India from early days recognized and protected private property\(^1\). This concept was similar to the Roman concept of occupancy\(^2\). King had no proprietary right over land but collected tax for the protection offered by him to private property of individuals. This led to the feudal type of land holdings in India\(^3\). This system was perpetrated by the Britisher’s through permanent settlement\(^4\). Thus zamindars who were the collection agents of tax became the owners of large tracts of land in long run. Farmers who actually cultivated the land became tenants. Farmers had to pay tax to the zamindars. Abolition of this system was one of the slogans of the independence struggle\(^5\).

After independence India envisaged an egalitarian society\(^6\). But private property rights over land were recognized to a limited extent\(^7\). So state in its long run will exert land use controls on private individuals, for the benefit of the

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6 See the Constitution of India,1950, preamble.
7 *Id.*, Art. 19(1)(f).
members of the community. The land use controls refers to the restriction exerted over owner’s right. Thus it is necessary analyse the feasibility of land use controls and extent of controls which can be exercised by the State based on the Constitution. After the change in property relations most of the areas under wetlands are government owned. Only paddy fields are one large area of wetland with private individuals. But during the early periods after the formation of state, property right over these government lands were given to private persons by revenue authorities based on their occupation for long time. Forest lands also were got encroached in the same way.

Public interest was the major concern of the government while exerting different types of controls on land use of owners. The National High Ways Act, 1951, the Mines and Minerals Act, 1957, the sand mining prohibitions and the Treasure Troves Act, 1878 are some of the examples, which are either Central or state legislations. Later on certain land areas required special protection either through the international commitments or through ecological importance of those areas. Coastal areas, ports, harbors, mangrove forest, swamps and marshes are some of such areas. Most of the areas referred are under the protection of the Central government. Only a license to operate these areas is given to the state government which causes various issues related to the land use regulations. The federal structure which India follows and constitutionality of various legislative entries related to land use controls and the problems confronted by the central and state governments need to be analysed.

The concept of land use controls is mainly directed towards the common good even if it is self control or state created. It gets more and more complicated

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8 See the land reform measures adopted in India after the adoption of the Constitution to achieve the Directive Principles of State Policy under Arts. 39 (a) and (b).

when it enters in to the private individuals land use rights. Major questions to be answered are how far an acceptable scheme for use of different categories of land especially categories of wetlands is adopted through the constitutional scheme. Another related question is whether the legislative scheme of control over different types of uses of wetlands is satisfactory or not.

To answer these questions from Indian perspective it is necessary to analyze classification of land use, limits of proprietary interest over land, regulatory scheme for different versions of land under Indian constitution and constitutional scheme of legislation on wetlands. It is also necessary to analyse the various categories of land use adopted in India whether it is a scientific way for protection of wetlands.

**Classification of Land Use under the Indian Constitution**

Land is a state subject\(^{10}\). The absorption of international obligations\(^{11}\), special areas of interest and protection of environment as a whole lies with the Central Government. Most of the land areas are governed by multiple authorities and legislations. This leads to more confusions rather than better enforcements. More over legislations without societal acceptance cannot be successful\(^{12}\). How can the constitutional scheme be clarified to resolve the doubt existing in areas of land use and to make it more viable to the concept of sustainable development?

How to meet the triangular needs of International standard to the central scheme acceptable to the states retaining the federal character of the Constitution?

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\(^{10}\) The Constitution of India, 1950, Art.246, Schedule VII, Entry 18.

\(^{11}\) Id., Entries 13,14.

\(^{12}\) See the Dowry Prohibition Act, 1961.
Indian constitution accepts the federal concept and distributes the legislative powers between the coordinate constitutional entities, namely, the union and the states. This concept implies that one cannot encroach upon the functions or instrumentalities of the other unless the Constitution provides for such interference. The legislative fields allotted to the units cover subjects for legislation. They do not deal with the relationship between the coordinate units functioning in their allotted fields. This is regulated by other provisions of the Constitution. There is no provision which enables one unit to take away the property of another except by agreement. From the environmental point of view, allocation of legislative authority is very important. Part XI of the Constitution provides for the distribution of legislative powers between the centre and the states. Union List contains ninety seven subjects upon which the parliament alone has the power to legislate. The State List contains sixty six subjects on which the state legislatures have the power to legislate. However in respect of Concurrent List which contain fifty two subjects both parliament and state legislatures have power to legislate.

