

# Influence of South African Legislation on India's Mines and Minerals Bill

## Problems and Perils

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In an arguably post-Washington Consensus era, horizontal learning is promoted as a new strategy for development by an interdisciplinary movement that includes critical law and development scholars. Horizontal learning describes a process-oriented approach that emphasises networking amongst global South nations leading to legislative development and policy experimentation. As a means to explore this new development approach, this paper examines India's attempt to appropriate, for use in a draft mining bill, elements of the law of a similarly situated developing country, South Africa. The case study suggests that a failure to retain the underlying social and political policy motivations for the model legislation can undermine the ability of the new legal regime to effectuate its policy goals.

A new interdisciplinary move is afoot in development studies, and the associated fields of law and development and the political economy of development. It involves the search for a new approach to economic development that is not limited to the programmatic dimensions of development policy, but rather focuses on its process-oriented elements. A growing number of scholars and practitioners on both the left and the right have rejected both the neo-liberal mantra of the 1980s and 1990s as well as its predecessor that relied on state-led development. The common feature of these previous two – otherwise diametrically opposed – development doctrines lies in a common underlying assumption: that economic development models developed in the now advanced industrialised countries could be successfully replicated in the developing world. The new political economy of development eschews this one-size-fits-all model for a more open, pragmatic approach built on horizontal peer-based learning and policy experimentation.

This paper explores the promises and perils associated with this “horizontal learning” approach by examining how India used South Africa as a model when developing a draft mining law. It explores the potential perils of horizontal learning rooted in legal formalism, in which emphasis is based on the transplantation of legal or regulatory frameworks from one jurisdiction to another. The paper argues the importance of retaining the underlying policy motivations – the legislative “why” – in legal borrowing, whether horizontal (between global South nations) or vertical (global North-global South).

This paper observes that, in a roughly post-neo-liberal era, there may be a propensity to present South-South horizontal learning as axiomatic, or a self-evident good.<sup>1</sup> To be sure, there is much by way of promise in this approach, as emerging economies adopt development models that share divergence from neo-liberal prescriptions, particularly with a greater role for the state. However, it is exactly the singularity of each development model that raises questions regarding the success of many legal transplants, particularly legal borrowing that mimics, or adopts wholesale, legislation from another global South jurisdiction.

The growing body of literature on horizontal learning is not unaware of the perils presented by horizontal learning. Proponents of horizontal learning, part of the interdisciplinary new political economy of law and development (NPED)

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movement outlined in Part I, emphasise alternately “local conditions”, “experimentation”, and “bottom-up” networking (Trubek 2008; Hausmann et al 2007). However, calls for an experimental approach to development that prioritises local conditions continue, in practice, to coexist with instances of cut and paste approaches to legislation. In the Indian context there are many examples of where elements of a law have been taken verbatim from a developed country source.<sup>2</sup> This paper considers one such example, the adoption of elements of South African mining law by India’s draft Mines and Minerals (Development and Regulation) Bill, 2011. As such, the paper re-emphasises elements of the horizontal learning process that encourage networking with a strong focus on local conditions and experimentation.

The case study as a whole is intended to argue against the prescriptions of legal formalism, the view that the specifics of legal and regulatory frameworks matters most in the implementation of law. Although this paper is rooted in a discussion of horizontal learning as a new development paradigm, it acknowledges overlap with other bodies of literature, particularly literature on comparative legal transplants. In cautioning against approaches based on legal formalism, this paper squares with the “culturalist” perspective on legal transplants in emphasising the relevance of social and political factors to the lawmaking process.<sup>3</sup>

In Part I, drawing heavily from the work of David Trubek, this paper outlines horizontal learning and the new political economy of law and development. Part II presents a case study examining the formation of India’s draft Mines and Minerals (Development and Regulation) Bill, 2011 and its relationship to South Africa’s the Mineral and Petroleum Resource Development (MPRD) Act, 2002 and Broad-Based Black Economic Empowerment (BEE) Act. In this case study, a comparative statutory analysis is supplemented by an examination of the public discourse surrounding key features of the new bill. Part III discusses how the lessons from this case study can better inform our understanding of the horizontal learning process.

