

Paper Submitted to the 11th Biennial Conference of the IASCP

“Environmental Justice in Rural South Asia: Applying Lessons Learned from the U.S. in Fighting for Indigenous Communities’ Rights and Access to Common Resources”

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Introduction

The environmental justice movement in the U.S. is unique because it addresses the issue of environmental harm not just as an environmental issue, but also as a civil rights issue.² Environmental justice recognizes that poor and marginalized communities bear a disproportionate environmental burden and aims to reverse this trend.³ Framing environmental harm as a civil rights issue allows for the use of additional tools in fighting the disproportionate environmental harm facing marginalized communities.⁴

The interlink between environmental issues, poverty, and the rights of local communities in South Asia was recently recognized in the Kathmandu Declaration.⁵ The Declaration was drafted and adopted by a body of judges from the Supreme and High Courts of Bangladesh, India, Pakistan, Nepal, and Sri Lanka in 2004.⁶ It sets out bold goals for increasing environmental justice and explicitly recognizes the need to curtail the exploitation of biodiversity.⁷ Implicit within this ideal to preserve biodiversity, especially in rural South Asia, is the important role that local communities play in preserving and sustaining the use of biodiversity.

In preserving and sustaining biodiversity, local community ownership and control over common resources has many recognized advantages.⁸ For one, community ownership results in management of resources by a group more familiar with the resources than a regulatory entity.⁹ Based on this familiarity, local resource users can then establish resource use limits based on a more intimate “local knowledge” of the resource.¹⁰

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² See Rosemarie Russo, *Unheard Voices: Environmental Equity*, ELECTRONIC GREEN JOURNAL, (Dec 2003).

³ See Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*, in Robert D. Bullard, (ed.), CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS, 22 (1993).

⁴ See *id.*

⁵ See *Kathmandu Declaration*, available at <http://asmalldoseof.org/precautionary/Kathmandu%20Declaration%20for%20PP%202004.pdf>, (last visited 6 June 2006).

⁶ See *id.*

⁷ See *id.*

⁸ See Shi-Lung Hsu, *A Two-Dimensional Framework for Analyzing Property Rights Regimes*, 36 U.C. DAVIS L. REV. 813, 844-845 (2003).

⁹ See *id.* at 844.

¹⁰ See *id.*

However, rural communities continue to face increasing difficulty in staking claim to common property and the right and access to the natural resources within.¹¹ Government policies encouraging trade of natural resources as a means of capital further limit the ability of local communities to lay claim to common property.¹² The effect of the inability to access and use natural resources and common property goes beyond a desire for obtaining property. Many local and indigenous communities are heavily, if not solely, dependent on natural resources for their livelihood.¹³ Preventing access to natural resources, therefore, threatens their ability to survive.

The struggle indigenous and local communities face trying to access and use natural resources is a struggle for environmental justice. Due to their heavy dependence on access to and use of natural resources, indigenous and local communities are more severely affected by any restriction on their ability to access and use natural resources than other communities. In other words, the indigenous and local communities are forced to shoulder a disproportionate environmental burden.

The other element of environmental justice struggles, marginalized communities, is a more complex issue. Indigenous communities, in general, tend to be marginalized based on differences of ethnicity, religion, and economic status.¹⁴ However, there are two forms of marginalization: marginalization of the community as a whole based on the previous characteristics, and marginalization within communities, where individuals within the community face marginalization. This paper will explore the environmental justice struggles facing marginalized communities and the struggles facing intra-community marginalized individuals.

The first section details the evolution of the environmental justice movement and its beginnings in the U.S. The discussion then moves to detailing the environmental justice struggles facing communities when the community as a whole is marginalized. The third section shifts the discussion to environmental justice struggles facing individuals that are marginalized by intra-community forces. The paper concludes by aiming to take the lessons learned from the environmental justice movement in the U.S. and applying them to the environmental justice struggles in a natural resource context.

The Beginning of Environmental Justice: A Fight Against Environmental Racism

The environmental justice movement in the U.S. arose to fight the inequality of environmental burdens facing communities of color. This movement is distinctive because it looks at cases of environmental harm not just as a purely environmental concern, but also as a civil rights issue.

¹¹ See Raja Devasish Roy, *Challenges for Juridical Pluralism and Customary Laws of Indigenous Peoples: The Case of the Chittagong Hill Tracts, Bangladesh*, 21 ARIZ. J. INT'L & COMP. LAW 113, 140 (2004), describing the difficulty of indigenous peoples of the Chittagong Hill Tracts to assert their right to access and use natural resources in the Hill Tracts.

¹² See Mara Kimmel Hoyt, *Breaking the Trade Barrier: Common Property Solutions to Tropical Deforestation*, 5 MINN. J. GLOBAL TRADE 195, 198 (1996), describing international trade in tropical wood as a cause of deforestation, leading to increased hardship for the communities dependent upon the forests.

¹³ See Jean-Philippe Platteau, *Community-Based Development in the Context of Within Group Heterogeneity*, Paper presented to Annual Bank conference on Development Economics (June 2003) at 248.

¹⁴ See e.g., Roy, *supra* note 11 at 171 detailing the marginalization of the indigenous communities in the CHT.

In particular, environmental justice advocates often use civil rights law when fighting environmental battles.