Even though the land is considered as the state, subject considering the environmental aspect, the centre could exert some control over the land for the maintenance of environmental quality. Ancient modes of classification of land

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15 The legislative powers under the scheme of the Indian Constitution is divided into three lists viz. the Union list or List I, the State List or List II, the Concurrent List or List III under Schedule VII.
16 The Constitution of India,1950, Arts. 245-263.
17 Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List. It is clear that all residuary powers of legislation remain with Parliament by Art. 248.
18 The Constitution of India, Art. 51 A (g) states that it shall be the duty of the citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures.
use\textsuperscript{19} and the methods to tackle the different uses of land have put the land under great and unimaginable pressure. Moreover, the paradigm shifts brought out in the land use\textsuperscript{20} has exerted another tension. Not only this, land remains to be the prime resource, which can be treated as a fertile asset even without the productivity assigned to it. Thus in order to understand the gravity of the problem it is necessary to understand the concept of land use existing in India. Land is treated as resource to be protected and conserved from environmental point of view. This is necessary for the existence of humanity. Importance of land has acquired international character. Environment has no national barriers. The general norms on land use restrictions are becoming stringent. On the other side, each nation and people who own land consider land as property. Therefore it acquires the legal characteristics. It is through the Constitution blending of these two interests takes place. Considering the former view entire authority over land is to be vested in the Central Government. The Constitution also supports it. Only the implementation of measure adopted lies with concerned state entities. On the other hand any other matters related to land as property can be resolved by state using its legislative power.

Land reform measures adopted just after the independence was based on the constitutional objective of egalitarian society. Legislations were enacted because land tenures in each state were different. The property transfer continued to be governed by the Transfer of Property Act, 1882, a Central legislation. It was accepted by all states as a preconstitutional law. Forest was another important area of land and spread over many states. Considering the importance of the area,

\textsuperscript{19} The Constitution while dividing the legislative power have not incorporated various types of lands such as internationally important lands, environmentally important lands, community interest areas, fragile areas forest, marshy, wetlands, cultivated and areas put under development projects.

\textsuperscript{20} Reasons for the land use changes are demand of land for non agricultural purposes, expansion of state activities, technological changes, increase in population pressure, change in farming practices, indiscriminate constructions, filling of paddy fields and rise in land prices.
it was incorporated under concurrent list. Central legislation governing the same brought forest under the control of the Central Government. The Forest Act, 1927 and the Forest (Conservation) Act, 1980 clearly lays down certain principles which states should necessarily follow.

To achieve equality in property holdings which is also another constitutional dream state law regarding land ceiling was enacted\textsuperscript{21}. Surplus lands were collected. This land was vested in state government and was redistributed among farmers\textsuperscript{22}. Later on land development programmes\textsuperscript{23} for the development of waste lands and paddy lands were introduced. Land conservancy legislation\textsuperscript{24} defined government land. This was a state legislation. Ports, harbours, coastal and allied areas are governed by central laws\textsuperscript{25}, but many of the regulation in these areas regarding building and other activities come from local bodies\textsuperscript{26}. Under many central legislation which regulates land use various authorities and departments shares the responsibility. Land coming under world heritage sites situated in different states is governed by central legislation. While the internal waters and their regulation is with state. Whatever may be the type of land, due to the federal demarcation of subjects, numerous legislations exist. There is lack of coordination between these entities. These departments have conflicting aims of administration. They lack clarity of approach in many forms of land. This creates chaos and confusion among the general public and many of land forms goes unprotected. Wetland is one of such area. Some wetlands are state governed, some

\textsuperscript{21} See the Draft National Land Reforms Policy, Department of Land Resources, Ministry of Rural Development Government of India( 2013), pp.4-5. See also the Land Reforms Act, 1963, chapter III, ss. 81-98A.

\textsuperscript{22} Ibid.

\textsuperscript{23} See the Kerala Land Development Act, 1964.

\textsuperscript{24} See the Kerala Land Conservation Act, 1957, s.3.

\textsuperscript{25} See the Indian Ports Act, 1908.

\textsuperscript{26} See the Municipality Act, 1994 and the Kerala Panchayath Raj Act, 1994.
are central and some wetlands are of internationally important ones. These legislations and authorities should be properly coordinated to achieve the aim of sustainable development.

**Limits of Proprietary Interest over Land**

In many countries wetland related legislations and planning is the result of combination of tradition, historical policies, deliberate action, institutional and cultural possibilities and informal initiatives\(^{27}\). Under the Indian federal structure, wetlands are covered by central laws, state laws, municipal laws and customary laws. In India most of the wetlands and their resources are treated as state property. There is wide variation in the extent to which the exploitation of these public resources is controlled. Rules of access to common resources\(^{28}\) such as forests, coastal zones, water bodies and wild life were nonexistent. Over time, space in the management of many wetlands under public property regimes has left the way clear for community management\(^{29}\) or for the alienation of the area for private use\(^{30}\). However the national legal systems do not provide tenure and access for local or indigenous people\(^{31}\) who had conserved high levels of biodiversity. Frequently this absence of defined property rights or legal responsibility in wetland has undermined a sense of collective responsibility\(^{32}\). In broader context leases and concessions to


\(^{29}\) In the long run, government has realized the need for community participation in forest management and devised programmes for the same.

\(^{30}\) Private participation in the management of common property resources is the trend of administration. Example is privatization of lakes in Bangalore. Even the Central Policy relating to land use in 2013 considers this as good governance measure for conservation.