### **Part I – Horizontal Learning: A New Development Paradigm?**

New thinking on learning and experimentation as an approach to development began to coalesce in the mid-2000s around the work of a group of scholars in political science, economics and law including Ricardo Hausmann, Dani Rodrik, Charles Sabel and David Trubek (Sabel and Reddy 2003; Sabel 2007; Hausmann et al 2007; Trubek 2008, 2010). Tellingly, each of these scholars’ engagement in this work began from different starting points reflecting interest in the topic from their varied disciplinary backgrounds. Hausmann and Rodrik’s contribution emerges from their policy-oriented research and teaching in development economics and institutional political economy. This work focuses on identifying new strategies for developing countries facing industrial stagnation in the face of globalisation that can be readily translated into implementable programmes of action by policymakers, and has converged around consideration of a new approach to industrial policy.<sup>4</sup>

Sabel’s contributions have emerged largely from his recent work on new governance and democratic experimentalism, based on his background in political science, and organisational studies and law, while Trubek’s inputs arise from his critiques of the law and development movement and search for a new approach in legal analysis and regulatory design.<sup>5</sup>

These scholars’ research programmes have proved highly complementary. Each entails a rejection of neo-liberalism and the Washington Consensus, as well as a desire to specify the role of the state in development. Policy experimentation and innovation are the central planks of their analyses. Rather than the wholesale importation of policy and legal models from industrialised countries, the “policy learning” scholarship advocates policymakers paying attention to successful policy programmes in peer countries, and critically, assessing the extent to which those policy approaches can be adapted to suit domestic challenges. Trubek (2010) writes,

People have come to see development as a step by step process that involves experimentation and bootstrapping. They recognise reform should be evidenced-based and projects must take account of the distinct nature of national legal cultures and institutions.

This process not only requires careful study of country experiences, but also engagement with counterparts in those countries so as to facilitate sharing of experiences.

### **Part II – Case Study**

The Draft Mines and Minerals (Development and Regulation) Bill, 2011

In 2008, the Indian Ministry of Mines put forward a comprehensive mining policy designed to act as a road map for modernisation within the sector. In order to achieve its stated goals of large-scale prospecting and zero waste mining the ministry realised that it was necessary to reform the regulatory environment in order to make it more conducive to investment and technology flows.<sup>6</sup> To that end, a draft Mines and Minerals (Development and Regulation) Bill, 2011 (hereinafter the “MMDR Bill”) was put forward.

Although the MMDR is ostensibly an attempt to attract higher levels of investment to the Indian mining sector, its method of balancing the need for investment against the need to protect indigenous rights and promote local economic development has been extremely controversial. This balancing has come in the form of a profit-sharing provision for the traditional occupants of the land on which a mine is located.<sup>7</sup> The Indian profit-sharing provision was inspired by South African mining legislation which calls for a 26% share equity ownership interest reservation for historically disadvantaged South Africans.<sup>8</sup>

The Indian provision has been politically controversial<sup>9</sup> and has changed dramatically since it was first introduced. The MMDR Bill originally contained a 26% equity reservation for local communities.<sup>10</sup> The version of the bill approved by the cabinet and submitted to the Lok Sabha has replaced the equity reservation with a profit-sharing provision. In India, although foreign investors privately oppose the profit-sharing provision, much of the public opposition has come from domestic Indian companies.<sup>11</sup> Both the Indian and the South African law

have been developed as a reaction to domestic inequities, however, the contexts out of which these inequities arose are significantly different. Despite the superficially similar strategy, it appears that, in their final form, these laws have little in common substantively. The South African law is titled the BEE Act and the MPRD Act 2002.

South Africa, the world's largest producer of platinum, chromium, and gold, has a very well-developed mining industry.<sup>12</sup> This industry is a central pillar of the South African economy and the long history of this sector is inextricably intertwined with the country's colonial and apartheid past. Prior to the ratification of the new South African Constitution in 1996, the mining industry was focused almost exclusively on the production of private gains for the financial stakeholders in mining ventures (Kloppers and du Plessis 2008). Traditionally, the companies that profited from the country's abundant mineral resources were controlled by either foreigners (ibid) or by South Africa's white minority community. In many ways, the ownership structure within the South African mining industry is a reflection of the country's colonial and apartheid past.

