

## Troubled Waters

### Reviewing Legal Pluralism at the Interface of Caste and the Access to Water in India

Shinde, Mrinalini\*

#### ABSTRACT

This essay argues that access to water, and the right to water in India is subject to legal pluralism in India: the plurality of state law and the normative order of the caste system in India. While the Constitution of India prohibits discrimination against or exploitation of the Scheduled Castes, society is also subject to a parallel set of social rules set forth by caste hierarchies. The Dalit community has been historically subject to exploitation and limited access to resources, with the use of religious and social sanction, this essay focuses particularly on the right to water, which is an essential part of the constitutional right to the environment is subject to plural legal systems, of state law and caste-based normative orders. Ethnographic social science research, particularly in anthropology and sociology has produced extensive findings on how the caste system limits access to natural resources and particularly water, owing to ideas of purity and impurity associated with water use, and the status of water as a common public good. This essay explores how lawyers must consider legal pluralities when understanding access and management of natural resources. The essay analyses John Griffiths' idea of legal pluralism which describes a scenario in which not all law is administered by the State or its institutions, and there exists de facto law, beyond the boundaries of the State. This paper expands Griffiths' model of pluralism to explain how the right to water is subject to both caste order and state law and how the lived reality of Dalits when accessing water is subject to a constant pluralism.

**Keywords** legal pluralism, India, caste system, Constitution of India, Dalit community, exploitation, right to water, constitutional right to environment, environmental rights, natural resources

#### Introduction

*The Hindu inhabitants of the town saw the scene. They were taken by storm. They stood aghast witnessing this scene which they had never seen before. For the moment they seemed to be stunned and paralysed. The procession in form of fours marched past and went to the Chawdar tank, and the Untouchables for the first time drank the water. Soon the Hindus, realising what had happened, went into frenzy and committed all sorts of atrocities upon the Untouchables who had dared to pollute the water. . .*<sup>1</sup>

This extract from Dr. B.R. Ambedkar, India's first Minister for Law and Justice, and the Chairman of its Constitution Drafting Committee refers to one of the most prolific instances of civil disobedience in India, the 'Mahad Satyagraha' in 1927, where members of the group of castes (formerly referred to as the 'Untouchables'), from the 'Dalit'<sup>2</sup> community physically claimed their right to access public drinking water. His description also illustrates the consequences that the protesters faced for this act of courage and sacrilege. The Mahad Satyagraha eventually led to a local judge declaring in 1931 that the Mahad tank was public property, and open for use by all members of the public.<sup>3</sup>

This was not the first time that members of the Dalit community had asserted their right to water in India. In 1914, Hiranman Dhondi Mochi who belonged to the Dalit caste of leather workers, was sued by temple authorities for drawing water from a temple lake on account of insulting their religion.<sup>4</sup> Mochi was sentenced to prison by the Magistrate, but this decision was appealed and settled in Mochi's favour, with the appellate court "[making] a distinction between drawing water and

\*Mrinalini Shinde is a Lecturer of International Environmental Law at the Environmental Law Center, University of Cologne, Faculty of Law. She is also a doctoral candidate at the University of Cologne and Université Paris 1 Panthéon-Sorbonne.



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<sup>1</sup>B.R. Ambedkar, Dr. Babasaheb Ambedkar: Writings and Speeches, Vol. 5, 1st ed. (Dr. Ambedkar Foundation: New Delhi, 2014) 250.

<sup>2</sup>The caste group Ambedkar refers to in his writings is referred to in literature by several terms, especially the terms "Dalit" or "Scheduled Caste". The term Dalit originates from the Hindi and Marathi word for the depressed classes in India. The term entered official use in 1932 in the Poona Pact "Agreed to by Leaders of Caste-Hindus and of Dalits" (24 September 1932) a political agreement "between leaders acting on behalf of the Depressed Classes and of the rest of the community, regarding the representation of the Depressed Classes in the legislatures and certain other matters affecting their welfare." Gail Omvedt, an authority in Ambedkarite and anti-caste sociology explained in her blog that the term Dalit reflects the social reality of those formerly referred to as untouchables, reflecting their oppressed status. On the other hand, the term "Scheduled Caste" refers to the classification and recognition of the aforementioned castes within the Constitution of India, and promotes their social and economic interest, grants them protection from discrimination and exploitation including reserving their representation within elected office and government administration. Omvedt explains how the term Scheduled Caste (hereinafter referred to as "SC") is a "neutral" legal term, and does not convey the lived and social reality of Dalits. Therefore, in keeping with this taxonomy, this essay uses the term Dalit when referring to the community in the colloquial context but uses the term SC when referring to applicable

intentional disrespect to religion, observing that if the two acts conflated, all rivers would be inaccessible to most Indians.”<sup>5</sup>

India thus not only has a history of denying Dalits access to water, but also a legacy of collective action by the Dalit community in claiming their right to access, along with intervention by state law and institutions to offset caste-based hierarchies of access to water. However, over a century after Mochi’s case, there is continued perpetration and brutal killings of Dalits for accessing common drinking water resources<sup>6</sup> or for accessing water rights such as access to fish stocks and river rights.<sup>7</sup>

Less than ten per cent of Dalits are able to afford safe drinking water, electricity and toilets, and survey data reveals that around forty-eight per cent of villages prevent Dalits from drinking water from public water sources.<sup>8</sup> This essay aims to understand how environmental injustice plays out at the interface of the caste system and the right to water in India, and how our conception of legal pluralism while accommodating indigenous laws and norms can also result in the propagation of environmental injustice. Basing itself in the theories of legal pluralism, the essay focuses on the contrast between the law of the State, and the law governing religion and community-level caste-based diktats, rules and regime for consequences in the Indian context. When we study different legal orders within pluralism, we can observe that the same groups may be characterised differently and even contrastingly in these legal orders, as evidenced by Hindu law which classifies certain groups as untouchables and prohibits them from accessing places of worship, extracting water from wells that are also used by upper castes, despite the fact that State law characterizes all citizens as equals under the law.<sup>9</sup>