\(^{31}\) Adivasis who were considered as the eyes and ears of forest were evicted from there after the enactment of the Forest Act, 1927. Not only that they were not given any right to forest produce and places for alternative settlement even under the Forest (Conservation) Act, 1980.

coastal and inland wetlands have historically been granted to third parties for commercial or recreational purpose ranging from mineral extraction to tourism. Many such instruments predate the enactment of stringent land use controls or environmental protection legislation. It is extremely difficult under national legal system to cancel or refuse to renew existing wetland leases, to evict unlawful users of wetlands or to require restoration of previously drained or modified wetlands\textsuperscript{33}. The implications for compensation can be enormous.

Where the wetland owner is different from its users there may be divergence of private and social benefits. The owner may have no interest in maintaining wetlands where the benefit go to others. Sensitive handling of change is particularly important. When private users are evicted there must be viable alternatives. If private land owners derive no advantage from maintaining wetland functions and values for the wider community\textsuperscript{34}, then there is little incentive for them to use wetland resources sustainably. Consideration of consistency between statutory, traditional and religious laws of countries is also important. Prior consultation and rationalisation is also important while dealing with such a sensitive area.

Wise use of wetlands requires maintenance of fresh water regime\textsuperscript{35} throughout the ecological units. They range from water sheds, catchments, and river basins. Catchments include upstream areas such as origin of river, downstream connections between flood plains, river mouths and ground water flows. River boundaries are not the same as political borders. It may flow through several jurisdictions. In India the position tends to be complicated. Ministry of Environment and Forest have governance over these areas. States also have


\textsuperscript{34} See the incentives which are provided in America to the owner for maintaining the wetlands under their custody.

\textsuperscript{35} Integrated river basin management is an attempt in this direction.
competency over land. Who take the primary responsibility for wetland conservation measures?

Jurisdiction over coastal areas is vested in the Central Government\textsuperscript{36}. But state and local authorities have differing degrees of responsibility for managing other parts of the coastal zone. In India internal waters and territorial sea come under state. Central Government administers the areas under the Exclusive Economic Zone. The power of land use planning authorities usually stops at intertidal zone. Planning responsibility at sea beyond tide level comes under separate Ministries.\textsuperscript{37} Different authorities in India have responsibility for conserving migratory marine species and birds. Systematic institutional coordination is necessary in this aspect. Each side of the land-sea divide is usually governed by separate legislation and there is rarely any coordination between the administrations concerned. Along with the Coastal Regulation Zone Notification, 1991 regulations ordinary planning, conservation and fisheries laws govern coastal zone. These laws were originally designed to regulate and manage other areas and activity. In the absence of institutional and legislative co-ordination it is very difficult to develop integrated management of coastal areas. Coastal wetlands suffer from narrow institutional remits that fail to take account of the complex functions and values of certain habitat type. Mangrove forest ecosystems in particular are known to have multiple functions of great economic importance. However administrative responsibility to mangroves is entrusted to forestry authorities without any statutory duty to consider fisheries and other values when exercising their functions.

\textsuperscript{36} See the Coastal Regulation Zone Notification, 1991.
The Constituent Assembly that framed India’s Constitution did not specifically consider the question whether the Parliament or state legislatures should regulate the environmental matters relating to use of land. Instead, the distribution was influenced by distribution of environmental matters within three lists of the Government of India Act, 1935. It was also influenced by the conflict between those who wish to create a strong centre and others who preferred to secure more power to states. Understandably, there was a tussle for control over natural resources such as forest and fisheries which were important economic subjects. Therefore the federal structure and the division of powers had put some tensions in matters relating to regional development and natural resources especially ‘the land’. There are about two hundred central and state legislations bearing on environmental protection which covers various aspects of land use. But the central and state laws have proved to be inadequate to meet the modern challenges of integrated management.

Classification of Land Use in India: A Statistical Survey

Indian land area was classified into five categories prior to independence. It was known as fivefold land utilisation classification. It gave a very broad outline of land use. It was not adequate enough to meet the needs of agricultural and developmental planning in the country. There was lack of uniformity in the definitions and scope of classification covered by these five broad categories. Thus it was not able to provide a comparable data. To remove these difficulties:

38 See the Constituent Assembly Debates, Constituent Assembly of India, Vol. IX (10th September, 1949).
41 Shyam Divan and Armin Rosencranz, Environmental Law and Policy in India, Oxford University Press (2005), pp.48-49.
42 These categories were : (i) forests, (ii) area not available for cultivation, (iii) other uncultivated land, excluding the current fallows, (iv) fallow lands, and (v) the net area sown.
Chapter 3  Constitutional Basis of Land use Controls

the Technical Committee on Co-ordination of Agricultural Statistics was set up\textsuperscript{43}. A new nine fold classification was suggested by the Committee. It also recommended standard concepts and definitions for all the states to follow. That incorporated forests, land put to non-agricultural uses, barren and uncultivable land, permanent pastures and other grazing lands, miscellaneous tree crops and groves, not included in the net area sown, culturable waste, and fallow land other than current fallows, current fallows and net area sown\textsuperscript{44}. The revised classification has been accepted in principle by all the states. The main purpose of the committee is to show the distribution in detail of the existing land according to its actual use. Thus the potential land-use classification is overwhelmed with several difficulties. In order to remove these and classify land based on its potential use, large amount of data are to be collected through soil surveys, land use surveys and waste land utilization surveys. With the adoption of the nine-fold classification since 1950-51 the classification before and after this became non-comparable\textsuperscript{45}. The concepts and definitions involved under this classification were standardized by the technical committee on co-ordination of agricultural statistics\textsuperscript{46}. From this classification it can be found that in India the scope for

\textsuperscript{43} The committee was set up in 1948 by the Ministry of Food and Agriculture.


\textsuperscript{45} For instance, in the old land-utilisation classification, the term 'current fallows' included the land lying fallow even up to a period of ten years in the former Bombay state and for two years in the former Punjab state whereas in the revised nine-fold classification, the current fallows have been limited to the lands lying fallow for one year only, and the term 'other fallow land' includes land lying fallow for more than one year, but less than five years.

\textsuperscript{46} Land Utilisation in India- 2008-2009

<table>
<thead>
<tr>
<th>S.No.</th>
<th>Classification</th>
<th>Area(\text{('000 ha)})</th>
<th>Percentage of the reporting area</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Total geographical area</td>
<td>328,048</td>
<td>-</td>
</tr>
<tr>
<td>2.</td>
<td>Reporting Area:</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(i)Forests</td>
<td>305,985</td>
<td>100.0</td>
</tr>
<tr>
<td></td>
<td>(ii)Not available for cultivation</td>
<td>65,928</td>
<td>21.6</td>
</tr>
<tr>
<td></td>
<td>(a)Non-agricultural uses</td>
<td>46,215</td>
<td>15.1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>16,049</td>
<td>5.2</td>
</tr>
</tbody>
</table>
extension of cultivation to new lands is limited. About 49.7 percent of the total area is being cultivated. Any shift in the pattern of cultivation ill affect the total land negatively\textsuperscript{47}.

This shows the extent of various lands existing in India. They are agricultural lands, non agricultural lands, lands put under developmental purpose, ecologically fragile and important lands, forest lands, irrigated lands, tribal lands, lands which are declared to be of international importance.

There are various legislations governing different areas of land. Legislations on them may be central or state. The tendency of federalism to limit every side of the action of governments and to split up the strength of the state among co-ordinate and independent authorities is especially noticeable. This is done to retain the difference between federal and unitary system.\textsuperscript{48} Thus the power is distributed and also subjected to the Fundamental Rights and other provisions of the Constitution. More over the constitutional framers opted for a strong centre\textsuperscript{49}. The states are entrusted with subjects of local importance such as

\begin{tabular}{ | l | c | c |}
\hline
\textbullet Barren and unculturable & 30,166 & 9.9 \\
\hline
\textbullet Other uncultivated land (excluding fallow land) & 32,500 & 10.6 \\
\hline
\textbullet Permanent pastures & other grazing land & 12,996 & 4.2 \\
\hline
\textbullet Miscellaneous tree crops & groves & 4,339 & 1.4 \\
\hline
\textbullet Culturable waste land & 15,165 & 5.0 \\
\hline
\textbullet Fallow land & 20,181 & 6.6 \\
\hline
\textbullet Fallow land other than current falls & 9,072 & 3.0 \\
\hline
\textbullet Current falls & 11,109 & 3.6 \\
\hline
\textbullet Net area sown & 141,161 & 46.1 \\
\hline
\textbullet Gross cropped area & 167,412 & - \\
\hline
\textbullet Area sown more than once & 26,251 & - \\
\hline
\textbullet Net irrigated area & 31,292 & - \\
\hline
\textbullet Gross irrigated area & 38,552 & - \\
\hline
\end{tabular}


\textsuperscript{47} R. Mahesh, “Causes and Consequences of Change in Cropping Pattern: A Location-Specific Study”, Discussion Paper No. 11, December 1999, Kerala Research Programme on Local Level Development Centre for Development Studies, Thiruvananthapuram.


\textsuperscript{49} Constituent Assembly Debates, Official Report, New Delhi, Third Reprint (1999), P.889. See the discussions regarding Entry 21 in the draft Constitution which dealt about agriculture. Sri
public order, public health, agriculture, forest and fisheries. The Concurrent List deals with some aspects of land use.

