

Legal Pluralism, Social Movements
and the Post-Colonial State in India:
Fractured Sovereignty and
Differential Citizenship Rights

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INTRODUCTION

In contrast to the predominant preoccupation of recent studies of transnational legal pluralism that have focused on *lex mercatoria* and the autonomous and spontaneous production of law by a small elite of international commercial arbitrators and mega corporate law firms (Garth, 1995; Teubner, 1996, 1997), this chapter delineates the role of international institutions, NGOs and social movements in their complex interactions with the state as actors in a heterogeneous legal landscape. The dynamics and trajectories of legal pluralism and the transnationalization of law are analyzed using empirical material from India. In considering how law enters into the making of the neoliberal order, the chapter attempts to unravel the working of power in the domestication of neo-liberal discipline and the resistance to it. It examines the resistance by the subaltern state to global institutions but also the struggles by people's movements against the Indian state. Three brief case studies are used to discuss the ambivalence of movement-groups towards the state, which is needed as an ally against multinational corporations in order to protect farmers' rights to seeds, yet which is initially bypassed in the Narmada struggle to target the World Bank directly only to seek judicial remedy later in the federal Indian Supreme Court against administrative malpractices and the highhandedness of the state government. Nevertheless, in the conflict over ecodiversity in the Gir Forest, human rights groups and the World Bank are allied together to use project law to protect the traditional rights of pastoralists against the state government and the World Wildlife Fund, who are keen to protect the habitat of lions using federal environmental law.

The changing contours of governance both within and beyond the nation-state are discussed with a view to exploring some of the ambivalences

of law as both a tool of domination but also of empowerment. The chapter argues that unpacking the politics of social movements and NGOs is to understand them not merely as local entities subsumed in larger national and global structures (like a Russian doll, with each larger entity encompassing and containing the one smaller) but as fragmented sites that have multiple national and supranational linkages. Social movements and NGOs in India assume salience as mediators of national and international laws at the local level but also as channels for the assertion of customary law and traditional collective rights of local communities in the national arena and in international fora. NGOs linked to grassroots movements are equally important in mobilizing dissenting knowledge in order to formulate alternative people's laws and policies by using a variety of norms from different sources. Their contribution to the reassertion of customary law, to the development of national and transnational law as well as their role as mediators, translators, and interfaces between local communities, nation-states, and international organizations thus deserves careful analysis.

Many of these developments toward the emergence of a global civil society in a "post-Westphalian world order," to use Richard Falk's term (1999), are ambivalent. On the one hand, they widen the spectrum of the possibilities of democratic participation in the age of the "post-sovereign state," as Scholte (2000) argues, in that citizens bypass their governments and enter into direct interaction with those institutions that are responsible for the new supranational governance. On the other hand, some of the actions of the social movements and NGOs paradoxically lend the WTO, the IMF, and the World Bank a greater authority and legitimacy contributing indirectly to a further weakening of the sovereignty of subaltern states.

LEGAL PLURALISM AND SUBALTERN STATES

The idea of legal pluralism, pivotal to legal anthropology in the 1960s and 1970s, calls into question the basic assumptions of liberal political theory and jurisprudence, namely the congruence of territory, state, and law. By foregrounding the coexistence of a plurality of legal orders within a single political unit (Upendra Baxi, 1999, speaks, for example, of state law vs. people's law/non-state legal systems), particularly of community/customary laws and religious laws along with metropolitan law, as well as law created specifically in and for the colonies in (post-)colonial societies, legal pluralism interrogates the centrality of state-made law and its exclusive claim to the normative ordering of social life. National legal landscapes have always been complex, variegated, and multi-layered, shaped more or less by diverse external influences through processes of borrowing, diffusion and imposition. But the growing prominence of international law, supranational legal

orders and regimes, the transnationalization of state law and, finally, the direct intervention of multilateral institutions, international donors and transnational NGOs have all lent a new dimension to legal pluralism. These changes affect the very nature of the law's regulatory and protective functions, transform the conditions for legitimation, and increase the direct involvement of global actors in the national legal arena.

Transnationalization and legal pluralism in the sense of a multiplicity of actors, arenas, methods, and forms of law production are also changing the very nature and concept of law as a coherent and unitary body of knowledge and a principled practice of decision-making (Cotterrell, 1995). As a plurality of supra-state and infra-state governance regimes with public and private actors replace government, decentralized and micrological law coexists, more or less uneasily, with the monumental law that used to be the monopoly of states. The domain of law is being expanded in the process to include conventions, treaties, bilateral and multilateral agreements, as well as protocols that have a legal effect, although they cannot be understood as laws in the strict sense of having a legislative basis. Moreover, the dividing line between private and public law, between law and policy, is being redrawn due to norm production by actors such as corporate law firms, private arbitrators and NGOs. Law creation increasingly becomes an open-ended process, as administrative as legislative in origin, with rules, regulations, and prescriptions being produced from a diversity of sources and sites with shifting boundaries.

But the state itself is being decentered and reconfigured in the process of the transnationalization of law and the supranational legal pluralism accompanying it. However, the widely prevalent diagnosis of the erosion of state sovereignty by the forces of globalization overlooks the continued salience of the state, albeit as a contested terrain in an increasingly plural legal landscape, a terrain in which various infra-state and supra-state legal orders interact and compete with one another (Santos, 1995). Since (post-)colonial states never had an absolute monopoly over law production, the specificities of their contemporary trajectories of economic and legal globalization can only be analyzed against the background of historical continuities, which are often represented as processes of recolonization (Randeria, 1999). Fractured sovereignty, the fragmentation of state action and legal plurality are not specific to the South, yet the ambivalent effects and contradictory character of these developments are felt most strongly in these weak states.

I use the term "weak states" in three senses: 1) (post-)colonial states with fragile structures and a relatively short history of state formation; 2) states that are subaltern in the international system, dependent on external aid and the dictates of international agencies; and 3) states that have not colonized completely the imaginary of their populations. How much space is available

for weak states to adopt policies to protect the interests of vulnerable sections of their own populations within the framework set by the neoliberal dogma enshrined in the "Washington Consensus" and the WTO regime, which privileges the interests of powerful states and global players? If subaltern states cannot set or change the rules of the game, do they at least have choices with regard to the extent, timing, and sequencing of economic reforms and concomitant legal changes, of the implementation of the WTO agreements, or of structural adjustment conditionalities?

It may be useful to distinguish here between failed states such as Somalia or Rwanda, weak states like Benin or Bangladesh, and cunning states such as India or Russia.¹ Cunning states, usually corrupt, short-change as middlemen both their citizens and international institutions and donors. While a weak state is unable to discharge its obligations to justice, lacks the capabilities to successfully discipline and regulate state and non-state actors and to negotiate the terms on which it will share sovereignty with sub-national and supranational actors, semi-peripheral cunning states use their weakness to legitimate their non-accountability to their citizens and to international institutions. Faced with popular discontent over their policies, they plead an inability to withstand external donor pressure for reforms. But they also use their weakness *vis-à-vis* domestic constituencies in order to justify their partial and selective implementation of reforms to international institutions.

Cunning states are autonomous enough to strategically select the reforms they introduce; they postpone some changes, drag their feet on others, implement certain policies half-heartedly, comply with credit conditionalities partially, and sequence reforms (e.g., privatization before de-monopolization). Though a weapon of the weak, such a strategy of cunning can be used to reap huge profits for sections of the ruling elites in these states. These may, of course, be seen as signs of a soft state, but in my view such a reading misrecognizes these strategies of resistance. For proponents of economic globalization, the Indian state is not strong enough to deregulate, privatize, and liberalize as necessary. They feel that reforms have been too late, too slow, and not far-reaching enough, whereas for opponents of neoliberal prescriptions it is a weak Indian state that has given in to the dictates of the Bretton Woods Institutions without adequate social policy measures to soften the impact of radical reforms on the poor. The former argue that the Indian state has been soft on labor while for the latter it is soft on capital but harsh against the laboring poor (Randeria, 1999).

It could be argued that some forms of legal plurality in India evince a continuity with traditional norms and institutions and that yet others reflect colonial design as well as post-colonial compromises, whereas recent forms of legal pluralism have been thrust on the country in the wake of neoliberal restructuring and resistance to it. Traditionally, legal pluralists, who have

studied infra-state pluralism, have always been advocates of community law and more or less explicit anti-statists. But, faced with globalization, the transnationalization of law, and supra-state legal plurality under the dominance of international institutions that champion the interests of global capital, legal pluralists, like many movement-groups in India, are beginning to discover the virtues of regulation by the state, its sovereignty and autonomy.

