## Abstracting 'Community Participation'

### Identification of the Research Question

In an increasingly globalized world, cross-border environmental harm has spurred collaboration between state, private, international and transnational entities to protect the environment and manage natural resources. This collaboration has led to the emergence of 'Global Environmental Law[1]' (GEL) and a surfacing of globally recognized principles across environmental legal regimes such as Environmental Impact Assessment (EIA)[2]. GEL principles including EIA now require community participation[3] in decision making processes that may have an impact on the environment, to varying degrees. The need for 'community participation' has also taken the form of a global environmental law 'norm' due to various conventions[4]. While many formal[5] and academic analyses[6] point toward its 'need', research on what exactly community participation entails within environmental law scholarship is thin in the 'global south', and unexamined in the Hindu Kush Himalaya, or the 'Third Pole', a crucial region that directly and indirectly sustains almost 2 billion people and livelihoods.

Considering community participation to be a self-fulfilling prophecy (the more of it, the better) in environmental law scholarship may be immature, as warnings from within[7] and outside[8] the discipline have shown. One recurring reason for this has been the high levels of expertise needed

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[1] Yang, T., & Percival, R. V. (2009). The emergence of global environmental law. Ecology Law Quarterly, 36(3), 615-664. The authors define Global Environmental Law as:
*"law that is international, national and transnational in character all at once" and "the set of legal principles developed by national, international and transnational environmental regulatory systems to protect the environment and manage natural resources".*

[2] *Ibid* at 627.

[3] Craik, N. (2019). The Assessment of Environmental Impact. In Lees, E., & Viñuales, J. E. (Eds.). (2019). *The Oxford handbook of comparative environmental law.* (First edition.). Oxford, United Kingdom: Oxford University Press.

[4] Roda Mushkat, Public Participation in Environmental Law Making: A Comment on the International Legal Framework and the Asia-Pacific Perspective, 1 Chinese J. INT'l L. 185 (2002).

[5] The Intergovernmental Panel on Climate Change, in its 2018 special report has made it clear that community participation in governance is essential to helping nations limit global warming to 1.5°C above pre-industrial levels. This would require "*building the capability to utilize indigenous and local knowledge*" as a part of enhancing institutional capabilities, according to Chapter 4 of the report. The need for 'bottom-up' localized governance is also fundamental to a prosperous and resilient 'Hindu Kush Himalayan (HKH)' region, according to the recent HKH Assessment report published by the International Centre for Integrated Mountain Development, covering a region of crucial geopolitical importance shared by China, India, Pakistan, Nepal, Bhutan, Afghanistan, Myanmar and Bangladesh.

[6] Ebbesson, J. (2008). Public Participation. In Bodansky, D., Brunnée, J., & Hey, E. (Eds.). (2008). *The Oxford handbook of international environmental law.* (First paperback ed.). Oxford: Oxford University Press.

[7] In context of the United States, Prof. Mihaly provides for a succinct explanation in Mihaly, M. B. (2009). Citizen participation in the making of environmental decisions: Evolving obstacles and potential solutions through partnership with experts and agents. Pace Environmental Law Review, 27(1), 151-226.

[8] Baviskar, A. (1995). *In the belly of the river: tribal conflicts over development in the Narmada Valley.* Delhi: Oxford University Press.

to take environmental decisions, something lay persons do not possess[9]. Studying concerns and justifications of 'community participation' in *context* of the HKH region within India, straddles realms of comparative environmental law, principles of 'dignity and fraternity[10]', and the perceived 'immaturity[11]' of environmental law scholarship.

The research question therefore proposed, in context of the HKH, is as follows:

What are the conditions under which the act/concept 'community participation' transforms into an analytical tool in comparative and international environmental law scholarship?

In other words, I propose to explore the 'content' of the act/concept of 'community participation' within comparative and international environmental law scholarship, as a starting point, rather than its 'need' under the auspices of environmental law and policy.

## Justification

Community participation represents a potential 'turn-onto-itself', in environmental law scholarship. This is to say that while environmental laws requiring greater participation from civil society are increasingly being transplanted and recycled across jurisdictions[12], in an emerging global dimension of environmental law, 'participation' takes place in hyperlocal scenarios, where communities interact with administrative bodies through various channels including public hearings and protest[13]. In other words, it is at once, global and local in its underpinnings, placing it squarely within the emerging discipline of global law. Therefore, 'community participation' has the potential to be an instrumental tool of reflecting on existing 'top-down[14]' doctrinal understandings which inform environmental law and scholarship, helping scholars zoom out of, and zoom into local contexts. These internal ebbs and flows within the act/concept of 'community participation' warrant rigorous scholarly inquiry, requiring us

[9] *Supra* note 7. See also Mushkat, R. (2002). Public participation in environmental law making: comment on the international legal framework and the asia-pacific perspective. Chinese Journal of International Law, 1(1), 185-224 at 208.

[10] India., & In Sankaranarayanan, G. (2014). Preamble. In *The Constitution of India*.

[11] Fisher, E., Lange, B., Scotford, E. & Carlarne, C.. (2009). Maturity and Methodology: Starting a Debate about Environmental Law Scholarship. Journal of Environmental Law, 21:2, 213-250.

[12] Marsden, S. (2019). International Legal Transplants. In Marsden, S. (2019). *Protecting the third pole: transplanting international law.* Cheltenham, UK: Edward Elgar Publishing Limited.

[13] For an environmental humanities perspective on the nature of interaction of communities with the government in context of hydropower dam construction in Northeastern India, see Karlsson, B. G. (2016). Into the grid : hydropower and subaltern politics in northeast India. In Chandra, U., & Taghioff, D. (Eds.). (2016). *Staking claims: the politics of social movements in contemporary rural India.* (First edition.). New Delhi, India: Oxford University Press.