**Critical Analysis of the Constitutional Scheme**

**Duty of Central Government to Implement International Treaties on Wetlands**

Union is vested with the power to participate in international conferences, associations and other bodies\(^50\). It also confers power on the Centre to implement decisions there at\(^51\). These obligations or international standards cannot be adopted by the government to the domestic arena as such. It has to go through the process of adoption or transformation\(^52\). It means that the legislature of the nation has to create a new law adopting the same to national stream. This transformation is decided by Constitution. Various provisions\(^53\) of the Constitution mandate enforcement of international treaty obligations and maintenance of the same in which India is a party. In *A.D.M. Jabalpur v. Shivkant Shukla*\(^54\) the dissenting judgment of Justice Khanna rightly held that if two constructions of municipal law are possible, courts should lean in favour of adopting such construction as would make the provisions of the municipal law in harmony with the international law or

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\(^51\) *Ibid.*

\(^52\) The rules of international law cannot directly and *ex proprio vigour* (by their own force) be applied within the domestic sphere by national courts or otherwise. Such rules for their application must undergo a process of specific adoption by national law. The doctrine of transformation requires that rules of international law do not become part of national law of a state unless they have been expressly adopted by state. In the case of international law derived from treaties there must be a transformation of the treaties into national law. This is not merely a formal requirement but a substantive one. This alone can validate the extension of rules laid down in treaties to individuals.

\(^53\) The Constitution of India, 1950, Arts. 51(c) and 372(1).

\(^54\) *A.I.R. 1976 S.C. 1207.*
treaty obligations. Justice Khanna’s opinion was followed in *Vellore Citizens Welfare Forum v. Union of India*. Sustainable development, Precautionary principle and polluter pay principle and public trust doctrine were held to be part of environmental law of the country. In *Jolly Varghese v. Bank of Cochin*, V.R. Krishna Iyer J. held that international conventional law can be accepted to the domestic law only after it gets internalized through legislation. In the event of doubt in interpreting the national rule, it can be interpreted according to the state’s international obligation. This view was subsequently liberalized by the courts in later decisions. The present position is that provisions of convention or treaty which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution can certainly be relied up on by courts as facets of those Fundamental Rights and hence enforceable as such. In *Visakha v. State of Rajasthan*, the court observed,

“any international convention not inconsistent with the fundamental rights and in harmony with the nation’s spirit must be read into legal provisions to enlarge meaning and content thereof to promote the object of constitutional guarantee.”

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56 *Our Common Future* defined sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”. See the United Nations General Assembly Discussions (1987), p. 43.

57 Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. See the United Nations Convention on Environment Development (1992), Principle 15.

58 The ‘polluter pays principle’ states that whoever is responsible for damage to the environment should bear the costs associated with it.

59 The ‘Public trust doctrine’ states that certain natural resources are held by the sovereign in trust and on behalf of all the citizens because of their unique characteristics and central importance.


Therefore it can be concluded that the center is having power to legislate on any subject of international treaty in which India is a signatory. Land use regulations also have fallen within that. International conventions bearing on environment covers various aspects of land also. Thus the implementation of international obligations considering national needs can be done by the centre. This is because the Constitution has vested power in the Central Government alone and only the Parliament can make law applicable to the whole country. More over land includes the character of hot biological reserve, Ramsar sites and common heritage of mankind. Based on this many legislative changes have been brought in India. Thus using this Entry the Central Government can exert controls on land use.

**Land Use Controls under the Highways Legislation**

Another article which vests power in the Central government for the control of land use is relating to highways. The National High Ways Act, 1956 and the rules farmed there under states that national highways passes through the state and it is the obligation of sate to maintain the same in proper conditions. This power extends to regulate the land which has been acquired for high way and land adjacent to that. This regulation is a restriction of ownership rights exercised by owners of that piece of land. But this restriction is directed towards common good. Along with this, another Entry in List I cast duty on the Central government to protect ancient monuments in the archeological site. Similar provision is also contained in List II. It empowers the state to protect the ancient monuments other than those declared as national importance. In a dispute which challenged

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63 See the National High Ways Act, 1956, ss. 4, 5, 6 and 8B.
64 See the Control of National Highways (Land and Traffic) Act, 2002, ss. 2(e), 23, 38.
the legality of such legislation, the court favoured the common good\textsuperscript{67}. Whether the legislation falls under List I or List II does not matter.

**Power to Legislate on Environment**

Various Entries under the State List also have bearing on land use. The Entry “land” itself falls under the State List\textsuperscript{68}. Matters which fall under category of wetland protection are water, fisheries, Mines and minerals, land and buildings. But legislative history shows that water has acquired greater importance and it could not be dealt by state legislation alone\textsuperscript{69}. Development of the concept of environment worldwide necessitated comprehensive protection of water. Just after the Stockholm conference, the Central Government enacted a legislation to prevent water pollution. Thus it could be seen that if any resource acquires national or international importance or more than one state consider that it is necessary for the centre to intervene, the Central Government can intervene. Only aim is protection of national resources rather than encroachment on the power of state to legislate on the subject. Moreover federalism does not envisage water tight compartmentalization of legislative powers. In all the Entries relating to land, states have come up with legislations. The land use board\textsuperscript{70} is the apex body which co-ordinates the works relating to the land resources. More over legislations, rules and directions for the protection of environment are an increasing phenomenon. It is based on the community needs for the integrated

\textsuperscript{67} \textit{Archeological survey of India v. State of Madhya Pradesh.} For further details see http://www.vidyasagar.net/wp-content/uploads/2014/05/SC_Copy_Kundalpur.pdf.