Legal pluralism was never a purely descriptive category but always also an evaluative one. Earlier, the idea of legal pluralism was part of a binary conceptualization of the world that distinguished non-Western societies that were characterized by a plurality of competing and overlapping legal orders from Western societies that were not. If anthropology, with its hostility, or at least its indifference, toward the state tended to celebrate legal pluralism, liberal political theory viewed such heterogeneity as a sign of backwardness, of immature state formation. It was assumed that modernization would lead to the establishment of the monopoly of the state over the production, implementation, and interpretation of law, along with the idea of abstract citizenship involving a single set of laws for all citizens. With the growing recognition among sociologists of law that all societies are legally plural, the existence of a variety of sources of legal norms and institutional arenas ceased to be a marker of difference and achieved the status of a universal.

But, by insisting on the "legal polycentricity" (Petersen and Zahle, 1995) of all societies, such an approach collapsed the different historical trajectories and temporalities of state formation in various regions of the world into a single conceptual category. Moreover, it overlooked the specific articulation of supranational and sub-national legal orders with lawyer's law within the rich and complex legal landscapes of most non-Western societies. Intended to counter the attribution of a deficient modernity to societies with legal pluralism by turning legal heterogeneity and hybridity into the norm, such a perspective ended up losing sight of the specificities of that plurality in different societies. So that even if all societies are legally plural, they are legally plural in different ways, depending on the reach and effectiveness of state law, the coexistence or interpenetration of state and non-state legal orders—whether the latter are traditional community structures parallel to state law or consist of (revolutionary) popular justice challenging state law—the extent of explicit recognition of non-state law by the state or its mere tolerance due to the weakness of the state *vis-à-vis* external actors or its inability to compete against private militias, religious authorities or local community councils. The careless homogenization and the spurious universalization involved in considering all societies to be legally plural begs the question of whether legal pluralism in India is the same as in Canada or in Kenya. Is India legally plural in the same sense as South Africa or Colombia?

Should the term be applied in common to Portugal, Brazil and Mozambique?

I shall discuss four different kinds of legal plurality in India, or rather routes by which it is introduced into the national legal field as a result of transnational actors and processes: 1) international or supranational law competes as one among several legal orders that operate at the local level, or are invoked by different actors; 2) changes are introduced into national rules, regulations and policies by the national legislature or administration either under external pressure of aid conditionalities or in order to bring state law into consonance with international regimes, protocols, etc., which lead to a pluralization "within" state law; 3) rules, contracts, procedures of international organizations and donor agencies operate directly within the nation-state;² 4) NGOs contribute to legal plurality by either framing alternative treaties or people's policies having a national or supranational character using a variety of traditional community based, or national or international norms. The extensity, intensity, velocity, and impact of these processes of legal transnationalization is not uniform within the national space, so that we can speak of uneven gradients of globalization depending on the area of regulation involved and the local context.

DOMESTICATING NEOLIBERAL DISCIPLINE: THE DANCE OF DONORS WITH DEPENDENT STATES³

The World Bank's *World Development Report: The State in a Changing World* redefines the role of the state as an "enabling state" in terms of the "reliability of its institutional framework" and the "predictability of its rules and policies, and the consistency with which they are applied" (World Bank, 1997: 4-5) as the key issues for ensuring the credibility of governments. The new role envisaged for the state in this neoliberal script is the attracting of foreign capital, securing the protection of its rights and of investor freedoms. Much of the rhetoric of globalization theories to the contrary, the state is not being rolled back as a rule-making or enforcing agency. Rather, it should be restructured as one arena of regulatory practice among others in order to facilitate the highest profits for capital.

The establishment of a new legal framework conducive to trade, investment and global capital is central to the "Washington consensus," which advocates a universally valid and applicable policy mix (privatization, deregulation, trade liberalization, free capital movement, demonopolization, flexible labor markets tight monetary and fiscal policy, the protection of investor's rights and of intellectual property rights) irrespective of regional context and the specificities of the country's economy. This also necessitates the creation of rule-making bodies and enforcement agencies within the state

(hence the emphasis on the rule of law and institutional, legal, and judicial reform) as well as those that transcend the boundaries of the nation-state. The WTO document, "Ten benefits of the WTO trading system," lists "good government" as one of them. What is meant by the term is that by restricting the options available in domestic regulatory and distributive policies and constraining special interest groups from lobbying for options at variance with the neoliberal prescription, the WTO contributes to the successful implementation of the Bretton Woods policy package.

Multilateral investment agreements, trade treaties, and the adjudicative powers of the WTO are all part of this new architecture of global governance, both "within" and "beyond" the nation-state. Their critics in India contend that these new constitutional and quasi-constitutional legal frameworks seek to anchor in the long run the power of capital with respect to the state and the operation of macroeconomic and social policy within a narrow understanding of democracy as multi-party elections and a selective interpretation of the rule of law. A major consequence of such strategies is to insulate many economic fields from the political arena of parliamentary control (Gill, 2000) and thus to limit democratic decision-making and accountability with regard to them. Keywords in development discourse, such as participation, empowerment, and civil society involvement, do not apply, for example, to macroeconomic policy, governance aspects of IMF structural adjustment programs, or the acceptance of trade and investment disciplines including the extension and institutionalization of intellectual property rights and contract law under the WTO. Attempts are made to ground its claims to legitimacy in the universal validity of its prescriptions because they derive from economics science and are used to plead for a need to insulate this expert knowledge from the exercise of political choice. The case for the WTO trade and investment liberalization rules is made, for example, in terms of the need to insulate them from the vagaries of democratic politics, which renders them domestically non-negotiable. By removing the relevant laws and policies from decision-making in the domestic political and legal sphere and diluting the jurisdiction of the national legislature these processes exacerbate the democratic deficit and weak legitimacy of semi-peripheral and peripheral states.

The issue of the legitimacy of international institutions such as the WTO, IMF or the World Bank is entangled with the issue of power. Critics in India point to the detrimental effects on state sovereignty of policy prescriptions and conditionalities—which are offers dependent states cannot refuse—and of the secrecy of negotiations leading to agreements between national bureaucrats and international organizations without parliamentary scrutiny and public debate. IMF and World Bank agreements with governments are negotiated similarly with the administration and are not subject to discussion

in and approval by domestic democratic institutions. WTO rules have to be ratified by parliament, which cannot amend them but only accept or reject the treaty *in toto*. The secrecy surrounding the prior negotiations, which civil society organizations have no access to and voice in,⁴ means that no information on the process itself, the positions of various members, and the alternatives available or considered is available to politicians or citizens (Howse, 2001). Interestingly, when confronted with the democracy deficit and problems of legitimacy of the IMF, WTO or the World Bank, bureaucrats working for these institutions insist that they are powerless advisors, merely serving their member governments but without the means to ensure political compliance.⁵

The necessity for not only formal but also "social legitimacy," to use Weiler's (1999) term of law in the domestic context, is underscored by the public debates on credit conditionalities in all countries of the South. As Sally Falk Moore (2000) points out, conditionalities have a law-like character and are an operational dimension of international relations practiced by donors *vis-à-vis* dependent states. Ordinary legal categories may be inadequate to classify conditionalities and capture their complexities. Does acceptance of these imposed conditions make it a contract-like arrangement? Or does the fact of a profound asymmetry of power turn the laying down of conditionalities into a quasi-legislative act?

Conditions coupled with credits are an offer that subaltern states can hardly refuse. But the formal acceptance of the terms of an agreement is one thing, compliance with them another. Non-compliance, partial or delayed compliance, and selective enforcement belong to the art of resistance by subaltern states in the international order.⁶ Often both donors and recipients know at the outset that absolute compliance is either impossible or politically unfeasible. Yet neither can afford to say this publicly. Thus, at the inception of each new policy initiative, some conditions are rescheduled, others overlooked as long as at least nominal compliance on a few terms can be taken as a symbolic reaffirmation of the unequal power of the two sides in "the dance of donors and their dependents," to use Moore's phrase (2000).

The Indian state has, for example, privatized only some public sector enterprises and even those rather slowly; it has enthusiastically embraced some parts of the WTO regime but asked for a five-year moratorium on others; although it complied willingly with most conditionalities coupled with the 1991 IMF loan. The government was asked to abolish statutory controls on foreign exchange flows, sharply cut public spending, and devalue the rupee by 18 percent against the dollar. The World Bank required in return for its loan the abolition of industrial licensing and a rise in the statutory ceiling on foreign equity ownership to 51 per cent. In return for another loan in 1993 it followed IMF and World Bank directives to speed up

finance sector reforms, remove unproductive farm subsidies, and liberalize consumer imports yet argued that the demand for the deregulation of the labor market (which would allow employers a free hand to hire and fire employees) could only be met gradually given the political sensitivity of the issues.