For some time, the fact that people of color lived in some of the most severely polluted environments was being ignored.¹⁵ The phrase “environmental injustice” defines the situation where people of color are forced, through their lack of access to decision making and policy making processes, to live with a disproportionate share of environmental harms.¹⁶

The idea of environmental justice addresses the impact of culture, race, gender, age, class, and power relations on issues ranging from health-related agricultural issues to inner-city toxic contamination of children.¹⁷ It recognizes the fact that clean air and water and non-toxic living conditions must be viewed as basic civil rights, not just environmental concerns, which are no less important than freedom of speech and the freedom to vote.¹⁸ The environmental justice movement is meant to unite environmentalism and social justice by challenging the business-as-usual environmentalism that is generally practiced by the more privileged wildlife and conservation oriented groups.¹⁹

Historically, the mainstream environmental movement in the United States revolved around the causes of preservation of nature, resource management, and pollution abatement.²⁰ This mainstream movement was primarily supported by white middle to upper middle class members of society.²¹ Even though environmental concerns cut across racial and class lines, the traditional activist in the mainstream environmental movement came from a background of above-average education, greater access to economic resources, and a greater sense of personal power.²² As a result, expanding the environmental agenda of mainstream groups to include the idea of race and class as factors of environmental protection has been a slow process.

Moreover, these mainstream environmental groups were ill-equipped to deal with the environmental, economic, and social concerns of communities of color.²³ They struggled with the impact terms like “environmental racism” could have on their mainly white, middle to upper middle class members. The potential for alienating the majority of their members was great, especially considering the environmental justice movement heavily focused on the impacts felt by communities of color and not on the traditional ideas of conservation and resource protection.

They also had a misconception about the level of interest communities of color had in environmental issues because when communities of color struggled for environmental rights,

¹⁵ See Alan H. McGowan, *Environmental Justice for All*, ENVIRONMENT, vol. 45:5, 1 (June 2003).

¹⁶ See Julian Agyeman, Robert D. Bullard, Bob Evans, “Exploring the Nexus: Bringing Together Sustainability, Environmental Justice and Equity.” *Space and Polity*, Vol. 6:1, 77, 81 (2002).

¹⁷ See Russo, *supra* note 2.

¹⁸ See Hilda L. Solis, *Environmental Justice: An Unalienable Right for All*, HUMAN RIGHTS, 5 (Fall 2003).

¹⁹ See Russo, *supra* note 2.

²⁰ See Bullard, *supra* note 3

²¹ See *id.*

²² See *id.*

²³ See *id.*

they were rooted in a wider struggle that includes community, labour, and human rights issues.²⁴ Because the focus was not purely on environmental rights, communities of color were not thought of as “environmentalists” in the traditional sense.

This changed in the late 1980’s when the multiracial environmental justice movement emerged.²⁵ At this time, communities of color began to organize around environmental issues at an unprecedented rate. In 1987, a report by the United Church of Christ’s Commission for Racial Justice entitled, “Toxic Wastes and Race in the United States,” brought the idea of environmental racism into the mainstream environmental movement.²⁶

The Commission found that, by far, race was the most prominent factor in the siting of commercial hazardous waste landfills.²⁷ This report started government officials, academicians, and grassroots activists talking about environmental problems that disproportionately affected communities of color, marking the start of the environmental justice movement carving out its own niche within the mainstream environmental movement.²⁸

This sub-movement has two key distinctions from the traditional environmental movement. One, it is more racially diverse and two, it is more ideologically inclusive, integrating both social and ecological concerns and paying particular attention to questions of distributive justice, community empowerment, and democratic accountability.²⁹ The ideological inclusivity allowed many groups to fall under the umbrella of environmental justice, ranging from grassroots activists well versed in civil disobedience to groups with little previous knowledge of environmental activism or political activism but compelled to take action to fight environmental injustice.³⁰

The new group of activists has a distinctive approach. Instead of a purely legal strategy where the focus of the movement is to engage the other side in legal battles, environmental justice groups look to increase their community’s ability to effectively participate in the decision-making process.³¹ The legal aspect of the movement is just one part of a broader movement focused on changing the way decisions are made. Besides the desire to change the decision-making process, environmental justice advocates are faced with a stark reality. Even though they draw from both substantive environmental laws and civil rights law, there are a limited number

²⁴ See Charles Lee, *Beyond Toxic Wastes and Race*, in CONFRONTING ENVIRONMENTAL RACISM *supra* note 502, at 50.

²⁵ See Dorceta Taylor, *Environmentalism and the Politics of Inclusion*, in CONFRONTING ENVIRONMENTAL RACISM *supra* note 502, at 53.

²⁶ See Jeff Chang, Lucia Hwang, *It’s a Survival Issue: The Environmental Justice Movement Faces the New Century*, available at <http://www.arc.org/C_Lines/CLArchive/story3_2_03.html> (visited 27 Aug 2003).

²⁷ See Bullard, *supra* note 3, at 42.

²⁸ See *id.*

²⁹ See Taylor, *supra* note 25, at 52.

³⁰ See *id.* at 53.

³¹ See Gregory Roberts, *Environmental Justice and Community Empowerment: Learning from the Civil Rights Movement*, 48 Am. U.L. Rev. 229, 256 (1998).

of legal tools available for their use.³² The U.S. courts have effectively blocked the ability of advocates to use civil rights law in fighting environmental battles.³³

The eroding of civil rights law affects the ability of the environmental justice movement to frame environmental burdens as a form of racial or class discrimination. The use of civil rights law is important because, as stated above, the recognition that hazardous waste and polluting industries are located based on racial concerns is an important aspect of the movement.³⁴ The use of civil rights law would validate this ideal by indicating that the decisions were made with the intent to discriminate against a community of color in violation of the community's right to be free of race-based discrimination.³⁵

There are, however, substantive environmental laws that can be used to fight the purely environmental aspect of the community's struggle.³⁶ While the social impact may not be as heavy as using civil rights law, the substantive statutes can result in the revocation of operating permits or force the relocation of polluting industries.³⁷

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

Additionally, diversifying tools to include a multi-leveled approach to increasing environmental justice can lead to greater success. Relying exclusively on the legal system, for instance, would result in limited movement success due to the unpredictable, and at times hostile, nature of the judiciary. Including other tools would also shift the emphasis from a purely legal battle to a more multi-tiered battle. Environmental justice aims to not only win legal battles, but also raise community empowerment. Community empowerment can increase in several ways, none of which need to include legal action.