[14] *Supra* note 1. For a commentary on Indian environmental legislation, see Desai, B. H., Sidhu, B. K. (2019). India. In Lees, E., & Viñuales, J. E. (Eds.). (2019). *The Oxford handbook of comparative environmental law.* (First edition.). Oxford, United Kingdom: Oxford University Press. For a description of the evolution of U.S Environmental Law from 'top-down' to 'multi-modal', see Arnold, C. (2011). Fourth-generation environmental law: Integrationist and multimodal. William & Mary Environmental Law and Policy Review, 35(3), 771-884.

scholars to, as Andrew Harding suggests '*shed our jurists' cloaks, equip ourselves with thick notebooks, immerse ourselves in context, and acquire as much local knowledge as possible*[15]'.

'Participation' in democracies has been the subject of scholarship within the western legal academy[16], and outside it, in education theory[17]. However, its depiction in environmental law scholarship in the South Asian region has been tokenistic, to some degree. This is to say that participation is understood as a 'procedural requirement'. The 'degree' or 'quantum' of participation, is perhaps the most common way in which it is understood by environmental law scholars[18] of this region.

In the South Asian region, the fabric of society is more communitarian than individualistic[19], making it difficult to simply 'apply' notions of 'participation' from the U.S and E.U to this region, where people see themselves as part of a larger community, and ecology. Simultaneously, questions[20] that are raised about 'participation' of citizens in environmental decisions, in environmental law scholarship from the U.S and E.U. are difficult to apply, in a straightforward way, in South Asia, without engaging in a comparative law project. However, environmental laws in the South Asian region are often transplanted[21] from these jurisdictions, without emphasis to context, both of the host and receiving socio-legal systems. This transplantation is taken for granted in environmental legal scholarship[22], risking treating 'participation' to an end in itself, and a hollow procedural requirement.

Understanding 'community participation' through contextualizing legal sources and scholarship, from the U.S and E.U, in the community fabric of the HKH in the South Asian region begins the process of unveiling the conditions under which its content can be understood – Which portions of laws requiring community participation from host systems carry over, and which don't? Why do the ones that do, do and the ones that don't, don't? What are the fissures within the act/concept of 'community participation', as it is understood by the law, that come up, when in processes of transplantation across thousands of miles? If one were to be more ambitious, what are the conditions under which this act/concept works for the people of the HKH and when can one conclusively say that the participation of a community in environmental decision making worked?

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[15] Harding, A. (2002). Global doctrine and local knowledge: Law in south east asia. International and Comparative Law Quarterly, 51(1), 35-54.

[16] For a representative article on participation understood using the concept of 'dignity' see, Gius, A. M. (2018). Dignifying participation. New York University Review of Law & Social Change, 42(1), 45-92. For an introduction to the benefits and shortfalls of participation by private actors in governance in U.S Administrative Law, see Freeman, J. (2000). The private role in the public governance. New York University Law Review, 75(3), 543-675.

[17] Dewey, J. (n.d.). *Democracy and Education*. Project Gutenberg.

[18] Ghosh, S. (2013). Demystifying the environmental clearance process in india. NUJS Law Review, 6(3), 433-480.

[19] Routh, S. (2011). Experimental learning through community lawyering: proposal for indian legal education. Pacific McGeorge Global Business & Development Law Journal, 24(1), 115-160.

[20] *Supra* note 7.

[21] *Supra* note 12.

[22] Twining, W. (2005). Social Science and Diffusion of Law. Journal of Law and Society, 32:2, 203-205.

## Relevance

Although legal scholars have devoted effort towards studying transplants of laws to, and within the third pole and HKH[23], and the South East Asian regions[24], there is immense scope for understanding the act/concept of community participation in this area, especially considering parallel efforts to understand regional dynamics from the environmental humanities perspective. In addition to having the potential for driving a local[25] turn to global environmental law, it potentially also serves as a 'node' or 'link' between sub disciplines of the law such international, constitutional and administrative law, and the discipline of environmental humanities for reasons of the inherent nature of participation: it invokes concepts of dignity, freedom of expression, decentralization, identities, claims, and movements of the indigene and other constituencies in the HKH, and the colonial presence that this region has encountered, in the past. Research on the nature of these links is increasingly relevant to enriching environmental law scholarship of this region, creating pathways to similar/divergent research across the transnational HKH on the one hand, and the act/concept of 'participation', a feature of global environmental and administrative law, on the other.

The HKH, within the Northern Indian districts of Kinnaur and Kangra help 'launch' and make 'feasible' a contextual comparative effort due to their relatively low, and largely educated population of about 1.7 million, heightened vulnerability to global warming, established to some degree in raw data contained in government records, anthropological and scientific research[26]. This region is located in an area of land measuring 4687 square miles, in the northern part of India, beneath the contested province of Jammu and Kashmir, and relatively close to both the China and Pakistan borders with India. Spanning an elevation range of 427 to 6816 meters above mean sea level, it is, to a degree, representative of the larger HKH and third pole region within the South Asian Association for Regional Cooperation and the contested Tibetan plateau of China. Studying 'community participation' in the HKH region within global environmental law scholarship is of significant relevance considering its geographical significance as the largest area of permanent ice cover outside the north and south poles of the planet, giving rise to major river basins including the Ganga, Indus and Brahmaputra[27], on which about 1.9 billion people depend directly and indirectly in the Asian continent.

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[23] *Supra* note 12. See also Harding, A. (2001). Comparative Law and Legal Transplantation in South East Asia: Making Sense of the "Nomic Din". In Nelken, D., & Feest, J. (Eds.). (2001). *Adapting legal cultures.* Oxford: Hart Pub.

[24] *Ibid.*

[25] Harding, A. (2002). Global doctrine and local knowledge: Law in south east asia. International and Comparative Law Quarterly, 51(1), 35-54.

[26] Rahimzadeh, A. (2018). Political ecology of land reforms in Kinnaur: Implications and a historical overview. *Land Use Policy, 70,* 570–579. Baker, M. (2005). *The kuhls of Kangra: community-managed irrigation in the Western Himalaya.* Seattle: University of Washington Press.

[27] Chettri, N., Shakya, B., Thapa, R., & Sharma, E. (2008). Status of a protected area system in the Hindu Kush-Himalayas: An analysis of PA coverage. The International Journal of Biodiversity Science and Management, 4(3), 164–178.

