Case Studies of Using Different Frameworks to Resolve Conflicting Interests.

Case Study: Ownership and Limitations of Rights – River Diversion and tribal homes (by Jasdev Rai)

Diverting a river to make a new route may be both supported and opposed for different reasons. There may be objection on aesthetic or religious grounds as some people may consider the river sacred (e.g. the sacred Ganges) or the site of ancestral lands. Nature worshippers may take the view that any interference with nature is unethical in principle. Other nature lovers may be concerned with the fauna and flora that may be affected by digging a new route or drying up an existing one. It may be that diverting the river could affect the lifestyles of some tribes even if they are not uprooted, such as the marsh people in Iraq or the tribes living in the Amazon jungle around the river. Digging a new canal or river route could mean dislocating entire villages or tribes from their natural habitat.

On the other hand it may be that the river regularly floods and diversion could avert this. It may be that many people see benefits in diverting the river as it could bring water to an otherwise dry land and lead to better agricultural livelihoods, thus benefitting thousands of people. It could mean that an entire town could benefit from water supply as a result of the diversion and development of a dam.

An action has several consequences, both damaging and beneficial. A number of concerns have to be balanced in a policy statement. Therefore, a statement defining an ethical outlook may suit one group of people but could be seen as highly undesirable to another group. The action of diverting the river relates to conflicting ‘universal’ ethics in the various UN instruments.

In the Preamble of the Convention on Biodiversity (CBD) three different statements have a direct relevance to this. The preamble stresses the need to preserve biological diversity and ecosystems in their natural habitat. “Noting further that the fundamental requirement for the conservation of biological diversity is the in-situ conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings,” This would mean the State should not ideally divert the river even if it thinks it can reproduce the habitat around the new course of the river.

Further, the convention protects the dependence of indigenous people on biological resources, “Recognizing the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources...” However, these commitments are overridden by the paragraph “Recognizing that economic and social development and poverty eradication are the first and overriding priorities of developing countries.”

Effectively the State can compromise its duty to preserve the ecosystems dependent on the current course of the river in favour of development needs and thus divert the course of the river. The three different statements of the Preamble can be summed up in one as ‘Any distortion in the natural route of a river must take into account ecological factors, the rights of settled tribes, religious observations and must not lead to deprivation of current dependents on that water supply, but must also benefit the maximum number of people, aid development and self sufficiency in food.’

Other conventions also have the same contradicting perogatives. Taking into account all these factors would lead to a paralysis of action. NGOs working on behalf
of settled tribes can bring legal action as has been done in India on some occasions on the basis of the right of that tribe to their lifestyle. Yet not doing anything could mean a State is failing to provide water to its population or is unable to feed its population due to scarcity of agricultural land. Diverting water supply could mean opening up new agriculture possibilities and the nation state becoming self sufficient in food and no longer at the mercy of international supplies or markets. Governments can force through decisions on ground of majority opinion or need as has been done in most cases in the past.

The directive principles of some Governments and some articles in international conventions compel Governments to respect the right of everyone to a decent standard of life which means a reasonable diet, shelter and clothing. This surely means that the government has to look at possibilities of using natural resources and technology with maximum benefit to meet these needs.

We have three competing ethical statements in this universal convention, that need to be balanced. The right of every person to expect a decent life and the duty of the State to provide basic necessities, the obligation of any developmental project to preserve ecosystems, and the rights of settled tribes to their lifestyles. However there are other ways of balancing this complex set of contradictory obligations. Rivers have never had a single flow path through ages. They have shifted their route and banks over years. Tribes who are dependent on the river for various reasons have moved their locations with the change in river systems. Consequently they must have ethical conceptual frameworks in their cultures which enable them to move from one location to another and settle afresh.

If the tribe is encouraged to articulate its ethical norms they may have a conceptual language entirely different than used in international norms. For instance they may have the following:

1. natural or other forces move the banks of the river away from the tribe
2. the elders of the tribe must provide easier access to food for the tribe
3. Sacred ancestral places have to be dispirited by custom and the spirits invited to new settlement.

Consequently the possibility of a move is not altogether an anathema to the tribe as is generally argued by NGOs objecting on ground of ‘rights’. The tribe uses the language of ‘duties’ rather than rights. Therefore if two different sets of ethical norms are used, the end result may be:

1. The river can be diverted
2. The tribe can relocate if its lifestyle can be preserved in another place.

It is when only the language of rights is used that the scope of addressing and negotiating the needs of two different groups is limited. The language of rights interpreted through universal conventions eventually leads to an imbalance, where one set of rights becomes subservient to others. Thus the right of the indigenous people to their natural habitat would be usurped by the rights of millions others to development. But by using the language of rights in the relationship of the State with the majority while permitting the language of ‘duties’ in accommodating the special sensitivities of a tribe can offer wider choices to deal with the central issue of diverting the river. In other words, the language used in drafting a series of ethical norms would have to be different for these two groups. One set is where the State has obligations and people have rights. The negotiation is between obligations and rights. The second set is where the State has to assume limited sovereignty and has responsibility to respect the benign sovereignty of a settled tribe and its ethical norms. In this relationship the State has to negotiate as if it is negotiating between itself as a
tribe and the affected tribe as the other. Alternatively it could be as if the State is negotiating between itself and an autonomous region within its territory. The negotiation, where the State puts its obligations to the wider community under a system of rights on the table and the tribe resorts to its practical ethical systems to enable a move to a new habitat for the benefit of millions others can resolve the conflict that is inherent in one set of universal norms or convention.

