strategic Environmental Assessments (SEA) and EIAs. These regulations are meant to categorize projects which are considered to have an effect on the environment, and those which are required mandatorily to conduct an EIA.³⁵ Ostensibly, the spirit of section 30 is to limit subjectivity in the approval process by creating some guiding criteria of indicators which EIA statutory regulations must enforce in practice.

2.2 Mines and Minerals Development Act 2015 and S.I No. 29 of 1997

EIAs in the Mines and Minerals Development Act 2015 are specifically tailored to regulate safety, health and environmental protection in mining operations.³⁶ It borrows its substantive definition of EIA from the EMA as the principal legislation on environmental matters in general and on EIAs in particular. As such, the Directors of Mines Safety and the Agency may cause such impact studies to be carried out when considered necessary.³⁷

EIAs in mining operations are regulated by a principle norm that the exploitation of minerals shall ensure safety, health and environmental protection.³⁸ This principle has a material effect on the approval of mining

31 *ibid* s115.

32 *ibid* s116.

33 *ibid* s115 (2) c.

34 Zambia Community Based Natural Resource Management Forum (n 27) 15.

35 Environmental Management Act, s30 (2) a.

36 The Mines and Minerals Development Act No.7 of 2015, preamble.

37 *ibid* s80 (2).

38 *ibid* s4 (c).

operations; so grave that a mining license cannot be issued, and effectively, mining operations cannot be permitted without prior satisfactory EIA approval from the Agency.³⁹ Further, the role of the Director of Mines Safety in EIAs is bound by section 39 of EMA which enacts that; an appropriate authority shall not issue or grant any license, permit or any other authorization for the doing of any activity by any person, which may have an adverse effect on the environment, before the appropriate authority first consults the Agency as to whether the issuing or grant of the license, permit or other authorization will have an adverse effect on the environment.

Unlike the EIA process under the EMA and its attendant regulations, the mining-EIA process makes peremptory rules in respect of who qualifies to conduct an EIA in practice.⁴⁰ This plays a crucial gate-keeping role regulating the entry into EIA professional practice and conduct – a missing link in the ZEMA EIA regulations which has been a subject of controversial contestations. The Mining-EIA regulations require qualified scientists to conduct scientific studies as part of the specialized Mining-EIA.⁴¹ The enforcement and implementation of the precautionary and prevention principles in this case cannot be contested. The requirement for environmental scientists to conduct scientific studies upon which planning and decision-making should be based significantly reduces room for subjective approvals and decision-making in the mining-EIAs. As such, the Mines and Minerals Development Act and its concomitant EIA regulations are not subject of this analysis.

2.3 Environmental Protection and Pollution Control Act 1990

The repealed Environmental Protection and Pollution Control Act (herein truncated as EPPCA) contains no specific provisions to establish EIA as a legal/regulatory mechanism for environmental protection and pollution control. Section 96, however, provides for the Minister's discretionary powers to make regulations, by statutory instrument, for anything

which had to be prescribed under the Act for the protection of any aspect of the environment and for the control of pollution in the environment. The current EIA regulations in force (the EIA Regulations, S.I No.28 of 1997) derive from this provision yet they remain in force by virtue section 15 of the Interpretations and General Provisions, Chapter Two of the Laws of Zambia.⁴² The regulations derive their subsidiary authority from the exercise of powers contained in sections 6 and 96 of the EPPCA. Section 6 establishes functions of the Environmental Council of Zambia (ECZ the Council) under which the Council was mandated to, inter alia, conduct studies and make recommendations on standards relating to the improvement of the environment and maintenance of a sound ecological system. In effect, the theoretical aspirations of the EIA regulations are defined by, and derive from, the repealed EPPCA, the practical effects of EIA are envisioned from the spirit of EMA. But while there is no illegality regarding such arrangements according to the Laws of Zambia, the EIA regulations in practice presents lacunas, weaknesses and inconsistencies associated with the very reasons why the EPPCA was repealed and replaced in the first place. The discussion now narrows down to examine the EIA regulations and the process it establishes in detail.

3 EIA REGULATIONS, PROCESS AND PRACTICE

3.1 The EIA Regulatory Framework

The EIA review process is regulated by the Environmental Protection and Pollution Control

³⁹ *ibid* s25 (a).

⁴⁰ The Mines and Minerals (Environmental) Regulations, S.I No. 29 of 1997, reg 4.

⁴¹ *ibid* reg 3(b).

⁴² Where any Act, Applied Act or Ordinance or part thereof is repealed, any statutory instrument issued under or made in virtue thereof shall remain in force, so far as it is not inconsistent with the repealing written law, until it has been repealed by a statutory instrument issued or made under the provisions of such repealing written law, and shall be deemed for all purposes to have been made thereunder.

(Environmental Impact Assessment) Regulations, S.I No 28 of 1997 (herein referred to as the EIA Regulations). The process begins with submission of six copies of a complete project brief to the Agency according to regulation 5. The project is then transmitted to the authorizing agency within seven days for comments. If the Agency is satisfied that the project will have no significant impact on the environment, or that the project discloses sufficient mitigation measures to ensure ‘acceptability’ of the anticipated impacts, the Agency shall, within forty days of receiving the project brief from the developer, issue a decision letter, with conditions as appropriate, to the effect, to the authorizing agency.⁴³ While the meaning of ‘acceptability’ in this context is the key basis for decision-making, there is no scientific criteria outlined within the regulatory process and in practice to determine ‘acceptability’. What is presented in both EIA process on paper and in practice is that the developer only needs to outline sufficient mitigation measures against the predicted impacts in order to guarantee approval of the project brief. As the case is, it is the developer who predicts, calculates, assesses and determines environmental risk and presents to the Agency together with what the developer proposes as mitigation measures.

This logic in the EIA process has a significant relationship to the conscious or unconscious conception environmental risk implicit in the drafters’ minds – that environmental risk comes with the implementation of the project and not necessarily inherent in the nature and scope of the project idea as it relates to the type of environment in which the project is to be operated. This reduces opportunities for relying on scientific certainty for planning and decision-making on the part of the Agency mandated to enforce and implement the precautionary principle. The members of public who dispute this logic, seeing it as illogical against the precautionary principle, undertake all necessary steps to contest what they view as controversial EIA approvals arising out of this logic. The claim of the appellants (being a group of environmental organizations) in the Zambia Community Based Natural Resources Management

Forum EIA High Court case was fundamentally premised on this argument.⁴⁴

But where the Agency determines that the project is likely to have significant impacts on the environment, it shall require that an Environmental Impact Statement (EIS) be prepared in accordance with the regulations, and shall inform the developer accordingly within forty days of receiving the project brief from the developer.⁴⁵ Following the sequential order of regulations five to seven, a project brief is the primary document upon which the Agency determines whether a project satisfies the ‘acceptability’ threshold to proceed with a project brief or to be subjected to an Environmental Impact Statement (EIS). In practice, this is an expensive undertaking for Second Schedule projects (Large scale projects requiring an EIA under regulation 7) owing to the fact that every project must first develop a project brief before the Agency can determine, from that brief, whether the project requires to be subjected to a full EIA or not. To avert the huge cost that come with such a requirement, project developers and their EIA consultants use their discretionary judgements to decide, by themselves, whether their projects require a project brief (under the First Schedule) or a full EIA under the Second Schedule. This has yet raised questions – in whose powers does the decision to undertake a Project Brief or full EIA lie? In the EIA regulations, it is clearly the Agency, based upon the scrutiny of a Project Brief. But in practice, the project developers and their EIA consultants make the decision.

Rightly so, developers and their EIA consultants are guided by the two regulatory Schedules provided by the Agency to determine which projects need a Project Brief and which ones require a full EIA. On the one hand, regulations 5 to 7 are peremptory mandating all projects to start with a Project Brief which, according to both the explicit definition of ‘Project Brief’⁴⁶ and the spirit of regulation 7, is the first step in the EIA

⁴³ Environmental Protection and Pollution Control (Environmental Impact Assessment) Regulations, S.I No.28 of 1997, reg 6(2).

⁴⁴ Zambia Community Based Natural Resources Management Forum and Five others (n 27) pg 3-4.

⁴⁵ EIA Regulations (n 43) reg 7.

⁴⁶ Project Brief means a report made by the developer including preliminary predictions of possible impacts of a proposed project on the environment and constituting the first stage in the environmental impact assessment process.

process irrespective of the nature and scope of the proposed project. On the other hand however, the First and Second Schedules explicitly guide the developers to judge their own projects regarding whether such projects require a mere Project Brief or a full EIA. At the same time, the determination of whether a project requires a Project Brief or full EIA is the discretion of the Agency based on the assessment of the ‘acceptability’ of predicted environmental risks and their impacts in the submitted Project Brief, according to regulation 7.

For those projects requiring a full EIA, part IV of the EIA regulations outlines a detailed review process in which the developer is required to submit twelve copies of the EIS to the Agency.⁴⁷ The twelve copies are meant to be distributed to a host of interested and/or affected stakeholders outlined in regulation 16 such as; the relevant ministries, local government units, parastatals, non-governmental and community-based organizations, all of which, are not required to conduct their own independent scientific assessments against the proposed project, but only required to comment on the submitted EIS based on their own opined perspectives. The submitted EIS is entered into a registry of EIAs and within seven days, the Agency transmits a single copy of the EIA to the authorizing agency for comments.⁴⁸ The authorizing agency or another authority the Agency is working with has the discretion to carry out such procedures as deemed appropriate. In the spirit of the precautionary and prevention principles, it would ordinarily be expected that such procedures be independent scientific assessments to provide checks and balances against the developers’ assessments and prediction of environmental risk and impacts in the submitted EIS. But in practice, the other authorizing agencies only offer comments based on their opinions regarding their perspective of the proposed project after reading the submitted copy of the EIS as required under regulation 15.

Should the developer’s EIS be rejected based on opinions of other authorizing agencies, the developer has legitimate grounds to challenge such a decision; to

argue that his/her project has been rejected based on opinions rather than scientific assessment. Such an argument become even stronger when the developer presents the best available technology to substantiate the scientific certainty which the Agency and other authorizing agencies may not be able to provide in justification of the precautionary principle.

Should such contentious issues arise at a preliminary stage of EIA process, the Agency has a discretion to organize or cause to organize public hearings in the locality of the proposed project.⁴⁹ According to regulation 17, the Agency shall consider the EIS and all comments it has received under regulations 15 and 16 to determine whether to issue a decision letter in accordance with regulation 21 (issue of letter of decision by the Agency) if the Agency is of the ‘opinion’ that it will reach a fair and just decision through a public hearing,⁵⁰ or if the Agency considers it necessary to protect the environment.⁵¹ In the said public hearings, the Agency shall appoint a person who, in its opinion, is qualified to preside over the public hearing and who shall serve on such terms and conditions as may be agreed between the Council and the person so appointed.⁵² The person appointed to preside over the public hearing shall, within fifteen days from the termination of the public hearing, make a report of his findings to the Agency.⁵³

A few concerns arise out of this process and the seriousness of these concerns is seen in the practical implications of EIA conduct:

Firstly, there is a high level of discretionary judgements that both the Agency and the other authorities have to rely on. This discretion is created by the weak form of the legal language used throughout the review process such as – the use of ‘may’, ‘consider’ and ‘opinion’. It weakens the bindingness of the process while creating room for the Agency to rely on its own discretionary opinions, administrative procedures and subjective judgements.

⁴⁷ EIA Regulations (n 43) reg 14 (1).
⁴⁸ *ibid* reg 15.

⁴⁹ *ibid* reg 16 (2).
⁵⁰ *ibid* reg 17(2) a.
⁵¹ *ibid* reg 17(2) b.
⁵² *ibid* reg 18(2).
⁵³ *ibid* reg 18(4).

Secondly, and related to the first, the Agency does not demonstrate its own independent technical/scientific authority, capacity and strengths in assessing, examining, monitoring and evaluating environmental risks and impacts. Rather, the framework clearly dictates the Agency's reliance on; i) the comments of other authorizing agencies or authorities such as, the local authorities and line Ministries in their comments: it is not clear what happens if the other authorizing agencies have a dissenting view opposed to the Agency's approval, ii) the developers' own propositions in the EIS or project brief, iii) comments and submissions from public hearings, and iv) report of the appointed person presiding over the public hearings.

While this may be a good sign of democratic environmental governance in normative terms, it also depicts the technical weaknesses of the Agency lacking strong scientific standards in environmental decision-making. This weakness creates regulatory subjectivity evinced in EIA approval disputations and contested decisions. If, as the case is, there is a technical committee of reviewers the Agency relies on, the EIA regulations do not outline the selection and criteria used to select the members of that committee. What qualifications should the reviewers possess seeing that EIAs arise out more than thirty socio-technical, socio-environmental and scientific specialties listed in the First, Second and Third Schedules of the regulations in tandem with regulations 3 and 7? These questions are answered through the Agency's administrative procedures which does not cure the subjectivity in the approval process, but reinforces it.

Thirdly, how does the Agency deal with all the public comments it receives from an EIS? Administrative practice shows that the Agency categorizes these comments into what it deems crucial and those that are considered more opinionated than technical. Understandably, it is practically impossible to give equal consideration to all the comments, as conflicting as they may be, at any time. But if comments of a section of interested and affected parties could be considered and treated as less important 'opinions', what does public participation mean to those whose comments are judged 'less important'? Experience also shows that it is the section of the interested and affected parties whose comments and views might have been considered 'less important' who actually contest and

appeal against the Agency's decisions even to the High Court.

Fourthly, the professional conduct of EIAs themselves is increasingly becoming questionable. Unlike the Mining-EIA regulations which are peremptory on the environmental and mining scientists mandated to conduct an EIA, including their qualifications and experience, the ZEMA EIA process has grey areas in this respect. The developer decides but does not determine who should conduct their EIA according to regulation 9. The developer submits names and qualifications of persons that must prepare the EIS but the Agency has a discretion to approve and/or reject the proposed names without providing a criteria for approving and/or rejecting the names of EIA consultants. Further, the Agency gives justificatory reasons for any rejection of proposed EIA consultants but it is not mandated to provide justificatory rationale for who qualifies to conduct an EIA.⁵⁴ In the event of rejected names, the Agency shall request that another name be submitted for consideration, yet no specifications are given as to what criteria such a counter-proposed name should satisfy. In essence, the Agency has an administrative, not a legal, discretion to decide who should, and who should not, conduct EIAs in Zambia.

3.2 Public Participation

Notwithstanding the fact that public participation lacks a globally-agreed definition, it actually presents a divergence of definitions, often contested, from a plethora of perspectives.⁵⁵ The Constitution of Zambia does not provide a conceptual meaning of public participation, neither does the EMA nor the EIA Regulations themselves provide a statutory working definition of public participation. It is helpful enough for this analysis, however, that the Constitution of Zambia, EMA and the EIA regulations provide a clear conceptual perspective of the value of public participation. This value is rooted, firstly, in the normative perspective of public participation enshrined in Article 255 of the

⁵⁴ *ibid* reg 9(3).

⁵⁵ Anne Glucker and others, 'Public Participation in Environmental Impact Assessment: Why, Who and How?' (2013) 43 *Environmental Impact Assessment Review* 104-111, 105.

Constitution, i.e. effective participation of people in the development of policies, plans and programs;⁵⁶ secondly, in the normative perspective enacted as a right to information which is intricately associated with the right to be informed in section 91 of the EMA, and thirdly, in the instrumental perspective of regulation 10 of the EIA regulations.

The normative perspective value holds public participation as an avenue for influencing decision-making in environmental matters, to enhance the democratic capacity and social learning of the interested and affected parties.⁵⁷ On the other hand, the instrumental perspective value holds public participation as an avenue for generating legitimacy in the decision-making process, a conflict resolution mechanism and a means of reflection in respect of what benefits or risks a proposed project brings to the fore.⁵⁸ In practice, however, there is an ostensible combination of the two perspective values in EIA. This combination is somewhat an inevitable overlap more for the sake of augmenting each other's' goals than to create an antagonism.⁵⁹ But the challenge comes when these two values clash in the approval process and in the courts.

It is common knowledge that courts in Zambia rely more on statutes [enacted with a strong normative values of public participation] than on provisions of the regulations [with an instrumental value]. Therefore, when Honourable Justice Kondolo reiterated that an EIA case whose magnitude revolved around a large-scale mining operation evoked great public interest,⁶⁰ he was indirectly referencing respect for both the normative and instrumental values of public participation vested in those members of public interested in, and affected by, the proposed project. But unlike the instrumental perspective, the normative perspective drives even the people who are not directly affected by the proposed project to contest an EIA

approval. The Zambia Community Based Natural Resource Management Forum case⁶¹ typifies this scenario - as the first five appellants represented a group of environmental organizations who were not directly affected by the proposed project. Meanwhile, the perspective value of public participation in the EIA Regulations is purely instrumental and contrasts the purely normative perspective values of public participation enshrined in the Constitution and in the EMA.

Regulation 8 requires that a developer ensures that public views are taken into account during the preparation of the Terms of Reference for an EIS. The use of the term 'ensure' is itself a weaker form of legal language by which the developer is required to show commitment or effort in incorporating public views in their plans. As such, the compliance requirement on the developer's part is to simply demonstrate 'effort' and show 'commitment' not a substantively positive obligation to take public views into account. In effect, the developer cannot be liable for failure to take public views into account as the provision only requires them to demonstrate effort, as long as they are able to show that they did undertake all practicable steps to do so.

In the final analysis, public participation is stripped off its value and remains at the mercy (or at the discretion) of the developer's 'effort' or 'commitment' rather than a substantively mandatory requirement to take public views on board. This lacuna in the practice of EIAs weakens the cogency of the Constitutional normative perspective value of public participation and as enacted in section 91 of EMA. Effectively, the rules reduce a statutory 'normative right' to an 'instrumental privilege' at the mercy of the developer's effort, which effort, has an emphasis on the instrumental perspective value of public participation, especially, the use of public participation for reflection and for rubber-stamping legitimacy in the approval process. In empiricism, on the one hand, both the normative and instrumental perspectives of public participation are critiqued for creating an ambiguity which does not outline what public participation is purposed to achieve in practice.⁶² In regulatory ethos, on the other hand, this ambiguity

56 The Constitution (n 2) Art 255(l).

57 Anna Glucker and others (n 55) 106-107.

58 *ibid* 106-107.

59 Donald P Moynihan, 'Normative and Instrumental Perspectives on Public Participation: Citizen Summits in Washington, D.C' (2003) 33(2) *American Review of Public Participation* 164-188, 180.

60 Zambia Community Based Natural Resource Management Forum and Five others (n 27) pg 12.

61 *ibid* 3.

62 Donald P Moynihan (n 59) 165.

prevents the codification of clear standards by which to judge, and through which to enforce, public participation.⁶³

Ultimately, the meaning, value and effectiveness of public participation in EIA decision-making is highly contested on three fronts: Firstly, to what extent are public views, interests, opinions and concerns taken into account; secondly, who makes and determines the final approval of proposed projects when members of the public express dissenting views against the proposed project? And thirdly, there is contrast, in both theory and practice, between the instrumental value perspective in the letter of the EPPCA-based EIA regulations of 1997 and the normative value perspective in the Constitution and in the spirit of the EMA with regards to public participation. Ultimately, the instrumental value of public participation benefits the legitimization of the developers' approval more than the normative values of the public.