The de-emphasis of legal avenues is particularly important in the rural South Asian context because of the inability of marginalized communities and individuals to even access the legal system, let alone obtain favourable judgements. The next section further explores how the idea of environmental justice is transposed into the rural South Asian context. In contrast to the U.S., where the environmental burdens are almost exclusively urban pollution, the environmental

³² See *id.* at 247.

³³ See *South Camden Citizens in Action v. New Jersey Dept. of Env. Protection*, 145 F. Supp. 2d 505 (N.J. Dist. 2001); 274 F. 3d 771 (2001) (holding that even though the affected community bore a large environmental burden, it was not a violation of civil rights) and *Alexander v. Sandoval*, 532 U.S. 275 (2001). (holding that private individuals were not authorized to bring cases under section 601 of the Civil Rights Act, which prohibits recipients of federal funding from engaging in actions with a discriminatory effect.)

³⁴ See Bullard, *supra* note 3.

³⁵ See Luke W. Cole, Sheila R. Foster, *FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT*, (New York 2001).

³⁶ See *e.g.* the citizen suit provisions of the Clean Water Act 33 U.S.C.A. §§1365, 1344 (o) and the National Environmental Policy Act, 42 U.S.C.A. §§ 4332 (c).

³⁷ See *id.*

burden on communities in South Asia revolves on the ability to access, use and own natural resources.

The section also explores how communities are marginalized and how their marginalization contributes to their inability to control and access natural resources, including common property ownership. The section begins with a more in-depth discussion of the idea of common property and how it relates to communities before turning to the discussion of the environmental justice struggles of rural communities in South Asia.

Environmental Justice in Rural South Asia: The Struggle for Access to and Use of Natural Resources

As stated earlier, local and indigenous communities highly depend on the ability to access and use natural resources for their livelihood. However, these communities face a continuing battle to assert rights to the natural resources and community property. In some cases, the state simply does not recognize the existence of local rights that dictate the use of common property resources that have been in place for generations.³⁸ Instead, land ownership is assigned to the government or a private enterprise.³⁹ In other cases, the customary laws and norms are recognized formally but ignored in practice.⁴⁰

Yet common property resource management schemes are widely recognized as a beneficial way of managing natural resources by providing environmental stability, cultural survival and economic growth.⁴¹ Common property systems have been using traditional methods of management long before state ownership and private property schemes were in place.⁴² Private property systems, on the other hand, marginalize local communities and increase environmental instability.⁴³

Community resource management schemes have many advantages, including long term knowledge of the surrounding ecosystems; traditional agricultural and other practices that foster the productivity and renewability of resources; community organization that regulates access to resources in a sustainable manner and community values that emphasize permanency in a given area, respect for that area; and responsibility to future generations.⁴⁴ Despite these benefits, local and indigenous communities continually face difficulty in implementing community management schemes and accessing common property.

³⁸ See Lee P. Breckenridge, *Symposium: Environmental Rights and International Peace: Protection of Biological and Cultural Diversity: Emerging Recognition of Local Community Rights in Ecosystems Under International Environmental Law*, 59 Tenn. L. Rev. 735, 752 (1992).

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ See Hoyt, *supra* note 12 at 212.

⁴² See *id.* at 214.

⁴³ See *id.* at 212

⁴⁴ See *id.*

In fact, as a result of minimal to no official support, and in some cases even official discouragement, local community management structures have dissolved or are breaking down.⁴⁵ This is further exacerbated by an erosion of traditional socio-cultural and religious values and institutions by externally driven socio-cultural and economic factors.⁴⁶ The breakdown of traditional community management goes beyond economic harm and becomes a struggle for environmental justice.

This section takes the idea of environmental justice and places it in a rural South Asian context to highlight the struggles indigenous and local communities face in trying to access and use natural resources. The section begins with a discussion of what comprises environmental justice struggles in South Asia. To highlight the struggles of local and indigenous communities, the case of indigenous communities in the Chittagong Hill Tract area of Bangladesh is presented. The section then concludes with a discussion of what tools are available to marginalized communities to fight for environmental justice.

Determining Factors of Marginalization and Disproportionate Environmental Burden

The term environmental justice has been used to describe anything from pure environmental issues, without a rights component, to an inter-linkage of human rights and environmental rights.⁴⁷ For the purposes of this paper, environmental justice will be thought to only encompass the link between two issues: a disproportionate environmental burden and a marginalized community or marginalized individuals.

Determination of Disproportionate Environmental Burden

In the U.S., determination of a disproportionate environmental burden focuses almost exclusively on urban pollution issues, such as increased exposure to air pollution or a high density of hazardous waste industries.⁴⁸ Rural areas, by their nature, do not have the same urban pollution exposure. Instead, as stated previously, the issue of environmental burden focuses more on the ability to access or use natural resources and common property.

Indeed, poverty and access to natural resources for livelihood are closely interlinked in South Asia.⁴⁹ The poor depend more heavily upon access to natural resources for their livelihoods than

⁴⁵ See Gregory F. Maggio, *Recognizing the Vital Role of Local Communities in International Legal Instruments for Conserving Biodiversity*, 16 UCLA J. ENVTL. L. & POL'Y 179, 225 (1997/1998)

⁴⁶ See *id.*

⁴⁷ See e.g. Cole *supra* note 35 detailing environmental justice as a link between environment and civil rights and in contrast, Justice B.N. Kirpal, *Developments in India Relating to Environmental Justice*, available at <www.unep.org/dpdl/symposium/Documents/Country_papers/INDIA%20.doc>, (last visited 4 June 2006), detailing only purely environmental litigation as "environmental justice."