\textsuperscript{68} See the Constitution of India,1950, Schedule VII, List II, Entry 18.

\textsuperscript{69} See the Constitution of India,1950 , Art.253 and the enactment of the Water (Prevention and Control of Pollution) Act, 1974.

\textsuperscript{70} The Kerala State Land Use Board was established in 1975 under the Department of Planning and Economic Affairs, Government of Kerala and is functioning as a full fledged department. The Department is functioning as an agency to assist the state government to frame policies for optimum land use and natural resource management in the state, with the basic objective of providing necessary advisory support on matters related to the optimum use of land and land resources such as soil, water, plant, animal system.
environmental development. Some of the latest efforts are the Coastal regulation Notification, 1991\textsuperscript{71} and measures undertaken for protection of Western Ghats. These are issued under the Environmental Protection Act, 1986. It is an umbrella legislation which comprehensively covers environment. There are many areas in which both the Centre and state legislations coexist. Thus multiplicities of authorities without clear demarcation of powers become another problem. A comprehensive land use policy directives incorporating all aspects’ of land use has been issued by the Government of India in 2013\textsuperscript{72}. It provides the framework for land use planning and management. The principles based on which land use is to be planned are dealt in detail in this policy\textsuperscript{73}. The goal of national land utilisation policy is to achieve improved livelihood, food and water security. Policy aims best possible relation of various developmental targets so as to ensure sustainable development. Its objective is to ensure optimal utilisation of the limited land resources. Policy strives for sustainable development addressing social, economic and environmental considerations\textsuperscript{74}. It provides a framework for the states to formulate their respective land utilization policies incorporating state specific concerns and priorities. Thus the states are free to develop a policy which is suitable for their region\textsuperscript{75}. The differences between legislation could be avoided by adopting suitable changes in the basic legislation within general framework laid down by the Centre.

\textsuperscript{71} See the Coastal Regulation Zone Notification, 1991.

\textsuperscript{72} See the Draft Land Use Policy, Department of Land Resources, Ministry of Rural Development, Government of India (2013).

\textsuperscript{73} Human beings are at the centre, inclusive growth, poverty eradication and gender equality and equal opportunities, balanced development and intergenerational justice, efficient utilisation of resources and mitigation of impacts, integrated and comprehensive developmental planning, and states are custodians of land, harmonization of existing policy, legislative and regulatory framework.

\textsuperscript{74} Supra n. 72.

\textsuperscript{75} Core issues faced by the land utilisation policy in India are high growth targets; industrialisation; conservation; competing and conflicting land uses and urban and regional land use planning.
Residuary Power and Legislative Scheme

The Concurrent List under the Constitution of India gives both the Centre and states power to legislate on the subjects under it. There are many Entries, which has bearing on land use. But when the centre has come up with a comprehensive legislation, state legislation can work parallel to that. Only changes which are necessitated by the peculiar nature of the state can be brought in each state while implementing the legislations. Every Entry under the Concurrent List is of great value to the national economy. Therefore the central legislations work more in this field rather than the piecemeal legislations by states.

The Constitution of India vests, residuary power on the parliament. Similarly Article 253 empower the Parliament to make law for the whole or any part of the territory of India for implementing the treaties and international conventions. In other words the normal distribution of powers will not stand in the way of the parliament in passing any law for giving effect to an international obligation even though such law relates to the Entry in the State List. The treaties can be implemented only through legislations and they cannot operate by themselves. But these legislations are subject to constitutional limits of Fundamental Rights. Along with this, under Article 249 power is given to the parliament to legislate. According to the Article if the Rajya Sabha passes a resolution supported by 2/3 of the members present and voting that it is necessary and expedient in the national interest that the Parliament should make laws with respect to any matter enumerated in the State List, then it shall be lawful for the Parliament to make laws for the whole or any part of the territory of India with respect to the matter so long as the resolution remains in force. Such a resolution

76 See the Constitution of India, 1950, Art. 248
last for one year and it can be renewed. Besides the above constitutional provisions, there are many policies and programmes in India that promote sustainable development and management of land resources\(^{78}\).