## Indicative Building Blocks

### Part I: Descriptive

I. Laying out the Himalayan method: The critical legal and ethnographic sub-methods and their linkages, and divergences are explained. Major debates shaping the sub-methods are explained. A map of the method, its application across the thesis, and representative utility for the third pole is drawn.

II. Mapping the terrain of the Area of Study (area) in the HKH: As Fisher notes, '*mapping provides a means for developing a more spatial and temporal geography of the subject, which is an important step in analyzing areas of environmental law more critically*[28]'. The thesis begins with locating the Kangra-Kinnaur region, as a representative section of the HKH. Justifications and concerns of treating the terrain as representative of the HKH are presented. Secondary literature on the cultural (community), material (biodiversity), and legal (customs, codes, rules, laws, policies, regional and international representations in the law) reflections of the area, in this initial exercise, sets the tone for comparative and critical legal analyses.

III. Mapping community dynamics in the area: The interaction of the communities, with the materiality and legality in the area is added to the map, within a representative and feasible time frame. The time frame chosen is justified and limitations established. These interactions will consist of formal legal, informal (demonstrations, protests, gatherings, other kinds of organizing and contention[29]), and those representative of the undercurrents of dynamics identified across the HKH, through secondary literature. From the map of interactions over the chosen time frame, case studies for ethnography are selected. The selection is justified.

IV. Ethnographic description from selected case studies: The chosen case studies are described, and the ethnographic method, as it applies to these cases is justified, and its limitations established. Accounts from various kinds of participation are quoted, and organized in the mapping undertaken, according to a diversity of variables including elevation above mean sea level, in different sub-terrains of the area, and ultimately, as environmental legal issues.

### Part II: Analytic

V. The Map, comparatively: The various environmental legal structures operating in the area are brought within a single space for critical comparative analysis. Various combinations of hyperlocal, national, regional, international, and global environmental legal structures implicating the communities of the area are compared, anchored in the case studies. The enmeshment, hybridization, and divergences of

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[28] *Supra* note 11.

[29] Tarrow, S. G. (2011). *Power in movement: social movements and contentious politics.* (Rev. & updated 3rd ed.). Cambridge: Cambridge University Press.

these structures is analyzed critically. A single comparative picture of 'community participation' is presented, as a description.

VI. The Map, through Third World Approaches to International Law (TWAIL): The map as it is reflected in TWAIL's recent resurgence in interaction with International Environmental Law, in order to 'lift' the map in the analytic realm of critical international legal approaches, from the positionality of the HKH in the 'Third World'. The dynamics of 'community participation' in the area are analyzed from the TWAIL sub-method, in order to excavate the linkages of the area dynamics with the broader undercurrents and power structures that TWAIL scholars have been trying to make visible in International Environmental Law.

VII. The Map, in Critical Environmental Law: The case studies, within the dynamic map, are analyzed beyond the temporal, and disciplinary limitations applicable on the thesis till now, rendering these within the CEL 'surface' (described in the methodology section). 'Community Participation' is repurposed as a 'body' on this surface.

VIII. Linkages, and ruptures: 'Community Participation' is understood through the linkages and divergences within the sub-method analyses previously done, and an 'abstracted' image of community participation in the Himalayan Method is presented.

IX. Reapplication: The abstraction is then applied again to the specific case studies, to test if 'community participation' can be used as an analytical tool, in these cases studies, and across the region.

X. Conclusion, application, and future prospects: The mapping and analysis of community participation through the Himalayan Method ends, with remarks on application to other act/concepts in environmental law, and regions across the world. Future research on applications is identified.

## Review of Literature

### Formal Participation

The act/concept of 'participation' has long been associated with theories of democracy[30] and the role of citizens therein. The protective form of democracy, proffered by Schumpeter, an Austrian, in Capitalism, Socialism, and Democracy[31] (1942), interprets democracy as a value neutral method which circumscribes broad participation, through the selection of decision makers through competitive voting. After the process of voting concludes, citizens are reduced to consumers of decisions made by their elected leaders, and their scope of participation reduces manifold.

In modern democratic theory and administrative law, the formal (rational, elitist, top-down, procedural) view of participation, is represented by utlilitarian/rationalist theories of expertise

[30] Pateman, C. (1970). *Participation and democratic theory.* Cambridge [Eng.]: University Press.
[31] Schumpeter, J. A. (1994). *Capitalism, Socialism and Democracy.* Routledge: Routledge.

and legal pluralism. Political scientists belonging to the latter were strongly influenced by Schumpeter's views, in that they espoused stable forms of governments without broad based public participation, which in their view, threatened to destabilize liberal democratic values[32]. In the 'expertise' model (also called the public interest model[33]) suggests that agency officials could do with minimum participation, considering their expertise and a prescribed legislative mandate[34]. To prevent agencies from becoming completely unaccountable and within legislative boundaries, those who propound the expertise mode suggest the inclusion of a regulated community of private interests. These views are echoed (albeit watered down to make room for divergent interests) by legal pluralists, which consider administrative agencies as largely independent decision makers in a democracy, required to consider private views, but ultimately acting on their own accord, under the constraints of judicial review[35]. In legal pluralism, participation matters only to the extent that the interests of participants are aggregated and acted upon by established institutions in a democracy, such as administrative agencies. Richard Posner espouses the protective form of democracy, by reducing citizens to disinterested political entities, that act similar to consumers, and as long as they do, the invisible hand of market forces manifests through decisions made by elected representatives and agencies[36].