3.3 Decision-making

Regulation 20 provides that, in making its final decision, the Agency shall take into account the following: (i) the impact predictions made in the environmental impact statement, the predictions made by the developers themselves; (ii) the comments made under regulations 15 and 16; (iii) the report of the persons appointed to preside over a public hearing as they merely report on the comments gathered from the public hearing, and (iv) where applicable, other factors which the Agency considers crucial in the particular circumstance of the project.

As already alluded to under the review process, the Agency's decision-making is highly subjective because it is not based on scientific criteria but relies on predictions of the developer, expert and lay opinions and comments gathered from stakeholders in support of, or in opposition to, the project, together with what the Agency may consider crucial in the particular circumstance of a project. While EIAs arise out of scientific fields as stipulated in the three regulatory Schedules, the approval process is itself not scientific in tandem with the application of the precautionary

principle. Consequently, EIA approval decisions are a reflection of subjective perspectives, opinions and public comments, subjective and discretionary judgements of the Agency and other authorizing agencies. Ultimately, EIA invoke controversy, contestations and a conflict of interests.

3.4 The Believer's Perseverance Syndrome

Regulatory empiricism shows that values, norms and belief systems have the strongest influence on compliance.⁶⁴ In fact, values, norms and beliefs systems are so strong that they can be used as instrumental and consensual bases for compliance and/or non-compliance with the law.⁶⁵ In the absence of scientific criteria, peoples' normative and instrumental values, morals and belief systems inform behaviour, which in turn, shapes and influences decision-making.⁶⁶ This is referred to as the Believer's Perseverance Syndrome, i.e. a tendency for people to look primarily or exclusively for information that allows them to confirm or prove their beliefs, morals, normative or instrumental dispositions towards an issue.⁶⁷ Devoid of scientific criteria for decision-making, the EIA process in Zambia relies on the Believer's Perseverance Syndrome in which the comments, opinions, assumptions, predictions and perceptions of the Agency, members of the public and stakeholders, the developers' EIS, comments and opinions of the persons appointed to preside over public hearings, and the Minister's decision over EIA conflicts, all depict conflicting values, morals and beliefs of different people including a minister's political views.

Therefore, while conflicts of interest, controversies and disagreements are inevitable, who possesses the right to judge another person's value system, morals and beliefs other than the judge in the courts of law? Without objective EIA criteria upon which the courts can rely to resolve conflicts, controversies and disputations, the EIA process remains a subjective

⁶³ *ibid* 165.

⁶⁴ Tom Tyler, 'Methodology in Legal Research' (2007) 13(3) *Utrecht Law Review* 130-141, 133.

⁶⁵ *ibid* 137.

⁶⁶ *ibid* 133.

⁶⁷ *ibid* 139.

regulatory ethos. This explains why EIA cases lose their substantive cogence when they appear before the courts of law. They change into the claimant's and defendant's value arguments around whose values are more at risk than the other: whose values and beliefs, therefore, needs to be accorded judicial protection? At this level, EIAs are no longer fundamentally about enforcement and implementation of the precautionary and prevention principles of environmental law for environmental protection. Instead, EIAs become a subjective authorization formality to legitimize the developers' proposed projects as opposed to environmental protection.

Finally, using Julia Black's regulatory criteria, the EIA regulatory framework in Zambia fails in the following areas; (i) instrument failure due to a reliance on inappropriate regulatory instruments,⁶⁸ (ii) information failure due to lack of information about the problems being regulated,⁶⁹ evinced in the lack of scientific criteria for decision-making; (iii) implementation failure due to poor enforcement of what is commanded,⁷⁰ even the more reason why EIAs need to be regulated by a professional body, and (iv) motivation failure – meaning, those being regulated are not motivated enough to comply with the rules and can violate them without planning to do so.⁷¹

4 CONCLUSION

This paper has attempted to analyze the root of controversial approvals in the EIA legal framework of Zambia, particularly, in the EIA rules as stipulated in the Statutory Instrument No.28 of 1997. The paper finds that the legal form and character of the EIA rules, the lack of scientific criteria for evaluating

environmental risk in the proposed projects, and the clear contrast in the perspective values of public participation, create a subjective regulatory ethos. In such a framework, normative and instrumental values, ethics and belief systems become the lenses through which people subjectively view an issue before them based on their own world views to influence EIA decisions. Without science forming the basis of decision-making, EIA decisions are made subject to the divergent perspectives, opinions and comments which depict different, and often conflicting, values systems of all the interested and affected stakeholders. Ultimately, whose value system could be judged as legitimate or illegitimate? On what grounds could such normative and instrumental judgements be made? This question is ultimately reserved for the High Court judge to answer in the process of adjudicating the myriad of value-based arguments that arise out of EIA process.

In the practical essence, EIA controversies lose the technical cogency of EIA as an enforcement and implementation mechanism for the precautionary and prevention principles of environmental law and environmental management when they are presented before the judge in litigation. Under the prevailing regulatory ethos, the controversies and conflicts of interest arising out of this process are not only inevitable but understandable from the legal form of the EIA rules. To a large extent, this problem reflects the Agency's scientific capacity weaknesses locked within the framework of EIA law, and particularly, the Agency's present failure to bench-mark itself against, and to meet, the robust standards of practice set twenty years ago by the erstwhile Environmental Council of Zambia.

It is hereby proposed, therefore, that EIA regulations need not be amended but completely overhauled in order to locate their primacy in the spirit of the Constitution and the Environmental Management Act, 2011. While it is appreciated that the process of revising these rules is already under way, the risk of carrying forward the mischief of Statutory Instrument No.28, 1997, is as daunting as pouring old wine into new skins while the essence of the old wine remains the same. Therefore, the paper prays for the need to cure the subjective regulatory culture at the centre of the approval system. That the mischief is itself characterized by the legal form, nature and character of

68 Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a Post-Regulatory World' (2001) *Current Legal Problems* 103, 104-7.

69 *ibid* 105.

70 *ibid* 106.

71 *ibid* 107.

the rules, the development of new EIA rules should ideally revolve around the legal form, nature and character of the substantive rules themselves more than a mere revision of regulatory instruments.

The EIA rules should be enforcing an approval procedure whose fulcrum is a professional and scientific standard of practice. This further highlights two fundamental issues at play with the current EIAs in Zambia; the EIA legal procedure as managed and regulated by the Agency, and the EIA professional practice as currently managed by nobody and sub-optimally regulated by ZEMA. While ZEMA can revise the EIA rules to cure the high level of subjectivity in the approval process, pertinent questions will still linger; who should conduct EIAs in Zambia, how should they do it – what ethical, scientific and technical issues should define this practice as professional? These questions review subjective matters which, firstly, ZEMA has shown considerable lack of capacity to regulate; and secondly, as a consequence, they are matters of professional conduct from which ZEMA should rescue itself.

In addition, there is nothing within the current regulatory framework that mandates the Agency to regulate EIA professional practice. As the case is, the Agency is an interested and affected party playing the role of police, jury and judge in the approval process. This is the source of the often observed polarity that frequently emerges between the propositions and expectations of the developer and the demands of interested and affected parties; a polarity which the Agency often fails to manage. As a result, the EIA process breaks down whenever an EIA expert and the Agency fail to bridge the polarized gap between the developer's propositions and the expectations of interested and affected stakeholders.

Foregoing, it would be a professional gesture for the Agency to relinquish itself from issues of professional practice and concentrate on regulating the legal process. EIA practice should be regulated by a mandated professional body in the same manner as lawyers, doctors and engineers regulate their own professional practice through the Law Association of Zambia (LAZ), the Zambia Medical Association (ZMA) and the Engineering Institute of Zambia (EIZ), respectively. It should be the mandate of the professional body to establish professional standards

of practice around which licensed EIA practitioners will base their scientific, technical and ethical practices. The regulatory advantages such an approach brings to the fore cannot be overemphasized as it provides a decentric regulatory ethos which cures the empirically flawed assumptions of the current EIA process.

ARTICLE

A CASE STUDY OF THE CARMICHAEL COAL MINE FROM THE PERSPECTIVES OF CLIMATE CHANGE LITIGATION AND SOCIO-ECONOMIC FACTORS

Sandra Cassotta, Vladimir Pacheco Cueva & Malayna Raftopoulos

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1

INTRODUCTION

In 2010, Adani Mining Pty Ltd (Adani) proposed the development of what would become one of Australia's most controversial mining projects. Known as the 'Carmichael Coal Mine' (sometimes referred in the Australian media as the 'Adani Mine' or 'Adani project'), the project has a predicted lifetime of 60 years and estimated life cycle production of 2.3 billion tonnes of thermal coal. Due to its enormous scale, and despite its potential economic and social effects (including fiscal income), the project has met fierce opposition because of its potential environmental and social impacts. It is estimated that the burning of coal from the mine will generate 4.6 billion tonnes of greenhouse emissions. These emissions are over 0.5 per cent of the remaining carbon budget which has been set to limit global temperature rises to 2°C above pre-industrial levels.¹ As such, the Carmichael Coal Mine project, which was initially projected to become one of the largest coal mines in the world, has found itself the object of an increasing amount of climate change litigation in Australia's courts. By 2020, the reputation of the Adani Group was so compromised that the company decided to change its name to 'Bravus Group' after mistakenly thinking that Bravus meant 'brave' or 'courageous' in classical Latin.² In reality, as explained by an article in *The Guardian* 'Bravus' means 'crooked' or 'deformed', 'mercenary' or 'assassin' in that language.³

By using the Carmichael Coal Mine as a case study, the purpose of this paper is to explore and analyse climate change litigation in a systemic legal and socio-economical approach. It will focus on the current challenges and potentials of the Australian legal framework and the jurisprudence of climate change litigation. The aim is to advance toward a more conscious global approach to designing regulations that can consider and balance direct economic benefits for the local economy, and global environmental concerns and global common vision about how to manage mining developments and energy challenges. The research question seeks to identify in the Carmichael Coal Mine case what are the legal elements of regression and advancement in climate change litigation that enable economic and social contributions against climate change impacts.

When examining this particular mining project, the authors will consider global concerns highlighted, for example, by the Paris Agreement and the International Panel of Climate Change (IPCC) concerning greenhouse emissions or by the United Nations Development Programme's (UNDP) Agenda 2030 relating to access to reliable source of energy for the population. This approach is to provide substantive guidance, especially in relation to how the local regulators and policy makers should proceed if they are to succeed in managing and regulating these projects when faced with climate change litigation. In that sense, climate change litigation can serve as a catalysing factor to facilitate the transition from fossil fuel to renewable energy. However, as will be explained later, at present Queensland is not ready to balance climate change damages with short-term monetary returns.

1 Joint Report to the Land Court of Queensland on 'Climate Change – Emissions', *Adani Mining Pty (Adani) v. Land Services of Coast and Country Inc. & Ors.* by Chris Taylor 1-16.

2 M Philpott, 'Adani Mining Changes Name to Bravus After 10 Years in Australia', *ABC News* (5 November 2020) <<https://www.abc.net.au/news/2020-11-05/adani-changes-name-to-bravus-mining-and-resources/12851592>>.

3 Naaman Zou, 'Crooked Not Courageous: Adani Renames Australian Group Bravus Mistaking it for 'Brave' *The Guardian* (5 November 2020) <<https://www.theguardian.com/business/2020/nov/05/crooked-not-courageous-adani-renames-australian-group-bravus-mistaking-it-for-brave>>.

2

THE BACKGROUND OF THE CARMICHAEL COAL MINE PROJECT

Australia is one of the most vulnerable continents to the impacts of climate change and is at the same time the location of the largest coal developments, thus making it the scene of numerous juridical reviews concerning coal mining projects and climate change

litigation. The Carmichael Coal Mine, located in Queensland, is only one example of climate change litigation processes in Queensland. Queensland jurisdictions, by means of merit review and judicial review, had to face numerous obstacles against coal mining project proposals in order to evaluate the approaches taken by tribunals and courts to the environmental assessment of coal projects.

The Carmichael Coal Mine is one of those difficult cases with massive environmental, climate and Indigenous rights implications, making it especially valuable for analysis. In particular, the focus is on all the legal elements of the approval process, how social actors contest them and how these are linked to economic and social considerations.

Although none of the challenges presented in this article have succeeded in stopping the Carmichael Coal Mine project, the authors are able to identify some elements of advancement and regression in the climate change litigation's process. These elements allow for new legal paths to blocking future project approvals in the mining sector if such projects pose threats to the environment and/or aggravate climate change.

In 2010, the Adani Group proposed the Carmichael Coal Mine project in Queensland's Galilee Basin. It involves a Greenfield open-cut coalmine, an underground coal mine, associated mine processing facilities and a 388 Km railway, linking the mine with the coal port at Abbott Point, near the town of Bowen.^{4,5}

The process of approval of the project was an exhausting experience from 2010 to the Queensland Coordinator-General's recommendation to approve the project in early 2014, after numerous approval processes and court proceedings.⁶ The Carmichael Coal Mine case involved numerous objections in climate change litigation and on a number of different grounds, including impacts on the Doongmanbulla

Spring Threatened Ecological Community, threatened species like the Black-throated Finch, and the mine's contribution to climate change. In addition, the economic feasibility of the project was among the objects of litigation. Climate change arguments of the Carmichael Coal Mine case (as in other cases considered by the Australian jurisprudence) build on scientific expertise related to climate change impacts and on joint expert reports, such the report of Dr Meinshausen's carbon budget model.⁷ According to this joint expert report, the carbon budget available after 2015 has been depleted to 850 billion tonnes of carbon dioxide, with exploitation of all known coal reserves having the potential to contribute 4,000 to 7,000 billion tonnes of carbon dioxide.

The 'Green Gas Protocol', is an international accounting for GHGs⁸ which categories GHGs emission into three categories: Scope 1 emission that are direct greenhouse gas emission from a project; Scope 2 emissions that are indirect greenhouse gas emission from the generation of purchased electricity; and Scope 3 emissions that are all other indirect greenhouse gas emissions resulting from a company's activities. This expert group reported that over its lifetime, the proposed Carmichael Coal Mine project will account for 0.53-0.56 per cent of the global carbon budget. The expert report also calculated GHGs emissions on a cumulative emission basis, including Scope 3 emissions, and concluded that the potential of emissions from the Carmichael Coal Mine project will be the highest of the world.

This report was accepted by Queensland Land Court, and thus determined an important advancement in the capacity of the Courts to take science into consideration in the legal reasoning by recognizing the concept of 'cumulative emissions'.⁹ This is the

4 N McNamara and W Crane 'Public Participation and the Adani Syndrome' (2018) 35(3) Environmental and Planning Law Journal Volume 327.

5 Another proposal exists for a 189 Km railway line if the line connection goes to Goonyella Railway line, rather than going directly to Abbot Point terminal.

6 McNamara and Crane (n 4) 328.

7 Chris Taylor and Malte Meinshausen, Joint Report to the Land Court of Queensland on 'Climate Change Emissions' – Adani Mining Pty Ltd (Adani) v Land Services of Coast and Country Inc. and Ors (2014) 8.

8 The Greenhouse Protocol is a widely used Protocol in international accounting for green gas emissions. For more details on the Protocol and Scope 3, see <<https://www.ghgprotocol.org>>.

9 Adani Mining Pty Ltd v Land Services of Coast and Country Inc. [2015] QLC 48, [429]. The concept of cumulative emissions will be further analysed in section 2.4.2.

‘cumulative capacity’ and ‘long terms effects’ of GHGs emissions and their capacity to cause environmental harm, as defined in the Australian legislation in particular the Mineral Resource Act (MRA)¹⁰ and the Environmental Protection Act (EPA).¹¹

The Carmichael Coal Mine case has gone through numerous judicial reviews of government decision-making since 2010 until now. Courts examined the lawfulness rather than reconsidering the substance or merits of the decision. The case is selected because it is very significant in terms of the development of the jurisprudence in climate change litigation as it allows the identification of relevant factors when making mining project approval decisions.

2.1 The Regulatory Framework for Mining in Queensland

Australian law deals with climate change impacts to the environment in a fragmented manner. There is no specific legislation. In order to fill this gap, climate change litigation in the mining sector has engaged in a range of specific legal frameworks mostly focusing on elements of environmental impact assessment under environmental protection, planning legislation and approvals of licenses of coalmines within the statutory context. Since Australia is a federation of states and territories, these elements are pertinent to the state level, with federal legislation engaging only in matters of national environmental significance, such as threats to Commonwealth-listed threatened species. This section will focus on the statutory context of this federation, specifically the legal framework where the process of approval of a mining project in this jurisdiction takes place, including how matters of climate change that arise in the assessment of the mining approval processes can be covered.

Environmental assessment, planning legislation and approval of licenses for coalmines in Queensland, applicable to the Carmichael Coal Mine case, involve four main statutory instruments necessary for a

resource title or a mining tenure and an environmental authority:

- 1) The Mineral Resource Act 1989 (Qld) (MRA);
- 2) The Environmental Protection Act 1994 (Qld) (EPA) that provides an environmental authority to be requested;
- 3) The State Development and Public Works Organization Act 1971 (Qld) (SDPWOA) for large scale projects;
- 4) The Environmental Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act), which implies a scheme of adaptive management.

The MRA has a mineral exploitation focus and does not tackle environmental protection. The MRA has objectives such as encouraging and facilitating mining projects, ensuring a financial return to the State and developing an administrative framework that accommodates mining projects. In contrast, the EPA is focused on environmental protection.

The SDWPA facilitates and assesses large mine project proposals, which means that under this act, mining projects will undergo an assessment process that includes the production and public notification of an Environmental Impact Assessment (EIS).¹²

The EPBC implies a scheme of adaptive management, which is a technique of natural resource management that demands participatory objective settings, ongoing monitoring, and iterative decision-making. It is best suited to projects with high uncertainty about an ecosystem and when the impact of decisions may be irreversible.

This act presents an advancement in terms of effectiveness of environmental protection because adaptive management hitherto has been applied in

¹⁰ Mineral Resource Act 1989, Queensland.

¹¹ Environmental Protection Act 1994, Queensland.

¹² Most major projects will in practice also be declared as ‘coordinated projects’ under the SDPWOA and a proponent is able to apply for such a declaration, which if made will entail for the Coordinator-General the dual roles of facilitating and assessing the large mine project proposals.

Australian decisions only in circumstances where the strategy was already prescribed through approval conditions and EIA, rather than where the court itself determined that it was appropriate, which proves that there is a willingness in the judiciary to engage in an analysis of adaptive managements programmes.¹³

Adaptive management is also strongly coupled with environmental law in the application of the Precautionary principle, which states: 'where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing costs-effective measures to prevent environmental degradation'.¹⁴

However, both under EPBC and the EPA there is no specific mention of GHGs emission. The MRA focuses on mineral exploitation rather than protecting the environment and the Coordinator-General conditions under the SDPWO are inconsistent with the possibility to take climate change impacts considerations into courts, especially with regard to the possibility to demonstrate the causality link or causation, which is the link existing between an individual mining project and the impact on climate change.¹⁵ The lack of specific reference to GHGs emissions under the EPBC and EPA means that consideration to climate change in an environmental context involves the adaptation of principles only concerned with direct local impacts in their decision-making rather than about the multi-various causes and in particular, global consequence of climate change.