However, an "exit policy" that will permit the retrenchment of workers in the public and private sector as well as the closure, liquidation or restructuring of unviable enterprises is yet to be legislated. Labor market deregulation as required by the World Bank will require federal legislation repealing or diluting the Industrial Disputes Act of 1947 and the Indian Trade Unions Act of 1926. Studies by the ILO have already shown that the social costs of market reforms in India have been substantial and systematically underestimated. But retrenchments without a proper safety-net scheme violate important economic, social and cultural rights recognized by the International Covenant on Economic and Social Rights (ICESCR) and granted protection by the Indian constitution. The reform of the tax system as desired by the donors remains incomplete, and the Indian government also has resisted the pressure by the World Bank and the IMF to introduce full convertibility of the rupee on the capital account, whereas it has been extremely pliable and accommodating of donor demands with regard to population policy and programs.

In the 1990s, for example, USAID was allowed not only to make its comeback in India in order to implement its largest and most expensive population control project in the world (State Innovations in Family Planning) in the state of Uttar Pradesh, but also permitted to help formulate state-level population policies for different states of the Indian Union. Interestingly, the central government did not accede to the USAID demand that the 350 million dollar project be administered by an independent agency and instead set up an organization under its own control but staffed primarily by bureaucrats of the state government of Uttar Pradesh. It also rejected the longstanding demand by USAID to introduce injectables into the public health system through the program. Instead of using the argument of the prohibitive costs of injectables to the public exchequer, it legitimized the refusal by pointing to the strong opposition by women's groups in the country to long-acting contraceptives viewed as health hazards. It pointed out that a case in the Supreme Court by women's groups against the testing of the injectable contraceptive Depo-Provera in public health programs has been pending since 1994 but that the interim injunction of the court banning such tests was in force (Randeria, 1999).

The state is usually presumed to be a unified set of institutions, but social movements in India have often sought and received judicial support against bureaucratic power, as in the case against shrimp farms on the southern coast.

Swaminathan (1998) has suggested that the Final Report to the ECOSOC's Commission of Human Rights (Türk, 1992) opens up an interesting and novel possibility of judicial remedy at the national level against Structural Adjustment Programs (SAPs). In a situation where governments are more accountable for their policies to international institutions, legal remedy against the violation of personal rights could render a cunning state accountable to its citizens. The Special Rapporteur of the ECOSOC Commission notes that SAPs impinge upon the right to an adequate standard of living, especially as it is related to basic subsistence rights. Thus these have a profoundly negative impact on a number of economic and social rights guaranteed in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Since the statutory language in question is relatively vague, it is difficult to show that the SAPs definitely violate these rights. Besides the Covenant lacks effective means of enforcement insofar as it is dependent on state action.

The ECOSOC's Committee on Economic, Social and Cultural Rights, set up in 1987, indicated that their violation should be remedied in accordance with the national legal system without either specifying the extent to which the rights should be justiciable or laying down the appropriate remedies. For example, the introduction of user fees in schools and hospitals as well as the cutting or redirection of expenditure in these areas restricts access to health and education, especially for the poor, just as the deregulation of labor markets and the privatization of public sector enterprises adversely affect the basic right to work and dilute the benefits of social legislation and wages while increasing working hours. Certain economic reform policies could, therefore, be argued to implicate constitutionally guaranteed economic and social rights to an adequate means of livelihood, living wages, and just and humane working conditions. Also, the procedural innovations in the framework of Public Interest Litigation could well be used for this purpose (Randeria, 2001a).

CIVIC ALLIANCES, PROJECT LAW AND STATE LAW: THE RIGHTS OF PASTORAL COMMUNITIES VS. THE RIGHTS OF LIONS⁷

International agencies are important sources for legal pluralism through the introduction of new norms into the national and local arena. Often they are also responsible for concretizing and implementing law either directly or through governments or NGOs. This may be international law or "project law" (Benda-Beckmann, 2000), i.e., rules and procedures used by bilateral and multilateral agencies, which they either have evolved on their own or derived from their respective national legal systems. By introducing their own formal procedures and substantive rules for the implementation of

projects, bilateral, and multilateral aid agencies have become a significant new factor in transnational legal pluralism.

As Benda-Beckmann (2000) has argued, international organizations also introduce into the national legal arena concepts and principles that may be seen as "proto-law" since they do not yet have the formal status of law but in practice often obtain the same degree of obligation. Moreover, through their loan and credit agreements with the state they also introduce what may be described as "project law" as an additional set of norms. Similarly, concepts like "good governance," "co-management," "sustainability," etc. have all been elaborated in various international treaties, conventions, and protocols, though they are neither fully developed principles nor show internal coherence. At the national and local levels, various sets of actors invoke them as competing with, or overriding, national laws, or use them to ground the legitimacy of claims against traditional rights and customary law. In the process, strange coalitions sometimes are forged, which might be described as "odd bedfellows.com."

Some of the paradoxes and contradictions of the possibilities of the co-existence of multiple and overlapping normative orders are evident, for example, in a clash between environmentalist NGOs and the human rights movement in India, which at times have been at odds with one another. The controversy surrounding a national park in Gujarat, in western India, illustrates such a conflict involving the use of different sets of legal norms at the local level with two different groups of NGOs, each with its own transnational networks representing opposing interests. Whereas the environmentalists champion the protection of wildlife in the Gir Forest, the human rights NGOs have been concerned with securing the livelihood and cultural continuity of the pastoral community in the area. Environmental groups, including the powerful transnational NGO World Wide Fund for Nature-India (WWF-India), draw their moral legitimation from their status as representatives of global stakeholders. The lions, due to the financial resources and media connections of the WWF-India, received better national and international press than the pastoralists. The environmentalists invoke and apply norms laid down in national and international environmental laws in order to campaign for the protection of biodiversity, and especially of the lions, of the Gir Forest. Local human rights NGOs, supported by a South Asian and Southeast Asian network, advocate the protection of traditional rights of access to natural resources based on the customary law of the pastoral group. But they also invoke the doctrine of public trust that would require the state to uphold these rights (Randeria, 2001a).

The traditional rights of the pastoralists to forest products, grazing land, and water resources are sought to be overridden in the name of the greater

common good by WWF-India, with which the state government of the province of Gujarat is aligned in this conflict. They argue that both the local ecological system and the lions are endangered by the traditional grazing methods of the large herds of livestock of the pastoral community as well as by its increasing demands for the provision of modern infrastructure and other facilities in the area (such as tarred roads, electricity, schools, and health centers) (Ganguly, 2000). The World Bank is at present financing several biodiversity programs in India under its eco-development project, both in the Gir Forest and in six other regions of the country (Randeria 2001a, 2001b). For the limited duration of the project and within the project areas, World Bank policies favoring the protection of indigenous peoples prevail over state laws and actions, in terms of the overriding commitments accepted by the government of India in its agreement with the World Bank (World Bank, 1996). However, it is far from clear whether the conditionalities in this agreement will continue beyond that, or will have any permanent or pervasive impact on national policy or law.

The background to the conflict is the national legislation in the form of the Wildlife Protection Act drafted with the expert advice of the Smithsonian Institute (USA) in the 1970s and adopted by the Indian Parliament. This Act has provisions for declaring certain areas as "protected areas" for the purposes of setting up national parks or wildlife sanctuaries. Aimed at environmental conservation, it also contains procedures that work in practice to the detriment of the rights of local communities in these areas. More specifically, action taken by the state government of Gujarat under these provisions would have resulted in further forced displacement of pastoral communities from the "protected areas." WWF-India has sided with the government in the interest of environmental protection, whereas human rights groups have found an ally in the World Bank, whose operational directives and policies seek to protect project-affected persons from forced eviction and guarantee the traditional rights of tribals. These provide for a participatory resettlement and rehabilitation policy that at least protects the living standards, earning capacity, and production potential of those affected by a project, and stipulates that these not deteriorate as a result of it. Thus, ironically, the displacement envisaged by the Gujarat government in consonance with national law has been temporarily averted with the help of the courts, not because it would violate the traditional rights of the local communities but because it contravenes not only this new policy of the World Bank but also the conditionalities accepted by the government of India as signatory to the agreement with the World Bank.