A hybrid of these theories are in many ways, central to modern governmental environmental decision making[37], and reflected in administrative state's functioning, based on the view that the biological and physical constraints (or carrying capacity) of the planet are somewhat independent of competing socio economic actors[38]. Therefore, it is expert opinion, based on scientific methodology that informs government policy on planetary constraints, rather than public participation. Participation carries utility only when it directs policy choices made by agencies towards better scientific temperament. To the extent that agency choices, as scientific as they might be, ultimately involve value judgments[39], environmental decision making is also impacted by legal pluralist thought. Therefore, in passing legislation, the aim of legislatures is to capture as many interests (industrial, transport for example), while operating within expert mandated boundaries, informed by carrying capacity of the biosphere. Decisions made by agencies under environmental legislation, therefore, reflect various interests in society, in a system which regards participation as a representation of ultimately self-interested parties[40]. The pluralist

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[32] Piomelli, A. (2006). The democratic roots of collaborative lawyering. Clinical Law Review, 12(2), 541-614.
[33] Freeman, J. (2000). The private role in the public governance. New York University Law Review, 75(3), 543-675.
[34] Stewart, R. B. (1975). The reformation of american administrative law. Harvard Law Review 88(8), 1667-1813 at 1675.
[35] *Ibid.*
[36] Posner, R. A. (2005). *Law, pragmatism, and democracy.* Cambridge, Mass.: Harvard University Press.
[37] Plater, Z. J. (1996). Environmental law as mirror of the future: Civic values confronting market force dynamics in time of counter-revolution. Boston College Environmental Affairs Law Review, 23(4), 733-780.
[38] *Supra* note 7.
[39] Latin, H. (1991). Regulatory failure, administrative incentives, and the new clean air act. Environmental Law 21(4), 1647-1720.
[40] Gauna, E. (1998). The environmental justice misfit: Public participation and the paradigm paradox. Stanford Environmental Law Journal, 17(1), 3-72 at 21.

theory, though more open to liberal democratic side of formal participation, has been interpreted as effectively capturing citizen voices in a '*seamless web of bureaucratic control and coordination*[41]'.

Broadly, the formal model of participation is one where the government initiates participation through notification or rule-making, in a top down[42] model, and has less to do with the substantive, rights centric justifications of participation (such as the right to live in a healthy environment)[43].

## Engaged Participation

There has been a parallel entrenchment of engaged (deliberative, bottom-up, substantive) participation in democratic theory. Literature shows that its justification has coalesced around principles of liberty, equality, dignity, and fraternity. The view that democracy is self-government goes back to Athenian times, where democracy was viewed as providing political power to ordinary people[44], as a way of rejecting hierarchy, amongst the elites and common people (although Athenian democracy was restricted to men who formed only about one sixth of the population[45]). This was an understanding that citizens governed each other, and no one was in a better position to have the sole power to make decisions for others[46].

These notions of the inherent 'dignity[47]' of citizens have parallels in other participative interpretations of democracy, such as in pragmatism, by John Dewey. In 'The Ethics of Democracy' (1888)[48], he argued that democracy is more than a mere procedural requirement, but a way of life, a form of moral and spiritual association between all citizens, meant to percolate through all institutions, including schools, families, and the workplace[49]. He saw democracy as an associated way of living, where each individual was interdependent with the other, in the process of leading life, leading to widening of an 'area of shared concerns'[50]. This interdependence was based on a deep seated faith in the capabilities and intelligent judgment of all citizens in this area of shared concern[51]. Therefore, individuals could realize their full

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[41] Richardson, B., Razzaque, J. (2006). Public Participation in Environmental Decision Making. In Richardson, B. J., & Wood, S. (Eds.). (2006). *Environmental law for sustainability: a reader.* Oxford: Hart Pub.
[42] Langton, S. (Ed.). (1978). *Citizen participation in America: essays on the state of the art.* Lexington, Mass.: Lexington Books.
[43] *Supra* note 41.
[44] Ober, J. (1998). *Political dissent in democratic Athens: intellectual critics of popular rule.* Princeton, N.J.: Princeton University press.
[45] Piomelli, A. (2006). The democratic roots of collaborative lawyering. Clinical Law Review, 12(2), 541-614 at 561.
[46] Dahl, R. A., & Shapiro, I. (2015). *On democracy.* (Second edition.). New Haven: Yale University Press.
[47] For a succinct working definition of dignity, see Waldron, J. (2012). How law protects dignity. Cambridge Law Journal, 71(1), 200-222 at 202.
[48] Dewey, J. (1993). *The political writings.* (D. Morris & I. Shapiro, Eds.). Indianapolis: Hackett Pub. Co.
[49] Dewey, J. (1998). *The essential Dewey.* (L. A. Hickman & T. M. Alexander, Eds.). Bloomington: Indiana University Press.
[50] *Supra* note 17.
[51] Dewey, J. (1947). *Creative democracy: The task before us*. Washington, D.C: National Education Association.

potential only in an association with others, in all institutions, within a democracy[52]. These thoughts of Dewey on Democracy have found fertile ground across participative democratic movements of the world, from the Students for Democratic Society's Port Huron statement and way of operating 1960s U.S[53] (associated with the civil rights movement, and at the same time that legal pluralism and environmental consciousness[54] was gaining traction), to Dr. B.R Ambedkar's writing and politics in uplifting lower castes in India during the 1930 and onwards till his death in 1956[55]. In fact, the inclusion of the principle of fraternity in the preamble to the Indian Constitution at the instance of Ambedkar can largely be attributed to Dewey, who taught him[56]. Though Dewey's thoughts had considerable influence in the humanities (political theory) in the 20th century, its reflection in legal thought was not as pronounced, till the 1960s in the U.S[57], when it saw resurgence in the form of critical legal studies and neo-pragmatism, inspired by his communitarian ideas[58]. Dewey has been sparingly used by collaborative, and environmental legal theorists[59].

In the latter half of the 20th century, at about the same time as the resurgence of pragmatism in the legal academy, criticism of legal pluralism started taking root in civil republicanism (or neorepublicanism), rooted in ethics of civic virtue and aristotliean thought[60]. For civic republicans, the value of participation lies not only in creating aggregated preferences to influence agency decisions, but also to inculcate civic and deliberative virtues in the citizenry[61]. In this sense, similar to Dewey's 'area of shared concerns', participation does not mean aggregation of choices made out of self interest, but is an expression of common good grounded in a deliberative non-hierarchical community[62]. The civic republican ideal of deliberative civic virtue also has parallels in thoughts of Rousseau on participation (although he focused on individuals, not communities), which he considered to have dual values of protecting (private interest) and educative (effect on participants)[63].