⁴⁸ See Bullard, *supra* note 3.

⁴⁹ See Stockholm Environment Institute, York, Overseas Development Institute, University of East Anglia,, International Institute for Environment and Development, et. al, *Improving Policy- Livelihood Relationships in South Asia, Final Report*, at 3 (April 2003).

the rest of society.⁵⁰ They also have less real control over these resources.⁵¹ Any degradation or loss of access to natural resources will deprive poor communities of their livelihood potential.⁵²

The two issues, poverty and access to natural resources, are so closely linked that natural resources management must be a central concern for any livelihoods-based approach in rural areas.⁵³ Even if poor and local communities are not intentionally targeted, any reduction in their ability to access and use natural resources will result in a disproportionate environmental burden due to the heavy reliance on natural resources for their livelihood. Thus, the determination of a disproportionate environmental burden in rural South Asia revolves around the level of access and use of natural resources.

Determination of Marginalized Communities

The second element of an environmental justice community is the existence of a marginalized community. In its most simple definition, marginalization is the result of processes or programs that make it more difficult for a person or a group to have access to the resources, opportunities and possibilities available to the rest of society as a whole.⁵⁴ Marginalization can be thought to contain four elements:⁵⁵

1. Marginalization is a process and not a condition. Meaning, it is a result of societal processes and not a situation in the absolute periphery of society's function systems.
2. Marginalization relates to a situation where there are normative expectations for the participation of individuals or groups and these are seen to be according to society's dominant system of norms and values.
3. Marginalization encompasses exclusion from participation in some areas of social life that is viewed as both essential in the given society and seen as important by the individual. It is characterized by an involuntary and incomplete participation in one or more spheres in life and a situation of vulnerability with limited control over one's social and economic existence.
4. There are varying degrees of marginalization. It does not necessarily lead to complete exclusion from participation in one or more given spheres or in all essential spheres of life. Marginalization in one sphere also does not automatically lead to marginalization in others.

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² See A. Atiq Rahman, D. L. Mallick, Nasimul Haque & Ainun Nishat, *Trends in Natural Resource Management: Bangladesh NRM Workshop Paper Series # 2: Trends in Natural Resource Management in Bangladesh: Looking for Integration and a New Institutional Framework*, at 2 (10 October 2002).

⁵³ See Stockholm Institute, *supra* note 49.

⁵⁴ See Joan Subirats, et. al, *Poverty and marginalization. An analysis of situation in Spain and Europe*, available at <<http://www.es.lacaixa.comunicacions.com/es/pfes.php?idioma=eng&llibre=16&resum=si>>, (visited 4 June 2006).

⁵⁵ See <http://www.grad-inprowe.dk/summary.htm>, (visited 4 June 2006).

Taking these elements into consideration, marginalization can thus be thought of as a process where there is more or less comprehensive involuntary exclusion from participation in one or more spheres in life.⁵⁶ Indigenous communities, therefore, meet the criteria necessary to determine marginalization. They are excluded from participation in one or more spheres of societal interaction because they differ from the rest of the society in terms of language, culture, religion, and other elements.

For example, the indigenous societies in the Chittagong Hill Tracts are descended from Sino-Tibetan roots and are not Bengali.⁵⁷ They do not speak Bengali as their main language and they are not Muslim.⁵⁸ These differences prevent them from completely integrating into mainstream Bangladeshi culture. Their differences lead to marginalization and marginalization, in turn, leads to decreased access to and use of common resources. The next section presents the case of the Hill Tracts and their inability to access and use common resources in more detail.

The Chittagong Hill Tracts: The Struggle of Indigenous Populations Fighting Against Marginalization

The Chittagong Hill Tracts (CHT) is an area of intensive study and the issues facing the peoples of the CHT are complex and involved. A full presentation of the history and issues facing the CHT is beyond the scope of this paper. However, a cursory summary of the CHT and its history will be presented to contextualize the marginalization of the indigenous populations within the CHT in order to highlight issues of environmental justice in a rural, natural resource context.

Introduction and Brief History of the CHT

The Chittagong Hill Tracts are located in Southeastern Bangladesh.⁵⁹ Not only is the CHT landscape dramatically different from the plains, but the original inhabitants also significantly differ from the majority Bengali people.⁶⁰ There are thirteen ethnic groups living in the CHT region and they are of Sino-Tibetan descent.⁶¹ Each ethnic group has their own distinct language, custom, religious beliefs, and systems of sociopolitical organization.⁶² The indigenous population of the Hill Tracts constitutes less than 1 percent of the total population of Bangladesh.⁶³ The geographic area of the CHT covers almost ten percent of the total land area of Bangladesh.⁶⁴

Before being annexed by the British into the area that is now Bangladesh, the CHT was composed of largely decentralized and only partly formalized self-governing chiefdoms and

⁵⁶ *See id.*

⁵⁷ *See* Bushra Hasina Chowdhury, *Building Lasting Peace: Issues of the Implementation of the Chittagong Hill Tracts Accord*, at 3 (August 200). available at www.acdis.uiuc.edu/Research/OPs/Chowdhury/ChowdhuryOP.pdf, (last visited 4 June 2006).

⁵⁸ *See id.*

⁵⁹ *See* Roy, *supra* note 11 at 1.

⁶⁰ *See* Chowdhury, *supra* note 57.

⁶¹ *See id.*

⁶² *See id.*

⁶³ *See id.* at 33.