But the human rights NGOs present a case that goes much beyond the highly limited protective approach outlined in the World Bank policy. In fact, they have recently challenged the very basis both of such a policy and of

national laws, which recognize only individual rights for purposes of compensation while disregarding the collective rights of communities to access natural resources (Randeria 2001a, 2001b). They are at present forming a larger nationwide coalition in order to reassert and protect the collective rights of local communities to common, customary rights (e.g., the rights of pastoralists, fisher folk, marginal and poor farmers, landless laborers and indigenous peoples to land, water, and forests), which they have enjoyed for centuries. Apart from court battles, the NGOs have been involved in local struggles on this issue for several years. But the entire issue has acquired salience due to an exacerbation of the situation under the liberalization and privatization policy of the Indian state in the era of "predatory globalization," to use Richard Falk's term. Increasingly, "wasteland," forest areas, and coastal areas under special environmental protection through the Coastal Area Zonal Plan are being acquired by the state and made over to industries at nominal prices. The Indian Supreme Court has ruled such acquisition of land by the state for the benefit of private industry to be permissible because it constitutes a "public purpose" irrespective of the fact that it is destructive of the lives and livelihoods of the local communities who lose their customary rights, and who may be forcibly displaced and impoverished as a result. Here we see how the "enabling state" comes increasingly into conflict with its citizens, especially those who are marginalized and underprivileged and dependent on common property resources of land, water, and forests for their survival. Hence, voluminous new national and supranational environmental law, as well as an increasing juridification of social life, goes hand in hand with the erosion of the collective rights of communities and their cultural autonomy (Randeria, 2001b).

The human rights and grassroots movement NGOs have in this context questioned the very concept of "eminent domain" in Anglo-Saxon jurisprudence, under which all natural resources vest in the state. As such, the British Crown and the colonial state and now the post-colonial Indian state have claimed unfettered ownership rights over all natural resources in its domain. Human rights NGOs see this understanding introduced through British law as contrary to, and unable to accommodate, the customary rights of local communities to commons. Moreover, they are advocating its replacement by the doctrine of "public trustee," which is now being increasingly recognized by the Indian Supreme Court following US interpretation and judgments, and which challenges the absolute nature of the "eminent domain" concept by viewing the state as a trustee rather than an owner of natural resources within its territory.

These are processes of the particularization of Western law and its creolization in which Western law is given a distinct accent and style through its local translation within the context of specific political struggles. They

caution us against the search for presumably authentic alternatives to modern Western legal concepts and norms in pre-colonial Indian traditions by pointing to the highly creative processes of what Merry (1997) has called the "vernacularisation of law." The specificity of the current processes of the transnationalization of law with their divergent dynamics, uneven trajectories, and dissimilar effects in different cultural contexts can, however, be adequately analyzed only against the background of the colonial importation, imposition, and reconstitution of law in the non-Western world (Randeria, 2001).

Two pieces of colonial legislation that remain valid even today in India are the Land Acquisition Act of 1894 and the Forest Act of 1927, both of which are based on the premise of "eminent domain." Actions taken by local authorities under these Acts in the name of "public interest," a concept not defined in the law, have been challenged by the NGOs invoking human rights, collective customary rights, and, most recently, the doctrine of the state as "public trustee." Several social movements and developmental NGOs have waged a long struggle for the revision of the laws that would adversely affect indigenous people as well as other marginalized and poor communities. Thus far they have succeeded in preventing repeated attempts by the government to enact a new Forest Bill that would further dilute, or abolish altogether, the traditional rights of access to natural resources enjoyed by these communities. As part of their campaign, the NGO coalition has formulated its own alternative draft of a People's Forest Policy together with a draft Bill. They have also sought to anchor the customary collective rights of communities to land, water, and forests in the constitutional right to life and livelihood (Article 21).

The Indian state has an inconsistent approach to the issue of collective rights. It recognizes the rights of some groups but not of others to their own religiously based family law (e.g., Hindus, Muslims, Christians, and Parsis have separate personal laws but not Sikhs, Buddhists, or Jains). Lower courts tolerate the decisions of semi-autonomous caste, tribal and jamat councils in family law matters. Groups that are recognized as legal entities for this purpose are different from those to whom reservations apply. The recognition of collective rights is in part a legacy of British colonial policy and of post-colonial compromises for the protection of religious minorities and the redressing of injustices to marginalized communities, yet it is also driven by present electoral pressures and political expediency. Once the British colonial state institutionalized both caste-based quotas and separate family laws for different religious groups, the identities of all these communities was colored by and forged in the context of these policies. The Indian constitution reflects this tension between accommodating collective rights of various kinds and a basic framework committed to the liberal principle of individual

rights. The legal pluralism both within state law (the recognition of differential rights or laws for various groups) and at the level of infra-state law (the tolerance of the parallel jurisdiction semi-autonomous community councils) is an index of uneven modernities rather than a remnant of traditional institutions and practices.

Though highly reluctant to accept any collective rights of local communities to natural resources, the state does confer group rights in various other contexts. One of the few exceptions to the former principle is the granting of special rights to some indigenous groups over the land and forests used by them collectively in order to protect these from alienation by non-tribals (Schedule V of the Indian Constitution). However, in addition to indigenous communities, several religious communities are recognized as legal entities to which separate sets of personal laws apply, just as group rights are conferred on Dalits (Scheduled Castes), indigenous peoples (Scheduled Tribes), and a heterogeneous category of castes including some Muslim groups (the so-called Socially and Educationally Backward Classes) for the purpose of quotas proportionate to the respective population of these groups.

The quotas, or reservations, as these measures of "positive/compensatory discrimination" are known, include provisions for political representation in legislative bodies as well as preferential treatment in admissions to institutions of higher learning and for jobs in the state bureaucracy and in public enterprises. Unlike the collective rights for local communities over natural resources that are being claimed in order to protect their right to life and livelihood and to preserve their own distinctive way of life, and which would thus be permanent, the group rights recognized by the Indian constitution are temporary measures. The policy of caste-based quotas was from the beginning introduced as a short-term measure designed to ensure political representation and remove educational and employment disabilities. Similarly, separate personal religious laws were envisaged to be of temporary duration until the uniform civil code for all citizens recommended in the non-justiciable Directive Principles of State Policy in the constitution could be legislated.

Both the policy of quotas for the underprivileged communities and separate religion-based family laws for minorities have been under massive attack in recent years from the predominantly Hindu middle classes. Both these policies of legal pluralism within state law have been represented as being detrimental to Indian society because they are seen as cementing and perpetuating particularistic identities at the expense of the integration of minorities into the "national mainstream." But that is a different story.

THE NARMADA STRUGGLE REFORMS THE WORLD BANK BUT LOSES THE LEGAL BATTLE IN INDIA

Given the fact that more and more citizens are now directly affected in their daily lives by the working of international institutions and their policies, it is not surprising that they choose to address these institutions directly with their protests, bypassing the national political arena and transnationalizing the issues. Many of the ambivalences of the new transnational arena of "global sub-politics," as Ulrich Beck (1998) terms it, are illustrated by the long drawn out though ultimately successful struggle of the local Narmada Bachao Andolan (Save Narmada Movement), together with a network of national NGOs and transnational NGOs in India, Europe, and the USA, against the building of the Sardar Sarovar project on the river Narmada in western India. The project comprised thirty large dams, 133 medium dams and 3000 small dams along with a 1200-megawatt powerhouse. The World Bank was eventually forced to withdraw its financial support to this environmentally damaging project, which would have ended up forcibly displacing between 100,000 and 200,000 people, and without adequate rehabilitation. Some of the complexities and contradictions of the campaign, which involved several Indian NGOs, environmental rights groups in the USA, and development aid groups in Europe, Japan, and Australia are explored in Jai Sen's (1999) excellent ethnography. It traces the emergence of a new modality of transnational social action—the "transnational advocacy network" (Keck and Sikkink, 1998) and also delineates how the dynamics of local resistance came increasingly to be shaped by the choice of the arenas of negotiation and the structures of the international institutions used as levers of power.

As the campaign against the Narmada Dam reminds us, transnational politics takes place within the national political arena of several countries of the North simultaneously, rather than outside the national political sphere. For example, public support on the issue was mobilized, and a domestic constituency built by various European NGOs in their respective countries, in order to lobby development ministries, parliamentarians and each country's executive director on the board of the World Bank. But, as social movements and NGOs in the South linked up with powerful US NGOs to use US congressional hearings as a forum to put pressure on multilateral development banks in general (and on the World Bank in particular) in order to change their policies and reform their structures, they not only reinforced existing asymmetries in power between the North and the South but also lent greater legitimacy to these institutions by leapfrogging the national political arena in order to address them directly, and thereby further diminished the legitimacy of their own government (Sen, 1999).