The gaps present in the statutory framework of the process of approval of a mining project including climate change components are not the only hurdles in climate change litigation in Australia. The big elephant in the room is in the decision-making process for challenging major mining projects in Queensland

that is rather unusual if compared to other jurisdictions.¹⁶

Under the EPA, the Land Court must consider different factors, which gives more weight to environmental protection considerations.¹⁷ In contrast, under the MRA, the Land Court must also take into account and is also supposed to consider other elements and be able to weigh economic and social considerations against environmental protection goal achievements.¹⁸

What is unusual in the Queensland system is that the Land Court determination is not binding on government and the effect is only a mere 'recommendation'. This means that the Court may recommend approval or refusal of a project with or without additional conditions imposed.

2.2 Climate Change Science and Australian Responsibility to Climate Change

Climate change has proven to be an intractable problem for the past twenty years, despite numerous meetings in the global United Nations Framework Convention on Climate Change (UNFCCC).¹⁹ Under the Kyoto

13 C Slattery, 'Canary in the Coal Mine: Why the Approval Conditions for the Carmichael Mine Reveal the Need to Amend the EPBC Act to Incorporate Adaptive Management Principles' (2016) 33 *Environmental and Planning Law Journal*, 428.

14 *SHCAG Pty Ltd v Minister for Planning and Infrastructure* (2013) NSWLEC 1031, 86.

15 The concept of 'causation' or 'causality link' will be further analysed in section 2.4.1.

16 It is unusual compared to other jurisdictions whereby a final decision is first made whether to approve a mine, with this decision then able to be appealed or judicially reviewed, rather than the court making a recommendation to a final decision-maker. J Bell-James and S Ryan, 'Climate Change Litigation in Queensland: A Case Study in Incrementalism' (2016) 33(6) *Environmental and Planning Law Journal* 581.

17 Under the EPA, the Land Court considers a number of factors, including: Principles from the Intergovernmental Agreement on the Environment, including the Precautionary principle, intergenerational equity, and conservation of biological diversity and ecological integrity; any relevant environmental impact assessment impact study, assessment report; the character, resilience and values of the receiving environment; all submissions made by the applicant and submitters; the financial implications as they would relate to the type of activity or industry carried out, or proposed to be carried out, under the instrument and the public interest. See the Environmental Protection Act 1994, 1994 (Qld) s 191, 191 (g).

18 Mineral Resource Act 1989 (Qld) s 269 (4).

19 UN Framework Convention on Climate Change, New York, 9 May 1992, 1771 UNTS 107.

Protocol,²⁰ the parties are required to account for GHGs emission and industrialized nations are committed to emissions reduction targets.

Progress has been made with the signature of the Paris Agreement²¹ to which the parties, including Australia, a signatory party, agreed to limit global warming to below 2°C, and now with a new aspirational goal of 1.5°C. However, at the event, Australia defended its rights to adjusting its targets even though these are currently not ambitious enough to stay under the 1.5°C or 2°C limit.²²

There is undeniable consensus and scientific evidence that climate change represents a serious, global threat and it is extremely likely that human influence has been the dominant factor, as found by the Intergovernmental Panel on Climate Change (IPCC).²³ Negative impacts have already been observed to water quality, ecosystems shifts, crop yields and an increase in climate related extreme events, such as heat waves, droughts, floods, cyclones and wildfires.²⁴ In October

2018, the IPCC released a report that warned of severe and catastrophic consequences if urgent action is not taken to limit temperature rises to 1.5°C.²⁵ Without any doubt 'urgent action' includes the elimination or significant reduction of coal combustion.

However, in response to climate change agreements, in Australia, the Morrison Coalition Government²⁶ announced that its focus remained on ensuring energy prices remain low and only two days before the May 2019 Australian Federal election was called, he gave final approval to what is one of the largest coal mines of the world, the Adani Carmichael Coal Mine.²⁷

The current scientific understanding of climate change, quantification of emissions as proposed from the Carmichael Coal Mine project, and the contribution of those emissions to climate change has been prepared and documented in a joint expert report on greenhouse gas and climate change issues for the Land Court of Queensland hearing of objections to granting the mining lease (ML) and environmental authority (EA) applications for the mine and rail components of the project. Even with a reduced timeframe scale, Carmichael Coal Mine project is one of the largest coalmines in the world and presents a serious impact on the global temperature rising to 2°C above pre-industrial levels.

The crucial question is how the tribunals and courts deal with this evidence when deliberating on legal issues and if the way they deal with scientific evidence actually facilitates the transition away from fossil fuels. From an analysis of the jurisprudence of other cases, such

20 Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, 2303 UNTS 162.

21 Paris Agreement, Paris, 12 December 2015, in Report of the Conference of the Parties on its Twenty-First Session, UN Doc FCCC/CP/2015/10/Add.1.

22 Jillian Button and Hamish McAvaney 'The Big Picture: Australia's Commitments under the Paris Agreement' Allens Insight (Melbourne, 26 May 2020) < <https://www.allens.com.au/insights-news/insights/2020/05/climate-change-guide/the-big-picture-australias-commitments-under-the-paris-agreement/> >. 23 Intergovernmental Panel on Climate Change (IPCC), 'Summary for Policymakers' in TF Stocker and others (eds), IPCC, Climate Change 2013: The Physical Science Basis. Contribution of Working Group 1 to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (CUP 2013) 17.

23 Intergovernmental Panel on Climate Change (IPCC), 'Summary for Policymakers' in TF Stocker and others (eds), IPCC, Climate Change 2013: The Physical Science Basis. Contribution of Working Group 1 to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (CUP 2013) 17.

24 Intergovernmental Panel on Climate Change (IPCC), 'Summary for Policymakers', IPCC, Climate Change 2014: Impacts, Adaptation, and Vulnerability, Part A: Global and Sectoral Aspects, Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (CUP 2014).

25 Intergovernmental Panel on Climate Change (IPCC), Global Warming of 1.5°C. An IPCC Special Report on the Impacts of Global Warming of 1.5 above pre-industrialized Levels and related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development and Efforts to Eradicate Poverty (World Meteorological Organization 2018).

26 The 'Coalition' is made up of two of Australia's main conservative parties: The National Party and the Liberal Party. The Coalition's historic contender in the Australian political scene is the Labour Party.

27 V McGinnes and M Raff 'Coal and Climate Change: A Study of Contemporary Climate Litigation in Australia' (2020) 37(1) Environmental and Planning Law Journal 91.

the 2012 Wandoan Mine Case²⁸ and the 2014 Hancock Coal Case,²⁹ various objectors question both threatening climate change predictions and optimistic predictions of economic benefits. The Carmichael Coal Mine case is one of these.³⁰ It is important to observe that climate arguments build upon the jurisprudence from reports produced by experts on climate change impacts, who produced the joint expert report mentioned above, which in turn relies on Meinshausen's carbon budget model.

Calculated on a cumulative basis, which would include Scope 3 emissions, potential emissions of the Carmichael Coal Mine are among the highest in the world. The expert report underlines that these cumulative emissions will matter for the long-term.

The argument was accepted by the Land Court in 2015 when deliberating on the *Adani Mining Pty Ltd v Land Services of Coast and Country Inc.* (2015), QLC 48 (429), which represents a significant step of progression in climate change litigation as the Land Services Court and Supreme Court of Coast and Country Inc. (LSCC). They argued that the cumulative emissions from the mine should be considered and that these cumulative emissions will have a global effect on the environment. This effect will cause environmental damage within the definition of the EPA and could pave the way for future Australian responsibility for climate change.

2.3 Legal Elements of the Approval Process in Climate Change Litigation: Advancements and Regressions

Climate change litigation plays a fundamental role in cases where governments are weak in taking action against climate change impacts. In the last decade, in Queensland there has been a significant amount of public interest litigation opposing government

approvals for new mining activities, albeit not successful, in stopping the activity.

This section analyses the legal elements determining causes of approval or rejection of the Carmichael Coal Mine case. It investigates if those legal elements were based on climate change argumentation and if those elements can be discerned as signs of regression or advancement in climate change litigation. Climate change litigation can demonstrate that there are weaknesses not only in the laws but also in the legal reasoning and legal interpretation made by the judges. Both the jurisprudence and the law can be key factors in pushing the mining sector to improve its performance and to increase awareness and responsibility from polluters.

From an analysis of selected relevant case law of the Carmichael Coal Mine case,³¹ it is possible to unfold the legal elements of the approval process and how those elements have been contested by court's reasoning. In particular, five elements were decisive in climate change litigation of the Carmichael Coal Mine case:

- 1) Causation;
- 2) Cumulative emissions;
- 3) Precautionary principle;
- 4) Market Substitution Agreement (MSA) and
- 5) Public interest.

The next sections will focus on each of these five legal elements in detail.

28 *Xstrata Coal Queensland Pty Lrd v Friends of the Earth – Brisbane Co-Op Ltd* (also referred as the 'Wandoan Mine Case'), [2012] QLC 13, [600].

29 *Hancock Coal Pty Ltd v Kelly* (No 4) (also referred as 'Alpha Coal Case'), [2014] QLC 12.

30 The economic impact of the Carmichael Coal Mine case will be considered in section 4.

31 Key case law in Queensland Courts concerning climate change litigation of the Coal Mine case examined in the following sections are: *Adani Mining Pty v Land Services of Coast and Country Inc. & Ors.* [2015] QLC 48 (15 December 2015); *Land Services of Coast and Country Inc. v Chief Executive, Department of Environment and Heritage Protection & Anor* [2016] QSC 272; in the Federal Courts: *Australian Conservation Foundation Incorporated v Minister for the Environment and Energy* [2017] FCAFC 134 (25 August 2017); as well as native title litigation: *Burrabungba v State of Queensland* [2017] FCAFC 133 (25 August 2017); *Burrabungba v State of Queensland* [2016] FCA 984 (19 August 2016); *Adani Mining Pty Ltd and Another V Adrian Burrabungba, Patrick Malone and Irene White on behalf of the Wangan and Jagalingou People* [2015] NNTA 16 (08 April 2015).

2.3.1 Causation

The concept of ‘causation’ or ‘causality link’ refers to the link established between an individual mining project and its impact on the climate. Although the effect of thermal coal as a major source of GHGs emission has been proven and assessed in solid, scientific studies and scientific papers, including the previously mentioned Meinshausen 2009 paper,³² proving causation has been the eternal conundrum in courts, representing a sign of regression for a long time in climate change litigation in the Australian courts proceedings in the sense that the legal reasoning of the courts has systematically denied such a causality link.

In the Carmichael Coal Mine case during the jurisdictional review process, where landholders, environmentalist and indigenous groups were challenging the grant of the mining leases, the causality link was not accepted.³³ The Queensland Land Court’s recommendation in the December 2015 case found that coal would come from elsewhere in the event of refusal.

Similarly, the Federal Court of Australia, in its judgement of the 25 August 2017 of the Judicial Review of the Australian Conservation Foundation Incorporated v Minister for the Environment and Energy [2017] FCAFC 134, did not consider causation on the ground that there is no such direct consequence between emissions and proposed actions,³⁴ and even if the actions were not taken, pollution would be caused by ‘someone else’.³⁵

However, the case does represent a considerable sign of advancement in law and also an important shift in the Australian jurisprudence because in reality, it could be advocated that ‘half a victory’ with regards to causation was achieved anyway. It was the first time

that climate change science was taken into consideration in courts and even if causation was not accepted, what was accepted was the existence of cumulative emissions from the mine to be considered³⁶ global effect on the environment and cause environmental damage within the definition of the EPA. The concept of ‘cumulative emissions’ will be analysed in the next section.

2.3.2 Cumulative Emissions

A significant advancement occurred in the Carmichael Coal Mine case due to the procedural shift by the Land Court to use joint expert reports and accept the existence of cumulative emissions and not merely annual emissions, which means that the effect of those emissions caused by coal would matter for long-term climate change. Cumulative Scope 1 and 2 emissions were even described in the Carmichael Coal Mine case as not negligible. The decision did not attribute responsibility for the impacts of Scope 3 emissions to the proponent but the Court accepted the existence of cumulative emissions and therefore de facto an equivocal link between GHGs emissions and climate change and that a single project can be considered as significant in a global context in a physical cause and effect sense.³⁷

However, the strong hurdle in the legal thinking of courts is that even though the defence does not deny a climate change contribution, the legal thinking is based on the argument that ‘if mining is not conducted with the project then someone else will do it’, in what is defined as ‘market substitution agreement’ defence. The second argument for the defence was that mining would determine significant economic benefits and jobs.³⁸ The Courts’ reasoning is based on a finding that if, in fact, global emissions are not increased, there is no impact that constitutes or causes environmental harm. The future will tell.

32 See (n 10) section 2.

33 Adani Mining Pty Ltd v Land Services of Coast and Country Inc. [2015] QLC 48.

34 Australian Conservation Foundation Incorporated v Minister for the Environment and Energy [2017] FCAFC 134.

35 *ibid* paragraph 48.

36 Adani Mining Pty Ltd (n 9) [429].

37 *ibid*.

38 The Adani’s EIS had estimated that the mine would generate over 10,000 jobs. It was revealed at a trial thought expert modelling that this figure was in fact more likely to be 1,206 jobs in Queensland, as part of a total 1,464 jobs in Australia.

2.3.3 Precautionary Principle

During the referrals, the Land Court conducts a hearing with applicants in proportion to the number of parties objecting, for example to a mining lease. When doing so, Land Court takes into consideration the EPA that considers a number of principles of environmental law, amongst which the Precautionary principle.³⁹ In order to prevent serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.⁴⁰

In the Adani Carmichael Coal Mine Case in Queensland, the Federal Court decision in the *Australian Conservation Foundation Inc. v Minister for the Environment (ACF)*⁴¹ rejected the argument of the applicant that the Minister failed to take into account the Precautionary principle. The court explained that the application of the principle requires two conditions precedent: a) a threat of serious or irreversible environmental damage; and b) scientific uncertainty as to the environmental damage. The legal court reasoning is that if there is not a threat of scientific or irreversible damage, the precautionary principle is not triggered.⁴²

The rejection of taking the Precautionary principle as a legal argument to stop the mining lease in the Adani Carmichael Coal Mine Case above into consideration may be due to the way this principle is applied in Australia. When applying the precautionary principle in the Australian context, one must be mindful to frame their consideration in scientific uncertainty rather than uncertainty generally. If the court reasoning considers that if there is, in fact, incontrovertible evidence that a mine will open overseas directly in response to the rejection of a mine in Australia and this mine will produce coal at an identical rate and over identical timeframes, then there is an argument that

there is no threat of serious and irreversible damage caused by allowing the Australian mine to proceed.⁴³

There is an evident sign of regression in the way the court interprets the climate change component, as it is not possible to predict the future of the coal market for the duration of the mining lease, which in turn means that it cannot be proven on the balance of probabilities that the impacts of a mine will be cancelled out by a theoretical alternative mine.

If the court reasons in ‘scientific terms’⁴⁴ and what is assessed is the amount of GHGs emissions that will certainly enter into the atmosphere, then a logical conclusion is to simply accept that there is indeed a threat of serious and irreversible damage and the lack of certainty as to the state of the coal market should not be used as a reason to postpone measures to prevent environmental harm.

In the Adani Carmichael Coal Mine Case, the Federal Court decision, in the *Land Services of Coast and Country Inc. v Chief Executive, Department of Environment and Heritage Protection & Anor* [2016] QSC 272 rejected the precautionary principle and the application of the ‘standard criteria’ because the possible economic benefits that the project would be able to provide were deemed more important.⁴⁵ Hence, it could be assessed that that in this judgement, economic considerations and ‘scientific reasons’ were determinant to rejecting the applicant’s contention.

2.3.4 Market Substitution Agreement

The Market Substitution Agreement (MSA) is the dilemma of Queensland climate change litigation. Queensland’s courts have systematically accepted the

³⁹ Environmental Protection Act (EPA), 1994 (Qld) s 191 (g).

⁴⁰ N De Sadeleer, ‘Environmental Principles: From Political Slogans to Legal Rules’ (Oxford University Press 2002) 221.

⁴¹ *Australian Conservation Foundation Inc. v Minister for the Environment* (2016) 251 FCR 308.

⁴² *ibid* [184].

⁴³ J Bell James and B Collins, ‘If We Don’t Mine Coal, Someone Else Will: Debunking the Market Substitution Assumption in Queensland Climate Change Litigation’ (2020) 37(2) *Environmental and Planning Law Journal*, 183.

⁴⁴ Or referring to ‘scientific uncertainty’ rather than ‘uncertainty generally’ as previously mentioned in this section.

⁴⁵ *Adani Mining Pty Ltd (n 9)* [625]: ‘Although there will be environmental damage caused by the mine, I consider that the adverse consequences are outweighed by the benefits that will flow from the development of the mine’.

MSA as an argument to dismiss climate change impacts because of mining leases. The argument was also defined as ‘no net impact’ or as the ‘drug dealer’s defence’ by Readefern.⁴⁶ The argument sustaining the MSA is essentially that there will be no net increase for GHGs in the atmosphere because of any one project because if the market demand for coal is not met by the proposed mine, then it will be extracted somewhere else.⁴⁷ The MSA has been used for example in the *Adani Mining Pty v Land Services of Coast and Country Inc.*⁴⁸ by the Land Court as a legal element in rejecting the negative impact of coal and no increase of GHGs emissions in mine where approved.

Even if there has been a sign of progression in the climate change litigation with regards to the fact that single projects are significant in a global context and the cumulative effect has been accepted,⁴⁹ the major obstacle has remained the MSA. The MSA is not a concept unique to Queensland but a concept that argues that a rejection of a particular mining project in a given location will make no difference to global GHGs and climate change because other coal mining projects will result in equal emissions and will be developed anyway somewhere else.

This is merely an assumption that is ‘market-driven’. However, MSA is wrong on several grounds as it is contrary to basic economic principles and even if a court cannot accept that the MSA is wrong, it should accept that it is uncertain.⁵⁰ Also the unethical component could be considered because even though MSA has been defined as the ‘drug dealer’s defence’, which compares mining activity to a criminal activity, it would not be acceptable that a criminal would find the way to avoid responsibility completely by arguing that should the activity be removed from the market, another criminal would do it.

In that sense, a sign of advancement in climate change litigation would be to ‘neutralise’ the MSA by instilling in the legal reasoning of the courts the use of the Precautionary principle as a counter argument, specifically on insisting on the uncertainty of the MSA and basing the legal reasoning on ‘standard criteria’. In that sense, when making an objection decision regarding an environmental authority, the Land Court must consider a number of factors, amongst which the standard criteria that are mentioned in the EPA and include the Precautionary principle as set out by the IGAE and mentioned in the previous section. However, there is still the hurdle that when applied in the Australian context, the Precautionary principle is based on scientific uncertainty understood in a ‘narrow vision’ and not scientific uncertainty in general or in a broader and holistic perspective.