⁶⁴ *See id.*

“tribal” confederacies.⁶⁵ When the CHT was formally annexed in 1860, the economy, cultural norms and political structures of the CHT far more closely resembled other similar indigenous societies of the sub-Himalayan frontier tracts in neighboring India and Burma than those of the plains of Bangladesh.⁶⁶

After annexation, the area was ruled by a set of special laws, including the CHT Regulation of 1900, which accorded a special administrative status to the CHT.⁶⁷ The regulations provided a flexible arrangement that allowed for various combinations of administrative power sharing between mid-ranking civil servants, local princes and chiefs, and headmen of smaller geographical areas or clan groupings.⁶⁸ The special status afforded to the CHT was repealed in 1964 by the Government of Pakistan against the wishes of the people living in the CHT.⁶⁹

The rights of the people living in the CHT were further eroded after Bangladesh gained independence from Pakistan.⁷⁰ The Constitution of Bangladesh declared that citizens of Bangladesh were to be known as Bengalis and then Prime Minister Sheikh Mujibur Rahman, emphasized the primacy of Bengali culture, heritage and language.⁷¹ The lone representative of the CHT in Parliament refused to endorse the Constitution as it did not recognize the existence of sub-national identities.⁷² The failure of the state to acknowledge the identity of the hill people and their political and economic marginalization eventually led to the emergence of an armed resistance by the hill people against the central government in the early 1970s.⁷³ Major conflict between the indigenous peoples’ forces and the government continued until 1997.⁷⁴

A peace accord was negotiated and signed on 2 December 1997.⁷⁵ Among other provisions, the Accord re-established a partially autonomous self-government system in the CHT and officially recognized the area as a “tribal-inhabited area.”⁷⁶ However, even though it is recognized as a “tribal” area, various re-settlement plans enacted by the Central government have populated the CHT with Bengali settlers from the plains, to the extent that settlers now constitute almost half of the population of the CHT.⁷⁷

In an area of limited geographic space, such as the CHT, the introduction of settlers inevitably led to conflicts over access to and use of land. Tensions between the indigenous populations of

⁶⁵ See Roy, *supra* note 11 at 117.

⁶⁶ See *id.* at 118.

⁶⁷ See *id.*

⁶⁸ See *id.*

⁶⁹ See *id.*

⁷⁰ See Chowdhury, *supra* note 57 at 6.

⁷¹ See *id.*

⁷² See *id.*

⁷³ See *id.*

⁷⁴ See Roy, *supra* note 11 at 121.

⁷⁵ See *id.* at 122. The details of the negotiations and the contents of the Peace Accord are beyond the scope of this paper. For more detailed information on the negotiation process and resulting Accord, please see Raja Devasish Roy, *The Discord Accord: Challenges Towards the Implementation of the Chittagong Hill Tracts Accord in 1997*, 100 J. OF SOC. STUD. 4 (2003).

⁷⁶ See *id.*

⁷⁷ See Chowdhury, *supra* note 57 at 3.

the CHT and the settlers are indeed rooted in the issue of land ownership.⁷⁸ This situation is exacerbated by the high dependence the indigenous people of the CHT have on land for their livelihood.⁷⁹

Further, because the settlers are of the Bengali majority, they have more economic and political power than the indigenous minority.⁸⁰ Groups that differ from the majority based on ethnic, racial, religious or other identities that mark them apart from the majority tend to feel dispossessed and deprived by the dominant group and feel they are denied access to resources.⁸¹ Dominant groups, in general, enjoy and can often engineer the support of political authority.⁸² The difference in power results in, among other things, a general sense of underdevelopment in areas of socioeconomic development, such as education and employment.⁸³

If the earlier definition and description of marginalization are taken and applied to the CHT, it is clear that the indigenous populations in the CHT are marginalized. They are not able to participate on equal par with the majority population in the economic or political spheres. They differ from the majority on several levels, including culturally and religiously, and speak a different language than the majority.

In addition, due to the integral part that access to and use of natural resources plays in sustaining their livelihood, a disproportionate environmental burden is placed upon the community whenever this access is diminished. While decreasing access to and use of common natural resources may be considered a burden to even the general, majority population, it becomes a disproportionate burden to the indigenous populations due to the dependence indigenous people have on natural resources for livelihood. The burden is further enhanced because the government resettlement plan and the economic and political power of the majority specifically target the indigenous population to limit their ability to access and use common natural resources.

The above discussion establishes the indigenous communities in the CHT as environmental justice communities because they meet the criteria for both disproportionate environmental burden and also face marginalization. Marginalization of the communities hinders their ability to access environmental justice because it decreases the ability access to legal systems and legal avenues because of lowered political and economic power.⁸⁴ However, combining a legal approach with community mobilization and empowerment will increase access to environmental justice. A more detailed discussion of the tools that can be used in environmental justice struggles will be discussed in Section Four.

⁷⁸ See *id.* at 33.

⁷⁹ See Roy, *supra* note 11 at 170.

⁸⁰ See Chowdhury, *supra* note 57 at 33.

⁸¹ See *id.*

⁸² See *id.*

⁸³ See *id.* at 27.

⁸⁴ See *Investigating the Links Between Access to Justice and Governance Factors: An Objective Indicators' Approach*, available at < <http://www.unodc.org/pdf/crime/gpacpublications/cicp13.pdf>>, (last visited 4 June 2006).

The next section examines the situation of marginalization *within* a community. The next section will first analyze how individuals are marginalized within a community and then look to see how internal marginalization affects the fight for environmental justice.

Marginalization from Within: Looking at the Impacts of Intra-Community Marginalization on Environmental Justice

Community marginalization places entire communities at a disadvantage both in accessing economic power as well as political power. Intra-community marginalization further impacts the lack of economic and political power. Again applying the previous definition of marginalization, intra-community marginalization results in individual members of a community not being able to participate in one or more spheres that are available to other members of the community.