In 1996, as part of the process of dismantling the apartheid system, South Africa put into place a new constitution calling for greater levels of social and economic inclusiveness. Section 9(2) of the Constitution of the Republic of South Africa Act 108 of 1996 states:

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

In accordance with Section 9(2), in order to address some of the tremendous socio-economic disparities in South African society, two central pieces of legislation were put into place: the BEE Act and the MPRD Act 2002. A critical goal of these pieces of legislation was to give a broader swathe of South African society a financial stake in the country's economic wealth.<sup>13</sup>

The BEE Act applies generally to South African companies while the MPRD Act applies specifically to the mining sector. The preamble to the MPRD Act explicitly acknowledges that a primary purpose of the Act is to promote economic and social development...promote local and rural development and the social upliftment of communities affected by mining...bring about equitable access to South Africa's mineral and petroleum resources...[and eradicate] all forms of discriminatory practices in the mineral and petroleum industries.

The preamble balances these efforts against the State's commitment to guaranteeing security of tenure in respect of prospecting and mining operations and emphasising the need to create an internationally competitive and efficient administrative and regulatory regime.

In other words, this legislation is in large part an attempt to strike a balance between the need to enfranchise traditionally disadvantaged and the need to maintain a globally competitive mining industry.<sup>14</sup>

Section 100(2) of the MPRD Act mandates the creation of a broad-based socio-economic charter for the South African

mining industry (the charter) designed to "ensure the attainment of [the South African] Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution". This section of the MRRDA goes on to state that the charter will set the framework, targets and time table for effecting the entry of historically disadvantaged South Africa into the mining industry, and allow such South Africans to benefit from the exploitation of mining and mineral resources.

To accomplish this, the charter lays out specific targets, time tables and commitments for, amongst other things, human resource development, community and rural development, procurement, and equity ownership.<sup>15</sup>

Most importantly for our purposes, the charter makes it mandatory that 26% of the equity ownership in South African mining ventures be held by historically disadvantaged South Africans (HDSA) by 2014. Section 2.1 of the Amended Charter<sup>16</sup> lays out this requirement in the following language:

Effective ownership is a requisite instrument to effect meaningful integration of HDSA into the mainstream economy. In order to achieve a sustainable change in racial and gender disparities prevalent in ownership of mining assets, and thus pave the way for meaning full participation of HDSA for attainment of sustainable growth of the mining industry, stakeholders commit to:

Achieve a minimum target of 26% ownership to enable meaningful economic participation of HDSA by 2014;

The only offsetting permissible under the ownership element is against the value of beneficiation, as provided for by Section 26 of the MPRD Act and elaborated in the mineral beneficiation framework.

Failure to comply with these mandates will render the company in violation of the MPRD Act and subject to the penalties contained in Section 47 read in conjunction with 98 and 99 of the Act. These penalties range from the revocation of mining licences to monetary fines and potentially even imprisonment.

It is extremely important to note that the method by which the concerned companies achieve 26% equity ownership by HDSA is not prescribed in the Act. There does not appear to be any mandate that this interest simply be given away. In fact, it has been argued that the primary beneficiaries of this policy have been a few select wealthy South Africans belonging to historically disenfranchised groups (Watt-Pringle 2010). Furthermore, the definition for historically disenfranchised South Africans is broad and is not necessarily connected with the community surrounding the mine.<sup>17</sup>

### The Indian law

In contrast to South Africa, India's mining sector is relatively underdeveloped. Although mining itself, particularly coal mining, constitutes an important part of the Indian economy, large-scale investment in this sector has been relatively limited due in large part to the antiquated legal/regulatory system governing mining in India.<sup>18</sup> India, however, is thought to be a relatively mineral-rich country and this potential combined with rapid growth in domestic demand could make its mining industry a prime candidate for investment. In order to realise this potential, however, reforms must first take place.

In 2005, Prime Minister Manmohan Singh commissioned the Hoda Committee on mining reforms, which submitted its report in 2006.<sup>19</sup> The committee's mandate was to find ways to make the mining sector less tangled and more efficient for domestic and foreign investors. The report laid the groundwork for India's National Mineral Policy, 2008, and the MMDR Bill. The National Mineral Policy, 2008, acknowledges the need in India for legal regulatory reform in order to encourage large-scale financial and technological investment in the Indian mineral sector and the MMDR Bill is an attempt to bring this policy into action.<sup>20</sup>

Given the attention being given to the profit-sharing provision in the MMDR Bill, it is interesting to note that there is no mention of it in the 2006 report. Instead there is a focus on reforming existing Relief and Rehabilitation legislation. In fact, South Africa, from whom the 26% provision was borrowed, was not even included in the report's "Cross-Country Comparison of Mining Laws" (p 244 of report).