However, it is also in Washington that the Indian movement and the

transnational campaign supporting it resulted in several unintended and unexpected long-term structural changes. The strategy to target executive directors from Europe and the USA on the board of the World Bank led to the directors taking the unprecedented step of challenging the authority of the bank's staff and taking a direct interest in the negotiation of projects. Jai Sen argues that, paradoxically, the campaign thus reduced democratic control over the structures of the World Bank by increasing the control of the US Congress and the concentration of power of the major shareholding states of the North (G-7 members control about 60 per cent of the vote) over the staff of the World Bank. However, the campaign also resulted in the setting up of the Global Panel on Large Dams, as well as internal changes of control and review mechanisms at the World Bank. Among the significant changes introduced as a result of the Sardar Sarovar Dam experience is an information disclosure policy that lays down that specific project information pertaining to the environment and resettlement be made known to those affected by the project prior to its appraisal. Bank management, therefore, is required to obtain this information from the borrowing government and make it publicly available (Udall, 1998).

GOVERNANCE BEYOND AND WITHIN THE STATE: THE WORLD BANK INSPECTION PANEL AND THE SUPREME COURT OF INDIA⁹

A major achievement of the campaign against the Narmada Dam was the establishment of an independent inspection panel at the World Bank in 1993 in response both to pressure from NGOs for more transparency and accountability and to threats from influential members of the US House of Representatives to block further US contributions to the International Development Association (Udall, 1998). The panel is by no means a full-fledged body for adjudication yet still provides a forum for an appeal by any party adversely affected by a World Bank-funded project (Kingsbury, 1999). The primary purpose of the Inspection Panel, however, is to examine whether the Bank's staff has complied with its own rules and procedures.

Among the seventeen requests entertained by the panel until mid 1999, two were related to projects in India: the National Thermal Power Corporation (NTPC) power generation project in Singrauli in 1997, and the eco-development project (of which the Gir project discussed above is a part) in the Nagarhole National park in Karnataka in 1998. In both cases it was alleged that the Bank's management had failed to comply with its own policies on environmental assessment, indigenous people, and involuntary resettlement. The request regarding serious flaws in the design and implementation of the eco-development project was submitted by an Indian NGO representing indigenous people living in the Nagarhole National Park.

It submitted that no development plans had been prepared with their participation as stipulated in the Bank's guidelines because the project had simply not recognized the fact that they resided within the core project area. The forced displacement of these Adivasi communities from their forest habitat would not only disrupt their socio-cultural life but also destroy their means of livelihood. Although the bank staff denied any breach of policies and procedures, the panel, after studying the written documents and a field visit, recommended that the World Bank's board authorize an investigation. The panel felt that "a significant potential for serious harm existed" (Shihata, 2000: 135), because key premises in the design of the project appeared to be flawed. In view of the meager information available to the bank staff, the panel felt that it could not have been able to foresee during project appraisal how the project could harm the Adivasi population in the park. Rather than consultations with them prior to the project, as was required, bank management stated that it was envisaged to ensure their participation in the implementation stage. Shihata points out that the more flexible and innovative "process design" of the project, as opposed to a "blueprint project" meant that ongoing planning mechanisms are established parallel to project implementation. Thus, as Shihata, who at the time was the counsel to the World Bank, points out, the very approach chosen surprisingly involves the risk of non-compliance with the World Bank's policy of consultation and participatory planning: a "feature, though apparent, was not explained at the time the project was presented to the Board for approval" (2000: 134).

The panel noted that, in violation of the guidelines on involuntary resettlement, no separate indigenous people's development plan was prepared at the appraisal stage and that no "micro plans," through which individual families and groups in the protected area can express their needs and get financial support, were under preparation for the Adivasi families, 97 per cent of whom wished to remain in the national park. Despite these findings and the potential of the serious negative impact of the project on the indigenous communities in the area, the Bank's board, bowing to pressure from the government in India, decided not to authorize any investigation in 1998. Instead, it merely asked the management, together with the regional government of the state of Karnataka and the affected people, to address the issues raised in the panel's report and to intensify the implementation and micro-planning of the project. Given the long history of non-compliance with bank guidelines, both by its own staff and by the government of Gujarat (as amply documented in the Morse Commission report on the Narmada Dam), the board's decision is a cause for concern. It reflects the refusal of the executive directors from borrowing countries on the World Bank's Board (including India) to permit Panel investigations that, in their view, might infringe on their national sovereignty.

A decade after the World Bank's and the government of India's serious violations of environmental and resettlement policies led to the withdrawal of the bank from the Sardar Sarovar project, one is surprised by the poor institutional memory of the bank; by its lack of responsibility, even in the absence of legal liability, towards those affected adversely by its projects; by its faith in the borrowing government's political will and capacity to implement environmental and human rights conditionalities; by the lack of bank supervision of this implementation and, more generally, the bank's continued insensitivity to the social and ecological costs of the kind of development it advocates and finances. Despite the decades-long failure of the government of India to issue a national resettlement and rehabilitation policy, the World Bank surprisingly continues to advance credits to it for development projects involving forced displacement. It is a poor consolation for those forcibly evicted by bank projects that the bank has an information disclosure policy absent in their own national context. An Inspection Panel with very limited powers hardly seems a solution to their problems of survival in the wake of forced displacement, especially so long as there exists neither an independent appeals commission with the authority to modify, suspend or cancel World Bank projects nor any appropriate judicial remedy against illegal state practices. NGOs critical of these half-hearted reform measures by the bank point out that the debt incurred by borrower governments is not cancelled even in the event of the discontinuance of a project, and that the bank continues to enjoy immunity from legal liability for the adverse social and ecological impacts of its projects.

If the experience of Indian citizens before the Inspection Panel has been disappointing so far, the bitter experience of the Narmada Bachao Andolan's attempts to seek judicial remedy against a state that has constantly flouted its own laws and policies shows equally some of the limitations of the use of national courts by social movements as an arena for social justice. Recourse to the judiciary helps publicize an issue in the press but also may lead to its depoliticization during an expensive, long-winded, and unpredictable court battle in which legal technicalities, and not moral claims, count. Despite a controversial and protracted public debate in India, and the extensive use of the Indian Supreme Court by the Narmada movement after the withdrawal of the World Bank from the project, the issue has yet to be seriously debated in the national parliament. The campaign has not been able to affect legal or policy changes in India with respect to mega-dams, land acquisition, involuntary displacement, or resettlement and rehabilitation. The movement in the Narmada valley, which sought to radicalize the "damn-the-dams" agenda into a critique of the ideology and practice of gigantism in developmental practice as well as to broaden policy to include models of an alternative future, relying on small local autonomous projects, has been

caught up for years in the Supreme Court in negotiating technicalities such as the height of the dam. Further, the government has justified its inaction with respect to policy changes for several years by pointing to the sub-judice status of all the issues before the court. In retrospect, the withdrawal of the World Bank from the project may seem like a mixed blessing since under pressure from NGOs in Gujarat, some of the bank's staff and missions had sought to enforce rehabilitation policies and their implementation. The relative improvement of the policies and their enforcement in Gujarat, as compared to Madhya Pradesh and Maharashtra, can be traced to this donor pressure.

The judges of the Indian Supreme Court pronounced their verdict on 18 October 2000, and the severe blow to people's movements and the grave denial of justice raises fundamental questions about the very limitations of the use of law courts by social movements in their struggle for social justice. For it has taken the apex court six-and-a-half years to come to the conclusion that the judiciary should have no role in such decisions! The majority judgment, by Chief Justice Anand and Justice Kirpal, dismissed all the objections regarding environmental and rehabilitation issues, relying entirely on the affidavits given by the state governments. It merely asked the Narmada Control Authority to draw up an action plan on relief and rehabilitation within four weeks. As critics of the judgment pointed out, it was hardly likely that the state government would do in four weeks what it had failed to do in thirteen years. The majority judgment, which praised large dams and their benefits for the nation, permits not merely the construction of the Narmada Dam but, by questioning the *locus standi* of social movements as public interest petitioners, it also limits the future legal options for collective action by citizens against the state.

In its writ petition filed by the Narmada Bachao Andolan (NBA) against the union government in 1994, the movement had asked for a ban on the construction of the dam. It sought this judicial remedy under Article 32 of the Indian Constitution, which guarantees every citizen the right to petition the Supreme Court in defense of the enforcement of his or her fundamental rights. The NBA contended that the magnitude of displacement caused by the dam was such that a total rehabilitation of those whose land was to be submerged by the project was impossible. Since no adequate provision for resettlement and rehabilitation had been made by the state governments, or could even be possibly made, it asked for a ban on the construction for violating the award of the inter-state tribunal, which required this condition to be met prior to the building of the dam. More fundamentally, the NBA raised the question of who has the right to define the greater common good and according to which criteria. Whose interest may be defined as the national interest when the interests of the displaced collide with those of future beneficiaries? Can a merely utilitarian calculus of a larger number of

beneficiaries as compared to victims be used to deny poor and vulnerable communities their rights to life and livelihood? Is it legitimate for the state to declare one set of partial interests, those of the wealthy farmer lobby, industrialists, and contractors, to be synonymous with the public good? The NBA thus challenged the very assumption that the state by definition acts in the public interest and asked for an independent judicial review of the entire project, its environmental, economic and human costs. Apart from raising the issue of the illegality of state practices (e.g., the absence of environmental studies that should have been conducted prior to the construction process as mandated by the Ministry of Environment), the NBA also argued that the adverse human and ecological costs of large dams in general far outweigh their benefits.