Although the literature on both broad schools of participation: formal and engaged, is extensive, especially in disciplines other than the law[64] (though work on the public trust doctrine, that is the

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[52] *Supra* note 48.
[53] Miller, J. (1987). *"Democracy is in the streets": from Port Huron to the siege of Chicago.* New York: Simon and Schuster.
[54] Carson, R. (2002). *Silent spring.* (40th anniversary ed., 1st Mariner books ed.). Boston: Houghton Mifflin.
[55] Mukherjee, A. (2009). B. R. Ambedkar, John Dewey, and the Meaning of Democracy. *New Literary History*, *40*(2), 345-370.
[56] *Ibid.*
[57] Posner, R. A. (1990). What has pragmatism to offer law. Southern California Law Review, 63(6), 1653-1670.
[58] Ryan, A. (1995). *John Dewey and the high tide of American liberalism.* New York: W.W. Norton.
[59] López, G. P. (1992). *Rebellious lawyering: one Chicano's vision of progressive law practice.* Boulder, Colo.: Westview Press.
[60] Penalver, E. M. (2009). Land virtues. Cornell Law Review, 94(4), 821-888.
[61] Sunstein, C. R. (1988). Beyond the republican revival. Yale Law Journal, 97(8), 1539-1590.
[62] Diver, C. S. (1981). Policymaking paradigms in administrative law. Harvard Law Review 95(2), 393-434.
[63] *Supra* note 30.
[64] See Sen, A. (1999). *Development as freedom.* (1st. ed.). New York: Knopf., Habermas, J. (1984). *The theory of communicative action.* Boston: Beacon Press., Gould, C. C. (2004). *Globalizing Democracy and Human*

states' responsibility to its citizens and natural resources as a trustee, directly implicates public participation in legal theory[65]), its reflection in theories of comparative and international environmental law, remain either descriptive or functional[66], not entrenched enough[67], especially into the third pole, or formal convention and legal instrument centric[68]. This literature focuses on sieving out legal systems and environmental problems from describing environmental legal structures within countries (Lees and Viñuales, 2019), looking at access to environmental justice from urban centers in South Asia (Harding, 2007), or focusing on transplantation of formal legal conventions in the area of study (Marsden, 2019). In my review, there seems to be a disconnect between the theoretical foundational literature on engaged participation, tracing its roots[69] to Aristotle, Epicurus, Charles Sanders Pierce, and Richard Rorty (leading the resurgence of pragmatism), to modern environmental legal theory.

On the other hand, spearheaded again by non-law scholars, literature of the area of study in terms of its materiality, culture, history, systems, and vulnerability, is substantial[70]. Literature connecting these 'thick' participation theories to hyperlocal contexts of the third pole, within a critical international legal framework remains thin, even though 'participation' has been en vogue since decades[71]. This is not to say that efforts have not been made to bring mountaneous terrain or the HKH, within environmental legal frameworks[72].

The research that I propose aims to fill that gap. It is informed, by formal and engagement centric theories of participation especially considering the discernable presence of a bureaucratic state that utilized various formal participative procedures in environmental decision making. It however enhances this understanding by tackling questions such as: Are constituencies shaped in

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*Rights.* Cambridge University Press: Cambridge University Press., Unger, R. M. (1998). *Democracy realized: the progressive alternative.* London: Verso., Cooke, B., & Kothari, U. (Eds.). (2001). *Participation: the new tyranny?.* London: Zed Books.

[65] Torres, G., & Bellinger, N. (2014). The public trust: The law's dna. Wake Forest Journal of Law & Policy, 4(2), 281-318.

[66] Lees, E., Viñuales, J. (Eds.). (2019). *The Oxford Handbook of Comparative Environmental Law.* Oxford: Oxford University Press.

[67] Harding, A. (Ed.). (2007). *Access to environmental justice: a comparative study.* Leiden, The Netherlands: Martinus Nijhoff Publishers.

[68] *Supra* note 12.

[69] *Supra* note 57.

[70] Bajpai, S. C. (1981). *Kinnaur in the Himalayas: mythology to modernity.* New Delhi: Concept., Bhargava, O. N., & Bassi, U. K. (1998). *Geology of Spiti-Kinnaur Himachal Himalaya.* Calcutta: Geological Survey of India., Swarup, R., & Singh, R. (1988). *Social economy of a tribal village on Indo-Tibetan border.,* Zinta, R. L., & Nadda, K. (2016). *Displacement and rehabilitation psychology: a study on Pong Dam oustees.* (First edition.). New Delhi: Indu Book Services., Baker, M. (2005). *The kuhls of Kangra: community-managed irrigation in the Western Himalaya.* Seattle: University of Washington Press., Shakya, B., Schneider, F, Yang, Y., & Sharma, E. (2019). A Multiscale Transdisciplinary Framework for Advancing the Sustainability Agenda of Mountain Agricultural Systems. Mountain Research and Development 39(3), A1-A7.

[71] Cooke, B., & Kothari, U. (Eds.). (2001). *Participation: the new tyranny?.* London: Zed Books.

[72] Bowman, M. (2011). Protection of Himalayan Biodiversity: International Environmental Law and a Regional Legal Framework. Mountain Research and Development 31(2), 180-181.

similar ways by formal and engaged participative requirements? How and if interests of communities aggregated in the third pole, To what extent are principles of dignity, equality, fraternity, and liberty reflected in participative structures in the HKH? In what ways does formal and engaged participation legitimize governance in the HKH? To what extent are the regional, international, and global legal instruments operating in the HKH formal or engaged? What are the ways in which participation can be reformed in the third pole? How can comparative and international legal research in the HKH inform and reform International Environmental Law? Why is there no international legal instrument applicable to the HKH?