For instance, reservation policies aimed at eradicating the discrimination against the scheduled castes in India are thought to be less effective because they do not address the problem of intra-community marginalization.⁸⁵ Even within the scheduled castes, there is hierarchy, endogamy, and discrimination.⁸⁶ In fact, being lumped together as “dalit” deceives the “lowest of the low” and does not bring adequate attention to the difficulties facing the “lowest of the low.”⁸⁷

The higher the level of inequality is in a community, the lower the level of political participation amongst the marginalized members within the community.⁸⁸ When aid or relief reaches a community, those deemed undeserving because they are seen as lazy, drunk, undisciplined, or have broken a social norm, will be considered ineligible for the aid or relief.⁸⁹ One major problem facing international development is that community-based projects have the effect of encouraging the wealthier and more educated people into leadership positions thereby leaving the poorer and less educated members unable to participate in capacity building, empowering exercises.⁹⁰

In the context of environmental justice, intra-community marginalization compounds the environmental burden. Any restriction on access to and use of common resources will more severely affect individuals facing intra-community marginalization. For example, the wealthier and more empowered members of a community are more likely to live in the bigger, nicer houses and are most likely to be positioned closer to water sources.

In contrast, the marginalized members would be more likely to live in poorer accommodations and further from any water sources, thereby increasing the distance individuals must walk to fetch water. This in turn would take more time and leaves the individual less time for other necessary chores, such as cooking and minding children, compounding the already disproportionate environmental burden.

⁸⁵ See *What about Discrimination within Caste?*, available at <www.hindu.com/op/2004/08/24/stories/2004082400311400.htm>, (last visited 4 June 2006).

⁸⁶ See *id.*

⁸⁷ *Id.*

⁸⁸ See Platteau, *supra* note 13 at 6.

⁸⁹ See *id.*

⁹⁰ See *id.* at 13.

Intra-community marginalized individuals also have less access to tools used to increase access to environmental justice. If marginalized communities have difficulty accessing legal systems, intra-community marginalized individuals have even more difficulty accessing the laws and legal systems because they must first overcome any community-based barriers to environmental justice before tackling any outer-community barriers. Marginalized individuals are also less likely to be able to access information or education on issues of environmental justice because they are less likely to have access to education or even be empowered enough to have the confidence to address these issues.⁹¹

The above discussion establishes the increased difficulty that marginalized communities, face in trying to access environmental justice. This difficulty is further exacerbated for marginalized individuals within a marginalized community. The next section addresses this difficult and offers tools that can be used to increase access to environmental justice. The discussion focuses on how communities may apply the tools and also how they can be utilized by marginalized individuals within a community. The section concludes by presenting lessons that can be learned from the U.S. example and the potential for increasing access to environmental justice in a rural context.

Mixing Law and Community: Tools that Can Be Used to Increase Environmental Justice

As stated earlier, the environmental justice movement in the U.S. uses a variety of tools in the fight for environmental justice and is not limited to a law-oriented approach. Likewise, rural communities must also use a diverse set of tools for several reasons. First, legal avenues are not easily accessible and the issues that must be raised, such as rights of indigenous communities, are contentious and have not had much success in judicial avenues.

Second, community empowerment is a main goal of environmental justice and can only be realized through working with and at the community level, not at an administrative or judicial level. Finally, a multi-tooled approach will attract more attention to issues of environmental justice and raise the profile of marginalized communities, both domestically and internationally.

This section will divide the analysis of the potential tools that can be used into two parts: legal tools and non-legal tools. Legal tools will look at what laws and judicial actions can be used to increase environmental justice. Non-legal tools will focus on the importance and impact of community empowerment. Each discussion will address the ability of communities, as well as individuals, to access and use the tools.

Legal Avenues: Looking for Ways to Approach the Judiciary

Currently, there is a discord between the existence of comprehensive environmental protection laws and the ability of communities or individuals to access and enforce these laws. In India, for example, there is a well-developed body of environmental protection legislation.⁹² Yet, these

⁹¹ See *Capacity Building by Human Rights Organizations*, available at <http://www.columbia.edu/cu/humanrights/publications/capacity/capacity_04.htm>, (last visited 6 June 2006).

⁹² See e.g. Water (Prevention and Control of Pollution) Act, 1974, Air (Prevention and Control of Pollution) Act, 1981, Environmental (Protection) Act, 1986.

laws are not effectively or consistently enforced.⁹³ However, the introduction of public interest litigation has circumvented the ineffective enforcement of environmental laws. This section will first discuss the availability and potential effectiveness of substantive environmental laws and then discuss the public interest litigation phenomenon.

The Use of Substantive Environmental Laws

For protection of access to and use of natural resources, most environmental protection statutes are unable to provide an avenue of redress for indigenous communities.⁹⁴ There are, however, a few pieces of substantive environmental legislation that does address the issue of natural resource allocation. In Bangladesh, for instance, the Forest Act of 1927, the accompanying Forest (Amendment Act, 2000) and the Social Forestry Rules, 2000, directly address the use of and access to forest lands.⁹⁵

The original Forest Act was meant to consolidate the law relating to forests, the transit of forest products, and the duty imposed on timber and other forest products.⁹⁶ This Act was specifically amended to include a provision on social forestry in 2000 by the Forest (Amendment Act, 2000) and the Social Forestry Rules, 2000.⁹⁷

The 2000 Amendments to the original Forest Act prohibit land cultivation, or attempted cultivation, and penalize activities that may cause damage to social forestry, or community forestry programs.⁹⁸ The Act states that the Government may establish a social forestry program by assigning rights to forest-produce or rights to use the land for the purpose of social forestry through written agreements.⁹⁹ In theory, this Act protects the rights of indigenous communities practicing social forestry to access and use the forest and forest products. However, all enforcement of the Forest Act lies with the appointed forest officer.¹⁰⁰ This precludes the ability of local indigenous communities or individuals to bring suit directly to the court for violations of the Forest Act.