The Indian caste system according to Singh is based on two principles: hierarchy and difference, which originate from ideas of relative purity and pollution of different castes.<sup>10</sup> The prominence of caste supremacy, hierarchies and discrimination in modern Indian society directly impacts the manner in which citizens access natural resources, particularly those which are associated with community rights. This is often in contradiction with the law of the State and the Constitution which expressly prohibits untouchability. For instance, political leaders belonging to the higher castes, at the village level, display a confluence of their State authority and caste-based authority to block lower caste groups from accessing common water sources.<sup>11</sup> Water in India has always been a space for multi-faceted conflicts; between sectors such as industry, and agriculture, between the urban and rural populations, and between upper and lower castes and their competing needs.<sup>12</sup> Access to water has historically been an avenue to build caste-based differentiation, through the religious values associated with water and particular caste groups.<sup>13</sup> According to Jaiswal, the upper caste contempt of manual labour too forms the basis of the caste system, with the upper castes having the holy exemption from engaging in violent acts such as levelling land for cultivation, jobs which were then reserved for the lower castes as their salvation was irrelevant to the caste system.<sup>14</sup>

Consequences for breaking caste-hierarchies can include becoming an ‘outcaste’ (boycott from all social interactions and communication) or excommunication, which acts as a parallel system of enforcement for a parallel legal order.<sup>15</sup> Upper-caste communities also attribute sacred functionalities to common water sources, especially to the river, creating further fault lines across water use for other castes lower in the hierarchy. ‘Sacred needs linked to water are further identified as ‘collective’ and ‘individual’ and are largely believed to be the prerogative of the upper castes,’ and the ‘use by a lower caste individual might cause pollution that could result in *supernatural punishment*’ (emphasis added).<sup>16</sup>

While there is significant anthropological and sociological research on how the caste system limits access to natural resources and particularly water, owing to ideas of purity and impurity associated with water use, and the status of water as a common public good; this essay explores how lawyers must take into cognizance these intersecting legal pluralities when understanding access and management of natural resources from the perspective of environmental law. The essay is founded in both theoretical approaches to this question, as well

legal provisions See: G. Omvedt, ‘Dalit or Scheduled Caste: A Terminological Choice’ (Seeking Begumpura, 08.07.2012) available at <https://seekingbegumpura.wordpress.com/2012/07/08/Dalit-or-scheduled-caste-a-terminological-choice/> (accessed 24.02.2023).

<sup>3</sup>T. Roy, ‘Water, Climate, and Economy in India from 1880 to the Present’ (2021) 4 *Journal of Interdisciplinary History* 565, 582.

<sup>4</sup>Ibid. at 581.

<sup>5</sup>Ibid.

<sup>6</sup>Abhijit Waghre, ‘Caste and access to water: The missing link’ (23.01.2023) *Indian Express* available at <https://indianexpress.com/article/opinion/columns/caste-and-access-to-water-the-missing-link-jal-jevan-mission-8396750/> (accessed 29.01.2023).

<sup>7</sup>M. Sharma, ‘Dalit Memories and Water Rights’ in Caste and Nature: Dalits and Indian Environmental Politics (Oxford University Press, 2017) 161, 182.

<sup>8</sup>S. Saikia, ‘Discrimination of Fundamental Rights: A Critical Review on the Present Caste Based Status of Dalits in India’ (2014) 2 *Journal of Social Welfare and Family Law* 41, 46. See also A. Kumar, ‘Access to Basic Amenities: Aspects of Caste, Ethnicity and Poverty in Rural and Urban India—1993 to 2008–2009’ (2014) 2 *Journal of Land and Rural Studies* 127, 146.

<sup>9</sup>R. Pradhan, ‘The Ain of 1854 and after: Legal Pluralism, Models of Society and Ethnicity in Nepal’ (12-14 September 2005) presented at *Negotiating Ethnicity in Nepal’s Past and Present*, in Kathmandu 1, 3.

<sup>10</sup>N. Singh, ‘Women’s Participation in Local Water Governance: Understanding Institutional Contradictions’ (2006) 10 *Gender, Technology and Development* 61, 67.

<sup>11</sup>S. Vij and V. Narain, ‘Land, water & power: The demise of common property resources in periurban Gurgaon, India’ (2016) 50 *Land Use Policy* 59, 65-66.

<sup>12</sup>See ‘Preface’ in N. Shantha Mohan and S. Routray (eds.), *Sharing Blue Gold: Locating water conflicts in India* (National Institute of Advanced Studies: Bengaluru, 2015) v.

<sup>13</sup>Ibid. at 2.

<sup>14</sup>S. Jaiswal, ‘Caste, Gender and Ideology in the Making of India’ (2008) 36 *Social Scientist* 3, 17.

<sup>15</sup>K. Freitas, ‘The Indian Caste System as a Means of Contract Enforcement’ (2006), available at <https://www.semanticscholar.org/paper/The-Indian-Caste-System-as-a-Means-of-Contract-Freitas/a0552f8e1bab8d66250a47e176495ada0ed73db9> (last accessed on 24.02.2023).

<sup>16</sup>N. Singh, ‘Indigenous Water Management Systems: Interpreting Symbolic Dimensions in Common Property Resource Regimes’ (2006) 19 *Society & Natural Resources* 357, 366.

as evidence found by empirical researchers in the Indian context, along with a discussion on court decisions which have addressed questions of caste and access to water resources.

## Background

Sally Merry, as a prominent scholar on legal pluralism, explains that in the early twentieth century there was an interest in scholarship on indigenous law in Africa and the Asia-Pacific region, mostly originating from anthropology, to understand how people ‘maintained social order without European law,’ which resulted in the documentation of customary social laws, and social sanctions; which existed in addition to the European laws foisted upon them.<sup>17</sup> She says that ‘there is general agreement that pluralism does not describe a type of society but is a condition found to a greater or lesser extent in most societies, with continuous variation between those that are more and those less plural.’<sup>18</sup> In the context of this characterisation of legal pluralism in previously colonized nations, it is essential to consider how ancient religious law in India interacted with European law, in order to create the status quo of legal pluralism that Dalits in India are subject to.