All these lead us to the specific question whether the scheme provided by the Constitution is adequate enough to meet the challenges of today. Historical evolution of land use controls has made it clear that land is considered as common property over which the *eminent domain*\(^{79}\) of the state can be exercised for the *salus populi*\(^{80}\). But problem arises when the land is within the individual ownership. The registered ownership conferred on the owner of property vest him with the title to use it and maintain its quality and pass a valid title to his successor or pass with a better quality. But when the owner misappropriates the title of exclusive use given to him what are the exact controls which can be placed on him? The constitutional scheme referred above does not give a correct answer. If the ultimate owner of land is state whether the rights conferred on the individuals are not absolute. Another area of special consideration is, when the government owns lands. When they come under various legislative authorities what are the mechanism appropriate to meet the situation\(^{81}\). All these lead us to the answer that the Constitution provides only fragmental or piecemeal approach\(^{82}\). Legislative and administrative scheme envisaged by the Constitution should be reorganized to meet the situation. When there are overlapping areas these are to be redressed amicably by proper policy on land use. A comprehensive

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\(^{80}\) *Id.*, p.55.

\(^{81}\) The problem particularly arises with the intertidal areas, coastal areas, specially challenged areas such as mangroves, estuaries, particularly sensitive sea areas etc.

law covering all aspects of land use can help the situation. This acquires
importance in the implementation of international conventions. Judiciary is also
not providing any clear answer to this problem. A specific entry incorporating the
term environment is absent in the constitution. The incorporation of the same can
make situation clear.

**Legislative Conflicts under Federal Constitution U.S. Approach**

It would be appropriate to analyze the constitutional scheme adopted by the
United States to meet challenges arising in the centre state relations. In 1868,
Michigan professor and an eminent jurist, Thomas M. Cooley published the first
edition of his classic ‘*Treatise on Constitutional Limitations*’. There he described
the powers of sovereignty: the eminent domain; the power of taxation; and the
police power exercised by the State. His contribution is given below,

> Judicial decisions, legal treatises, and historical events, as a convenient guide”. He undertook the task of considering the constitutional limitations that restrict the exercise of these sovereign powers. Cooley wrote in “full sympathy with all those restraints . . . upon the exercise of the powers of government,” thus leading the way in safeguarding vested rights and private property.”

Early in the twentieth century the mood shifted. In 1921 jurist Benjamin N.
Cardozo pioneered “sociological jurisprudence.” He argued that “the final cause
of law is the welfare of society” and that existing legal principles and judicial
precedents should be “extended or restricted” so as to fix the path of the law in the
direction of “justice and general utility.”

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“Property . . . though immune under the Constitution from destruction, not immune from regulation essential for the common good.”84

Cardozo’s argument carried the day as progressive jurists fluidly and dynamically interpreted the Constitution so as to legitimize land planning, zoning, slum clearance, and urban renewal85. But situation is different now.

“Regulations, rather than promoting the common good, may be designed to . . . force some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”86

Recently the U.S. Supreme Court reconsidered various constitutional provisions to call into question the legitimacy of land-use controls, environmental regulations, economic restrictions, and public exactions. Thomas Cooley’s ‘Constitutional Limitations’ once again gained significance the jurisprudence. It seems to be the time to readdress the clash between sovereignty and property. This compilation does so by presenting a number of cases from over the two hundred year history of the American Republic. Many a time Courts have considered the legitimacy of government intervention in private affairs. It took a detailed look at the constitutional history behind many of the legal controversies relating to the legitimacy of government-sponsored wealth redistributions, the mobility boundary on federal power; the public use limitation on eminent domain and the tension between government authorities.

85 Garrett Power, Constitutional Limitations on Sovereignty, Social Science Research Network (2014).
86 Armstrong v. United States 364 U.S. 40 (1960), p. 49. Since 2012 decision addressing the constitutionality of the Affordable Care Act considered many of the same issues.
Conclusion

The Commission on Centre State Relation\textsuperscript{87} on legislative matters recommended the incorporation of a provision on environment to meet the challenge relating to wetlands. This particular constitutional provision has to see the two challenges such as (a) the relationship of man with nature and (b) the dichotomy which emerges between development and livelihood on the one side and needs of conservation on the other. The Constitution cast a duty on the State to secure a social order. This social order is necessary for the promotion of the welfare of the people. It should inform all the institutions of national life\textsuperscript{88}. This requires the State and the citizens to protect and improve the natural environment\textsuperscript{89}. These provisions in a manner cover aspects both of development and livelihood as well as protection and development of environment and natural resources. But this scheme is found inadequate to meet the emerging challenges.

History reveals the compromising nature of man with nature earlier. But the picture is different in the existing state of environment. It would be difficult to sustain and support development and livelihood unless the natural systems are secure. Conservation and only ‘wise use’ of resources\textsuperscript{90}, either protecting certain resources as such and in some cases sustainable utilization without depleting the resource base can meet the situation.


\textsuperscript{88} See the Constitution of India, 1950, Art.38.

\textsuperscript{89} Id., Art. 48A and 51A.