In response to the petition, the Supreme Court stayed further construction on the dam from 1995 to 1999 while asking for reports from the three state governments on the progress of the rehabilitation of the "oustees," as well as on the future provisions for them along with expeditious environmental surveys and plans to overcome hazards. In the hearings in 1999, the counsels for the state government of Gujarat had asked the court to give a clear signal in favor of the dam so that foreign investors would be encouraged to invest in it (Sathe, 2000). It is difficult to judge how much weight the argument carried in the court's decision to allow construction to be resumed although not much progress had been made on either rehabilitation or environmental assessment. But the argument reflects the priorities and concerns of the government of Gujarat, which chose to privilege the right to security of foreign investment over the fundamental rights of its own citizens. Interestingly, the Narmada project, which has since been propounded by the state government to be the "life-line of Gujarat" in so far as it would provide drinking water and irrigation facilities to the drought prone areas of Saurashtra and Kachch,⁹ has now been revealed to follow completely different aims. In 1996 it was announced that water from the dam would be sold to private industries at market prices, an offer that several large fertilizer, cement, petrochemical, and chemical companies may accept as a cheaper alternative to desalinating sea water.

It is also worrying that the court refused to consider the general question of the utility of big dams on the grounds that policy matters were best left to the legislature and administration, while at the same time declaring them to be essential for economic progress. Premised on the doctrine of the separation of powers, this advocacy of judicial restraint with regards to not going into policy issues in order not to trespass on administrative competence, came as a surprise and a disappointment, after more than a decade of judicial activism in general and five years after the admission of the plea by the NBA in particular. However, the Narmada judgment does not mark an anomaly

in the apex court's history of judicial restraint in the context of public interest petitions challenging large developmental and infrastructure projects in the last decade. Rather, as Upadhyay (2000) points out, it is consonant with the inclination of the judiciary to insist on the executive taking decisions correctly as opposed to taking correct decisions. The Supreme Court has often left it up to the government to decide on the nature of public projects for an improvement in living standards of citizens and to resolve conflicts of interest arising from contrary perspectives on development. Here it sees its own role as examining whether all relevant aspects have been taken into consideration and if the laws of the land have been followed, but not whether the decision is right or wrong. Interestingly, in cases of environmental protection, the court has taken a very different view. Neither technical expertise nor policy issues have led it to apply judicial restraint when it has sought to reconcile development with ecological considerations. It has sought to develop a rich environmental jurisprudence to compensate for administrative indifference but has preferred a defensive approach of non-interference into administrative decisions on infrastructure projects (Upadhyay, 2000).

Decades of resistance by the victims of development in the Narmada valley, who have borne the brunt of state repression and violence, have not led to any rethinking on the basic issues raised by the movement: forced displacement, ecological destruction in the interest of industrial development, as well as the search for more environmentally sustainable and socially just alternative models of development that respect cultural diversity and the right of communities to determine their own ways of life and livelihoods. After the World Bank pulled out of the financing of the Sardar Sarovar Dam on the Narmada River, the government of Gujarat floated bonds to raise capital for it within the country and abroad. Attempts to attract multinational finance, which are removed from democratic control in any of the countries concerned, have continued for the Maheshwar Dam on the Narmada.

THE INDIAN NEEM TREE ON TRIAL IN MUNICH

The story of the struggle around the Indian neem tree serves to illustrate seven theses on supranational and sub-national legal pluralism, the role of the state as both an architect but also as a victim of the transnationalization of law, and the contribution of NGOs both in mobilizing resistance as well as in creating alternative law.

On 9 and 10 May 2000, the fate of the Indian neem tree hung in balance in Room 3468 of the European Patent Office in Munich. At issue was the legitimacy of a patent for a method of preparing an oil from the seeds of the tree to be used as a pesticide, one of fourteen patents on products of the

Indian neem tree granted by the Munich authority. The American transnational corporation W. R. Grace and the US Department of Agriculture, joint owners of six of these patents, were represented by a legal firm from Hamburg. Ranged against them was a transnational coalition of petitioners asking for the patent to be revoked: Vandana Shiva, Director of the Research Foundation for Science, Technology and Ecology; Linda Bullard, President of the International Federation of Organic Agricultural Movements; and Magda Alvoet, currently the Belgian Health and Environment Minister. They were represented by a Swiss Professor of Law from the University of Basel.

The representatives of the US chemical concern remained silent throughout the two days of the hearing. It was the silence of the powerful, of those who knew that time, money, and the government of the USA were on the side of US corporate interests. The European Patent Office heard the eloquent political arguments of Vandana Shiva on biopiracy and intellectual colonialism as well as the testimony of a Sri Lankan farmer, Ranjith de Silva, on the moral illegitimacy of a patent that disregards centuries of traditional local knowledge. But what ultimately counted for the Opposition Division Bench hearing the case were measurements of centrifugation, filtration, and evaporation in the testimony of Abhay Phadke, an Indian factory owner. His firm near Delhi has been using since 1985 a process very similar to the one patented by the American multinational corporation and the US Department of Agriculture to manufacture the same product in India. At the end of a five-year legal battle, on 10 May 2000 the European Patent Office revoked the patent on the grounds that the process patented by the Americans lacked novelty.

The struggle over the patents relating to the neem tree may be used to illustrate seven theses on the transnationalization of law and legal pluralism which delineate the constrained yet central role of the state and the significance of NGOs and social movements in this process:

1. *Hegemonic vs. counter-hegemonic globalization.* Contrary to the view expressed in the *Frankfurter Allgemeine Zeitung*, the European Patent Office in Munich was not the scene of a conflict between the East and the West but between two visions of globalization and over the future direction of the process. The battle lines were drawn here, as in Seattle, between proponents of a neoliberal globalization for profit and its globally networked civil-society opponents. As actors in an emerging global civil society, transnationally networked farmers' movements and environmental NGOs in India are among the most ardent opponents of a new international legal regime of "intellectual property rights" that enables transnational corporations (TNCs) in the North cheap and easy access to the natural resources of the South,

turning common heritage into commodities, jeopardizing the biodiversity of agricultural crops, threatening the livelihood of poor primary producers, and forcing consumers of seeds and medicines in the South into dependency and often destitution. They point out that the capitalist countries of the North industrialized without the constraints of the patent regime that they have now imposed on the developing world (Shiva *et al.*, 2000). Central to their struggles in the local, national and transnational legal and political arena is the question: who sets the rules for the processes of globalization and according to which norms? These movements are raising issues of food security and farmer's rights, but also and more generally issues of social justice, the democratization of global governance, and the legitimacy of international institutions and legal regimes.

For example the transnational "seed tribunal" on September 24 and 25 in Bangalore, organized by several NGOs, women's groups, agricultural worker's unions, and farmer's movements heard testimonies from Indian farmers about: the sale of kidneys by family members to meet the rising expenses of agricultural inputs; suicides by farmers caught in a debt trap due to the high price of seeds from multinational corporations and subsequent crop failure; the inadequate and poor quality of the public distribution of seeds, which facilitates the entry of foreign multinationals; increased market dependency of small peasants; as well as the destruction of biodiversity in their regions. The farmer's organizations passed a resolution calling on multinationals like Monsanto to "Quit India," echoing Mahatma Gandhi's slogan coined in 1942 at the height of the national movement against British domination. They called for a boycott of seeds from the Indian subsidiaries of multinationals unless the former became independent of these foreign firms. They also vowed to maintain the food sovereignty and seed sovereignty of farmers and to protect it from multinational companies while declaring that they would not obey any patent law or plant variety protection law under the WTO regime that considered seeds to be the private property of these corporations. They demanded that seeds and food be excluded from the TRIPs (Trade Related Intellectual Property Rights) regime of the WTO and advocated for the reintroduction of the quantitative restrictions on agricultural imports that had been removed recently by the government of India in consonance with WTO provisions for trade liberalization, a point to which I shall return below.