Traditionally, caste councils were the authorities responsible for resolving disputes, mediating conflicts and deciding on legal matters, matters concerning a legal system which also in essence recognised caste hierarchies. While caste councils have reduced in their powers with respect to adjudication and dispute resolution, they continue to persist and exercise their power over those ‘communities that show a high degree of internal cohesion and an equivalent degree of social control.’<sup>19</sup> Julia Eckert explains that in India, the ‘persistence of legal pluralism in itself has been seen as a form of withdrawal from or resistance to the allegedly alien state law.’ Alternative judicial bodies such as caste councils were perceived as authentic and a way to subvert state law, without expressly rejecting it in the marketplace of laws.<sup>20</sup> It is important to take the power of these caste councils seriously despite the objectionable norms they enforce or procedures they follow, because these caste councils and tribunals also enjoy the tremendous advantage over state law, of operating ‘in ways that people understand and can generally anticipate.’<sup>21</sup>

‘Dharmashastra’ or Hindu religious law, was the dominant legal system of customary law in ancient India. Colonialism in India recognised customary and religious law according to their own agenda of administrative convenience and to satisfy the agenda of the colonizers. Thus, personal laws of the native populations was either included in State law, or allowed to remain unlegislated in State law, creating a form of juridical legal pluralism.<sup>22</sup> Laws enacted by colonizers who vested control of territory and continued to annex territory as part of the colonial project, such as the Indian Forest Act, 1927 and the Land Acquisition Act, 1894 did not provide land rights to local tribal populations ‘and, in particular, assumed the tribal inhabitants of forests to be mere encroachers without any land rights.’<sup>23</sup> While the Land Acquisition Act provided cash compensation to those whose land was acquired, this did not extend to those whose customary legal systems

did not provide formal titles of ownership and land tenure, such as the tribal populations, while the capital and land-owning upper castes were paid compensation for their acquired lands.<sup>24</sup> We see how the caste system through both religious law, and indirectly through State law continues to uphold hierarchies within the right to natural resources, in this case the right to land itself, which is considered a bundle of rights including right to housing, right to life and of course, the right to access water. This serves to illustrate how the juridical legal pluralism that replaced the Dharmashastra continued to favour the upper castes over tribal communities, creating a sort of singularism, within the pluralism. This lack of tenure, and associated land rights is further worsened in conflict scenarios or in natural disasters.<sup>25</sup>

Progressing from Merry’s explanation of legal pluralism in the context of colonization, I wish to turn to the core tenets of legal pluralism as described by John Griffiths, who undoubtedly is the preeminent scholar on the topic. Griffiths explains that ‘“Legal pluralism,” besides referring (...) to a sort of situation which is morally and even ontologically excluded by the ideology of legal centralism – a situation in which not all law is state law nor administered by a single set of state legal institutions, and in which law is therefore neither systematic nor uniform - can also refer, within the ideology of legal centralism, to a particular sub-type of the sort of phenomenon regarded as “law”’. According to Griffiths, this characterisation of pluralism presupposes that it is ‘justified,’ as a technique of governance on pragmatic grounds,’ under which parallel legal regimes can exist through State recognition of customary law.<sup>26</sup> Griffiths illustrates this with the example of the East India Company, which adhered to customary law in India when deciding matters concerning ‘inheritance, marriage, caste and other religious usages and institutions, the laws of the Koran with respect to the Mohamodans and those

<sup>17</sup>S. E. Merry, ‘Legal Pluralism’ (1988) 22 *Law & Society Review* 869.

<sup>18</sup>*Ibid.* at 879.

<sup>19</sup>J. Eckert, ‘From Subjects to Citizens: Legalism from below and the Homogenisation of the Legal Sphere’ (2006) 53 *The Journal of Legal Pluralism and Unofficial Law* 45, 47.

<sup>20</sup>*Ibid.* at 65.

<sup>21</sup>B. Z. Tamanaha, ‘The rule of law and legal pluralism in development’ (2011) 3 *Hague Journal on the Rule of Law* 1, 6-7.

<sup>22</sup>M. Voyce, ‘The Vinaya and the Dharmashastra: Monastic Law and Legal Pluralism in Ancient India’ (2007) 56 *The Journal of Legal Pluralism and Unofficial Law* 33, 34-35.

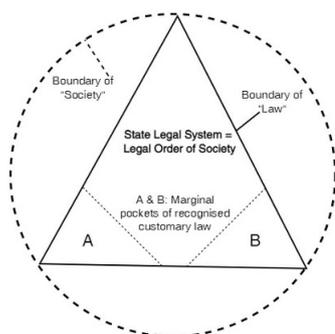
<sup>23</sup>B. Rajagopal, ‘The Role of Law in Counter-hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India’ (2005) 18 *Leiden Journal of International Law* 345, 359.

<sup>24</sup>*Ibid.*

<sup>25</sup>R. Meinzen-Dick and R. Pradhan, ‘Property rights and legal pluralism in post-conflict environments: Problem or opportunity for natural resource management?’ in C. Bruch, C. Muffett and S. S. Nichols eds., *Governance, natural resources, and post-conflict peacebuilding* 1st ed. (Routledge: London, 2016) 525, 539. See also M. Deva Prasad and S. Menon C, ‘Indian Forest Rights Legislation: Significance of Recognizing the Legal Pluralism for Indigenous Peoples Rights’ (2020) 41 *Statute Law Review* 78.

<sup>26</sup>J. Griffiths, ‘What Is Legal Pluralism’ (1986) 24 *The Journal of Legal Pluralism and Unofficial Law* 1, 5.

of the Shaster with respect to the Gentoos'.<sup>27</sup> 'Shaster' and 'Gentoos' here is the archaic and anglicised spelling of the terms 'Shashtra' and 'Hindus.' This essay focuses on this particular characterisation by Griffiths, given that he uses the example of the East India Company, in discussing the legal pluralism between caste and State law, which is endemic to South Asia, and particularly India when establishing the rights to public resources, spaces, natural resources and particularly water. Griffiths produces a figure which accurately characterises the boundaries of State and other laws in such a pluralised legal landscape. Griffiths depicts these boundaries in a clear diagram which is reproduced below which explains how the boundaries of society and social control exceed the boundaries of the state legal system. This basic formulation is essential to the discussion in this essay, as I will later attempt to recreate this figure as it applies to the Indian context with respect to the right to water and the caste system.



**Figure 1.** The Juristic Concept of Legal Pluralism  
Source: Griffiths, n. 26 at 6; graphic recreated based on the original by Griffiths.