## Relevant Legal Sources and Instruments

I propose to analyze various formal legal instruments consisting of participatory mechanisms, across the world, and in the area of study, through the Himalayan method laid out below. These sources, and discussions leading up to them, are available online. I propose to analyze the background of these instruments, to understand in what form (and using what kinds of justifications) participation requirements make their way therein. They have significant relevance to this research project since they implicate mountainous, polar environments, and community participation, in International Law. These include (in increasing chronological order):

Indus Waters Treaty between the Government of India and the Government of Pakistan (Karachi, 19 September 1960), Declaration of the United Nations Conference on the Human Environment (Stockholm, June 16 1972), World Charter for Nature (New York, October 28 1982), Agreement on Conservation of Nature and Natural Resources (Kuala Lumpur, 9 July 1985), Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991), Arctic Environmental Protection Strategy (Rovaniemi, 14 June, 1991), Protocol on Environmental Protection to the Antarctic Treaty (Madrid, 4 October 1991), Alpine Convention (Salzburg, 7 November 1991), United Nations Framework Convention on Climate Change (Rio de Janeiro, 9 May 1992), Convention on Biological Diversity (Rio de Janeiro, 5 June 1992), Convention on Access to Information, 1994 North American Agreement on Environmental Cooperation (Quebec, January 1 1994), Agreement on the Cooperation of the Sustainable Development of the Mekong River Basin (Chiang Rai, 5 April 1995), Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998), Framework Convention on the Protection and Sustainable Development of the Carpathians (Kiev, 22 May 2003), Framework Convention on Environmental Protection for Sustainable Development in Central Asia (Ashgabat, 22 November 2006), Paris Agreement (Paris, 22 April, 2016), Towards a Global Pact for the Environment (New York, 10 May, 2018).

## Methodology and proposed analytical approaches

### Statement of Method

I propose a Himalayan Method as a space where qualitative ethnography in the Kangra and Kinnaur regions of the Western Himalaya in India, and analytical approaches to international law

drawing on a critical international[73], environmental[74], and comparative law[75], global environmental law[76], meet, in convergence and friction[77].

The proposed method of ethnography is that of thick description[78], self-reflection, with the temperament of praxis as understood by Freire[79], through qualitative interviewing[80] of various stakeholders in the civil society of the chosen area. It will involve individual and focus group interviews in regions where communities have been impacted by planning and construction of key developmental projects just as highways and hydroelectric power plants, to describe the various ways in which participation occurs, in the Kangra-Kinnaur area. These interviews will be with individuals from village governments, advocacy groups, administrative officials, judges, and legislature representatives.

To identify these projects, I propose to review secondary sources such as annual reports, local environmental, forest, and water policies, policy briefs, guidances, media coverage, arising from the Government of Himachal Pradesh (where these areas a located), and transnational organizations working on the HKH, such as the International Centre for Integrated Mountain Development (ICIMOD). I will consider factors such as the ecological profile of the area (biodiversity and risk thereto, soil), number of people impacted, nature of impact (displacement, for example), vulnerability (seismic and flood profiles), response of the judiciary (duration of time that these issues have been in litigation), to select specific case studies from the review of secondary sources mentioned.

This method will require access to online and offline literature on existing ethnography of the area selected, legal databases from India and the HKH, international legal instruments mentioned earlier, and literature of the proposed analytical approaches described below.

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[74] Philippopoulos-Mihalopoulos, A. (2017). Critical environmental law as method in the Anthropocene Critical environmental law as method in the Anthropocene. In Philippopoulos-Mihalopoulos, A., & Brooks, V. (Eds.). (2017). *Research methods in environmental law: a handbook.* Northampton, MA: Edward Elgar Publishing.

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[76] *Supra* note 1.

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[79] Freire, P., Ramos, M. B., & Macedo, D. P. (2000). *Pedagogy of the oppressed.* (30th anniversary edition.). New York: Bloomsbury Academic, an imprint of Bloomsbury Publishing.

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## Explanation and justification

I: Local, leading towards Global

For Feldman, scholarship requires (a) a commitment to choosing methods of investigation best suited to satisfy curiosity, (b) self-consciousness and reflexivity, so as to avoid assumption of conclusions, and (c) a desire to make scholarly work available for evaluation[81]. Applying these tenets to environmental law scholarship, Fisher and her co-authors[82] derive that mature and critical environmental law scholarship would include (a) making explicit methodological choices to frame research projects, often from associated scholarly areas such as social theory, (b) reflective and contextual mapping of the chosen domain, so as to differentiate scholarship from commentary, and make terrains and temporalities available for critical thought, (c) engaging with mainstream methodology debates, such as comparative law, to make environmental law scholarship better suited to interdisciplinarity, (d) assertively and critically engage with other disciplines, rather than borrowing understandings, focusing on what environmental law scholarship can contribute in broader scholarly discourse, and (e) setting standards for what constitutes good quality environmental law scholarship, such as the one provided by Feldman.

The Himalayan method attempts to engage with the thoughts of Feldman and Fisher.

It is designed to place context at the center of the envisaged project. As stated earlier, a comparative environmental law project is in dire need of local knowledge, especially in multi-layered social-legal-cultural terrain. This begins with a praxis based ethnography of communities of the study area. Freire defines 'praxis' as the lifeblood of 'words' used in communication[83]. To engage in praxis would, according to Freire, mean understanding that each 'word' contains the dimension of 'action' and 'reflection'. Without action, words become 'idle chatter' and without reflection, they convert to 'activism'. In the absence of either of these elements within the 'word', any dialogue is inauthentic and since human beings use dialogue to 'name' the world, and make sense of it, dialoguing becomes an existential necessity. The temperament of 'praxis' *can* therefore be justified to be essential to an ethnographic encounter between researchers and communities, so as to identify and reflect on local knowledge, and begin the process of developing context for a scholarly project. It is important to add that to engage in 'praxis' would also require a scholar within such an encounter to be critically reflective of her own identity (for instance, that of an outsider[84]).

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[81] Feldman, D. (1989). The nature of legal scholarship. Modern Law Review, 52(4), 498-517.
[82] *Supra* note 11.
[83] Chapter 3. In Freire, P., Ramos, M. B., & Macedo, D. P. (2000). *Pedagogy of the oppressed.* (30th anniversary edition.). New York: Bloomsbury Academic, an imprint of Bloomsbury Publishing.
[84] Male, from New Delhi (urban), formally educated, middle-class, English speaking, in my case.