In comparison to the South African MPRD Act and charter, the language contained in India's National Policy (the Policy) is relatively muted when it comes to issues of socio-economic equity. The preamble to the Policy is silent on issues of social justice; it focuses instead on the role played by the mining industry in the country's economic development as a provider of "vital raw material for infrastructure, capital goods and basic industries."<sup>21</sup> The Policy does address environmental and displacement issues in §2.3 and in §7.11 but the primary focus of the document seems to be economic development.

When the Policy does deal with equity in the mining sector, it limits the discussion to host and indigenous tribal populations that have been affected by a given mining project. The Policy states in §2.3 that the interests of these populations will be protected through the development of "models of stakeholder interest based on international best practice". These models of stakeholder interest appear to be closely related to issues of compensation and rehabilitation which are governed by the National Rehabilitation and Resettlement policy.<sup>22</sup>

The MMDR Bill currently under consideration by Parliament appears to be designed to put the policy into effect and modernise much of the legal/regulatory system governing mining. The Bill does, in many ways, make India a more attractive destination for mineral sector investment; however, the attempt, pursuant to §2.3 of the Policy, to adopt a model creating a stakeholder interest has been controversial. The "international best practice" the Indian government had initially chosen to adopt on its surface looked like a modified version of South Africa's 26% ownership target for historically disenfranchised South Africans.

The version of the MMDR Bill that received approval from the cabinet in 2011 is essentially a profit-sharing provision but, as mentioned, it first appeared as an equity sharing provision. The 26% equity provision first appears in the sixth version of the Bill posted on the department of mines website, the Updated Draft Mines and Minerals (Development and Regulation) Act (ver 03-06-10). Section 42(2) of this version of

the Bill would have granted "any person or persons holding occupation or usufruct or traditional rights of the surface of the land over which the lease has been granted" a right to a 26% equity interest in the company holding the lease or, if the lease is held by a natural person, a 26% share in the profits from the venture. This obligation was separate from the obligations to compensate for the land acquisition as well as to rehabilitate and resettle affected persons pursuant to other law.<sup>23</sup>

A significantly amended version of the Bill was approved the cabinet on 30 September 2011, and subsequently submitted to the Lok Sabha.<sup>24</sup> Instead of calling for profit-sharing, the Lok Sabha version of the MMDR Bill contains a profit-sharing provision. Section 43(2) of the approved MMDR Bill mandates that the holder of a mining lease make annual payments into a body called the District Mineral Foundation (DMF). The exact amount of payment varies depending upon the mineral being extracted. For coal and lignite, this payment should equal 26% of after tax profits (ibid at § 43(2)(b)). For all other major minerals, the amount given to the DMF will be an amount equal to the financial year's royalty payment (ibid at § 43(2)(a)). The DMF payment for minor minerals will be set by the state government with the concurrence of the National Mining Regulatory Authority (ibid at § 43(2)(c)).

Interestingly, the 26% figure has survived despite the fact that the provision is no longer about equity sharing. Under the Companies Act, 1956, the 26% equity figure has significant meaning – it is not an arbitrary figure. Having 26% of the shareholder vote gives a particular group the power under the Companies Act, 1956, to exercise a variety of controlling powers that cannot be exercised at lower levels of equity holding. It is unclear exactly why the 26% figure should be carried over into a provision which is now essentially little more than a secondary tax on profits.

The current law does call for a single non-transferable equity share in the mining venture to be "allotted at par or for consideration other than cash to each person of the family affected by the mining related operations of the company" (ibid at § 43(3)). This, however, appears to be little more than a symbolic gesture.

## Discussion

As illustrated in the comparative statutory analysis above, the Indian legislative process has turned the 26% provision into something very different from its original South African form. Indeed, the only real similarity seems to be the actual figure, 26%. Disconnected from its original purpose as an ownership percentage necessary for the exercise of a variety of control powers within a corporation, it is hard to see the justification for this transplanted figure. To gain a deeper understanding of the evolution of this provision in the Indian context, this discussion explores the public discourse surrounding this issue in four leading Indian English language newspapers.<sup>25</sup>

This discussion makes three points that need to be evaluated as lessons for the horizontal learning process in Part III.