The World Bank Legal Review on Law, Equity, and Development has expanded the understanding of legal pluralism in India especially with regard to the normative power of non-state law. They say that the use of the term legal pluralism can often be used 'to give normative validity (or recognition) to non-state law as 'law' in the general public sphere, that is, to expand the validity of non-state legal orders within the realm of state-defined law.' However, they argue against such an approach, on the grounds that referring to local normative orders as law is not an immediate acceptance of their legal validity and the expansion of the term can in effect legitimise unequal distribution of resources along caste, class, and gender fronts. This is the explanation offered by the World Bank for why its concept of legal pluralism will remain limited when taking into account non-state law as law, because of a conscious decision to challenge dominant interests and local elites with whom it negotiates in its practice.<sup>28</sup> In my understanding this stance of the World Bank, as a leading international organisation, when placed in the Indian context reaffirms that state law, including law applicable to the State when entered into through international law, continues to protect elite interests. These elite interests are protected even when the system may not necessarily recognise the legitimacy of non-state law. When accompanied by state law which too reflects and protects elite interests, both State and non-state law demonstrate a singularity within pluralism.

Masaji Chiba explains that legal pluralism as a term does not possess a widely accepted definition, however, legal pluralists have often focused on a search for customary law or tribal law and how it works with state law in dual structures in non-Western jurisdictions.<sup>29</sup> He defies this characterisation and says that in many non-Western countries duality is not an accurate description when pluralism in these countries instead 'is structured as a unique conglomeration of those various systems of law, which the people concerned have chosen among many possibilities, mostly on their own initiative, but not uncommonly by the manifest or latent imposition of foreign countries'.<sup>30</sup>

Another prominent scholar on legal pluralism, Natan Lerner, explains how legal pluralism often addresses three kinds of law: official law (state-made), unofficial law (by general consensus) and legal postulates (values and ideals in the fundamental social structure), which correlate to positive law, customary law and natural law, respectively. Lerner classifies the caste system under legal postulates, explaining how citizens may be forced to act against state-made official law in order to uphold religious beliefs.<sup>31</sup>

## Casteism as Legal Pluralism

India was expected to conduct its decennial official population census in 2021, which appears to have been postponed to 2024-2025 with the government citing the Covid-19 pandemic as reason for the multiple delays.<sup>32</sup> The latest data is from 2011, and therefore hardly reflects the current scenario. However, according to the 2011 data, India was then home to over 200 million persons belonging to the Scheduled Castes, comprising 16.63 per cent of the Indian population.<sup>33</sup> The 'Scheduled Castes' (hereinafter 'SC') are those castes formerly referred to as the Untouchables, which have been protected under the Indian Constitution.<sup>34</sup> Article 14 of the Constitution of India which recognises the fundamental right against 'discrimination on grounds of religion, race, caste, sex or place of birth,' allows the State to make 'special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes' (hereinafter 'ST').<sup>35</sup> Article

<sup>27</sup>Ibid. at 6, Griffiths quoting M. B. Hooker, *Legal pluralism: an introduction to colonial and neo-colonial laws* (Clarendon Press: Oxford, 1975).

<sup>28</sup>*The World Bank Legal Review: Law, Equity, and Development* (The International Bank for Reconstruction and Development/The World Bank 2006) 64-66.

<sup>29</sup>M. Chiba, 'Other Phases of Legal Pluralism in the Contemporary World' (1998) 11 *Ratio Juris* 228, 228-229.

<sup>30</sup>Ibid. at 232.

<sup>31</sup>N. Lerner, 'Group Rights and Legal Pluralism' (2011) 25 *Emory International Law Review* 829, 841.

<sup>32</sup>Census to be delayed again, deadline for freezing of boundaries extended to June 30' Indian Express (07.01.2023) available at <https://indianexpress.com/article/india/census-delayed-again-deadline-for-freezing-of-boundaries-extended-to-june-30-8364829/> (last accessed on 24.02.2023).

<sup>33</sup>Ministry of Social Justice and Empowerment, *State/UT-wise SCs Population, 2011*, available at <https://www.census2011.co.in/scheduled-castes.php> (last accessed on 24.02.2023).

<sup>34</sup>Constitution of India, art. 341.

<sup>35</sup>Constitution of India, art. 14.

17 specifically abolished untouchability and states that 'its practice in any form is forbidden. The enforcement of any disability arising out of Untouchability shall be an offence punishable in accordance with law'.<sup>36</sup> Article 46, which is a directive principle of state policy (not enforceable, but aims to serve as guidance to the State and aids transformative interpretation of the Constitution), states that the 'State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation'.<sup>37</sup> States have the power to designate which castes are considered as Scheduled Castes and Tribes under the applicable Constitutional provisions, and the names and identities of these castes differ from state to state.

Further, the Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989 specifically lists the offences which are punishable in the context of SC and ST victims. The long title of the Act states that it is 'an Act to prevent the commission of offences of atrocities against the members of the SC and the ST communities, to provide for Special Courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences and for matters connected therewith or incidental thereto'.<sup>38</sup>

It is evident from States laws, that there is an acknowledgement of systematic oppression and violence against the SCs and STs in India, and their protection has been guaranteed by the Constitution, whose drafting committee was headed by Dr. Ambedkar himself; along with subsequent criminal sanctions for caste-based violence and discrimination. However, in India in its current reality, Dalits have not been guaranteed the equality and welfare promised by their Constitution. As Borooah and Iyer (both renowned economists) observed in their study of access to education in rural India, Dalits often live in 'segregated colonies on the fringes or outskirts of villages,' and 'Dalits are not allowed to use common burial grounds'.<sup>39</sup> To me, this seemingly simple observation; and the use of the terms 'segregated' and 'not allowed,' by non-lawyers when describing the material effects of the caste system in practice in modern India, is at the crux of the discussion on legal pluralism and the caste system in India. Essentially, Dalits in India find themselves at the crossroads of and subject to two parallel legal systems: one of state law, created by a democratic State that prohibits untouchability and aims to promote their upliftment; and the second of caste norms and social rules which de facto operate as a pseudo-legal or perhaps even quasi-legal system of social control, founded in the caste hierarchy, discrimination and untouchability.