2. *Cunning rather than weak states? Contesting the limits to state autonomy.* The jury at the "seeds tribunal" envisaged a central and active role for the state in the protection of the livelihoods of farmers in India. It recommended making improvements in the public distribution of seeds, the setting up of regulatory bodies to ensure good quality agricultural inputs, a ten-year moratorium on

the introduction of genetic engineering in food and farming, representation for farmers on the agricultural prices commission, and ensuring minimum support prices. But the jury's diagnosis of the "silence of the state" on the issue of farmer's rights coexists uneasily with the state's own demands in recent legislation for changes to protect the interests of farmers. For the state has been anything but silent, as testified to by the Patents (Second) Amendments Act of 1999, the Protection of Plant Varieties and Farmer's Rights Bill of 1999, and the Biological Diversity Bill of 2000 currently before parliament. A harsh critique of the state, coupled with an appeal to it for the protection of national food security and sovereignty and the rights of poor primary producers, reflects some of the ambivalence of civil society actors with respect to the state, which is seen both as an opponent but also as an ally. Under the conditions of economic and legal globalization the state is simultaneously seen as being in collusion with multinational corporate interests and as the protector of national sovereignty. But can the Indian state be relied on to reform its policies in favor of its vulnerable citizens rather than in favor of global capital? This depends on whether we have oftentimes tended to misrecognize cunning states as weak ones. Weak states cannot protect their citizens, whereas cunning states do not care even to afford them the limited security they could.

The global harmonization of differing national systems of patent law illustrates some of the complexities of legal globalization and the contradictory role of the state in it. There is no global patent law; the field is still regulated on the national level, with the exception of the EU. But the WTO's TRIPS regime imposes powerful constraints on the sovereignty of nation-states both with regard to the content and the timing of national laws that have to conform to the new WTO regime. The extent of national autonomy under the *sui generis* system available as an option under TRIPs, which NGOs would like their governments to exploit, remains highly contested, with mounting pressure against it from genetic technology exporting nations like the US and Argentina. However, despite legal transnationalization and the growing importance of the WTO, the state remains an important arena of law production. Despite the fact that India has an elaborate legal framework in this area, it has had to amend its patent laws, which earlier permitted only process patents to include product patents, as well as to introduce laws on plant varieties and breeder's rights in order to permit for the first time the patenting of agricultural and pharmaceutical products. Given the necessary political will, it could enact and implement laws within the WTO framework that would protect the interests of farmers, consumers, and Indian producers.

The Gene Campaign in India has pointed out, for example, that the GATT/WTO requires member states to provide either a patent regime or an

effective *sui generis* system to protect newly developed plant varieties. It does not enjoin states to follow the UPOV model. Thus, the Indian state has a choice to opt for a *sui generis* system more suitable to the Indian context. The UPOV system is based on the needs of industrialized countries in which agriculture is a commercial activity, unlike in India, which has a large majority of small and marginal farmers. It protects the rights of seed companies, who are the major producers of seed in an environment where seed research is conducted in private institutions for profit. It is thus at odds with Indian realities, where farmers are breeders who have individually and collectively conserved genetic resources and produced seeds, and where most research in the area is done in public institutions. The Gene Campaign, therefore, advocates *sui generis* legislation by the Indian state to protect the rights of farmers as producers and consumers of seed.

Was it a lack of technical expertise, an ignorance of the options available within the WTO agreement, an indifference towards the needs of poor primary producers, a conscious perusal of policies to their detriment due to pressure from powerful national and international lobbies, or some mixture of all of these, that led the Indian government to remove the quantitative restrictions (QR) on the importation of 714 items, including 229 agricultural commodities in March 2000, after having lost the legal battle against the USA in the WTO? The government claimed that its new Exim policy met its WTO obligations and benefited consumers by allowing imports of cheap foreign goods. But under the WTO agreement, India was bound neither to remove the QRs in 2000 nor to select the specific items that it did. In fact, had it argued for retaining QRs on the grounds of food security as well as the negative impact of their removal on employment and on the livelihoods of poor primary producers, it may have been able to continue most QRs. That the government chose to argue for a continuation of QRs in view of its balance of payments problems undermined its own case, given that it no longer has a foreign exchange deficit. It is difficult to say if this was a strategy deliberately intended to fail. The contrast to the policies of highly industrialized nations, however, could not be greater. The USA, Japan, and most European governments increased subsidies to their own farmers, thus seriously distorting agricultural prices and making calculations of measures of productivity or competitiveness based on relative prices spurious. For example, imposing an 80 per cent tariff on rice imports into India, in conformity with WTO prescriptions, after lifting the QR on rice imports is unlikely to afford Indian rice producers adequate protection. Along with rice, one can now freely import tea, coffee, rubber, spices, milk, vegetables, fish, and more than sixty fishery products. The National Fishworker's Forum, in its strong protest against the lifting of QRs, has warned that fish prices are likely to crash as a result of large-scale imports. It views this latest move by the

government in the context of a long history of attempts to liberalize the deep-sea fishing policy regime.

Moreover, as many critics in India of the Uruguay Round have pointed out, contrary to the rhetoric of creating a level playing field, many WTO rules tilt the balance further against countries of the South (Khor, 2000a; 2000b). Theoretically, it may be the case that the latter, who are net losers from the TRIPs regime, could offset such losses by gains from textile or agricultural trade liberalization. However, most countries of the North, which have been very slow to comply with their commitments in this regard, can take recourse to the very extensive safeguards provision for agricultural and textile trade. The TRIPs agreement lacks any such provision that would permit countries to reimpose tariffs temporarily in case losses to domestic producers are heavier than expected (Howse, 2001). So, though the costs of implementing the TRIPs regime has turned out to be much higher than anticipated for most developing countries, the agreement merely allows for a certain grace period for implementation. Many of them, including India, therefore, would like to reopen for negotiation the compromises that they made in the GATT Uruguay Round under the sway of imperfect information and the threat of unilateralism by the USA (Khor, 2000a; 2000b).

3. *A plurality of conflicting supranational legal regimes.* Two of the strategies that have been adopted by subaltern states faced with structural adjustment conditionalities and several supranational legal regimes are to delay implementation at the national level and to exploit the existence of a plurality of international laws and treaties, which often contravene one another. India, along with African and five Central and Latin American countries, has called for a review and an amendment of the TRIPs Agreement of the WTO as well as a five-year moratorium on its implementation. The Organization of African Unity and India have demanded that the TRIPs regime be brought into consonance with the Convention on Biological Diversity and the International Undertaking on Plant Genetic Resources, which would result in the exclusion of life forms from patentability and the protection of innovations by local farming communities. The Indian government has pointed out that its obligations under TRIPs run counter to some of its obligations under the Convention on Biological Diversity. However, the sanctions under the former, which permit, e.g., cross retaliation in any area of trade, are much stronger compared to the weak enforcement mechanisms of international environmental laws. Indian NGOs, along with transnational advocacy networks like GRAIN and RAFI, for example, have been using this plurality of transnational legal regimes to question the legitimacy of the WTO TRIPs regime, which contravenes provisions of both the Biodiversity Convention and the Protocol on Biosafety on genetically modified life forms

and does not conform to the earlier International Undertaking of the FAO, which explicitly recognizes Farmer's Rights to seeds.

4. *NGOs as mediators and creators of laws.* The protracted struggle against the Dunkel Draft and the TRIPs Agreement shows the variety of vital contributions to legal globalization made by transnationally linked NGOs and social movements in India. Just as they have represented the interests of Indian farmers in international and transnational fora, they have also disseminated information on the legal complexities to the national press and local communities. Not only have their campaigns created public awareness of the issues involved, mobilized farmers, and put pressure on the state but they have also challenged in US and European courts the granting of patents to TNCs from the North over agricultural and pharmaceutical products and genetic resources in the South. But, in addition to mediating between the local level and national as well as supranational fora, and contesting new legal regimes in various political and legal arenas, NGOs and advocacy groups are also engaged in the production of alternative norms by weaving together norms from different sources. In 1998, as an alternative treaty to UPOV, the Gene Campaign drafted a "Convention of Farmers and Breeders" (COFaB) that recognizes the collective community rights as well as individual rights of farmers as breeders; recognizes their common knowledge from oral or documented sources; stipulates that a breeder will forfeit his right if the "productivity potential" claimed in the application is no longer valid or if he fails to meet the demands of farmers, leading to a scarcity of planting material, increased market price, and monopolies; and grants each contracting state the right to independent evaluation of the performance of the variety before allowing protection. The UNDP Human Development Report of 1999 commends it as a

strong and coordinated international proposal [that] offers developing countries an alternative to following European legislation on needs to protect farmers' rights to save and reuse seeds and to fulfil the food and nutritional security goals of their peoples. (74)¹⁰

5. *Fragmentation of state law and fractured sovereignty.* The transnationalization of law is accompanied by an increasing fragmentation of law and a fracturing of state sovereignty. State action becomes increasingly heterogeneous with state law losing its unitary and coherent character. For example, Indian patent laws have to be brought into conformity with several supranational legal regimes that may contravene one another, such as the WTO TRIPs regime and the Convention on Biological Diversity. Or Indian population policy, which is strongly influenced by the UNFPA and the USAID, has to be in tune both

with the UN Cairo Conference Action Program, with its emphasis on reproductive rights, and with the Tirthat Amendment in the US Congress, which prohibits US financial assistance to any national population program that permits abortion. The IMF and the World Bank loan conditionalities in the 1990s required far-reaching changes in Indian tax laws, industrial licensing laws, and trade liberalization. The dilution of labor laws demanded by them would contravene constitutional guarantees but would also collide with ILO agreements and ICESCR provisions, as I discuss below. The coexistence of these different logics of regulation by different institutions of the state, or in different areas of regulation (and sometimes even within the same area of regulation), results in a new kind of legal pluralism, a pluralism within state law linked, on the one hand, to the transnationalization of law (see Santos, 1995: 118) and, on the other, the simultaneous operation of multiple transnational norms without their incorporation into domestic law.