There is an added complication, however, in the CHT and in other areas with indigenous populations. Most indigenous communities follow their own form of customary law.¹⁰¹ Some issues, such as family or personal matters, are by and large not directly interfered with by national laws.¹⁰² The legal status of customary laws regarding lands and other natural resources,

⁹³ See Martin Lau, *The Scope and the Limits of Environmental Law in India*, 4 RECIEL 15, 17 (1995).

⁹⁴ For example statutes looking to limit and mitigate water or air pollution will not be able to protect the right of indigenous communities to access or use natural resources.

⁹⁵ See *Bangladesh Report*, available at <www.adb.org/Documents/Events/2003/Reg_Workshop_Forests_Climate_Change/bangladesh-paper.pdf>, (last visited 4 June 2006).

⁹⁶ See Forest Act (1927), available at <www.bforest.gov.bd/Forest%20Act%201927.pdf>, (last visited 3 June 2006).

⁹⁷ See *id.*

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ See Forest Act (1927), Ch. XI.

¹⁰¹ See Roy, *supra* note 11 at 113-114.

¹⁰² See *id.* at 147.

however, is more contested.¹⁰³ As a result, customary land and forest rights are usually allowed only where they do not conflict with state law.¹⁰⁴

For communities or individuals, the dual system and complicated legal nuances are a barrier to access. Legal battles take time and money, both of which are sparse in marginalized communities. Additionally, many marginalized communities are unable to access legal systems and have little to no experience with formal legal systems.¹⁰⁵ On an individual level, these prohibitive barriers are further enhanced.

Moreover, if claims are taken to a customary legal tribunal, the marginalized individuals may not receive favorable judgments based on their societal status. Customary legal tribunals are often comprised of village or community elders and will apply the customs adopted by the community.¹⁰⁶ If intra-community discrimination is a well accepted custom, then the marginalized individuals will have difficulty asserting their right to access and use natural resources.

Like advocates discovered in the U.S., substantive environmental laws do not provide an easily accessible avenue for redress. The introduction of public interest litigation (PIL), however, has taken strides towards breaking down these barriers by making courts more accessible to individuals and communities. The next section explores this phenomenon in more detail.

Public Interest Litigation and Public Interest Environmental Litigation

Public Interest Litigation (PIL) first came to attention in the late 1980's when the Indian judiciary fully embraced the idea of public interest litigation and used it to pass down wide-sweeping judgments ranging from banning the use of diesel fuel in India's major cities to declaring that a fundamental right to a clean environment was a part of the fundamental right to life.¹⁰⁷ It is a non-traditional form of legal action that can be used to protect public fundamental rights and interests.¹⁰⁸

PILs differ from traditional legal actions in two significant ways. One, any individual or collective can file a PIL as long as there is a public interest at hand, even if those filing the PIL are not directly affected by the issue.¹⁰⁹ Two, PILs may be filed directly with a specific judge or justice and do not have to follow the procedural rules other legal actions must follow.¹¹⁰

In the area of environmental issues, PIL is a particularly effective tool because environmental issues tend to affect everyone, not just the immediate community and because environmental issues are particularly time-sensitive. Public Interest Environmental Litigation (PIEL) is also

¹⁰³ *See id.*

¹⁰⁴ *See id.*

¹⁰⁵ *See Investigating the Links Between Access to Justice and Governance Factors, supra* note 84.

¹⁰⁶ *See Roy, supra* note 11 at 128, ftnt 34.

¹⁰⁷ *See Armin Rosencranz and Michael Jackson, The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power*, 28 COLUM. J. ENVTL. L. 223 (2003).

¹⁰⁸ *See id.* at 230-232.

¹⁰⁹ *See id.*

¹¹⁰ *See id.*

necessary because public officials and agencies may not be able to police the environmental system due to lack of funds, staff or expertise.¹¹¹

Also, the policing agencies may be unwilling to bring action against the violators due to political pressure.¹¹² Or, the agencies *themselves* may be promoting the activity they should be regulating.¹¹³ PIEL also reduces the government's burden to enforce regulations by employing citizens as monitors of environmental protection.¹¹⁴

Even if they are not successful, the PIL can bring attention to violations of public interests and rights.¹¹⁵ It can be used as a media tool and also used to raise community awareness. The increased exposure can lead to changes in behavior based on a changed system of values resulting from increased attention to issues of environmental justice.¹¹⁶

There are a few limitations to PIL. First, while one of the benefits is the use of judicial independence, it is also one of the limitations. If the PIL appears before a judge that is hostile to the idea of PIL writ petitions, the petition can be immediately dismissed. Second, PILs can only be filed against government or governmental agency action.¹¹⁷ They cannot be filed against private industries or private land owners, limiting the extent of environmental protection than can be implemented.

Finally, PILs are still a form of legal action. As such, they are only effective in systems with legitimate, functioning judicial and legal systems. Also, while they are more easily accessible for individuals, they still require a level of information and education. This requirement may isolate the most marginalized community members.

Supplementing the national legislation and public interest litigation, international law has recently become a potential avenue for accessing environmental justice. Issues specific to indigenous peoples have come into the international forum as will be detailed in the next section.

Increasing Access to International Law

Historically, international law was not an avenue of redress available for indigenous people. In addition to not being able to participate in the development of international legal norms, international law is constitutive of norms that were imposed, usually by force, upon them.¹¹⁸ It is

¹¹¹ See Jona Razzaque, PUBLIC INTEREST ENVIRONMENTAL LITIGATION IN INDIA, PAKISTAN AND BANGLADESH, 11 (2004).cite

¹¹² See *id.*

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See Ehsanul Habib, *Public Interest Environmental Litigation: A Tool to Ensure Compliance and Enforcement*, FIFTH INTERNATIONAL CONFERENCE ON ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT at 449, available at <www.inece.org/5thvol1/habib.pdf>, (visited 3 May 2006).