The notion of scientific uncertainty should be rethought because scientific uncertainty means a scale of values, rather than one specific one relating to climate change impact. Scientific uncertainty in ‘general means’ means that we are not sure in terms of economic benefits for example or we are not sure about the results of scientific proofs ‘in general’ not only related to climate change science but also in terms of economy, sociology, health, etc. and the interactions of these impacts amongst each other. Nowadays it is impossible to consider climate science physical impacts in an isolated way but rather it is the ‘cascading effects’ between the physical world, chemical world, biological world and human societies in general that have to be considered by observing the multiple intersections existing between physical changes, ecosystem, economy, sociology in the human system. This is the broad, scientific concept of general uncertainty that should be considered in line with the contemporary scientific findings assessed from the IPCC and other relevant institutions and not the old narrow ‘mediaeval’ scientific uncertainty that the Australian courts only consider at present in climate change litigation.

For that reason, the MSA can be neutralised by arguing that it is not in line with basic economic principles and economic provisions. In case of threats of serious and irreversible damage, the lack of certainty as to the state of future coal markets should not be used as an element of the legal reasoning to postpone measures to prevent environmental damage.

46 The Guardian, ‘Is it Un-Australian to Be Driving on with Fossil Fuel Expansion Plans?’ 14 April 2014. See also, McGinnes and Raff, ‘Coal and Climate Change: A Study of Contemporary Climate litigation in Australia’, (2020) 37 *Environmental Planning Law Journal* 1.

47 *ibid.*

48 *Adani Mining Pty Ltd (n 9)* [452].

49 See previous section 2.3.2 on ‘Cumulative emissions’.

50 James and Collins, ‘If we Don’t Mine Coal, Someone Else “Will”’: Debunking the “Market Substitution Assumption” in Queensland Climate Change Litigation’ (2020) 37 *Environmental and Planning Law Journal* 167.

2.3.5 Public Interest

In *Adani Mining Pty Ltd v Land Services of Coast and Country Inc. (Adani)*⁵¹ public interest was taken into consideration and has represented an element of advancement in terms of climate change litigation since the Land Court has accepted that climate change considerations form a part of the 'public interest' under Queensland law. However, the legal element of public interest was not sufficiently strong to win against the MSA arguing that GHGs emissions would be emitted anyway from other projects and sources. Even though Scope 3 emissions were found to be important to consider under the public interest concept, there is still progress to be made in the court reasoning in weighing ethical and economic considerations against public interest. At a federal level, it is clear that litigation concerning the Carmichael Coal Mine case has demonstrated the weak relevance of this concept. The case was undermined by the strong economic and social interests and has become politicised by other factors rather than environmental and human protection goal achievements, probably also by the lesser relevance accorded to this concept in Australian law.

3 CLIMATE CHANGE LITIGATION LINKED WITH AN ECONOMIC, SOCIAL, PUBLIC PARTICIPATION AND STAKEHOLDERS APPROACH

Climate change litigation has served to shed light on the connection with environmental law to both economic and social benefits, which is essential to understand economic consequences. This linkage has proven useful to understand the economic benefits of the mining projects. In the Carmichael Coal Mine case, the promise of economic profits was heavily stated:⁵² the estimation of the number of future jobs the mine would have generated was over 10,000 jobs.

However, as it will be demonstrated in section 4, the estimation was overstated and the existence of certain economic voids in different sectors was later established and proved.

In the Carmichael Coal Mine case, it was the balance between public interest and economic and social factors that was important to strike and even though climate or environmental impacts had been ascertained, it was the relevance of economic benefits that was decisive in the approval of this mining project.⁵³

In the case *Adani Mining Pty v Land Services of Coast and Country Inc. of 2015*⁵⁴ the Land Court of Queensland acknowledged that the economic benefits were overestimated. However, this was not enough for the Court to warrant a refusal of the project because of the prevalence of the MSA in the case in point. This is clearly a sign of regression in climate change litigation and contradicts the science that emissions would have an impact because of the cumulative effect. The refusal to take established science into consideration and let the MSA prevail can also be considered as a climate injustice issue because of the global impact that these emissions could have in the rest of the world, especially in developing countries nearby. In addition, climate injustice is tangible with the refusal or systematic undermining behaviour of courts allowing climate-scepticism to prevail over science and law and destroying the credibility of climate scientists and their arguments in the process of litigation.

The participation of stakeholders in this process has been identified as a strong sign of advancement in the process of approval in mining projects. In the Carmichael Coal Mine case, the relevance of stakeholders' participation reveals the need to incorporate adaptive management principles linked to public participation. This suggests considering stakeholders as a tool of success in climate change litigation processes in connection to mining lease court cases.⁵⁵ Stakeholders are an important factor that can

51 *Adani Mining Pty Ltd v Land Services of Coast and Country Inc.* [2015] QLC 48.

52 The economic and social approach of the Carmichael case is examined in section 5.

53 *Adani Mining Pty Ltd (n 9)* [575], [586].

54 *ibid.*

55 C Slattery 'Canary in the coal mine: why the approval conditions for the Carmichael Mine reveal the need to amend the EPBC Act to incorporate adaptive management strategies' (2016) *Environmental and Planning Law Journal* 33.

influence climate change litigation as limited opportunities for stakeholders' involvement challenges the legitimacy of the approval conditions and undermines the transparency in the environmental decision-making processes.

4 ECONOMIC FACTORS TO TAKE INTO ACCOUNT IN THE CASE OF CARMICHAEL COAL MINE

In 2013, an Australian government approved independent scientific body completed a report for a number of Queensland Government agencies in relation to the Carmichael mine's supplementary EIS. Amongst the various questions posed to the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development (IESC), the agencies wanted to know what 'additional measures and commitments [are] required to monitor, mitigate and manage impacts resulting from changes to surface or groundwater resources?' Amongst other things, the authors of the report recommended:

A Mine Void Management Plan, (...) would be expected to be developed prior to completion of mining in the first pit (...). In the Final Void Management Plan, the proponent should demonstrate that impacts to water resources are mitigated and managed in perpetuity.⁵⁶

This piece of advice is in line with the best practice notion that successful mine closure results in few or

no negative legacies.⁵⁷ However, Currell et al. point out that the IESC recommendation, as sage as it may be is not binding and companies are 'not required to resolve all technical and scientific issues identified in the committee's advice'.⁵⁸ Furthermore, they argue that in Australian mine approval processes, it is common to omit remediation/mitigation strategies 'if the proposed mine has a more serious impact than is currently modelled'. What is concerning about this warning is that in repeated instances Australian government regulators, make no attempt at preventing adverse outcomes in the mining sector and this behaviour pervades thinking not just in relation to environmental issues but also those of a financial and economic nature.

It is for this reason that a number of economists and journalists interested in this project have drawn similarities between the physical voids that will need to be created to extract the resource and the 'economic voids' that are likely to appear once production starts. These commentators have identified four different types of economic voids: mining royalties, tax, employment and public debt. Below, each one will be examined in detail.

4.1 Mining Royalties

Queensland's Mineral Resources Act (1989) and Mineral Resources Regulation (2013) stipulate that coal mining be subject to royalty payments based on a sliding scale of from 7 per cent to 15 per cent depending on the market value of a tonne of coal.⁵⁹ Even though this requirement may seem simple, it was the Office of the State Revenue's Royalty Ruling MRA001.2, (issued in

⁵⁶ IESC, Advice to Decision Maker on Coal Mining Project – IESC 2013-034. Carmichael Coal Mine and Rail Project – EPBC 2010/5736. Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development (Canberra, 2013) <www.iesc.environment.gov.au/projectadvice/advice-decision-maker-coal-mining-project-iesc-2013-034>.

⁵⁷ P H Whitebread-Abrutat, A D Kendle and N J Coppin, 'Lessons for the Mining Industry from Non-mining Landscape Restoration Experiences' in M Tippet, A B Fourie and C Digby (eds), Proceedings Eight International Conference on Mine Closure (Australian Centre for Geomechanics 2013) 625-40.

⁵⁸ Currell, M.J., Werner, A.D., McGrath, C., Webb, J.A., Berkman, M. 'Problems with the application of hydrogeological science to regulation of Australian mining projects: Carmichael Mine and Doongmabulla Springs', *Journal of Hydrology*, (2017) 681.

⁵⁹ The rate calculation depends on the average price per tonne of coal sold, disposed of or used in a given period by a particular mining operation. See Royalty Ruling MRA001.2 Determination of coal royalty.

2019) that finally clarified a number of issues related to calculating the appropriate value of coal at the relevant taxing point and the ability to claim deductions for particular 'allowable' expenses. Before then, these issues were resolved on an ad hoc basis. However, given the enormity of Adani's initial proposal, corporate tax advisors, such as PwC and civil society organisations, raised, as early as 2013, the need to clarify coal royalty rules, thus opening up the path for what is now MRA001.2.⁶⁰

Legal clarifications aside, the issue of royalty revenues arising from Carmichael's operation needs further examination. In 2018, one of Adani's public statements said, 'The Carmichael project will pay billions of dollars in royalties'.⁶¹ This is not likely to occur, given that the market value of thermal coal (Carmichael's primary product) is expected to remain at around its current international value of USD \$8 per tonne (where the 7 per cent royalty rate applies). Carmichael's export target of 27 million tonne per annum (mtpa) is likely to yield AUD \$125m annually, a significant figure when compared to 2018's coal industry contributions of AUD \$538m but much lower than the one Adani claims because, at that market value, it will take 8 years before it reaches the 1 billion mark.⁶² One can argue that however much the company inflates its royalty payments, it will still make some payments, thus debunking the economic void claim. However, in mid-May 2015, an Australia Broadcasting Corporation⁶³ investigation found that the after some

high level political debate in the state's cabinet, the Queensland Government announced a seven-year royalty deferral for Adani valued at AUD \$320 million.⁶⁴

This together with the three years it will take to construct the mine means that the State will not receive royalties for a total of 10 years from the start of the project, which represents a significant loss of revenue for the public.

4.2 Tax

Non-renewable resources contribute approximately 10 per cent of Australia's GDP⁶⁵ and yet the country's taxation regime at the federal level does not include taxes specifically designed for profits derived from the mining sector.⁶⁶

The taxes that currently apply to mining operations are the same that apply to other sectors: corporate

60 Judy Sullivan and James O'Reilly, 'State Taxes Uncertainty in Royalty Regimes and Disputes Process – The Need for Legislative Reform' PwC Energy and Mining Tax Update (Edition 1, December 2013) 4 <<https://www.pwc.com.au/tax/assets/mining-energy-tax-update-dec13.pdf>>.

61 Adani Australia, Did You Know Adani's Carmichael Mine will Generate Billions of Dollars for the Government? (2018) <<https://www.youtube.com/watch?v=8S5cqxGONz4>>.

62 T Buckley and S Nicholas, 'Conflating Queensland's Coking and Thermal Coal Industries' Institute for Energy Economics and Financial Analysis (Cleveland OH, May 31, 2019) <https://ieefa.org/conflating-queenslands-coking-and-thermal-coal-industries_june-2019/>.

63 Mark Willacy, 'Queensland Government Offers Adani Mining Group a 'Royalties Holiday' that could Cost State \$320 million' ABC News (Brisbane, 18 May 2017) <www.abc.net.au/news/2017-05-18/queensland-government-gives-adani-royalties-holiday/8536560>.

64 Queensland Government, 'Palaszczuk Government Welcomes Royalties Agreement with Adani' (Media Statement, The Queensland Cabinet and Ministerial Directory, 31 May 2017) <<http://statements.qld.gov.au/Statement/2017/5/31/palaszczuk-government-welcomes-royalties-agreement-with-adani>>.

65 Minerals Council of Australia, 'Submission to Senate Economics References Committee Inquiry into Corporate Tax Avoidance' (Minerals Council of Australia, Canberra, 2015) 2.

66 In 2012, the Rudd Labour government introduced the Minerals Resource Rent Tax (MRRT) to tax profits derived from iron ore and coal mining at a rate of 30 per cent but the Abbot Coalition government repealed the tax in 2014. It did not apply to companies making less than AUD \$75m of MRRT mining profits per year. Companies making more AUD \$75m were entitled to an 'extraction allowance' of 25 per cent therefore the effective rate was 22.5 per cent. Any MRRT paid was deductible for income tax purposes. Because mining companies used various tax minimisation schemes, the MRRT tax never raised the desired revenue for the government. In the first six months after its introduction, it had only raised AUD \$126 million against a full year forecast of AUD \$2 billion. See P Guj, 'Mineral Royalties and Other Mining Specific Taxes' (International Mining for Development Centre 2012). See also <<https://www.news.com.au/finance/business/rio-pays-no-mining-tax/news-story/a9829f30fb4d9a0df0589-d85a40ae5d8>> and <<https://www.sbs.com.au/news/swan-reveals-mining-tax-revenue>>.

income taxes (top rate of 30 per cent) and various withholding taxes. Despite the existence of these taxes, large mining companies are notorious for paying little or no tax at all in Australia. This is due to the provisions in the tax code that allow companies to offset large accumulated losses against past and future profits, claim expenses such as depreciation, research and development and debt financing amongst others. The sector also benefits from tax incentives and concessions such as the fuel tax. In addition, mining companies make full use of tax minimisation schemes involving overseas subsidiaries registered in tax havens or low tax jurisdictions.⁶⁷ In 2018, the Australian Taxation Office (ATO) questioned both BHP and Rio Tinto for selling iron ore to their Singapore subsidiaries (where the corporate tax is 17 per cent) at one price and then reselling for a higher price to their final clients.⁶⁸ This practice is known as trade misinvoicing and multinational companies commonly use it to avoid capital controls, claim tax incentives and evade or minimise taxes. Money laundry operations also use the same technique.⁶⁹

For its part, Adani has promised a contribution of AUD \$22 billion in taxes to government over the life of the mine.⁷⁰ However, during a 2015 trial in the Queensland Land Court, company representatives admitted that the figure is more likely to be AUD \$16.8 billion.⁷¹ In addition, following the lead of other large conglomerates in Australia, the company

has set up a corporate structure designed to minimise tax paid in Australia. Indian and Australian media investigations have been unable to decipher the complex corporate web created by Adani but it is clear that subsidiaries exist in Singapore, Mauritius, the British Virgin Islands and the Cayman Islands, the latter three being well established tax havens. These media reports suggest that the company may end up paying a fraction of the stated billions in tax, a situation that, if it occurs, will leave a large void in the government's revenue expectations in years to come.⁷²

4.3 Employment

Adani's original 60 mtpa proposed mine⁷³ together with the operation and expansion of the company's terminal at Abbot Point Port and construction of the 388 km freight rail line connecting the mine with the port, would have required a large labour force in a region in Queensland that depends heavily on natural resource extraction.⁷⁴ And Adani's public announcements early in the project proposal phase matched high expectations by claiming that the company would generate '10,000 direct and indirect

67 M West, 'Australia's Top 40 Tax Dodgers 2020: Fossil Fuels Dominate Once More' Michael West Media (21 January 2020) <www.michaelwest.com.au/australias-top-40-tax-dodgers-2020-fossil-fuels-dominate-once-more/>.

68 Emma Alberici, 'Why Many Big Companies Don't Pay Corporate Tax' ABC News (Wednesday 14 February 2018) <www.abc.net.au/news/2018-02-14/why-many-big-companies-dont-pay-corporate-tax/9443840>.

69 Global Financial Integrity, 'Trade Misinvoicing' <<https://gointegrity.org/issue/trade-misinvoicing/>>.

70 Leith van Onselen, 'Adani White Elephant Won't Even Pay Australian Tax', *MacroBusiness* (3 October 2017) <www.macrobusiness.com.au/2017/10/adani-white-elf-phant-wont-even-pay-australian-tax/>.

71 Michael West, 'Adani Mining Feels Heat Over \$14b Galilee Basin Coal Mine Gap' *Brisbane Times* (28 April 2015) <www.brisbanetimes.com.au/business/adani-mining-feels-heat-over-14b-galilee-basin-coal-mine-gap-20150427-1mud1h.html>.

72 Lisa Cox 'Uncertainty over Massive Queensland Mine after Election Shock and Concerns Over Indian Company' *The Sydney Morning Herald* (6 February 2015) <www.smh.com.au/business/uncertainty-over-massive-queensland-mine-after-election-shock-and-concerns-over-indian-company-20150206-137mbi.html>.

73 A project of those dimensions would have made Carmichael, the second largest producer of thermal coal in the world after Peabody Energy's North Antelope Rochelle mine in the USA (107 mtpa)⁷⁴ and dwarfed Australia's current largest thermal coal operation, BHP Billiton's Mount Arthur Mine (15 mtpa). Josh Robertson, 'What we Know about Adani's Carmichael Coal Mine' ABC News (Friday 26 April 2019) <www.abc.net.au/news/2019-04-26/what-we-know-about-adanis-carmichael-coal-mine-project/11049938>.

74 Charis Chang, 'The Hunt for Adani's 10,000 Jobs Brings Up 'Zero Results' NEWS.com.au (Sydney, 27 September 2017) <www.news.com.au/finance/business/mining/the-hunt-for-adanis-10000-jobs-brings-up-zero-results/news-story/7532705440f71254b658b320d91ed02e>.

jobs' over the life of the mine.⁷⁵ However, during a court case in 2015, Adani's economist, citing the company's latest economic assessment said the project would generate 1,464 direct and indirect jobs in Australia in the first 30 years from the start of the mine.⁷⁶ Since then, the proposed rail link has decreased in length and the revision calls for a 200km rail line that would make use of an existing line owned by Aurizon.⁷⁷ In the revised proposal, the mine itself is expected to produce an estimated 10mtpa of coal based on an investment of AUD \$2 billion for the life of the mine and not the original AUD \$16 billion.⁷⁸

In the absence of any regulation ensuring that companies keep their employment promises during the operational stages, the challenge is to rely on mechanisms that maximise employment for the local population.⁷⁹ It is also important that during the proposal phases, companies rely on economic modelling that does not inflate employment figure. As it stands, this project has already created a large void in terms of the employment expectations it originally raised.

4.4 Public Debt

Australia's biggest bank, the Commonwealth Bank was adviser to the project until 2015 when it withdrew. Since then Adani has had difficulties securing a bank that would support the project.⁸⁰ The Queensland Government offered AUD \$900m in the form of a low interest loan but then retracted it in 2017.⁸¹ The last possibility for external funding came in the form of the Northern Australia Infrastructure Facility (NAIF) that would have made AUD \$1b available but it was also blocked (West, 2017).⁸²

These setbacks and financier's concerns over the long-term feasibility of coal projects,⁸³ decreasing world coal prices and the company's human rights record in India,⁸⁴ means the company has some way to secure Carmichael's finances but options are still available. In the period 2018-19 the Indian state of Gujarat saved Adani's troubled 4GW Ultra Mega Power Plant at Mundra in the Gulf of Kutch by renegotiating its purchase agreement allowing it to increase its power tariff by 30 per cent for the next 30 years.⁸⁵ At the

75 This figure originates from consulting firm GHD in a report commissioned by Adani. Rod Campbell, 'Fact Check: Will Adani's Coal Mine Really Boost Employment by 10,000 Jobs?' *The Australian Business Review* (Sydney, 31 August 2015) <www.theaustralian.com.au/business/business-spectator/fact-check-will-adanis-coal-mine-really-boost-employment-by-10000-jobs/news-story/903c1932738b1d1a1763c74e45f4d7c7>.