The broad nature of ethnography which has been chosen to understand the land use and political economy of the study area in recent scholarship[85] has been one of 'thick description', introduced by Ryle[86] and put into mainstream thought by Geertz in 'The Interpretation of Cultures[87]'. According to Geertz, 'thick description' goes beyond the prescribed method of 'establishing rapport, selecting informants, transcribing texts, taking genealogies, mapping fields, keeping a diary, and so on'. To do this, as Geertz mentions, would be to not consider acts (only) for what they are (for example, contracting of the eyelid), but for what is being said (winking), which can only take place by a detailed or 'thick' description of how people act. A thick description helps unearth the 'pattern of life' within which what 'is' becomes 'what is said'. In context of say, a public hearing, such a description could help researchers differentiate the number of people coming to raise issues before an authority (often available in secondary data, and used by lawyers in drafting lawsuits), from what they said, hence unearthing the meaning of 'community participation' to a greater extent. Although an account of 'what was said' cannot precisely depict the 'pattern of life' of a community in question, it establishes a contextual grounding for enriching environmental law scholarship proposed in this research project, again, avoids 'assumptions' that Feldman warns against – in the present context, assuming either that participation always works, or that communities have no relevant environmental know how, or anything in between.

I propose to locate these praxis based ethnographic accounts within a web of legal scholarly methodologies, in order to unearth the conditions under which 'community participation' can be used as an analytical tool.

Firstly, since my chosen area of interest lies in the global 'south', with an enduring legacy of colonial administration in the Western Himalayas[88] in the context of land use[89] and irrigation systems[90], I propose to use the lens of the third world approaches to international law (TWAIL) critique of International Environmental Law, to connect the ethnographic component of the research, to International Law (IL).

TWAIL initially emerged in the late 1980s aiming to prioritize the concerns of the 'underdeveloped' nations within the framework of IL[91], which the movement largely considers to be based on an idea of a stable distinction between the third and first worlds, built on

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[85] Rahimzadeh, A. (2016). Mountain Livelihoods in Transition: Constraints and Opportunities in Kinnaur, Western Himalaya. *UC Berkeley*. ProQuest ID: Rahimzadeh_berkeley_0028E_16208. Merritt ID: ark:/13030/m50g8dzr. Retrieved from https://escholarship.org/uc/item/5t29j6n5.
[86] Ryle, G. (1968). *The thinking of thoughts.* [Saskatoon]: University of Saskatchewan.
[87] *Supra* note 78.
[88] Tucker, R. P. (1982). The forests of the Western Himalayas: the legacy of British colonial administration.
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[91] Anand, R. P. (1987). *International law and the developing countries: confrontation or cooperation?.* Dordrecht: M. Nijhoff.

continuing effects of colonialism[92]. The aim of TWAIL scholarship has been to complicate this distinction by 'surfacing' the interconnectedness of the erstwhile colonizing nations and those which were a part of colonies[93]. While the initial disinterest of TWAIL scholars in International Environmental Law (IEL) had to do with IEL as a tool for western countries to undo their developmental mistakes at the expense of third world nations[94], since the past decade, there has been an increasing engagement between TWAIL and IEL[95]. This has partly been due to IEL being a site to advance the interests of the people in the 'underdeveloped' nations, particularly since IEL is becoming increasingly entrenched with more mainstream International Human Rights Legal regime. Another reason for this engagement has been the ongoing inability of IEL to decisively stem global environmental harm through international legal agreements. Recent scholarship critical of IEL's disciplinary rigidity relies on TWAIL methods articulating colonialism's role in constructing IL, to show how the natural environment, in turn, plays similar roles in shaping the international legal order[96].

The methodological approach of TWAIL is important to the Himalayan method since it helps locate 'communities' in the chosen area, within a sufficiently entrenched discipline representative of South Asia, providing opportunities to (a) conceptually examine 'participation' as represented in IL and (b) uncover points of contact with comparative, global, and critical environmental legal methods discussed below, especially since these methods, though instrumental have yet to come in contact with the socio-legal systems of the HKH.

II: Global, leading towards Local

As shown in the literature review, there has been a broad analysis of 'participation' by citizen/communities across jurisdictions in environmental and related fields such as land use and administrative law scholarship, with varying degrees and understandings of success. Since the past two decades in particular, there has also been immense effort in the discipline of comparative environmental law[97], most recently marked by a crucial mapping of the state of comparative environmental law worldwide (Lees & Viñuales, 2019). These efforts have emphasized on the juxtaposition-plus, functional and legal transplant methods of comparative law[98], as explanatory of the universe of environmental laws globally, and in the third pole[99]. The

[92] Anghie, A. (2005). *Imperialism, Sovereignty and the Making of International Law.* Cambridge University Press: Cambridge University Press.
[93] Gandhi, L. (2019). *Postcolonial theory: a critical introduction.* (Second edition.). New York: Columbia University Press.
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[97] Morgera, E. (2015). Global environmental law and comparative legal methods. Review of European, Comparative & International Environmental Law, 24(3), 254-263.
[98] *Supra* note 75.

critical comparative law method, however, has yet to be utilized on such a scale, perhaps since, as Viñuales puts it, '*as with many other critical approaches, in other areas of legal inquiry, the reminder is important and welcome, although in some cases it is unclear whether what is proposed is more than a reminder that law is a complex social process that cannot be artificially separated from its context*[100]'.

There are compelling reasons to enlarge the role of the contextual (critical) comparative method for this research project, which go beyond the 'reminding' that Viñuales mentions. The critical perspective to comparative law asks the comparatist to be reflective of her position *vis* a *vis* a particular legal system. This is done through 'distancing' or to '*break away from firmly held beliefs and settled knowledge and as an attempt to resist the power of prejudice and ignorance*' and 'differencing', or to '*make a conscious effort to establish subjectivity*'. That is, the impact of the self, the observer's perspective and experience, is scrupulously taken into account'[101].

Differencing seeks to emphasize the close links between rules and systems being studies, and the socio-cultural context of those who '*see in terms of them*' (similar to 'thick description' mentioned above). Both the comparatist and the people of her chosen legal system 'see' rules from the perspective of the context that they find themselves in[102], and in recognizing this in the face of the urge to 'normativise' any way of thinking about the law (such as considering Environmental Impact Assessment to have normative force in Environmental Law), is to begin 'differencing'. In adopting the critical method, a scholar engages in questioning 'legocentric' ('*law is treated as a given and a necessity, as the natural path to ideal, rational or optimal conflict resolutions and ultimately to a social order guaranteeing peace and harmony*[103].') notions of law and society, through a process of self reflection. It is only after recognizing the 'chaff' of 'assumptions', and 'formalism', that various legal systems can be compared.