## Caste and Legal Pluralism: Access to Water

The Constitution of India does not explicitly recognise the right to water or the right to access water, and there has been no specific statutory enactment of the right either. However, Article 21 of the Constitution<sup>40</sup>, guarantees the right to life, and the Judiciary, particularly the Supreme Courts and High courts in their original jurisdiction, have interpreted the right to life as including the right to access water. So indirectly, through judicial precedent the fundamental right to water in India has

been well-established. For instance, the Supreme Court in 1991 held that the 'right to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has a right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life'.<sup>41</sup> Judgments become part of the binding law of the land, and therefore the right to water is actionable and enforceable in India and is reflected in High Court judgments as well.<sup>42</sup> Article 21 must then be read together with Article 15(2)(b) of the Constitution which states that 'No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to (...) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public'.<sup>43</sup> This link between the right to water and the right to equality, not only establishes a fundamental right to water in India, but also equal access to common water sources free of discrimination on the basis of caste and religion.<sup>44</sup>

The state legal system in India thus protects equal access to water, and protects against the discrimination along caste lines when accessing that water, within the fundamental rights of the Constitution, and has been consistently upheld by the highest courts of the country, leaving little doubt regarding the status of the right within state law.

The following section of the essay seeks to illustrate how in practice, caste laws of social control actively deny Dalits of this right, manifesting in the contrast of legal pluralities to which they are subject. The first section provides an overview of instances of caste-based discrimination in access to water, based on the empirical findings of researchers from several disciplines. The second section describes how within this discrimination, Dalit women especially are subjected to the impacts of such pluralism.

<sup>36</sup>Constitution of India, art. 17.

<sup>37</sup>Constitution of India, art. 46.

<sup>38</sup>The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989.

<sup>39</sup>V. K. Borooah and S. Iyer, 'Vidya, Veda, and Varna: The Influence of Religion and Caste on Education in Rural India' (2005) *The Journal of Development Studies* 1, 19-20. See also, Kathleen O'Reilly and Richa Dhanju, 'Public taps and private connections: the production of caste distinction and common sense in a Rajasthan drinking water supply project' (2014) 39 *Transactions of the Institute of British Geographers* 373, 379.

<sup>40</sup>Constitution of India, art. 21.

<sup>41</sup>Forum for Policy Dialogue on Water Conflicts in India, 'Right to Water in India: Privileging Water for Basic Needs' (2015), available at [https://waterconflictforum.org/lib\\_docs/Right%20to%20Water,%20Privileging%20water%20for%20basic%20needs\\_Final.pdf](https://waterconflictforum.org/lib_docs/Right%20to%20Water,%20Privileging%20water%20for%20basic%20needs_Final.pdf) (last accessed on 24.02.2023). See Subhash Kumar v. State of Bihar, [1991] AIR SC 420, 7.

<sup>42</sup>See Hamid Khan v State of Madhya Pradesh, [1997] AIR MP 191; Vishala Kochi Kudivella Samarkshana Samithi v State of Kerala, [2006] (1) KLT 919.

<sup>43</sup>Constitution of India, art. 15(2)(b).

<sup>44</sup>P. Cullet, 'Right to water in India – plugging conceptual and practical gaps' (2012) 17 *The International Journal of Human Rights* 1, 71.

The third section uses the fisheries sector to illustrate how caste councils limit access to marine and other fishing waters in India, a further illustration of the caste system limiting access to state-rights within juridical pluralism.

## Access to municipal water, irrigation and freshwater

In this section of the essay, I argue using findings and evidence from empirical research conducted in other disciplines such as economics, sociology and anthropology that the lived reality of Dalits in India reflects a prevalence of caste-based discrimination when accessing water, based on caste-based normative orders and postulates which acts contrary to all of the protections guaranteed by state law, including the Constitution.

For instance, in research conducted in the city of Bengaluru using fieldwork, Ranganathan and Balazs, confirmed how reforms in water regulations have excluded public deliberation and discussion, instead focusing on economic efficiency or equity, resulting in a lack of meaningful participation by ‘historically marginalized groups.’ While the phrase acts as a euphemism and sanitized phrase often used to describe members of the SC and ST communities, the phrasing disguises the present and their continued marginalisation in Indian society.<sup>45</sup>

Srinivasan and Reddy conducted their fieldwork on the nexus between irrigation and human health in then Andhra Pradesh (now Telangana) state of India, and found that among 471 households surveyed, fifty-eight per cent were landless, over sixty per cent belonged to backward communities and twenty per cent belonged to the SCs. They found that the households which are exposed to irrigation from wastewater are exposed to environmental pollutants which result in severe health impacts, including higher levels of morbidity, especially female morbidity. More importantly, higher morbidity is observed downstream of the river than upstream, further cementing the conclusion that Dalits (who traditionally live downstream so as to not ‘pollute’ or desecrate the water of the upper castes), are exposed to environmental pollution, and the costs and burden of this pollution is borne by landless farmers with small landholdings, and by extension, Dalits.<sup>46</sup>

Saket in his review of how caste impacts provision of public goods in India, found inter alia, that SC & ST students in India face discrimination when accessing to drinking water and sanitation.<sup>47</sup> Quantitative research by Bros and Couttenier in development economics on the provision of public goods in India showed that there was a “positive and significant relationship at the district-level between the number of homicides of SCs and STs as a proportion of their population and the probability that members of these groups meet higher caste at a public water source.”<sup>48</sup> The correlation indicates that Dalits face a real threat of homicide around public water sources, where untouchability is “violently enforced or serve as an excuse for caste-based violence.”<sup>49</sup>