76 J Fahrer, 'Carmichael Coal and Rail Project Economic Assessment Expert Report' Report to Land Court Of Queensland (Brisbane 2015).

77 Rod Campbell, 'Fact Check: Will Adani's Coal Mine Really Boost Employment by 10,000 Jobs?' *The Australian Business Review* (Sydney, 31 August 2015) <www.theaustralian.com.au/business/business-spectator/fact-check-will-adanis-coal-mine-really-boost-employment-by-10000-jobs/news-story/903c1932738b1d1a1763c74e45f4d7c7>.

78 Josh Robertson, 'What we Know about Adani's Carmichael Coal Mine' ABC News (Friday 26 April 2019) <www.abc.net.au/news/2019-04-26/what-we-know-about-adanis-carmichael-coal-mine-project/11049938>. The projected production in the latest proposal is 40mta.

79 One such mechanism is the Impact Benefit Agreement (IBA). Currently, local level governments and indigenous landowners use these agreements in their dealings with mining companies but federal and state governments can also use them. So far, the Bravus Group has not entered into an IBA with any entity.

80 Michael West and Lisa Cox, 'Adani and Commonwealth Bank Part Ways, Casting Further Doubt on Carmichael Coal Project' *The Sydney Morning Herald* (Sydney, 5 August 2015) <www.smh.com.au/business/companies/adani-and-commonwealth-bank-part-ways-casting-further-doubt-on-carmichael-coal-project-20150805-gisd1l.html>.

81 M Tahara-Stubbs, 'Adani Claims Financial Close on Carmichael Coal Mine' *Project Finance* (London, 18 July 2018).

82 Michael West 'EFIC may Finance Adani Coal Mine' *Michael West Media* (23 May 2017) <<https://www.michaelwest.com.au/report-efic-may-finance-adani-coal-mine/>>.

83 As of 2019, over 100 globally significant financial institutions have divested from thermal coal, including 40 per cent of the top 40 global banks and 20 globally significant insurers. Tim Buckley, 'Over 100 Global Financial Institutions Are Exiting Coal, With More to Come' *Institute for Energy Economics and Financial Analysis* (Cleveland OH, 27 February 2019) <https://ieefa.org/wp-content/uploads/2019/02/IEEFA-Report_100-and-counting_Coal-Exit_Feb-2019.pdf>.

84 Environmental Justice Australia 'The Adani Group's Environmental and Human Rights Record' *The Adani Brief Update* (Environmental Justice 2019).

85 This effectively is a taxpayer-funded subsidy to the company that consumers will have to pay via increased electricity tariffs in Gujarat.

same time, the Government of India awarded the company a Special Economic Zone tax exemption for 10 years and the State Bank of India provided a US \$1.5 billion loan to the Adani Group. What this means is that the company has enough political influence to maintain Indian government support. In Australia, there is the possibility that the Federal Government may lend AUD \$1b at a discounted 3 per cent annual rate for 30 years via the Export Finance and Insurance Corporation to build the railway link between the mine and the port.⁸⁶

Despite its recent good fortunes in India and the promise of public money from Australia, the company remains highly indebted. A 2015 report by Credit Suisse, placed Adani in a category of Indian corporates with 'high exposure to [fluctuating prices of] commodities' whose foreign currency debt servicing 'continues to be of concern'.⁸⁷ In a later report, Credit Suisse warned that Adani's listed companies' debt to Earnings Before Interest, Taxes, Depreciation and Amortization (EBITDA) ratios were high in 2017 and would take years to decrease.⁸⁸

Providing taxpayer's funds to a company with such high levels of indebtedness carries an equally high level of financial risk. The Bravus Group may decide, in future, to write off incurred losses and abandon the project altogether leaving a large void of debt that all Australians would have to pay over the next 30 years without realising any of the supposed benefits.

Apart from current concerns with the Bravus Group's misleading the public in terms of the abovementioned economic factors, we also need to take into account

Australia's economic resilience to climate change. This resilience depends, largely, on government investment on climate change mitigation and this, in turn, depends on current government revenues. Therefore, every dollar that ends up in the above-mentioned 'void' is not just a financial loss but also a lost opportunity to invest in measures that will strengthen Australia's chance to mitigate the worst effects of climatic change.

5 CONCLUSION

The main findings were ascertaining the current status in terms of advancement and regression in climate change litigation, as well as outlining the regulatory framework for mining projects in Australia. Despite the initial potentials in terms of job opportunities, financiers have recognized that investing in coal has a number of risks that are primarily linked to climate science, climate policy pressures, competition from renewable energies producers, the use of public funds, the evasion or minimization of tax and royalties and making employment promises. The Australian federal and state governments should seriously consider enacting laws and policies that prevent companies from using tax minimization schemes, both domestic and off-shore. These laws should also limit the use of royalty dispensation schemes. Employment levels should be negotiated by using Impact Benefit Agreements, involving the impacted indigenous communities surrounding a mining project and the state so that job numbers at that level are also maintained at a certain level. When deliberating on legal issues relating to mining leases approvals, Courts and tribunals still do not take into account scientific evidence, which will have a repercussion on the transition away from fossil fuel. However, at least, climate change litigation has been crucial to insist on weighing the economic and social contributions against climate impacts. The current Australian regulatory framework need to shift towards a more just, modern and ethical system by including scientific findings and scientific uncertainty in a broader, holistic regulatory vision or at least more in line with the current Anthropocene Era that we are living in.

86 Tim Buckley 'The Fix Is In: Adani Hooks India's Poor and Australia's Taxpayers' Michael West Media (29 May 2019) <www.michaelwest.com.au/the-fix-is-in-adani-hooks-indias-poor-and-australias-taxpayers>.

87 A Gupta, K Shah and P Kumar, The Adani Group (India Corporate Health Tracker: Sector Review. Credit Suisse Equity Research, 16 February 2017) 9 <https://research-doc.credit-suisse.com/docView?language=ENG&format=PDF&sourceid=mb1ast&-document_id=x754328&serialid=z1xSn4xZTOJ CZ921-PyMcyqKWxHK%2Bd2Zxu-0xhtt2oXt0%3D>.

88 According to the report, the EBITDA rates in 2017 were: Adani Power: 8.1, Adani Ports & SEZ: 4.1, Adani Enterprises: 8.6 and Adani Transmission: 5. See Gupta, Shah and Kumar, *ibid*.

ARTICLE

PROBLEMS AND SOLUTIONS OF ACCESS TO GENETIC RESOURCES AND BENEFIT SHARING: A THEORETICAL PERSPECTIVE PART I*

Gerd Winter **

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1

INTRODUCTION

The regime called access to genetic resources and benefit sharing (ABS) is based on the principle of sovereign rights of states over their biological resources. The principle was acknowledged by Article 3 of the Convention on Biological Diversity (CBD) of 1992 and by its Art. 15 extended to genetic resources. In Article 2 'genetic resources' (GR) is defined as 'genetic material of actual or potential value', and 'genetic material' as 'any material of plant, animal, microbial or other origin containing functional units of heredity'. According to Art. 15 (1) and (7) the Contracting States are authorized to determine access to their genetic resources and obligated to aim at 'sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilisation of genetic resources with the Contracting Party providing such resources'.

This framework was further concretized by the Nagoya Protocol (NP) of 2010. The NP defines the scope of application to be access for utilisation (i.e. research and development), empowers states providing GR (provider states) to require prior informed consent (PIC) and mutually agreed terms (MAT) for access to their GR, ask them to provide for legal certainty of relevant domestic regulation, require users to seek PIC of indigenous and local communities if accessing traditional knowledge associated with GR or GR for which such communities have the established right to grant access, obliges users of GR to share benefits arising from the utilisation of GR with the provider state and share benefits arising from the utilisation of GR and associated traditional knowledge held by indigenous and local communities with the same, and asks states hosting users of GR to ensure compliance with access regulation of provider states. In terms of regulatory tasks all this means that states may regulate access if intending to make use of their sovereign right over their GR, and they must regulate utilisations performed within their jurisdiction of GR accessed in provider state countries. Of course, both issues can be – and usually is - contained in one and

the same law so that one better speaks of states in their capacity as provider and/or user state.

The ABS national regimes have meanwhile taken quite differentiated forms concerning both the provider and user functions. An example for a sophisticated form for provider functions is the Brazilian regime.¹ Its characteristics are: the access regime covers not only genetic material but also genetic information; R&D on GR acquired as commodities are also categorized as access, even if conducted in a foreign country; foreign users must cooperate with domestic researchers; non-commercial research and development (R&D) must first be registered; notification and presentation of mutually agreed terms (MAT) are required if commercialisation of finished products or reproductive material is planned; domestic proxies of foreign users can be made liable for sharing benefits; special scrutiny is applied concerning access to traditional knowledge associated with genetic resources (aTK); incoming revenue is earmarked for nature conservation and/or local/indigenous communities. On the side of user compliance the EU probably has the most developed regime.² Its characteristics include: users of GR are subject to basic duties to ensure compliance with provider state requirements concerning access to the GR and aTK, utilisation, marketing and sharing of benefits arising from utilisation; due diligence declarations are to be submitted by users about lawful access at stages of research funding and premarketing; competent authorities have to check the lawfulness of access and utilisation; simplified

1 Law 13.123 of 20 May 2015 (Access and Benefits Sharing of Genetic Resources and Associated Traditional knowledge) <www.wipo.int/news/en/wipolex/2015/article_0014.html>.

2 The core legal act is Regulation (EU) 511/2014 of the European Parliament and of the Council of 16 April 2014 on compliance measures for users from the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation in the Union, [2014] OJ L 150/59. More specific guidance is offered by the European Commission in its Guidance document on the scope of application and core obligations of Regulation (EU) No 511/2014 [...] [2021] OJ C 13/01, hereafter referred to as Commission Guidance (2021).

procedures are foreseen for acquisitions of GR from registered collections.

As a further component of implementing the NP the support for ABS transactions was established at the international level through the ABS Clearing House (ABSCH) which operates a database storing national legislation, national responsible authorities and individual access permits, such registered permits serving as internationally recognized certificate of compliance.³

In spite of this major progress in regime building there are a number of still unsolved problems. They will first be presented. Second, the reasons why so many problems remain unsolved shall be reflected, and in particular whether underlying principles of equitable sharing of advantages between parties have been disregarded. Third, building on such reflection and keeping additional criteria in mind a number of reformatory approaches will be sketched out and discussed.

2 PROBLEMS⁴

The following problems shall now be explained in turn: the definition of utilisation, the distinction between commercial and non-commercial utilisation, multiplicity of GR in final products, the range of derivatives, the treatment of digital sequence information, the enforcement of benefit sharing, transaction costs on both the provider and user side, the transboundary occurrence of GR, burden sharing between research institutions and industry, and traditional knowledge associated with GR.

³ Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, Nagoya, 29 October 2010, UN Doc. UNEP/CBD/COP/DEC/X/1, art. 14 [hereafter NP].

⁴ 'Problem' is simply meant to be an issue inciting further study. See its Greek origin in 'pro' = before and 'ballein' = to throw, hence something thrown before someone.

2.1 The Definition of Utilisation: Too Narrow, Too Broad?

The material scope of ABS regimes is, among others, framed by the notion 'access to genetic resources for their utilisation' (Art. 6 NP). Although the term 'access' alludes to the physical taking or purchase of samples some legal systems extend it to include situations where an organism that was bought for consumption subsequently becomes object of R&D.⁵ The EU approach is to categorise the change as R&D which is also somewhat strange because it would imply that non-accessed GR are utilized.⁶

Some more difficulties arise from the scope delineated by 'genetic resources'. Although the term is legally defined⁷ there is a need to draw lines such as, for instance, with regard to GR associated to accessed GR, human microbiota, alien species, etc. But they can be found and have reasonably been laid out by the Commission Guidance (2021). A still debatable question is how the terms 'genetic resources' and 'biological resources' relate to each other but that can be solved too.⁸

An unresolved issue however is the definition of utilisation. While Art. 2(c) NP defines it as 'to conduct research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology' it is not determined what research and development means. It is widely agreed that there is no precise line between research and development, but that they may overlap, and anyway that they do not need to come together, but that, for instance, research without development – often called basic - is also utilisation.

⁵ See, for instance, Art. 2 VIII of the Brazilian Law 13.123 which defines 'access' to include research and development which is surprising because R&D in the NP sense means utilisation.

⁶ Commission Guidance (2021) (n 2) para 3.4.

⁷ Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, 1760 UNTS 79, Art. 2 [hereafter CBD].

⁸ While 'genetic resources' refers to the genetic program, 'biological resources' is rather used in relation to organisms as phenotypes, such as if they are stored in a collection, traded as commodity, etc.

However, it is unclear what the actual content of research and development shall be. The Commission Guidance proposes a 'litmus test' which is whether the R&D 'creates new insight into characteristics of the genetic resource which is of (potential) benefit to the further process of product development'.⁹ It is thus the 'new insight', and one regarding the genetic program that is considered as decisive.

According to the Commission this shall exclude from scope a vast number of activities, including

- the taxonomic identification of genetic material by morphological or molecular analysis,
- the sequencing of genomes,
- use of GR as testing or reference tools,
- the processing of GR for incorporation in a product where its properties are already known (such as, for example, the processing of Aloe Vera for incorporation into cosmetics),
- the storing of GR in collections and related assessment of their health,
- the rearing and culturing of GR (such as farm animals),
- trading, transfer and exchange of GR and related knowledge, unless the material has been transformed into a 'half product',
- discovery and description of new species, as long as this is done without additional research on the genetic and/or biochemical composition of the genetic resources to discover or making use of the properties (functions) of the genes,
- the description and documentation of the distinctive nature or features of GR, unless this is combined with research on specific properties of the GR,
- phylogenetic analysis,
- large scale screening except for research on selected genetic information,
- behavioural studies on GR (e.g. to find out about their biocontrol properties) unless the genetic influence on behaviour is explored,
- vectors used to introduce foreign material into host organisms unless new knowledge about the vector is created,
- GR exploited to produce active compounds for further use,
- the use of invariant laboratory strains as a model for research,
- crossing and selection of GR for maintenance and conservation of breeds and varieties,
- known reproductive technologies,
- use of plant varieties legally protected by plant variety rights, registers or listings,
- the processing of known GR for subsequent incorporation in a product,
- formulation of a product by mixing or adding known ingredients or compounds,
- the testing of products unless the test results are used to modify the product.¹⁰

A note on definition theory may be appropriate here: Terms should be defined with a view on contexts and purpose rather than with regard to general dictionary wisdom. Reference to a dictionary is however how the EU Commission proceeds. It also refers to the OECD Frascati Manual which formally standardizes terms for statistics.¹¹

Looking therefore at context and purpose the litmus test would be appropriate if the NP primarily aimed at promoting the progress of biological sciences. However, its objective is rather to find a compromise between the interests of provider states and users (including their states), based on the acceptance of sovereign rights of provider states. Such compromise can rather be found by creating and sharing benefits, be they non-monetary or monetary. Therefore, in that line the definition of research and development would be broader including some of those activities that are auxiliary to the core R&D process, such as the sequencing of genomes, molecular analysis, taxonomic research, introduction of (known) genes into other organisms, etc.

⁹ Commission Guidance (2021) (n 2) para. 2.3.3.1.

¹⁰ Compiled from Commission Guidance (2021) (n 2) para 2.3.3.2. and Annex II.

¹¹ OECD, Frascati Manual 2015. Guidelines for collecting and reporting data on research and experimental development. The measurement of scientific, technological and innovation activities (OECD Publishing 2015) <<http://dx.doi.org/10.1787/9789264239012-en>>.

In conclusion the 'litmus test' proposed by the EU Commission tends to privilege user over provider interests and may drive provider states to exaggerate PIC and MAT conditions in order to draw some of the excluded items back into scope. The result would be a patchwork of different requirements that makes the tracing back of benefits overly complicated. Provider states setting strict conditions would also be exposed to jurisdiction shopping by users so that their sovereign rights run void. We are therefore confronted with the problem that strict requirements strangle user freedoms, weak requirements frustrate provider interests, and differentiated requirements are difficult to implement.

2.2 R&D for Private Gain or for the Public Domain?

More problems arise concerning the handling of material or information resulting from the utilisation of GR. Two questions stand out: should the results be published or allowed to be kept private, and should they be commercialised or allowed for free use?

Concerning publication the CBD has various provisions advocating the enhancement of public knowledge about GR and their sustainable use¹² while the NP does not address the issue directly. On the other hand the sovereign rights of provider states include that the states are free to hinder the publication of R&D research results.

Concerning commercialisation the CBD and NP introduce the term commercial in two contexts. One is related to R&D activities: Art. 8 (b) NP asks for simplified access procedures for research with non-commercial intention. Likewise, Art. 17 (4) (i) NP lists commercial or non-commercial uses as possible content of the internationally recognized certificate of compliance (IRCC). The other context is the bringing on the market (or not) of products¹³ from R&D, which

is called commercialisation (or not) of products. This is referred to as a final step of handling GR (Art. 5 (1) NP, Art. 15 (7) CBD), and as an activity that shall be supervised by checkpoints (Art. 17 (1) (iv) NP).¹⁴

The problems of publication and commercial use are obviously interrelated. Commercialisation frequently implies to keep the result secret in order to exclude competitors, or to obtain intellectual property protection which makes the R&D result public but restricts its use. In contrast, free use is frequently based on published material or information.¹⁵

This interrelation leads to practical conflicts of interest. For instance, users in the public sphere normally wish to publish their results, possibly even including commercialisable ones, while the provider state may rather wish to keep them secret in order not to jeopardise subsequent commercialisation. In contrast, users in the private sphere are normally interested in holding them secret until they are brought to the market, or in restricting their further use through intellectual property protection, while provider states may be interested in making results public in order to build up domestic R&D capacity or generally participate in the global research commons.

Neither the CBD nor the NP nor even national implementing legislation provide guidance for such conflicts. Concrete provisions how to solve such conflicts are largely lacking. There is only a weak admonition in Art. 8 (b) NP to facilitate non-commercial research which by implication will be published. Even the core terms – publication, commercial/non-commercial – are hardly ever

¹² CBD (n 7) Arts. 7, 12, 13, 15 (6), 17.

¹³ Corresponding to common definitions (OECD 2015 (n 11) the term product is here used to cover goods and services.

¹⁴ For a national implementation see EU Regulation 511/2014, Art. 3 (6) and 4 (3) (b) (iv). See also the preambular considerations Nos. 3 and 6.