The subject matter of the research question, and the area of study chosen, are terrains consisting of various legal-social systems – from the Wajib Ul Urz, tribal customary land use law of the Kinnaur region[104], to the distant yet relevant Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters[105], in a rich milieu of contention between communities and administration, and court orders and legislation from domestic Indian environmental law (including on Environmental Impact). This is in addition to existing comparative work on the third pole and broadly, in comparative

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[99] *Supra* note 12.
[100] Viñuales, J. (2019). Comparative Environmental Law: Structuring a field. In Lees, E., Viñuales, J. (Eds.). (2019). *The Oxford Handbook of Comparative Environmental Law.* Oxford: Oxford University Press. Doi: 10.1093/law/9780198790952.001.0001.
[101] *Supra* note 78.
[102] Legrand, P. (1997). The impossibility of legal transplants. Maastricht Journal of European and Comparative Law, 4(2), 111-124.
[103] *Supra* note 75.
[104] *Supra* note 26.
[105] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998) 2161 UNTS 447, in force 30 October 2001.

environmental law scholarship. Case studies chosen to observe and analyze 'community participation' in the region, would find themselves submerged in this mileu, requiring a critical comparative method, without which the scholar may find herself making, as Frankenberg says, 'bad abstractions[106]', giving rise to warped understandings of 'community participation'.

In another way of analyzing this milieu, Yang and Percival have located the increasing instance of transplantation of environmental laws, rules, and principles across markedly diverse jurisdictions and cultures, collaboration between private actors such as Non-Governmental Organizations and Multi National Corporations, nation-states, and regional, transnational initiatives to respond to global environmental issues, within a framework called 'global environmental law[107]' (GEL). These linkages, according to them, are '*blurring the traditional divisions between private and public law and domestic and international law, promoting integration and harmonization*[108]', leading to the emergence of GEL, which is '*international, transnational, and national at once*[109]'. GEL is characterized by a growing, global convergence around a few principles, such as Environmental Impact Assessment, as a result of these collaborations, in a world characterized by globalization. In the context of legal systems connected with 'community participation', therefore, GEL, as a method, helps trace local, national laws within the emergence of principles are a wider scale and vice versa, understand how private participation is influencing this emergence. GEL has begun to gain traction, as a discipline, and method in the past decade, and addresses the creation of disciplinary silos of the international, comparative, transnational, and domestic environmental laws. It therefore finds relevance in locating 'community participation', a hyperlocal phenomenon, within broader environmental law scholarship, and help with its conceptual analysis.

Perhaps the overarching variable in this research project is its location in the third pole, reinforcing the ever present, cross-methodological imperative to turn and return to context. The topography of the Himalaya has direct linkages with communities of the region and how they perceive the world around them. This material, mountainous presence, requires scholarship focusing on this region to abstract from humane and generational to planetary scales, as proposed by the recent critical environmental law method[110] (CEL). Proponent of this method urge an interpretation of the 'body' – human, non human, and mineral, as an assemblage, connected to each other on a tilted surface/plane/field. According to CEL, the emergence of the anthropocene has furthered this blurring of humans as beings and as a natural force[111].

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[106] *Supra* note 75.
[107] *Supra* note 1.
[108] *Ibid.*
[109] *Ibid.*
[110] Philippopoulos-Mihalopoulos, A. (2017). Critical Environmental Law as a Method in the Anthropocene. In Philippopoulos-Mihalopoulos, A., & Brooks, V. (Eds.). (2017). *Research methods in environmental law: a handbook.* Northampton, MA: Edward Elgar Publishing.
[111] Morton, T. (2019). *Ecological Thought.* Cambridge, MA, Harvard University Press.

Some bodies on this surface are heavier, and tilt the surface accordingly, such as humanity the anthropocene as a body, impacting all other elements of the assemblage. CEL does not claim that this 'surface' is plain, or without any ripples, but that singularities and individualities are created by ruptures in this surface, in the form of conflicts between elements of the surface, for example. This 'surface' exists on a temporal scale, that is, as mentioned, planetary, and notions of 'rights', and 'inter-generational equity' in environmental law scholarship are not adequate concepts, in and of themselves, according to CEL, hence requiring such a surface. In this broad context, CEL asks scholars to embark on a methodological process, involving four steps. First, to ontologize environmental law, that is to see the world as a continuous connection of bodies, with constantly emerging ruptures, instead of treading on the epistemology of the law, that is to espouse differences such as western/eastern and human/non-human, based on 'using' resources equitably in a slow procedural legal regime that fails to accept geological finitude. Second, to recognize environmental law's materiality, as a 'body' itself, reaching beyond disciplinary borders and across space and time, within the ontological surface of various other bodies. Thirdly, to mineralize environmental law, or begin treating other 'bodies', including fossil fuels, mountains, and the planet, as having legal agency. Lastly, to situate environmental law in on the ontological surface, and be juridically responsible for its historical 'presence' on the same, concerned not with the bite-size – pollution regulation, but also the planet as a whole.

CEL is instrumental to this research, since it requires reflection of the act/concept of 'community participation', not only from within disciplinary silos, or from a human centric frame, but also from the that of its ontology within the assemblage of methods, geographies, laws, principles and rules, words, in the anthropocene.

III: Method as a sieve

The various elements of the Himalayan Method come from across the academy (legal and anthropological), and geographies, having markedly diverse ways of analyzing 'community participation'. In temporal scales, the methods urge scholarship to consider months, to eons, in their analysis. In terms of context, some methods require global principles whereas other, hyperlocal accounts to be considered. In order to satisfy the curiosity posed in the research questions, such methodological diversity would be crucial to sieve out the terrain of the act/concept of 'community participation' can be considered sufficiently grounded in environmental law literature.

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