Along with access to drinking and domestic water use, there is demonstrable caste discrimination at play affecting irrigation in the agricultural sector. Saket’s

research also found that farms owned by upper caste farmers were found to generate greater yield than those owned by the SCs and STs, owing to the fact that households from the upper castes did not prefer trading water with lower castes, and between 3 and 13 per cent of income equality in farmers from the caste groups was owing to caste discrimination.<sup>50</sup> Around sixty per cent of irrigation in India is conducted through the use of groundwater, and there has been a creation and emergence of groundwater markets throughout India for agricultural and domestic use, aided by advances in technology for tube wells along with increased electricity supply. Greater water supply led to a greater share of water-intensive cash crops and organised institutions such as cooperative sugar factories etc., which largely excluded Dalits, and the ‘groundwater revolution redefined cropping patterns, labour practices, tenancy arrangements, and caste relations in most parts of India.’<sup>51</sup> Groundwater markets often operate in extra-legal spaces, and payments for water can be in cash or kind, including output sharing and labour contracts. When the power dynamics in such spaces are unequal, as they obviously are within the caste system, these transactions are no longer free and fair but coercive and exploitative. Lack of regulation in the quantity of water extracted, and the privatisation of water extraction has allowed wealthy farmers to gain control over scarce groundwater resources, and poorer farmers tend to be forced into dependent relationships with wealthy tube well owners. The wealthy farmers are organised on the basis of self-serving caste-lines.<sup>52</sup> In his empirical research in Gujarat, Farhat Naz observes that ‘upper-caste water lords use the social barriers of caste within a larger realm of sacredness and profanity to limit the possibility of the water exchange in the groundwater market.’<sup>53</sup> Caste status and the size of landholdings are directly proportional, and caste operates as the primary factor regulating the size of landholdings, ownership of tube wells, and influence over the government in the formation of state policies.<sup>54</sup>

In Uttar Pradesh, empirical research found that while upper castes have several sources of drinking water, Dalits have to depend on a singular source of water such as one well or handpump that is also subject to frequent failure,

<sup>45</sup>M. Ranganathan and C. Balazs, ‘Water marginalization at the urban fringe: environmental justice and urban political ecology across the North–South divide’ (2015) 36 *Urban Geography* 403, 414.

<sup>46</sup>J. T. Srinivasan and V. Ratna Reddy, ‘Impact of irrigation water quality on human health: A case study in India’ (2009) 68 *Ecological Economics* 2800, 2804-2805.

<sup>47</sup>R. P. Saket, ‘Caste and Provision of Public Goods in India’ (2018) 8 *International Journal of Humanities and Social Science* 160.

<sup>48</sup>C. Bros, and M. Couttenier, ‘Untouchability, homicides and water access’ (2015) 43 *Journal of Comparative Economics* 549, 556.

<sup>49</sup>Ibid. at 557.

<sup>50</sup>Saket, n. 47 at 161.

<sup>51</sup>J. Ananda, L. Crase, and P. G. Pagan, ‘A Preliminary Assessment of Water Institutions in India: An Institutional Design Perspective’ (2006) 23 *Review of Policy Research* 927, 933.

<sup>52</sup>F. Naz, ‘Water, Water Lords, and Caste: A Village Study from Gujarat, India’ (2015) 26 *Capitalism Nature Socialism* 89, 94-96.

<sup>53</sup>Ibid. at 98.

<sup>54</sup>Ibid. at 98. See also, A. Mukherji, ‘Political ecology of groundwater: the contrasting case of water-abundant West Bengal and water-scarce Gujarat, India’ (2006) *Hydrogeology Journal* 392, 397.

smaller windows of time for access, and being shared by far more people adding pressure on already limited resources.<sup>55</sup> Moreover, the installation of handpumps in the first place is not random or systematically planned; rather, the head of the village council has the power to install them and they do so for themselves, and other members of their castes. Bhatia recounts an incident involving Avinash Kushwaha, a Member of the Legislative Assembly of Uttar Pradesh who installed several hundred handpumps in villages only for members of the Kushwaha caste that he belonged to in the period between 2005 and 2010.<sup>56</sup> When locations of water sources are manipulated in such a manner, Dalit families have to resort to begging and subjecting themselves to humiliation in trying to negotiate access to water.<sup>57</sup> Often the manner in which people refer to each other's castes is by reference to whether their water can be drunk or not, but of course during periods of water scarcity and drought, the upper castes do not hesitate to drink water from the wells of Dalits, displaying the self-serving flexibility of norms that is characteristic of upper caste domination in the caste system.<sup>58</sup>

Varun Sharma has conducted extensive fieldwork in Andhra Pradesh to study the confluence of caste and power in accessing water. He explains how caste-based land holdings in the catchment area of village water sources exhibited 'territorial segmentation' owing to the rigid caste system and reflect how different castes have variegated access to water, and its resources such as fish, timber, fuel wood, food for livestock and potable water for domestic use.<sup>59</sup> Sharma's fieldwork revealed an instance wherein a farmer belonging to a backward class (unclear if from an SC), shared oral history of how, during a period of prolonged drought, his ancestors a few generations ago were 'sacrificed atop the tank bund to placate the rain and village gods,' exhibiting the extent to which the caste system has the power to operate as a tremendous cultural and de facto legal force of social control.<sup>60</sup> In furtherance of the phenomenon of state law demonstrating caste hierarchies closely mirroring the caste system, Sharma's research revealed that when the state Irrigation Department established a local Water Users Association (WUA), official positions of the WUA were seized and occupied by the upper castes, using 'brute force and violence' in elections, which should have ideally been democratic and representative of the community. Thus, decisions regarding the access to irrigation water was determined by and to the advantage of the upper castes.<sup>61</sup> Water transactions in India continue to be based with proximity to, or involving relationships based on caste with influential members of the caste being able to act as 'water brokers' on behalf of other villagers.<sup>62</sup> In modern India, elected village councils usually act as an intermediary between citizens and the State, often serving as the go-between for access to welfare schemes. However, research by Dunning and Nilekani found that how public benefits are distributed at the village level through the village councils is also a function of caste including the selection of locations and employees. They found evidence that wells and water tanks built with funds under the Mahatma Gandhi National Rural Employment Guarantee Act were located near the private property of the President of the village council, who

in turn also had immense discretion regarding the choice of employees and beneficiaries from such funds.<sup>63</sup> Prominent scholar on South Asian law and society Prof. Marc Galanter has documented how lower court officials too when belonging to the upper castes have been 'almost uniformly unsympathetic to the claims of the lower castes - even where these claims were subsequently vindicated by the High Court.'<sup>64</sup>

## The gendered experience of a caste-based pluralism governing water

*'The poor health of people from the lower castes, their social exclusion and the steep social gradient are due to the unequal distribution of power, income, goods and services. Caste is inextricably linked to and is a proxy for socio-economic status in India.'*<sup>65</sup>

'Gender intersects with other axes of social difference (such as class, race, caste, dis/ability, etc.) whereby water crises can exacerbate socially constructed differences and power relations.'<sup>66</sup> Within the limited access of water that Dalits are subject to under the practice of untouchability and caste-base discrimination, there is a further gendered division of access within the Dalit community. Due to a gendered division of household labour and livelihoods, women often bear the physical and social burden of water insecurity within households.