¹⁵ See the definition proposed by DFG, Model clauses for mutually agreed terms on access to genetic resources and benefit sharing, DFG 2021, which is: "Utilisation for non-commercial purposes" means research and development that aims at enhancing knowledge about the accessed genetic resource, including products and processes developed therefrom, and making such knowledge publicly available and usable at no more than incremental cost for dissemination".

defined.¹⁶ Absent guidance by international or national law the matter is largely left to the negotiations and finally PIC and MAT conditions between provider states and users, and thus to the de facto bargaining power of the two parties. The outcome may be to the disadvantage of provider states, or users, or the general public interest in open and non-commercial research contributing to the conservation of biodiversity.

2.3 Multi-contributions to the Development of Products: When Should There be a Cut-off?

R&D processes on genetic resources can embrace long chains and networks of activities and involve a multitude of different genetic resources. This is particularly evident in animal and plant breeding where multiple stages of reproduction may diminish the influence of an original contribution as compared with multiple other traits flowing into the product. In such case, it can be doubted that there is still a 'benefit arising from the utilisation of genetic resources' (emphasis

added), and that fairness and equity do demand the sharing of benefits.¹⁷ The situation is different if the original trait and its function are still noticeable in the final product. As a solution cut-off criteria might be used that draw a line between what has disappeared and what is still noticeable. This could be tried by a quantitative criterion such as, for instance, a minimum percentage of an original genome in the final product. But often a highly important property originates from a much smaller percentage, and unimportant functions may be due to larger ones. One could use a qualitative criterion instead, such as whether a trait is present in the finished product and determinant to its functional characteristics.¹⁸ But that is hardly operational in borderline cases.

Another solution would be to draw a line at the stage of the marketing of a product. While the revenue obtained would be subject to benefit sharing R&D on the finished product would not be utilisation of the original GR and thus be out of scope. For instance, a new plant variety bred from accessed GR and marketed would be subject to benefit sharing, while the further breeding of a subsequent variety developed from the first would be considered to be cut off from the original traits.¹⁹ But why should traits and properties that are still influential in the subsequent product be set aside only because a new variety has been generated? It may be new in terms of plant variety Protection law but ABS does not protect intellectual ingenuity. It rewards the conservation of GR, and that is not overruled by intellectual efforts.

A further problem of multi-causality is that the different products emerging from the chain of breeding will belong to all states which possess them in in-situ conditions, i.e. in 'surroundings where they have developed their distinctive properties'.²⁰ This can be many states which makes it difficult for the provider of some trait to trace marketing and claim benefit sharing.

16 For an exception see the comprehensive definition of commercialisation see Art. 1 (1) of the South African National Environment Management Laws Act, 2004, as amended by Act No 14 of 2013: 'commercialisation, in relation to indigenous biological resources, includes the following activities: (a) the filing of any complete intellectual property application, whether in South Africa or elsewhere; (b) obtaining or transferring any intellectual property rights or other rights; (c) commencing product development, including the conducting of market research and seeking pre-market approval for the sale of resulting products; (d) the multiplication of indigenous biological resources through cultivation, propagation, cloning or other means to develop and produce products, such as drugs, industrial enzymes, food flavours, fragrances, cosmetics, emulsifiers, oleoresins, colours ex-tracts and essential oils; (e) trading in and exporting of indigenous biological resources to develop and produce products, such as drugs, industry enzymes, food flavours, fragrances, cosmetics, emulsifiers, oleoresins, colours, extracts and essential oils; and (f) commercial exploitation;'" See further von C von Kries and G Winter, 'Defining Commercial and Non-commercial Research and Development under the Nagoya Protocol and in other Contexts' in E C Kamau, G Winter and P-T Stoll (eds), *Research and Development on Genetic Resources. Public Domain Approaches in Implementing the Nagoya Protocol* (Routledge 2015) 60-74.

17 Cf. NP (n 3) Art. 5.

18 Similar Art. 17 of the Brazilian Act 13.321 of 20.05.2015 which states: 'In the case of a finished product, the genetic heritage or the associated traditional knowledge component must be one of the key elements of value adding to the product, in accordance with this Act'.

19 Commission Guidance (2021) (n 2) para. 8.4.

20 Cf. NP (n 3) Art. 2 paras. 4 and 12.

In conclusion, one more problem emerges, namely the need but difficulty to determine and trace the specific contribution of accessed GR in cases of multi-causality of product development.

2.4 Derivatives: How to Link with Genetic Resources?

According to Art. 2 (e) NP derivative means ‘a naturally occurring biochemical compound resulting from the genetic expression or metabolism of biological or genetic resources, even if it does not contain functional units of heredity’.

It is clear that not any chemical compound but only one that originates from GR qualifies as derivative. However, there is uncertainty as to whether R&D on a derivative is utilisation and thus in scope of related obligations. Art. 2 (d) and (c) NP can be read to mean that R&D must be part of utilisation of GR. In that line Regulation (EU) 511/2014 does not address R&D on derivatives as an independent activity. The Commission Guidance (2021) specifies this postulating a ‘continuity’ of R&D on the derivative with R&D on the genetic resource.²¹ Such ‘combined access’ excludes from scope the acquisition of a derivative for research on the same derivative without reach to the genetic origin. However, Art. 2 NP could as well be understood to just require a link between R&D on the biochemical compound and existing knowledge about its genetic origin. Imagine a chemical compound deriving from a GR is found to have high pharmaceutical value: should that be out of scope if the user has not combined her chemical research with research on the genetic resource? This would appear to me to discriminate against provider state interests and disregard that such derivative utilisation has been exemplary cases of biopiracy in the run-up of international and national ABS law-making.

2.5 Digital Sequence Information: Volatile or Enclosed?

It has become common practice to sequence the genome of an organism and upload the resulting data to databases. Most of these are publicly accessible so that anyone can download the information, do their

own research, synthesise genes and develop their own products. Such information is called digital sequence information (DSI). Rohden et al, drawing on proposal of a CBD Ad Hoc Technical Expert Group (AHTEG) suggest to subdivide DSI to contain nucleic sequence data (NSD) and subsidiary information (SI). NSD refers to the nucleic acid sequence reads and the associated data plus information on the sequence assembly, its annotation and genetic mapping, while SI is information on, inter alia, gene expression, ecological and abiotic relationships, functions, morphology and phenotype, taxonomy and modalities of use.²²

Some provider states have included information on genetic resources in their definition of genetic (or biological) resources.²³ This is, for instance, the case in South Africa where ‘genetic resources’ is defined to include ‘(a) any genetic material; (b) the genetic potential, characteristics of information of any species’.²⁴ Concerning the ABS-regime for bioprospection this requires that a permit must be obtained for R&D not only on genetic material but also on information about it.

Such claims could be understood to stipulate a new kind of intellectual property right, one, so to speak, in ‘wild’ information as opposed to ‘invented’ information as required by patent law. However, such exclusive right would hardly be supported neither by Art. 15 CBD nor Art. 5 NP which after all speak of material, not information as object of sovereign

²¹ Commission Guidance (2021) (n 2) para. 2.3.4.

²² F Rohden and others, ‘Combined Study on DSI in Public and Private Databases and DSI Traceability’ (2019) <<https://www.cbd.int/abs/DSI-peer/Study-Traceability-databases.pdf>>.

²³ For an overview see M Bagley and others, ‘Fact-finding Study on how Domestic Measures Address Benefit-Sharing Arising from Commercial and Non-commercial Use of Digital Sequence Information on Genetic Resources and Address the Use of Digital Sequence Information on Genetic Resources for Research and Development’ (2020) 31 et seq <www.cbd.int/doc/c/428d/017b/1b0c60b47af50c81a1a34d52/dsi-ahteg-2020-01-05-en.pdf>.

²⁴ Art. 1 ((1) Act No. 10 of 2004: National Environmental Management: Biodiversity Act, 2004, as amended by Act No. 14 of 2013: National Environment Management Laws Act, 2013.

rights.²⁵ While based on their sovereignty provider states may well introduce new IPRs, but for a transborder reach involving acceptance and enforcement by other states an international treaty would have to be established like the Paris Convention for the Protection of Industrial Property.²⁶

This, however, does not exclude that a less sophisticated version of property is conceived. It should first of all be clear about the notion of information. Information is opposed to material. It is the result of cognition and explanation of material. Material although 'being out there' is of no relevance if not perceived through information. Therefore, property in material is unavoidably property in a described and explained object, or in short, it is property in 'informed' material. Property rights therefore intricately extend to information insofar information describes property material.

If no exclusive right can be established relative rights can. They can be specified by provider state legislation and PIC/MAT. Such framing may shape rights and obligations concerning reporting, publication,

applications, commercialisation, etc.²⁷ The undisputed right of regulating access to GR as material can thus serve as leverage for determining how the GR including related information shall be used. Users are bound by related administrative acts containing PIC and contracts containing MAT. User states are obliged to ensure compliance with PIC and MAT conditions at least concerning research and development.²⁸

The crucial question of course is to what extent such conditions are made known and respected if DSI is stored in open access databases and accessed by users of the same. In order to answer that question a look at the database landscape is needed.²⁹ The core public structure for research on NSD is the International Nucleotide Sequence Database Collaboration (INSDC). It coordinates the three largest databases: Genbank, operated by the US National Center for Biotechnology Information (NCBI), European Nucleotide Archive (ENA), operated by EMBL-European Bioinformatics Institute (EBI) under the auspices of European Molecular Biology Laboratory (EMBL), and DNA Data Bank of Japan (DDBJ) which is operated by the National Genetics Research Institute in Japan. Most of the costs of the databases – which are substantial – are born by the US federal government, 20 European states and the Japanese state, respectively. INSDC with its focus on nucleic data is surrounded by approximately 1600 biological databases that store scientific information on biological resources beyond NSD and SI, but interact with INSDC. Billions of sequences are stored at the INSDC bases, with trillions

25 See further on the ongoing doctrinal debate C Lawson, F Humphries and M Rourke, 'The Future of Information under the CBD, Nagoya Protocol, Plant Treaty, and PIP Framework' (2019) 22 *J World Intellectual Prop* 103–119 <<https://doi.org/10.1111/jwip.12118>>; T Spranger, 'Expert Opinion on the Applicability of the Convention on Biological Diversity and the Nagoya Protocol to Digital Sequence Information' Submitted on behalf of the German Federal Ministry of Education and Research (BMFT 2019) <https://www.bmbf.de/files/Legal_opinion_DSI_Prof_Spranger_EN_BF.PDF>; Chr Lyal, 'Digital Sequence Information on Genetic Resources and the Convention on Biological Diversity' in E C Kamau (ed), *Global Transformations in the Use of Biodiversity for Research and Development. Post Nagoya Protocol Implementation Amid Unresolved and Arising Issues* (Springer forthcoming). For a doctrinal discussion on the usefulness of the distinction between exclusive and relative intellectual property rights see Chr Godt, 'Data Property': Entitlements Between "Ownership", Factual Control and Access to Commons' in B Akkermans and A Berlee (eds), "Sjef-sache". Essays in Honour of Prof. Mr. Dr. J.H.M. (Sjef) van Erp on the Occasion of His Retirement (Eleven International Publishing forthcoming).

26 Accessible via <<https://wipo.int/en/treaties/textdetails/12633>>.

27 See for an overview of practices Bagley and others (n 23) p. 31 et seq. As an alternative construction the African Group of Negotiators on Biodiversity to the CBD Ad Hoc Group on Digital Sequence Information has suggested that sequencing activities should be regarded as utilisation of GR, which – I believe – implies that DSI would be a result of R&D and as such contribute to the further generation of benefits. Available at <www.cbd.int/abs/DSI-views/2019/AfricanGroup-DSI.pdf>. For further elaboration of this classification see K Sollberger, 'Digital Sequence Information and the Nagoya Protocol. Legal Expert Brief on Behalf of the Swiss Federal Office for the Environment (FOEN)' 7 April 2018 <<https://www.bafu.admin.ch/bafu/de/home/themen/biotechnologie/biotechnologie—rechtliche-grundlagen/rechtsgutachten.html>>.

28 Concerning subsequent applications and commercialisation this is not (or not clearly) the case See above chapter.

29 See Rohden and others (n 22) 17 et seq.

of DNA bases. The sequences can comprise bases ranging from a few to millions each. Millions of sequences are submitted per year. Researchers submitting data to INSDC are responsible to pursue intellectual property rights (IPRs) they may own on a piece of information, and are liable for any damage that may arise from uses of their data that violate third parties' IPRs. All data are freely accessible without registration. 10-15 million users per year are estimated to visit the INSDC webpages.³⁰ Users accessing data may make any use of them, including for publication (although credit to author and database are to be given), research, development, and commercialisation. It is their responsibility to pay tribute to any IPRs rights that may exist. The institutions maintaining the databases disclaim any liability for violation of the same.

As for ABS relevant information INSDC practices do not provide means for tracing data uses back to provider state PIC and MAT. PIC and MAT in most countries are issued in paper form or pdf files which can technically not be linked to INSDC entries. The only indication of origin INSDC offers is that data submitted shall inform about the country of origin of the pertinent organism. But that is only implemented in a small percentage of cases and does not anyway allow the tracing back to possible PIC and MAT conditions on utilisation and commercialisation.³¹ The powerful trend towards digitalisation of genetic information and its culture of open access is therefore a major problem for the principle of sovereign rights of provider states.

2.6 The Benefit Sharing Monitoring Gap: Unjustifiable but Realistic?

While utilisation of GR has attracted much legal attention the sharing of benefits is still regulatory terra incognita. Regulatory progress in the EU, for instance, has been concerned with what kinds of utilisation are within or beyond scope but not as much with ensuring benefit sharing (BS). Still, Art. 5 (3) NP, somewhat concretising Art. 8 (7) CBD, mandates Contracting Parties, including user states, to take measures, 'as

appropriate' to ensure that benefits are shared. This obligation of course allows states to establish straightforward governmental monitoring and enforcement of BS. But the NP itself is less demanding. The user state shall 'designate check points' that 'should be relevant' 'to the collection of relevant information at, inter alia, any stage of [...] pre-commercialisation and commercialisation' (Art. 17 (1) (a) (iv) NP), it 'shall, as far as possible and as appropriate, cooperate in cases of alleged violation of domestic [...] benefit-sharing legislation' (Art. 15 (3) NP).

The concept chosen instead is a contractual model. It bases the implementation of benefit sharing on mutually agreed terms (MAT) between provider states and individual users. If disputes arise from MAT such as if a user refuses to share benefits the provider state can only enforce contractual obligations seeking recourse at user state courts, or at its own courts risking non-recognition of decisions in user states.³²

The EU in its user state function could have gone beyond what the NP sets as a minimum standard but did not do so, or only did so with some slight hint. It reserves its most powerful instrument of monitoring, namely due diligence declarations, to the stages of receipt of research funding and of final development of a product (Art. 7 (1) and (2) Regulation (EU) 511/2014). It is only with some doctrinal creativity that one can conclude from Art. 9 (1) and (2) Regulation (EU) 511/2014 that administrative bodies have powers or even duties to supervise subsequent commercialisation and benefit sharing.³³

Provider states thus depend on their own capacities and powers to monitor pre-commercialisation, commercialisation and the sharing of benefits. But states often lack the skilled human and financial resources needed, and they do not have legal powers of investigation and prosecution in user states.

In conclusion, concerning benefit sharing an imbalance to the disadvantage of provider states was built into the NP without this being predetermined by Art. 15 CBD. User states so far refuse to go further.

³² Cf NP (n 3) Art. 18 (2).

³³ See for a more detailed argumentation G Winter, 'The ABS Compliance Regime of the European Union' in E C Kamau (forthcoming) (n 25).

³⁰ *ibid* 25.

³¹ *ibid* 38-39.

2.7 Transboundary Genetic Resources: Take All Benefits or Share?

Genetic resources often spread over national borders. This raises questions of justice between provider states which may be termed the horizontal relation of justice in distinction from the 'vertical' between providers and users.³⁴ Why should one provider state be entitled to take all of the non-monetary and monetary benefits although other states have also contributed to the preservation of the GR? Would it not lower the benefits of all provider states taken together if they compete for ABS accesses and are tempted to offer conditions that are most favourable for users but least favourable for providers?

Creating pools of GR would a way to cope with the issue. They could be set up on the basis of Art. 11 NP which encourages cooperation of parties where the same genetic resources are found in situ. An early attempt was that of the Andean Community which however has achieved not much more than serving as a tool to harmonize national legal regimes concerning ABS.³⁵ Pools for East Africa have been considered but not yet instituted.³⁶ The problem that one provider state takes it all has therefore prevailed.

2.8 Transboundary R&D Conditions: Take All Benefits or Share? Public Funding for Private Gain?

Problems of 'horizontal' equity also appear on the user side. Two of them shall be mentioned: one-sided sharing of benefits, and one-sided bearing of utilisation costs.

One-sided sharing of benefits occurs because in the normal case single users alone reap the benefits of utilisation of accessed GR although drawing on knowledge produced by many other researchers and developers. The frame of reference of this problem is the tension between intellectual property rights and the public knowledge domain. There is an overall trend towards the latter which should be kept in mind when new options are elaborated.

One-sided bearing of costs occurs because most of the costs of access are born by public research institutions while the biotech industry benefits at low cost from research results funded from public monies and published for public access. It is also to their advantage that the basic duties and administrative oversight does not extend to the marketing of products and the sharing of benefits. Therefore, hardly any considerable revenue from sales of products or licensing of patents has flown from industry to provider states. In short, research is sent to the front while industry holds itself in the background. It could be argued that the division of labour between public research and industry corresponds to normal practices of modern states where research is deemed to be publicly funded infrastructure that can freely be used for subsequent commercial activities. But the ABS idea may throw a different light on the issue. ABS rests on the general conviction that biodiversity must be conserved for the benefit of mankind, including industry, and that the willingness of host states to protect can be incentivised by benefit sharing, or more simply, through money flowing from industrialised uses to developing providers. Such flow is weak if the commercial stages come later and are anyway hard to supervise. Therefore, industry should acknowledge its interest in and accept its responsibility for preserving biodiversity, maybe by financial engagement already at earlier stages of R&D.

2.9 Transaction Burdens and Costs: Necessary or Inefficient?

While the problems described so far are substantial in kind, raising questions of equity between differing partners, problems of how transactions are organised must also be kept in mind. I have already discussed some issues insofar as they have substantial impact (such as, for instance, monitoring commercialisation). Additional issues would include legal certainty,

³⁴ G Winter, 'Common pools of genetic resources and related traditional and modern knowledge' in E C Kamau and G Winter (eds), *Common Pools of Genetic Resources. Equity and Innovation in International Biodiversity Law* (Routledge 2013) 3-25, at 3-4. See further Part 2 of the article.

³⁵ M Ribadeneira Sarmiento, 'Research on Genetic Resources in Latin America and the Caribbean (LAC). Perspectives for Facilitated Access' in Kamau, Winter and Stoll (n 16) 131-150.

³⁶ E C Kamau, 'Exploring Bases for Building Common Pools in Eastern Africa' in Kamau and Winter (n 34) 373-398.

transparency, effectiveness, and proportionality which all are stipulated by Arts. 6, 12 – 18 NP.