¹¹⁶ See *id.*

¹¹⁷ See Rosecranz, *supra* note 107 at 230-232.

¹¹⁸ See Jeremy Firestone, et. al, *Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International and Comparative Environmental Law*, 20 AM. U. INT'L. L. REV. 219, 240 (2005).

the product of states and therefore reflects the core values and interests of states, rather than the indigenous people against whom it had been employed to effect their subordination.¹¹⁹

This situation is now changing with developments within international institutions pointing to the increasing global movement towards recognizing the importance of indigenous people and their role in issues such as sustainable development.¹²⁰ Additionally, indigenous people are now able to represent their own interests directly to the United Nations with the establishment of the Permanent Forum on Indigenous Issues in 2000.¹²¹ The establishment of the Forum marks the beginning of a new perspective on indigenous peoples' self-determination and right to development because the Forum directly distributes its reports to the relevant UN organs, programs, and agencies to further dialogue on indigenous issues.¹²²

Beyond the actual creation of international legal documents advancing the rights of indigenous people, the inclusion of indigenous peoples' rights to international law over the past thirty years has helped indigenous people form coalitions.¹²³ In turn, these coalitions have petitioned national governments and international bodies to change the policies that undermine the integrity of their traditions, beliefs, and territories.¹²⁴

As detailed above, the potential for success in environmental justice battles using only legal avenues is limited. The necessary legal infrastructure to protect indigenous peoples rights and ability to access and use natural resources is not in place. To supplement legal measures, non-legal measures must be explored. The next section looks at the importance of community empowerment and explores the role of community empowerment in environmental justices struggles.

Non-Legal Tools: Focusing on Community Empowerment

Community empowerment strategies must necessarily be a prominent part of any environmental justice strategy because they address and aim to reverse the economic and political powerlessness facing marginalized communities.¹²⁵ The strategies must seek to accomplish three goals: improving education, building the movement, and addressing the root-causes of the problems.¹²⁶

The first objective, improving education, focuses on two types: educating the community about the specific environmental harm facing the community and educating the community that it must take power over decision-making.¹²⁷ The second objective requires the creation of an active

¹¹⁹ See *id.* at 241.

¹²⁰ See *id.* at 257.

¹²¹ See *id.* at 258.

¹²² See *id.* at 259.

¹²³ See Traci L. McClellan, *The Role of International Law in Protecting the Traditional Knowledge and Plant Life in Indigenous Peoples*, 19 WIS. INT'L L.J. 249, 266 (2001).

¹²⁴ See *id.*

¹²⁵ See Roberts, *supra* note 31 at 249.

¹²⁶ See Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 VA. ENVTL. L.J. 687, 695 (1995).

¹²⁷ See *id.* at 693-695.

community group that will remain active and together long after the problem at hand is resolved.¹²⁸ The last objective requires an effective strategy that will address the root-cause of environmental injustice and not be distracted by a side problem that results from the injustice.¹²⁹

Community empowerment strategies seek to reverse the power structure of decision-making processes and enable those that will be affected by the decisions to be the ones making the decisions.¹³⁰ Empowering local communities with decision-making authority contributes to the preservation of globally important resources because local communities depend on the resources and land on which they live.¹³¹ Through educating and mobilizing communities, the inequitable environmental burden can be remedied in time.¹³²

The ultimate goal of community empowerment is to create a number of empowered communities that can group together to create an even stronger community movement.¹³³ The ability to create networks is greatly enhanced by the use of the Internet to share information and received reports about other communities to create alliances between groups.¹³⁴ The use of information sources, such as the Internet, may also help the marginalized individuals within a community because they can interact and learn from people outside of their community free of those that see them and treat them as marginalized.

The benefits of community empowerment show the strength that communities can garner by empowering from within. To that extent, great emphasis should be placed on eradicating intra-community marginalization. Without eradicating the marginalization, the weaker members of society will fall increasingly behind as the rest of the community rises through empowerment. In the end, the ability of the community to become completely empowered will be hindered unless empowerment is bestowed upon *all* members of the community.

Conclusion

Environmental justice advocates worldwide face an uphill struggle. The ultimate goal of environmental justice is a re-distribution of wealth and power to abolish the disproportionate environmental burden facing marginalized communities. Redistribution of wealth and power does not come easily or willingly. However, as the discussion on environmental justice is still relatively new in rural areas of South Asia, several lessons can be learned from the experience of the U.S.

First, ideological inclusivity is a necessary pre-requisite. Individuals advocating for access to livelihood must be embraced as potential allies even if the primary focus is not on environmental issues, per se. The larger the alliance fighting for environmental justice, the greater the impact and the more resources available to fight for environmental justice.

¹²⁸ *See id.*

¹²⁹ *See id.*

¹³⁰ *See Roberts, supra* note 31 at 256.

¹³¹ *See Hoyt, supra* note 12 at 212.

¹³² *See id.*

¹³³ *See id.*

¹³⁴ *See McClellan, supra* note 123 at 266.

Second, a diversity of tools must be used. As stated earlier, solely relying on legal avenues will severely limit the potential for movement success. Using a variety of tools, such as PIL, international mobilization and community mobilization, will increase the opportunity to achieve environmental justice. Furthermore, even if a particularly environmental battle is lost, if a community becomes empowered and has more control over the decision-making process, a victory has been achieved.

Finally, intra-community marginalization must be eradicated because marginalized communities already face an uphill battle. Isolating individuals within the community will weaken the communities ability to fight policies or programs hindering their ability, as a community, to access and use natural resources. Environmental justice, moreover, looks to eliminate marginalization and is not limited only to community marginalization. Instead, the very idea of marginalization must be eradicated before environmental justice can be achieved.