Gopika Solanki who has worked extensively on the role of religious laws, legal pluralism and women's rights in India, illustrates this intersection of the axes of social difference from the early history of the city of Mumbai (then Bombay) in India. She describes how the colonial state codified in its records that workers who worked in 'polluting' jobs were 'untouchables' and were not permitted to stay within the city limits because of

<sup>55</sup>S. Bhatia, 'Caste, Class and the Power of Water: The Socio-Political Ecology of Drinking Water in Rural India' (2020) 20 *Geography and You* 67, 70.

<sup>56</sup>Ibid. at 71.

<sup>57</sup>T. Birkenholtz, 'Full-cost recovery': producing differentiated water collection practices and responses to centralized water networks in Jaipur, India' (2010) 42 *Environment and Planning* 2238, 2246.

<sup>58</sup>L. Mehta, 'Whose scarcity? Whose property? The case of water in western India' (2007) 24 *Land Use Policy* 654, 658.

<sup>59</sup>V. Sharma, 'Water, caste and power in drought-prone Andhra Pradesh' in N. Shantha Mohan and S. Routray (eds.), *Sharing Blue Gold: Locating water conflicts in India* (National Institute of Advanced Studies: Bengaluru, 2015) 14.

<sup>60</sup>Ibid. at 20-21.

<sup>61</sup>Ibid. at 24-25.

<sup>62</sup>D. Mosse, 'The Symbolic Making of a Common Property Resource: History, Ecology and Locality in a Tank-irrigated Landscape in South India' (1997) 28 *Development and Change* 467, 479.

<sup>63</sup>T. Dunning and J. Nilekani, 'Ethnic Quotas and Political Mobilization: Caste, Parties, and Distribution in Indian Village Councils' (2013) 107 *American Political Science Review* 35, 38.

<sup>64</sup>M. Galanter, 'Law and Caste in Modern India' (1963) 3 *Asian Survey* 544, 548-549.

<sup>65</sup>V. Vijayanath et al., 'Caste and Health in Indian Scenario' (2010) 10 *Journal of Punjab Academy of Forensic Medicine & Toxicology* 42, 43.

<sup>66</sup>F. Sultana and A. Loftus, 'The right to water: prospects and possibilities' in F. Sultana and A. Loftus (eds.) *The Right To Water: Politics, Governance and Social Struggles* (Earthscan: London, 2012) 9.

that status until the beginning of the 20<sup>th</sup> century. In Mumbai, private buildings were mostly owned by the upper castes who did not rent them to the Dalits, who were forced to reside in thatched huts in the city outskirts. In her research she found that for most members of the community she interviewed, there was a prevalence of memories around 'the struggles of their forefathers to construct huts on garbage dumps without access to water.'<sup>67</sup> Castes whose job it had been determined to clean human wastes, were themselves denied access to toilets and sanitation, which had a disproportionate impact on the health, safety and freedom of women belonging to those castes.<sup>68</sup>

Sabharwal and Sonalkar found that Dalit women faced lower mortality compared to upper-caste women (an average difference of 14.6 years), and conditions linked with mortality, such as poor sanitation and water supply, impacted Dalit women more than upper-caste women.<sup>69</sup> In several villages, there is a custom of allowing Dalit women to fetch water from taps only after upper caste women have finished taking their share of the water, or there are marks indicating positions for each caste around common wells, often accompanied by verbal humiliation to force Dalit women to keep their distance from upper caste women, and not 'pollute' them.<sup>70</sup>

Another aspect within gendered caste-discrimination in water access is existing mythology among the upper castes that their discriminatory rights are a result of divine intervention. In Deepa Joshi's empirical research in Uttarakhand, a state housing the Himalayan foothills, upper caste women 'reported water-abundance and claimed that it was due to the Water Goddess (*Jal Devi*), revered in a temple located at the foot of the village' while Dalit women in the same village reported that they suffered from tremendous water scarcity. Water scarcity for them includes being able to have water to bathe and being unable to wash clothes and utensils adequately. They had to spend nights filling containers from a small trickle of a spring. They express anguish that while the upper castes conveniently refer to the lower caste as being unclean or dirty, exclusion from water access made those insults a self-fulfilling prophecy as the community's sanitation and hygiene suffers.<sup>71</sup>

Further, if Dalit women are caught stealing water from upper caste sources, there are harsh penal costs imposed, which prevents them from defying the wishes of the upper caste women.<sup>72</sup> While the ability to extract water has expanded significantly in independent India, Dalit women remain at the lowest rung of access to water, owing to the gendered manner in which the right to water, and women's role within society in accessing that water is situated within the caste system.

### Access to marine waters and fish stocks

A third aspect of the limits of the right to water I wish to examine in this essay relates to the distribution of fishing rights and access to marine waters and fishing stocks in India, where caste unities play out publicly, often overriding state law and institutions meant to manage or regulate fishing. Martin Bavinck and colleagues have conducted extensive research on the legal pluralism

which exists within state law and institutions, and non-state law and institutions with respect to regulating and controlling fisheries in India, relying on empirical data and fieldwork. They found that along the western coast in Gujarat, especially in matters related to adjudicating of fishing-related disputes in smaller fishing harbours, they are resolved by caste courts, and in bigger harbours, the 'samaj' or caste council/courts addressed fishing disputes through 'subsidiary caste-based boat owners' associations.' They also found that the State Fisheries Department, which was responsible for the growth of the fisheries sector, is unable to maintain its role as the steward of resources. Instead, the caste council forms a '*parallel, if not formally recognized, legal authority to the state along the coast. Their writ is particularly powerful with regard to the social aspects of fisher's lives, but they also are important in resolving intra-caste and, occasionally, inter-caste fishing disputes.*' (emphasis added)<sup>73</sup>

In their study along the eastern coast, Bavinck and colleagues found that fishing hamlets were governed by caste councils, which regulate and control local affairs.<sup>74</sup> In disputes relating to fishing rights at the level of caste councils, it was found that the state department for fisheries tended to uphold caste council decisions, rather than state law, because they respected council decisions owing to their apparent and enduring authority within the fishing community, given that their goal was mainly to maintain law and order and not investigate the roots of conflict. The research found that while it was evident that the subject matter of state law and that of the fisheries caste councils was the same, the two systems existed separately and almost independently of each other. 'State law ends where fishermen law begins, and where fishermen law is effective, the state sees little reason to become involved.'<sup>75</sup> Divya Karnad in her research on the other hand offers an interesting insight into the interface between state and non-state fisheries rules, explaining that there has been recent innovation in how caste customs persist within state legal practice as well, with evidence of caste based and non-caste based trawl boat owners associations in Tamil Nadu working closely with the state in order to formulate fishing rules

<sup>67</sup>G. Solanki, 'Adjudication in Religious Family Laws: Cultural Accommodation, Legal Pluralism, and Women's Rights in India' (PhD Thesis submitted to McGill University 2007) 137.