Legal certainty and transparency of transactions are of outstanding concern for all involved partners, and especially for researchers who have hitherto had free access to GR apart from certain manageable requirements of provider states concerning research oversight, environmental protection and international trade. ABS has exposed them to often complicated and lengthy procedures. Any new concept will have to come up with more practicable solutions.

Effectiveness and proportionality raise questions of costs efficiency of designs. The new ABS requirements have imposed a heavy administrative burden on R&D activities. On the provider side a state operating an ABS regime and striving for proper enforcement must not only supervise accesses in its domestic sphere but follow the utilisation of its accessed genetic resources both internally and abroad, from first research activities throughout to the final marketing of products and the obtaining of intellectual property rights. Financial returns of any significant size have hardly ever been reported.³⁷ Although monetary compensations have been envisaged since the entering into force of the CBD in 1993, they have rather consisted of upfront payments or voluntary donations.³⁸ In any case, the transaction costs will often have been higher than the returns. Benefits deriving from cooperation in research and development if they emerged seem to have been more rewarding than monetary benefits. By the way, R&D cooperation also involves monetary gains for the partner on the provider state side.

37 N Pauchard, 'Access and Benefit-Sharing under the Convention on Biological Diversity: What Can Some Numbers Tell Us about the Effectiveness of the Regulatory Regime?' (2017) 6 *Resources* 11 <www.mdpi.com/2079-9276/6/1/11/html>.

38 See for upfront payments J Cabrera Medaglia, 'The Role of the National Biodiversity Institute in the Use of Biodiversity for Sustainable Development - Forming Bioprospecting Partnerships' in E C Kamau and G Winter (eds), *Genetic Resources, Traditional Knowledge and the Law* (Earthscan 2009) pp 243-268; for cases of voluntary payments which were made *volens volens* upon moral or political pressure see N Pauchard, *Gouverner les ressources génétiques. Les stratégies des acteurs face aux droits de propriété et aux règles sur l'accès et le partage des avantages* (Editions Athlil-Presses Universitaires Suisses 2020) 402-410.

On the user side costs arise when R&D organisations acquaint themselves with the ABS system, create IT tools checking genetic resources for ABS relevance, apply for and negotiate PIC, MAT and Material Transfer Agreements (MTAs), where required (such as in the EU) prepare due diligence declarations and store relevant information for years, and possibly employ provider state personnel for joint research projects.

In addition, administrative costs arise for the elaboration and dissemination of ABS information tools, negotiation of rules harmonising EU wide harmonisation activities, and checks of utilisation and benefit sharing.³⁹

As most of the R&D results generate non-monetary benefits it is impossible to weigh them up with the transaction costs. In any case the more differentiated the ABS regimes are organised in order to ensure the sharing of monetary benefits the more financial costs will arise. Most illustrative is the blockchain model for tracing benefits to accessed GR: it may at the end eat up all – or even more of – the revenue they generate. The problem is thus how to find a system that is fair at minimal transaction costs.

2.10 Parenthesis on Traditional Knowledge Associated with Genetic Resources

In the preceding parts I almost completely disregarded traditional knowledge associated with genetic resources (aTK). This is not due to any assumed unimportance of it. On the contrary by Art. 8 (j) CBD and Arts. 7, 12 and 16 NP aTK has been laid out as a good that must be preserved, supported and compensated if accessed and utilized. Many national ABS systems have also dedicated differentiated provisions on access to the utilisation of aTK. Discussions about reforming the ABS regime have hardly ever lacked mention of aTK.

39 On experiences made with ABS practices see the survey by Milieu Analysis of implications of compliance with the EU ABS Regulation for research organisations and private sector companies, May 2020, 19 <https://ec.europa.eu/environment/nature/biodiversity/international/abs/pdf/ABS%20Regulation_Report%20on%20Compliance%20Implications%20for%20public%20and%20private%20sectors.pdf>.

Nevertheless, however, such mention is characterised by a certain sanctimoniousness accompanied by wide ignorance of what is really going on. The regulatory scrutiny somewhat stands in contrast to that lack of empirical knowledge and practical ingenuity.

Any reformatory reflection would need to first broaden the knowledge base. In-depth studies are needed on kinds of aTK, its dissemination across local communities within and across states, its hosting by individuals and communities, practices of access, kinds of utilisation, and commercialisation.⁴⁰ It could be that there are only disappointingly rare cases of access and utilisation of the kind the CBD, NP and general perceptions expect. This may especially be true in cases of deep cultural gap between genuine traditional healing and modern medicine.⁴¹ It may further be that much of claimed traditional knowledge is already known from anthropological research of the past. On the other hand, it may be revealed that traditional knowledge is more dynamic than assumed developing at its own pace of practical experience.⁴² This could be an attractive object of access and utilisation.

In conclusion the knowledge about ABS concerning aTK is not a sufficient basis for already designing options for reform. I will therefore desist from further venturing into that matter.

3 CONCLUSION

Summing up the following yet unsolved problems have been identified:

- how should utilisation be defined having in mind the interest of researchers in freedom

40 See examples of that kind of study J K Githae, 'Potential of TK for Conventional Therapy – Prospects and Limits' in Kamau and Winter (n 38) 77-100; J Kleba, 'A Socio-legal Inquiry into the Protection of Disseminated Traditional Knowledge – Learning from Brazilian Cases' in Kamau and Winter (n 38) 119-142; E C Kamau, 'Protecting TK Amid Disseminated Knowledge – A New Task for ABS Regimes? A Kenyan Legal View' in Kamau and Winter (n 38) 143-172.

41 See further Githae *ibid*.

42 Kamau (n 40).

- of research and the interest of providers in participating in R&D and resulting benefits
- whether R&D results should be held confidential in order to allow commercial gain, or made public in order to enhance the public domain of knowledge
- what criteria are appropriate to draw a line between relevant and irrelevant contributions of GR in multicausal development of products
- how R&D on derivatives can be linked to R&D on genetic resources from which the derivatives originate
- whether public databases that store digital sequence information can and should be reformed to carry conditions for utilisation and benefit sharing stipulated by provider states
- whether and how the contractual obligation to share benefits should be improved by administrative oversight on the user side
- how in situations of transboundary GR the right of one provider to take all benefits can be integrated in a pool setting
- whether on the user side the costs and benefits of ABS are well distributed between public and private sector utilisation and commercialisation
- how much the transactions in the ABS system cost, and whether the costs are justifiable.

There may be ways and some have been considered of how to solve those problems without fundamentally putting the ABS concept into question. However, the multitude of difficulties indicates that there may be underlying reasons that call for more basic changes of model design. This will be discussed in the second part of this article.⁴³

43 The second part will be published in Volume 17/2 and is available as advance publication at <http://www.lead-journal.org/content/a1706.pdf>.

COMMENT

HOW GREECE UNDERMINED THE IDEA OF RENEWABLE ENERGY COMMUNITIES: AN OVERVIEW OF THE RELEVANT LEGISLATION

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1

INTRODUCTION

The energy sector is undergoing an important transformation under the pressure of climate change which renders the transition to clean forms of energy urgent. Through the idea of energy communities (EC), citizens, businesses, and local governments can become actively involved in the process of energy transition. At the same time, the idea of ECs has not only gained ground as an important driver towards energy transition but also as an alternative to the centralized energy system that can foster energy democracy. The ECs can identify local needs and bring together the local population to achieve common goals, such as self-sufficiency and self-determination, and increase public acceptability of RES installations. Additionally, various side benefits for the communities have been highlighted in the literature, such as employment opportunities, an increase in environmental awareness, and the opening of new businesses.¹ ECs have boomed in Europe in the past few years following the EU Directive 2008/2001 and 2019/944, especially in Germany, the Netherlands, UK and, Denmark, where

the regulations have favoured ECs.² Yet they are still underdeveloped in Southern Europe, where the pertinent model is focused on big investments on large scale RES.³ Generally, the importance of an adequate framework that can promote energy communities has been discussed broadly in the literature.⁴

In 2018, Greece adopted an innovative regulation in an effort to promote energy communities and to achieve decentralization. Despite the initial efforts, private investors took advantage of the Greek legislation and the available funds forming part of energy communities. There is little evidence that the country is actually moving towards energy decentralization and democratization.

1 Pablo del Río, Mercedes Burguillo, 'Assessing the Impact of Renewable Energy Deployment on Local Sustainability: Towards a Theoretical Framework' (2008) 12/5 *Renewable & Sustainable Energy Review* 1325–44; Gabriella Dóci, Eleftheria Vasileiadou and Arthur C Petersen, 'Exploring the Transition Potential of Renewable Energy Communities' (2015) 66 *Futures* 85–95; Valeriya Azarova and others, 'Designing Local Renewable Energy Communities to Increase Social Acceptance: Evidence From a Choice Experiment in Austria, Germany, Italy, and Switzerland' (2019) 132 *Energy Policy* 1176–83; Jurgen Deutsche and others, 'Energie-Autarkie und Energie-Autonomie in Theorie und Praxis' (2015) 15 *Zeitschrift Für Energiewirtschaft* 151–62.

2 Marieke Oteman, Mark Wiering, Jan-Kees Helderman, 'The Institutional Space of Community Initiatives for Renewable Energy: A Comparative Case Study of the Netherlands, Germany and Denmark' (2014) 4 *Art No. 11 Energy, Sustainability and Society* <<https://energysustainsoc.biomedcentral.com/track/pdf/10.1186/2192-0567-4-11>>; J Dubois and others, 'Safety Cost of a Large Scale Hydrogen System for Photovoltaic Energy Regulation' (2013) 38(19) *International Journal of Hydrogen Energy* 8108–16; Gill Segyfang and Alex Haxeltine, 'Grassroots Innovations: Exploring the Role of Community-based Initiatives in Governing Sustainable Energy Transitions' (2012) 30 *Environment and Planning C: Government and Policy* 381–400; Henk-Jan Kooij and others, 'Between Grassroots and Treetops: Community Power and Institutional Dependence in the Renewable Energy Sector in Denmark, Sweden and the Netherlands' (2018) 37 *Energy Research Social Science* 52–64.

3 Giorgio Osti, 'The Uncertain Games of Energy Transition in the Island of Sardinia (Italy)' (2018) 205 *Journal of Cleaner Production* 681–9.

4 Campos Inês and others, 'Regulatory Challenges and Opportunities for Collective Renewable Energy Prosumers in the EU' (2020) 138/111212 *Energy Policy* <<https://www.sciencedirect.com/science/article/pii/S0301421519307943/pdf?md5=d2fc83801bdab3246f98152a7de826ff&pid=1-s2.0-S0301421519307943-main.pdf>>; J Lowitzsch, CE Hoicka and FJ van Tulder, 'Renewable Energy Communities under the 2019 European Clean Energy Package – Governance Model for the Energy Clusters of the Future?' (2020) 122/109489 *Renewable and Sustainable Energy Reviews* <<https://www.sciencedirect.com/science/article/pii/S1364032119306975/pdf?md5=2faf2cd5047b2a8f9b966536ced2965f&pid=1-s2.0-S1364032119306975-main.pdf>>.

Since 2018 and this innovative law which, however, brought little results, the legislation has advanced and the idea of energy communities has been undermined and substituted by the idea of ‘local energy’ projects that can promote big investments and hinder growth. In these projects various public, private, and third sector actors can participate in a combined management model. This is currently observed in cases like Tilos⁵ and Fournoi.⁶ Additionally, of the 374 registered Energy Communities (EKOIN) that emerged after the introduction of the law 4513/2018, the majority are still struggling at the various stages of licensing and only 35 are currently active. Of those, only 20 are organized by municipalities while the rest are private. A similar trend was also observed recently in the UK, where a significant change in the pathways of energy transition is expected as ECs are being substituted by local energy projects.⁷

There is still no comprehensive research on the Greek legislation regarding energy cooperatives and communities, and most importantly on how the Greek regulation moved from a supportive framework for energy communities to a new focus on ‘local energy’ with strong participation from private companies and local authorities.

2

COUNTRY PROFILE

Greece is a country with high renewable energy potential, but it has traditionally been heavily dependent

on lignite and oil.⁸ Since the liberalization of the energy market with the Directive 96/92/EC through Law 2773/1999, Greece has adopted a number of regulations in an effort to modernize the environmental regulation in line with the European Directives, focusing especially on the promotion of RES. However, the relevant regulation has repetitively been criticized as complex, bureaucratic, and inconsistent.⁹ The example of EC presented in this paper further stresses this inconsistency and instability. Despite this, Greece has taken significant steps to promote renewable energy development. The share of RES in the energy mix has increased from 6.9 per cent in 2004 to 18 per cent in the last few years, which was also the European target for the country. Solar and wind followed by large scale hydro have been the main renewable energy investments.¹⁰

3

RELEVANT LEGISLATION

3.1 Law 4513/2018 on Energy Communities and Other Provisions

The law was introduced in 2018 by the Ministry of Environment and Energy in an effort to deal with the increased energy poverty and to strengthen the social economy and innovation in the country. The law uses the terminology ‘energy community’ instead of ‘energy cooperative’, in line with the European directives on

5 Gilles Notton and others, Tilos, The First Autonomous Renewable Green Island in Mediterranean: A Horizon 2020 (15th International Conference on Electrical Machines, Drives and Power Systems 2017) 102–5.

6 M Bertsiou and others, ‘Water Management and Electricity Output of a Hybrid Renewable Energy System (HRES) in Fournoi Island in Aegean Sea’ (2018) 118 *Renewable Energy* 790–8.

7 Patrick Devine-Wright, ‘Community versus Local Energy in a Context of Climate Emergency’ (2019) 4 *Natural Energy* 894–6.

8 Marula Tsagkari, ‘Energy Governance in Greece’, in M. Knodt, J. Kemmerzell (eds), *Handbook of Energy Governance in Europe* (Springer, 2020) <https://link.springer.com/content/pdf/10.1007%2F978-3-319-73526-9_12-1.pdf>.

9 *ibid* 15; Antonis Metaxas and Michael Tsinisizelis, ‘The Development of Renewable Energy Governance in Greece. Examples of a Failed (?) Policy’ (2013) 23 *Renewable Energy Governance* 155–68.

10 Eurostat Statistics Explained, *Renewable Energy Statistics* (Eurostat 2020).

renewable energy. In Article 1, energy community is defined as a ‘cooperative solely aiming at promoting social and solidarity-based economy and innovation in the energy sector, addressing energy poverty and promoting energy sustainability, generation, storage, self-consumption, distribution and supply of energy as well as improving end-use energy efficiency at local and regional level’.

Energy communities, according to this law, should undertake some mandatory activities like energy provision services, energy management and storage, use of electric vehicles, and production of raw materials for biomass, among others. Apart from the mandatory activities, the Law 4513/2018 in Article 4 para 2 also includes some optional activities like managing funding programs, raising awareness, and supporting vulnerable groups against energy poverty. Other than the aforementioned mandatory and optional activities stated in paras 1 and 2 of Article 4, no further activity can be exerted by an EC (art. 4.2 L. 4513/2018). This clearly limits the scope of ECs by excluding other activities like agriculture. This provision is in contrast with the nature of cooperatives which (as also stated in cooperative law R. 193/2002) often have a wide range of activities related to the social economy. Additionally, there is a strict divide between profit and non-profit EC, thus failing to acknowledge the broader purpose of energy communities which is to go beyond profit and contribute to the common good of the community. Through this provision, the ECs are seen as investors as they are permitted to allocate all the surpluses as well as the remainder after dissolution/liquidation.¹¹

A unique innovation of this legislation was allowing the participation of local authorities, which was forbidden or contested in the previous relevant laws. With the Law 4513/2018, the involvement of local

authorities is not only allowed but also encouraged. In Article 2 it is stated that local authorities can form or join an EC. The empowerment of the local authorities is a significant improvement as they can provide capacity and funding. However, in some cases, in order to facilitate the participation of local authorities, the law allows for the lowest possible membership, especially in less populated island regions of the country. In some cases, only three members, two of which can be local authorities, can form an energy cooperative (EC. Art. 2 para 2 L. 4513/2018). This, along with the restrictions in the membership, poses significant questions regarding the opportunities for participation of local communities as well as the open door principle according to which ‘cooperatives are voluntary organisations, open to all persons able to use their services and willing to accept the responsibilities of membership, without gender, social, racial, political or religious discrimination’.¹²

3.2 Government Gazette Â/940/20.3.2020

The regulation Â/940/20.3.2020 focuses on the promotion of renewable energy in the lignite dependent areas in an effort to boost the energy transition. In particular, the regulations of ministerial decisions aimed at resolving the delays observed in the previous years in the licensing process of new power plants as well as the upgrade of electricity networks in order to facilitate the connection of new power plants. However, it also included a number of ambiguous regulations regarding energy communities.

Article 2 distinguishes the categories of power plants from RES, which will be classified into five groups, and based on this categorization the applications of the project bodies will be examined and the final connection offers will be granted. In this context, the

11 Ifigenia Douvitsa, ‘The New Law on Energy Communities in Greece’ (2019) 40 *Cooperativismo e Economía Social* 31–58.

12 International Cooperative Alliance, ‘Cooperative Identity, Values & Principles’ (COOP) <<https://www.ica.coop/en/cooperatives/cooperative-identity>>.

priority that was previously given to applications submitted by ECs is being significantly reduced to one month. Only an EC in which the Local Government Organizations participate, profits are not distributed, and more than 60 members participate are still eligible for 4 months priority in the licensing procedure. A possible retroactive application of the law can have a big negative impact on the already submitted application. This approach can also be incompatible with the EU Energy Policy, as the European Commission has repeatedly criticized the application of retroactive measures and their effect on the RES development (in the Directive 2009/28/EC and the relevant Position Paper).

3.3 Regulation 4685/2020

The controversial law 4685/2020 titled ‘Modernization of Environmental Legislation’ was adopted by the Greek parliament in May 2020, during the global lockdown due to the COVID-19 pandemic. Among other provisions, the law has been accused to hinder the achievements of the previous law on energy cooperatives and small producers while promoting large scale investments. More concretely, the law simplifies the process for large producers of renewable energy sources but not the development prospects of small producers and energy communities. For instance, Article 17 states that the obligation to pay an environmental fee is reduced by half for ‘institutions, as well as legal entities, public or private law for public benefit purposes, except for energy communities, such as hospitals, health centres, and schools of all levels’. At the same time, specific milestones are set from the moment the certificate is awarded until the project is complete. So, although now the right to produce energy can be obtained ‘faster’, it is also possible to lose it if the project is not ready on time. The priority in the licensing process, introduced by Law 4513/2018, is only maintained for those energy communities in which the Local Government Organizations participate, profits are not distributed and those that have more than 60 members. This will put extreme pressure on those energy communities that have more complicated decision-making mechanisms through assemblies and more difficult access to funding and fund release through processes that are time-consuming.