For example, the plurality of transnational laws on biodiversity regimes is duplicated at the national level as well. The Indian Parliament's Biodiversity Bill of 2000 provides for the setting up of a new regulatory body, the National Biodiversity Authority (NBA). But the NBA may not be the sole authority to deal with bioresources or claims on rights over bioresources, a fact that the bill does not make provision for, or even recognize. It specifies neither the jurisdiction of the NBA *vis-à-vis* other competing bodies nor the applicability of other laws regulating intellectual property rights and access to bioresources. Its provisions may not be in harmony with the much older Drug and Cosmetics Act, the new Geographical Indicators Bill, or the Plant Varieties Protection and Farmer's Rights Bill. The Biodiversity bill refers to the Convention on Biodiversity of 1992 yet fails to utilize its provisions in order to recognize the claims of indigenous peoples or to allow benefit claimants to assert their traditional rights. By vesting regulatory authority solely in the NBA, it in effect may end up denying communities the right to defend their traditional rights and make claims independently of the state body, especially one without an adequate database to protect such claims and rights. Given the record of the Indian state, such a centralization of all regulatory power in a bureaucratic body, with little civil society participation, may or may not be effective against the biopiracy of multinational corporations. However, it is likely to be to the detriment of local communities and indigenous peoples, despite lip-service to the establishment of local biodiversity committees.

6. *Legal plurality and the emergence of the cunning citizen?* The existence of multiple and overlapping transnational legal orders within a particular field may also present a third option for states with a political will and strong democratic institutions, an option between the unrealistic hope of restoring

national legal autonomy and the equally utopian dream of all-encompassing global regulation. National norms could be supplemented and strengthened through a multi-layered approach that envisaged various public and private actors acting within and beyond national borders in order to establish multi-level public and private regulatory regimes. Rather than pinning one's hopes on the state as a unitary source of normative order, it is important to include the role of transnationally networked movements and advocacy networks, which, as private actors, create, mobilize, mediate, and weave together norms from different systems into new regulatory webs (Trubek *et al.*, 2000). Instead of posing the problem in terms of a stark binary choice between national or global legal regulation, or between state law as opposed to community law, this chapter has tried to sketch the contours of an emerging new landscape of legal pluralism, a mosaic of supranational regulation, national legislation, alternative people's treaties and policies, project law, traditional rights, and international laws.

In such a context the protection of the rights, lives, and livelihoods of most citizens in the South will need shifting alliances with states and international institutions. The World Bank, for example, and the Indian state are both cast in a neoliberal globalization script, like in Hindi films, in the double role of ally and adversary. Faced by cunning states and non-accountable international organizations, citizens and civic alliances in the twenty-first century may well be in the same position as the British government in the nineteenth century. They have neither permanent friends nor permanent enemies but only permanent interests.

7. *Post-colonial continuities?* Let us return for a moment to the Sri Lankan farmer Ranjith de Silva, who appeared as a witness for the transnational coalition of petitioners in the European Patent Office in Munich to challenge the US patent on a product of the neem tree. His grandparents would certainly have been astonished that products of a tree in their backyard could become—with the stroke of a European pen—the intellectual property of a US corporation and the US Department of Agriculture. But neither legal pluralism nor transnationalization jurisdiction would have been unfamiliar to South Asians of his grandparents' generation. The Privy Council in London, for example, had the ultimate authority to decide over their property disputes, due to the fact that they were subjects of the British Empire. And personal law for Muslims and Christians in South Asia always has had a transnational dimension. The family law that applied to the de Silva's as members of the Catholic community in Sri Lanka was a hybrid mixture of the prescriptions of the Roman Catholic Church with a variety of local practices codified by the colonial state into a homogeneous Christian personal law. In disputes concerning the control of land, British ideas of

individual property or of "eminent domain," depending on how their land had been classified, would have collided with traditional norms of community access to natural resources and collective usufructory rights, a point to which I shall return below.

Sensitivity to the history of colonialism could be an important corrective to the presentism and Eurocentrism of most analyses of (legal) globalization, with their propensity to overstate the singularity of the present and to posit a radical discontinuity between contemporary social life and that of the recent past. For example, in the literature on globalization, when references are made to the erosion of the sovereignty of the nation-state, or to an increasing legal pluralism (both supranational and sub-national), or to hybridity of laws in the wake of their transnational export, transplantation, and domestication in different cultural contexts, these may represent new developments for societies in the West. From the perspective of the non-Western world, however, it may seem to be an irony of history that, turning Marx on his head, one could argue that today the former colonies mirror in many ways the legal future of Europe. This is especially striking with regard to phenomena such as transnational jurisdiction, supranational and sub-national legal pluralism, the role of private actors in legal diffusion, as well as the emergence of multiple and shared sovereignties. Like the transnational corporations of the contemporary world, the British East India Company, which began the process of introducing British law into India prior to its becoming a Crown colony, was a private trading company. The relationship between the state and private trading companies in European countries has been unclearly delineated in the past and present. Powerful, partly autonomous from the state and seeking to escape from government control and metropolitan law, private trading companies in the nineteenth and twentieth centuries, like their transnational counterparts today, always relied on their respective governments to further their interests abroad. The "post-sovereign states" (Scholte, 2000) of the industrialized world increasingly resemble (post-)colonial ones in which the state has never enjoyed a monopoly over the production of law and has always had to contend with competition from within and beyond its borders. That Western social theory misses this convergence and represents overlapping sovereignties as a re-feudalization of Europe may have to do with its parochialism as well as with its tendency to see the West as both unique and universal.

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Notes

- 1 Many thanks to Ivan Krastev for suggesting the term "cunning state" in the course of several stimulating discussions around the issues developed in this chapter.
- 2 See K. von Benda-Beckmann (2000) for a detailed discussion of this point.
- 3 This section draws on many of the issues dealt with at length in Günther and Randeria (2001) and summarizes several arguments elaborated in Randeria (2001).
- 4 When the WTO declares that it has been consulting with NGOs, these are more likely to be chambers of industry and commerce (see the list of NGOs with whom the WTO consults on its website) rather than advocacy networks or grassroots development groups, since the negatively defined umbrella term, non-governmental organizations, encompasses a heterogeneity of organizations with little in common except that they are neither government nor profit-making firms.
- 5 The representative of the WTO, at a recent conference at the Institute for Advanced Studies in Berlin on "Governance Beyond the State" (May 2000), when questioned about the legitimacy of the power exercised by the organization reiterated the standard WTO defense that "the WTO Secretariat simply provides administrative and technical support for the WTO and its members," a formulation found on the organization's website "10 Common Misunderstandings about the WTO," the first among them being "The WTO Dictates Government's Policies."
- 6 In my interviews with them, IMF and World Bank lawyers underscored their helplessness in the face of foot-dragging and non-compliance by member states with the terms of the loan agreements with them.
- 7 I am grateful to Achyut Yagnik (SETU, Ahmadabad) for discussions relating to the issues raised in this section of the chapter. My thanks to him, Varsha Ganguly, and Ashok Shrimal for sharing with me their experiences of the World Bank project and the campaign for the rights of pastoral communities, as well as for giving me access to their material on the subject.
- 8 For a detailed critical study of the World Bank Inspection Panel, and especially of the two Indian cases that have come up before it, see Randeria (2001a).
- 9 The Independent Review mission of the World Bank (Morse and Berger, 1992) cast grave doubts on these claims because it found little evidence of any serious planning towards this end.