<sup>68</sup>Ibid. at 136-137.

<sup>69</sup>N. Sadana Sabharwal and W. Sonalkar, 'Dalit Women in India: At the Crossroads of Gender, Class, and Caste' (2015) 8 *Global Justice: Theory Practice Rhetoric* 44, 63.

<sup>70</sup>Ibid. at 65-66. See also R. Deliege, 'Replication and Consensus: Untouchability, Caste and Ideology in India' (1992) 27 *Man* 155, 169.

<sup>71</sup>D. Joshi, 'Women, water, caste and gender: the rhetoric of reform in India's Drinking Water Sector' in V. Narain ed. *Globalization of Water Governance in South Asia* (Routledge: London, 2013) 35, 39.

<sup>72</sup>Ibid. at 40.

<sup>73</sup>M. Bavinck et al., 'From Indifference to Mutual Support - A Comparative Analysis of Legal Pluralism in the Governing of South Asian Fisheries' (2013) 25 *European Journal of Development Research* 621, 625-626.

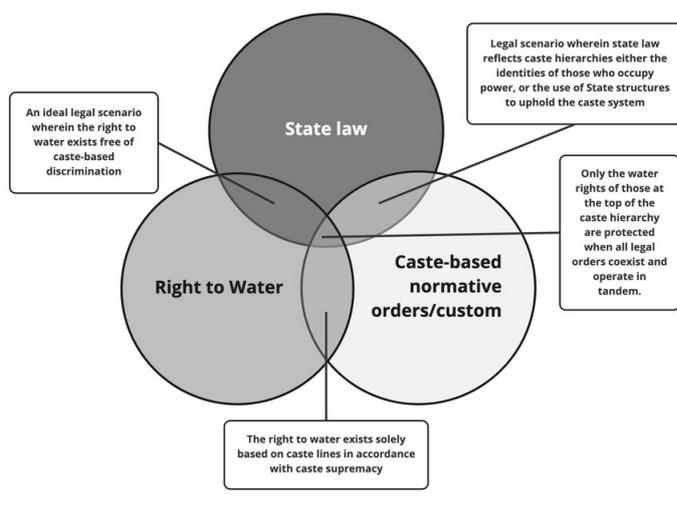
<sup>74</sup>M. Bavinck, 'A Matter of Maintaining Peace - State Accommodation to Subordinate Legal Systems: The Case of Fisheries along the Coromandel Coast of Tamil Nadu, India' (1998) 40 *The Journal of Legal Pluralism and Unofficial Law* 151, 153.

<sup>75</sup>Ibid. at 165.

which would restrict new entrants and further expansion of the fishing rights and continue to cement caste-based access to marine and fishing resources.<sup>76</sup> The example of the fisheries sector thus provides a similar illustration to that of forest and land rights in the previous part of the essay, where we can observe a clear diversion between state and non-state law with respect to the rights of access; and then further illustration of how interests also get consolidated within state law.

## Conclusion

This essay aimed to explore how the right to water in India is limited by the legal pluralism of state law and caste customs and norms. Griffiths describes legal pluralism as ‘a situation in which not all law is state law nor administered by a single set of state legal institutions, and in which law is therefore neither systematic nor uniform.’<sup>77</sup> This is supported by his diagram, which, when modified to reflect the reality of the caste system and the right to water in India, would appear something akin to the following:



**Figure 2.** Modifying Griffiths: Legal Pluralism; Caste and the Right to Water in India

Through this essay, I have provided evidence of how the caste system through its religious normative order exercises social control and limits access of Dalits to water, despite State law recognising the inalienable right to water, and criminalizing caste-based discrimination in access to water. In spite of evolved jurisprudence and constitutional protection of the right to water, economic development and lack of resources are often cited as reasons for India lagging behind in ensuring the right to water for all its citizens. We see that in the absence of a positive statutory right, citizens have to depend on the judiciary to interpret the Constitution and step into a quasi-legislative role, and usually as a negative right, to prevent violations of the right. Although the State assumes proprietary rights over water resources, including under the public trust doctrine, the commodification of water and the possible privatisation of water through permits and sales, affects marginalized communities including Dalits.<sup>78</sup> When understanding legal pluralism in the Indian context, citizens have

multiple legal systems applying to them based on different contexts. The State then is not the only relevant legal institution but shares space with village and caste councils, and these can operate in contradiction to each other. Just as forum shopping has been amply discussed in the context of international trade law or arbitration law, citizens too can engage in forum shopping between caste, state law and institutions, depending on where their interests are served better, which in the case of caste is more often non-state-made law. But as we have seen throughout this essay, state law also can indirectly end up upholding caste hierarchies.<sup>79</sup>

<sup>76</sup>D. Karnad, ‘Navigating customary law and state fishing legislation to create effective fisheries governance in India’ (2017) 86 *Marine Policy* 241, 241-242.

<sup>77</sup>Griffiths, n. 26 at 5.

<sup>78</sup>V. Narain, ‘Water as a Fundamental Right: A Perspective from India’ (2010) 34 *Vermont Law Review* 917, 922-923.

<sup>79</sup>R. S. Meinzen-Dick and R. Pradhan, ‘Legal Pluralism and Dynamic Property Rights’ (2002) *Consultative Group for International Agricultural Research (CGIAR) Systemwide Program on Collective Action and Property Rights (CAPRI) Working Paper-22* 1, 4-5 available at <https://ebrary.ifpri.org/utils/getfile/collection/p15738coll2/id/127262/filename/127473.pdf> (last accessed on 24.02.2023).