It is clear that issues on environment, resource depletion, pollution and consequent climate change threaten the nation as well as the global community. The basic law of land needs to adopt the changes through its provisions. These are brought in through the Constitutional amendments. The attempt was to influence the state policy through the Directive Principles and Fundamental Duties provisions. These changes are brought in the State Policy, individual's behavior towards environmental issues and also by providing an important role to local bodies. But these are not adequate to suit the complex situations. Some available options before the Government are (a) stronger Constitutional statements or (b) incorporation of specific Articles in the text of the Constitution on matters concerning the environment (c) conferment of specific legislative powers according to the basic Constitutional scheme under the Seventh Schedule to the Constitution to the Centre.

Many Constitutions of other nations have provisions for Constitutional statements on important issues. Indian Constitution does not provide for such elaborate statements. The substance of such vital issues which guide the state and citizen are contained in the Articles relating to the Directive Principles and Fundamental Rights and Duties. These have already been done and further detailing them would not make any difference.

91 See the Constitution of India, 1950, the 42nd, the 73rd and 74th Amendments.
93 The South African Constitution of 1996, Art. 24 say “everyone has the right…. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that….. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development”.
The Venezuelan Constitution Art. 127 run as follows –“It is the right and duty of each generation to protect and maintain the environment for its own benefit and that of the world of the future….. it is a fundamental duty of the State, with the active participation of society, to ensure that the populace develops in a pollution-free environment in which air, water, soil, coasts, climate, the ozone layer and living species receive special protection, in accordance with law”.
Similarly the Constitutional structure does not provide for individual subjects being the subject matter of legislation either by the Union or states to be dealt with separately in the body of the text. All such subjects are provided for in the Seventh Schedule. Although the issues relating to environment is of the greatest importance it is neither necessary nor desirable to disturb the well considered structure of the Constitutional provisions.

The third option is a viable and desirable one. It is suggested that the scope of Entry 20\textsuperscript{94} in the Concurrent List can be extended and a new Entry. It can be entitled as “Environment and Ecological Planning for natural resource use and management”. Such an Entry would definitely provide a legislative focus to all environmental issues. This could have effect on the role which the Centre and States are already performing by virtue of Entry 20. State List empowers states on matters concerning land, agriculture, water and minerals. State plays a vital role in these matters. Balance in these issues is tilted with the issues relating to environment. The specific legislations concerning the natural resources can take care of environmental issues.

The examination on environmental issues relating to land use has led to the conclusion that what is lacking is a clear policy directive concerning the natural resources. There should be set of basic actions which encompass all activities relating to natural resources. Even if there is variations in the use of agencies, and in programme contents the essential features should be similar. Such a national focus and clear unambiguous direction can be done through the constitutional provision. Earlier method namely indirect\textsuperscript{95} mode of legislation need not be

\textsuperscript{94} See the Constitution of India,1950, Schedule VII, Entry 20 deals about Economic and Social Planning.

\textsuperscript{95} The Water (Prevention and Control of Pollution) Act, 1974 was promulgated under Article 252 even though water was a State subject. On the other hand, the Air (Prevention and Control of Pollution) Act, 1981 and the Environment (Protection) Act, 1986 were promulgated under Article 253.
resorted to on environment. In the landmark decision of the Supreme Court *T.N. Godavarman Thirumalpad v. Union of India*\(^96\), the Court delinked ecology from land and its ownership.

"Ecology is not a property of any State but belongs to all being a gift of nature for the entire nation."

The Court has taken away legal jurisdiction which the states may have claimed on the basis of territorial jurisdiction. Environment and ecology are no more merely physical attributes but very life blood of the nation. The Union must hence be empowered by a clear Entry in List I of the Seventh Schedule. Through this state’s authority to administer the natural resources should not diminish. On the other hand it should help in integration with executive authorities across state boundaries. This Entry can be titled as ‘Environment, Ecology and Climate Change’. This would enable the Centre to formulate a comprehensive Policy Statement on Environment issues, to bring in legislation as and when required, to fulfill its international obligations and provide institutional mechanisms for coordination involving states, local bodies and elements of civil society.

The observation made by judiciary with regard to this issue in an important one and can be beacon light in this situation\(^97\). The Court said that the state in exercise of its power under Art.162\(^98\) of the Constitution can issue executive directions in relation. Therefore based on the Entries assigned to states, there cannot be any doubt that it has requisite jurisdiction to issue executive instructions in relation to the

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\(^96\) A.I.R. 1997 S.C. 1228.


\(^98\) The Constitution of India,1950, Art. 162 states that Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:

Provided that in any matter with respect of which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.
matters covered under its legislative competence. If therefore any of such instructions have been issued, those cannot be said to be bad in law. The argument that such restrictions would amount to deprivation of property under Art 300 A is not valid. A person, in terms of Art.21 of the Constitution cannot take recourse to or earn his livelihood by violating the provisions of any law. Therefore the state has the right and duty to regulate the activities affecting public as well as private land use, considering the aspect of sustainable development.