Therefore a depository of ethical norms has to be of the two different conceptual systems. At the international level, the depository also needs to be of two different systems to ensure compliance by the State to the outlook of the tribes.

The other conflict that still exists within the exercise of diverting a river is the religious dimension. The Ganges is considered sacred by the Hindus. Diverting its course could be considered highly offensive to religious sentiments in some areas. Using the normal language of rights would mean that the majority Hindu population could not only mount substantive legal challenges but also considerable political opposition to any plans to divert the river. A court will have to decide on the balance of right to religious practice against the State’s obligations to fulfil other rights. A hierarchy of rights is established and one or the other party this becomes a loser when a universal convention is the sole basis of decision.

Yet there is in most religions and traditions an equally strong duty upon the individual to provide for others, to share and a prayer to God to be benevolent to all the human race. Most major religions also ask God to give humans the energy and the wisdom to meet these altruistic desires. And almost all religions have appropriate prayers etc when taking steps that may uproot a religious place, a shrine, a sacred spot etc.

Therefore, there is a scope of flexibility within the ethical framework of religion and the possibility of enabling this through a different language. But when ethics are defined in the current state-citizen relation the scope is subverted by the language of rights. If a parallel ethical charter is also formed by a religion, then it is possible that desired results can be achieved with ease through negotiation and congruence of two different systems of rights and obligations.
7.2. Case Study: Conflicts between national and local interest, e.g. Religious Tradition and Sacred Trees

by Jasdev Rai

In the Thar desert of India there is a community of people called Bishnoi. They are followers of a fifteenth century holyman called Guru Jambeswar ji who gave them 21 principles. The Bishnoi have faithfully kept at least 2, one is don’t cut green trees and the second is don’t kill animals as every life is sacred. Over the centuries the Bishnoi can claim to have had a number of martyrs to protecting the trees in their desert region. When Kings or others have tried to cut the trees, the Bishnoi have tied themselves to the trees. Some have been killed in this commitment but the Bishnois have successfully protected their trees and wildlife. As late as 1998, a famous Indian film star was jailed for a few days for killing a black deer. The Bishnoi witness refused to withdraw his account despite threats and inducements.

The Bishnoi are driven by their Dharma and are one of the most fiercely committed eco-tribes in India. Their Guru told them that the trees were important for their survival as a community and if the trees are cut, great misfortune would visit them. Making this astute observation part of their religion has protected the diversity and ecosystems of the region. The Indian Ministry of Environment and Forests protects their religious practice of saving both the trees and the wildlife.

Whereas the Indian government protects their practices as part of freedom of religion and marking the area a reservation, there is no doubt that it is there sense of ‘dharma’ which has influenced State authorities over the centuries to defer decisions in their favour. Even Kings in the past have given way to them despite their absolute sovereignty over the region.

The system of ethics that has worked here is not the rationally argued apocalyptic language of UN conventions but a mystical religious observance. This is also found in many tribes across the Allavari mountain range and a few other forests in India where trees are considered sacred. There are over 25,000 thousand sacred groves with their own ecosystems, trees and waterholes that have been protected through centuries because they are considered sacred by the tribes who live near them. They are called by various names by different tribes. They also have different trees and animals. Some have had small temples built in them. Some are on top of hills and others sacred practices protect simply one kind of tree. The neem tree is protected and treated as a sacred tree by many communities in India.

However, while these sacred ecosites have survived centuries because local tribes have not only refrained from cutting them down for their own use, such as firewood, building homes etc, but protected them as sacred, these sites have suffered from modern development projects. The Aravallis mountain range has been flattened in some places, the sacred groves have been destroyed to make way for building blocks, shops and industrial sites.

The tribes who hold these places sacred did not have the same zeal as the Bishnois. As a result local Government in the provinces gave licences for developers to go ahead with their projects. However, the national Government under the Ministry of Environment and Forests and further through a Supreme Court of India decision has set up a commission to reverse these building projects. The Supreme Court has ordered demolition of many sites. The provincial (State) government has however challenged the decision by trying to get concession for some of the built sites not to be
demolished as the building plans have advanced too far. Moreover developers are ignoring Supreme Court decision.

This incident exposes the weakness of modern constitutional systems that tend to give greater emphasis to rights than duties. The dharma of the tribes has been marginalised and ignored in favour of the right to development. Here national and regional interests have varied. No dialogue took place between the modernisers and the tribes, whose religion is often treated as primitive superstition. Ironically it is the ‘primitive superstition’, which has intuitively predicted the dangers of destroying ecosystems rather than modern rational man.

In pre-colonial India, the system of law was based on principles of Dharma, or duties and not rights. But twentieth century India has adopted the modern secular concept of rights as the basis of its constitutional framework. Duties or Dharma is subservient to fundamental rights. This has led to confusion and tension between cultural and religious practices that go back several thousand years particularly in the field of ecological preservation, and the modern set of positive rights including right to development. Clearly a hierarchy of legal system has influenced policies at state level and in the minds of urbanised populations.

The national government, having woken up to the climate change issues is now fast trying to reverse developments and give support to traditional cultural traditions to protect the environment. But it is too late in some cases.

The conflict of two different paradigms in the sacred groves of India gives weight to the argument that one universal system of norms leads to contradictory pressures in the field and arbitrary policies, which lead to patchwork of environmental protection. A better practice would be to give equal respect to both paradigms and find a way to encourage interactive dialogue between the different conceptual systems to both protect the environment and promote development.