4 CONCLUDING REMARKS

From the above analysis, it is evident that the new regulatory packages in Greece will have an important impact on the renewable energy communities and the energy transition path. Despite the initial positive steps taken by the laws preceding and including Law 4513/2018, there is currently an inverse trend that undermines energy communities. In Table 1 we present an overview of the related legislations and the main provisions regarding ECs. The recent regulations are mostly driven by the need to promote big investments, with the participation of various players like private companies and municipalities that will reduce investment risks and hinder growth. At the same time, the importance of energy communities, which can represent the interests of the local population and have a significant positive impact, is not being acknowledged. Of course, the removal of unjustified administrative and bureaucratic barriers in the Greek regulation was more than welcome, but with an understanding of the different ways in which energy communities organize and operate and the inherent challenges they face, that call for a special regulation in the first place. One can expect more ‘local energy projects’ to appear in the coming years. However, these projects not only often fail to represent the needs and aspirations of the local society but are also short-lived.¹³ This new regulation will undoubtedly have detrimental effects on energy communities which remains to be seen.

¹³ Devine-Wright (n 7) 895.

LAW		PROVISIONS REGARDING ENERGY COMMUNITIES
Law 3852/2010	New Architecture of Local Government and Decentralized Administration	More administrative power was given to the local authorities.
Law 3851/2010	Accelerating the development of Renewable Energy Sources to deal with climate change and other regulations addressing issues under the authority of the Ministry of Environment, Energy and Climate Change	Special credit for household consumers within the administrative borders of the municipal or community district in which the R.E.S stations are installed.
Law 4430/2016	Social & Solidarity Economy	RES treated as social cooperative enterprises and thus, were exempted from the rules of the antagonism, along with prioritizing administrative preferences and having to pay smaller guarantees.
Law 4513/2018	Energy Communities and other provisions	Sets the main regulatory framework for ECs, including benefits like a priority in the licencing process, special remuneration and allows the participation of the local authorities, citizens, and private companies.
B/940/20.3.2020	Modernization of Environmental Legislation	Limits the priority given to applications submitted by ECs and a fixed remuneration scheme is applied.

BOOK REVIEW

**MARJAN PEETERS AND MARIOLINA ELIANTONIO EDS.,
*RESEARCH HANDBOOK ON
EU ENVIRONMENTAL LAW* (EDWARD ELGAR
PUBLISHING LIMITED 2020)**

Reviewed by: Virginie Rouas, Research Associate at SOAS, University of London

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Marjan Peeters and Mariolina Eliantonio eds.,
Research Handbook on EU Environmental Law (Edward
Elgar 2020)

Without a doubt, the European Union (EU) has the most developed and advanced environmental legal framework among regional integration organisations. Therefore, it does not come as a surprise that EU environmental law is a regular subject of academic study. In this context, the *Research Handbook on EU Environmental Law*, edited by Marjan Peeters and Mariolina Eliantonio, is one of the newest additions to the academic scholarship on the EU institutional and legal machinery that protects the environment. According to the editors, this book ‘aims to draw insights into the use of different regulatory instruments by the EU’ and the role of the Court of Justice of the European Union (CJEU) ‘in putting them into practice in the field of EU environmental law’. One important contribution of this book is its emphasis on contemporary issues and practical aspects of EU legislation on environmental protection. In particular, it provides a critical overview of existing EU environmental law, highlighting successes, challenges, and opportunities for strengthening rules and improving implementation. With this in mind, this research handbook is divided into seven thematic parts and gathers concise contributions from academic authors covering a wide range of aspects of EU environmental law.

First, as a reminder that knowledge of the functioning of the EU institutions is essential to understand EU environmental law, Part I explores the institutional and horizontal issues related to EU environmental law. Helle Tegner Anker examines the EU’s competence to legislate on environmental matters, in particular legal bases under the Treaty on the Functioning of the European Union (TFEU). She also explores the principles of subsidiarity and proportionality and the limitations they impose on the EU’s exercise of its environmental competences. Leonie Reins then assesses the application of Article 193 TFEU, which enables Member States to go beyond EU rules and adopt more stringent environmental protection measures, paying special attention to case law of the CJEU. She argues that the environmental guarantee provided for in Article 193 has so far served to further institutionalise EU environmental law and policy. Moreover, Gyula Bándi discusses how the

environmental principles of EU law provide guidance for environmental regulation and the practice of administrative implementation and judicial adjudication. Annalisa Volpato and Ellen Vos explore the role of EU agencies in environmental law and policy, while Antonio Cardesa-Salzmann and Elisa Morgera examine the EU’s competence and participation in external environmental action and assess the EU’s track record as a global player in international environmental governance. The chapter written by Geert van Calster focuses on the impact of the EU’s internal market provisions and its case-law on the possibility to adopt national measures to protect the environment. Finally, Luca de Lucia and Maria Chiara Romano discuss the nature of transnational administrative acts and their impact on environmental protection.

As a result of the increasing influence of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) on EU legislation, Part II justifiably provides insights into procedural rights in EU environmental law. Uzuazo Etemire critically assesses the current status of EU law on access to environmental information, while Lorenzo Squintani and Goda Perlaviciute examine the EU legal framework governing public participation in environmental matters, looking in particular at the relationship between public participation and the acceptability of policies, plans, and projects that affect the environment. Matthijs van Wolferen and Mariolina Eliantonio describe the challenges of access to justice in environmental matters in the EU and, in particular, how the judicial organisation of the EU creates an additional challenge for public-interest litigants. Finally, Agustín García-Ureta explores the challenges arising from environmental impact assessments in the light of applicable EU directives and CJEU case-law.

Although the EU has adopted a large volume of environmental rules, low levels of compliance have compromised their effectiveness in achieving environmental protection. Therefore, Part III explores the pressing issue of compliance with EU environmental law through three chapters on specific enforcement mechanisms. Ludwig Krämer discusses the role of direct effect, a jurisprudential doctrine that allows individuals to rely on EU legal provisions where Member States have failed to transpose or implement

such provisions, has played in the context of EU environmental law. In particular, he explains how the recent CJEU case-law may be signalling the end of the application of this doctrine. Furthermore, Martin Hedemann-Robinson explores the thorny issue of the role of the EU in regulating environmental inspections by national authorities, and the need to strengthen the EU legal approach to such inspections. Lastly, using qualitative data, Melanie Smith examines the important role played by infringement and financial sanction procedures initiated by the European Commission in enforcing environmental law in the EU.

Liability is a key tool for deterring environmentally destructive behaviour. Therefore, it is only natural that liability for environmental damage under EU law should be discussed in this research handbook. In Part IV, Barbara Pozzo describes the background and content of the Environmental Liability Directive, as well as the challenges facing its implementation at national level and the harmonisation of liability across Member States. Moreover, Michael Faure discusses EU environmental criminal liability. He examines how the activist role played by the CJEU paved the way for the adoption of the Environmental Crime Directive, describes the limitations of this instrument, and presents potential options for how the EU can ensure better harmonisation of environmental criminal law at national level.

Part V of this book ‘delves into the fragmented substance of EU environmental law’ by discussing the complex and technical content of specific EU legal instruments, recent legal and jurisprudential developments, and current challenges in nine environmental sectors. First, An Cliquet focuses on EU nature conservation law. She outlines the core provisions of the Birds and Nature Directives and relevant case-law of the CJEU, and discusses the recent Fitness Check of those directives. Nathalie Hervé-Fournereau then undertakes a prospective analysis of the future of EU water law on the basis of the 2019 Fitness Check of the Water Framework Directive and the Flood Directive. EU legislation on air pollution is reviewed by Kendro Pedrosa and Bernard Vanheusden. They discuss the relationship between EU air legislation and the Convention on Long-Range Transboundary Air Pollution, as well as the increasing role of the CJEU in dealing with air pollution cases. Lolke Braaksma

and Hanna Tolsma review the evolution of the EU’s integrated approach towards pollution prevention and control. Their chapter analyses the extent to which the Industrial Emissions Directive has successfully implemented an integrated approach to pollution prevention and control. Moreover, Chris Backes provides an overview of the development of EU waste law and the CJEU’s important role in defining the legal concept of waste. He also explores the relationship between waste law and the increasingly prominent concept of circular economy. Martin Führ and Julian Schenten address the difficult issue of the regulation of industrial chemicals and review the content and implementation of the REACH Regulation and the Classification, Labelling and Packaging Regulation. They question the current EU governance model for risk management processes. Giulia Claudia Leonelli assesses the governance of genetically modified organisms (GMOs) in the EU through the prism of evidence-based and socially acceptable risk approaches towards the regulation of uncertain risks. She argues that the European Commission’s technocratic focus on sound science and trade in GMOs, and its failure to recognise EU citizens’ widespread aversion to GMOs, have undermined the political and democratic legitimacy of the GMO regulation in the EU. In addition, Nicolas de Sadeleer discusses how the scandal involving the use of defeat devices by the Volkswagen group to blur vehicle testing under artificial conditions has revealed flaws in compliance with EU rules on car emissions. In particular, he explores the regulatory issues that have arisen with regard to the control of pollution emissions from light-duty vehicles powered by gasoline and diesel. Finally, Andrew Johnston and Beate Sjøfjell consider the EU’s approach to environmentally sustainable business, focusing on various initiatives, including the Non-Financial Reporting Directive. They argue that the current regulatory framework is insufficient to ensure that businesses operate in a more sustainable manner and call for a fundamental shift towards a firmer and more coherent regulatory approach.

Part VI pays special attention to the EU regulatory action to address the pressing global issue of climate change. The four chapters of this part concentrate ‘on several important pillars of the EU climate law *acquis*’. First, Estelle Brosset and Sandrine Maljean-Dubois discuss the new approach of the Paris Agreement and

its implications for the EU, the EU's role of the as a global actor in the climate change debate, and the EU's internal climate policy. Furthermore, Seita Romppanen analyses the role of effort sharing and land use, land-use change and forestry (LULUCF) sectors in the context of the EU's 2030 climate and energy policy framework. Stefan Weishaar examines the evolution of the regulatory framework of the EU emissions trading system (EU ETS), in particular the governance shift within the EU ETS. His chapter also explores the role of climate litigation in shaping the development of the EU ETS. This analysis is timely at a time when an increasing number of States and companies are being sued for their failure to act. Lastly, Thomas Schomerus gives an up-to-date overview of EU legislation on energy efficiency and energy saving legislation, and critically assesses whether it fulfils its role in addressing climate change. While Part VI deals with important regulatory issues related to climate change, it neglects to explore the role and management of renewable energy whereas the EU has an important and always evolving legislative framework on this subject.

Finally, Part VII sets out the overall conclusions of the editors as to what can be derived from this collection of chapters.

This book shows that the EU has succeeded in building a broad regulatory framework aimed at protecting the environment. At the same time, the complex intertwined structure of EU laws and policies has challenged the effective understanding and implementation of EU environmental law. While the wide range of regulatory approaches used by the EU to address environmental issues may provide 'a fine-tuned regulation for a specific problem', streamlining and simplifying EU environmental legislation may be needed. Furthermore, if the body of EU legislation has improved over times, there is still room for improvement and legislative practice provides examples of measures aimed at watering down ambition. To sum up, an important challenge for the EU is the development of necessary and ambitious environmental legislation that does not further complicate and burden the legal landscape of environmental protection.

An important contribution of this book is how it highlights 'the "implementation deficit" that is so

manifest in EU environmental law' and that hinders the achievement of a high level of environmental protection. The lack of compliance by both private actors and public authorities remains problematic. Furthermore, the paucity of EU harmonisation of administrative sanctions across Member States, as well as the lack of regulation on inspections, contribute to the problem of compliance. While civil society could potentially play an important role in the enforcement of EU environmental law, the centralised nature of EU environmental law and the limited access by NGOs to the CJEU limit the role of civil society.

Finally, another added-value aspect of this book is its emphasis on the role of the CJEU in the development and implementation of EU environmental law. A large number of contributions analyse how the CJEU has not only cleared the way for strengthening environmental legislation, but also missed some opportunities. This book reveals the importance of case-law in the interpretation of EU environmental legislation and how the CJEU has played a significant role bringing the objectives of EU environmental law to fruition. It also shows how the CJEU has had the difficult task of balancing environmental interests with other social and economic concerns.

In view of the richness and complexity of EU environmental law, this book succeeds in providing an overarching analysis of the content and implementation of EU legislation in the most important, or well-known, environmental sectors. However, the contribution of this book could have been more significant if it had delved into emerging areas of EU environmental legislation that are under-explored (eg single-use plastics ban; protection of environmental whistleblowers; European Citizen's Initiatives in environmental matters; energy issues; the interplay between environmental regulation and digitalisation). This shortcoming is nonetheless recognised by the editors themselves, who, in the closing chapter of this book, mention a number of issues that are likely to merit further research. They consider how technological innovation (eg satellite monitoring) and new research tools (eg big data analysis) can help understand and enforce better EU law and point to the role of civil society in the pursuit of environmental accountability of EU and national institutions.

Ultimately, this research handbook is an important one-stop shop for academics, practitioners, and students. It is a valuable teaching resource to stimulate the critical thinking of advanced students about the EU's approach to environmental law. It is also a must-have for practitioners who are looking for short but critical analyses of the most important issues of EU environmental law.

BOOK REVIEW

DANNY CULLENWARD AND DAVID G VICTOR, *MAKING CLIMATE POLICY WORK* (POLITY PRESS 2020)

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Danny Cullenward and David G Victor, *Making Climate Policy Work* (Polity Press 2020)

In 'Making Climate Policy Work', Cullenward and Victor present a clear, outstandingly explained and timely warning against absolving state responsibility for climate action to the 'invisible hand' of carbon market forces. There is a deliberate and refreshing distancing from the entrenched and ideological 'state vs market' debate; instead the authors take a political economy approach defined by pragmatism and a mantra of 'what works in the real world'. While acknowledging the theoretical power of the carbon market in finding economic efficiency, they argue that political realities prevent their environmentally effective implementation; thus consciously appealing to both free market ideologists and sceptics. The pair are well placed to provide this insight. Cullenward has extensively researched the workings of Emission Trading Schemes (ETSs) and has seen them meet the 'real world' of politics while advising the Californian ETS; while Victor offers a political science perspective and expertise in industrial regulation. The ideas laid out in this book have also long been under refinement, with the first shoots of this theory visible in a 2007 publication (Victor and Cullenward, 2007).¹ Overall, the book offers a compelling argument to reassess the role of ETSs with effectual recommendations for their redesign. However, much like the title, the book can be generalising in its authoritative tone and exaggerates its contribution to policy construction, with an underdeveloped proposal for how industrial policy will drive the majority of emissions reductions.

Stephan and Paterson categorise research on the politics of carbon markets into: the policy process by which specific schemes are established, the role of different actors in this process, and the evaluation of their impact.² 'Making Climate Policy Work' can be spilt into three parts: the first transcends these categories and explores how political actors and institutions obstruct the implementation of theoretically optimal markets and the resultant consequences for climate

change mitigation. Each chapter logically deconstructs the politics of a core carbon market concept. Chapter 1, 'A turn toward markets?', offers a pseudo-executive summary: markets homogenise, and therefore blunt, climate policy across sectors that differ greatly in their exposure to political forces; and markets can promote efficient distribution of established technology but cannot drive the technological innovation required for 'deep decarbonisation'. A simple political theory is developed to then apply to market concepts throughout the book and three core case studies are outlined: the European Union ETS, the Western Climate Initiative (California and Quebec) and the Regional Greenhouse Gas Initiative (North-Eastern United States). Chapter 2, 'Ambition', shows how the politics of voters and organised industry result in policymakers resorting to regulation to make emission reductions, rendering ETSs ineffectual with low prices and high volatility. Chapter 3, 'Coverage and allocation', explores how economic theory demands extensive coverage across the economy but that politics insulates certain sectors or undermines market efficacy for the sake of their inclusion. Chapter 4, 'Revenue and spending', analyses how weak markets generate limited state revenue through allowance auctions and critiques its currently inefficient spending. The relationship between an ETS and the rest of the world is covered in Chapter 5, 'Offsets', and Chapter 6, 'Market links', with the argument decisively made that this relationship is counterproductive. Offsets are irreparably flawed by a political logic that drives cost down at the expense of quality, which is conveniently unquantifiable. On the other hand, market links are only possible where they are ineffective because real gains in economic efficiency through linking would risk harming the interests of actors that enabled the political construction of each linked market.

The second section, within Chapter 7 'Getting the most out of markets', offers recommendations to improve ETS efficacy. These include limiting scope to politically amenable sectors, controlling carbon prices at politically feasible levels, strategic and efficient revenue spending, and global influence via effective and internationally transferable policy design. Thus far, the book is an excellent piece in its own right that saps faith in market-managed climate action with detailed research and data from its case studies. This grounds the arguments in a pragmatism that counters literature premised on both free-market theory and

1 David G Victor & Danny Cullenward, 'Making Carbon Markets Work' (2007) 297(6) *Scientific American* 70-7.

2 Benjamin Stephan & Matthew Paterson, 'The Politics of Carbon Markets: An Introduction' (2012) 21(4) *Environmental Politics* 545-62.

ethical objections to the commodification of the atmosphere. Although, there are other grounds for critique; repeated references to ‘the real world’ combine with bold statements to produce an authoritative tone that can be unsubstantiated. Assertions such as ‘regulations are more popular [than market mechanisms] with politicians and the public’ are not supported with polling data but rather with a first principles derivation from their simplistic political theory (pp.51). Additionally, despite the book’s universal tone, it is highly Western- and democracy-centric; the three case studies are exclusively drawn from North America and Europe and the proposed theory of politics has voters at its core. A note suggests it is a merely ‘a small step to extend the logic’ to non-democratic polities but offers no further explanation, but ultimately the authors do concede that more work is required to fully account for differences between countries (pp.191).

Part three, found in Chapter 7 ‘Rightsizing markets and industrial policy’, diverges from ETSs to present the climate policy that they argue can provide the ‘deep decarbonisation’ sought after. Their vision sees improved ETSs playing a marginal role with designs that facilitate integration with prominent industrial policy and international strategy. The advocated industrial policy is centred around ‘experimentalist governance’ to generate the incentives for innovation and diffusion of new technologies and policies (pp. 151). This is essentially an endorsement of the traditional concept of state intervention to support nascent and risky ideas, but with an injection of dynamism and continual learning. The recommended ‘international strategy’ aims to promote cooperative experimentation internationally but also convincingly argues that climate leaders must prioritise ‘followership’: building climate policy that can be effectively implemented by other countries (pp.169). Both these proposals for ‘making climate policy work’ are interesting additions to the field but are unfortunately undertheorised and remarkably not fully subjected to the authors’ own political logic. For example, ‘penalty defaults’, the threat of near-existential penalties for firms unless deliberately subjective ‘good efforts’ are made, are considered an effective incentive for firms to innovate solutions (pp.158-159). However, it is overlooked that the ambiguity of these penalties exposes them to the same

political meddling by interest groups that weakened ETSs.

Overall, this is a book with an important and well-argued message that policymakers and academics alike should read. As climate policy action accelerates and debates on Article 6 of the Paris Agreement intensify, the book offers clear advice for the use and design of ETSs. Although the book overstates its ability to provide effective alternatives, it does identify a research area with great potential that deserves further investigation.

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