First, South Africa was probably not the best place to look for a model. The mining sector in South Africa is well developed while India's mining sector is underdeveloped and needs significant capital investment before it can achieve its potential. Given the importance of South African mining to the global mining industry, the Government of South Africa is coming from a position of strength. Although South Africa's policy has had an impact on foreign investors, the domestic South African mining industry is already well developed. International investors are already in this market and, although this move may discourage further investment, it is unlikely to result in the collapse of the sector. In contrast, the Indian government needs to attract investment and, as such, it is not coming from a position of strength with relation to the international mining community. As the Indian ministry of mines has pointed out in a response to an article published in the *Times of India*,

It is totally wrong to say that the current status of mineral prospecting is buoyant and reassuring. ...The Hoda Committee Report of the Planning Commission...states that prospecting in India is not at all developed...and that this is the major thrust required through the National Mineral Policy 2008.<sup>26</sup>

In articles covering a period from the 2006 Hoda Report to April 2011, the consensus in both financial and general dailies is one of the mining sector as untapped, a lucrative resource for greater domestic and foreign investment. It will be very difficult for India to accomplish its goals without attracting greater numbers of multinational corporations into the Indian mining sector. The mining sector is portrayed as plagued with land acquisition issues due to the presence of tribal groups in the mineral-rich states of Jharkhand, Bihar, Orissa (and to some extent, Karnataka),<sup>27</sup> interventions of Indian courts,<sup>28</sup> and squabbles between central and state governments<sup>29</sup> over mining regulation. Articles also suggest that the government is eager to open the mining sector to foreign investment for some very practical reasons, amongst them: high rates of illegal mining<sup>30</sup> (a debate into which Congress Party leader Sonia Gandhi recently stepped),<sup>31</sup> and a greater ability to monitor and extract royalties from foreign investors. The resulting picture is one of a rudimentary mining sector, rife with unregulated activity.

### Existing Bottlenecks

The existing bottleneck in the mining sector is well illustrated by the challenges facing the Posco project in Orissa, a case study that spans both the 2006 Hoda Report and the MMDR Bill. Investment by the Korean giant constitutes the biggest foreign investment ever in India,<sup>32</sup> but has been held up for more than six years by claims by displaced peoples, concerns over the Forest (Conservation) Act, and wrangling between the state and central government.<sup>33</sup> Near the end of 2010, Posco threatened to pull out its investment unless obstructions were removed.<sup>34</sup> The centre intervened in early 2011 to ensure Posco's continued investment presence, the intervention coming prior to a state visit from the Korean president.<sup>35</sup> The project remains in limbo.<sup>36</sup> In contrast with South Africa's

well-developed mining sector, India's mining sector appears a poor comparison.

Second, the underlying goal of the South African provision is to right a uniquely South African problem. The South African 26% equity provision is not simply about compensation, this is about addressing the legacy of apartheid. Mining is one of South Africa's crown jewels and the law acts to see that the historically disenfranchised majority is afforded the opportunity to have an ownership interest in this critical industry. The Indian provision, even if it had remained an equity giveaway, was never designed to address an analogous historical wrong. It was simply an alternative form of compensation for people living in the area surrounding the mine. As we have seen, even at its inception, India's 26% equity and now profit-sharing provisions were quite different from South African law. South Africa was seeking to reorder an economic system skewed by a long history of apartheid. The primary impetus for this law was not to compensate local peoples for a recent loss of land. It attempted to give the historically disenfranchised majority the ability to participate as equity holders in one of South Africa's most important industries. In fact, the 26% figure may help stave off calls for nationalisation and help comfort foreign investors.<sup>37</sup> By contrast, although its equity character made it look similar to the South African 26% rule, the Indian provision originally acted very much like a secondary form of compensation for the loss of land. Giving displaced populations a vested interest in the project for which they are losing their land is an admirable goal but it most likely requires a more general rethinking of the National Rehabilitation and Resettlement Policy.

These differing policy goals manifested themselves early in the process of Indian legislative formulation. Even when the Indian policy called for a 26% equity reservation it was still simply an alternative form of compensation. In contrast, in South Africa, the 26% does not have to be fully realised until 2014, the policy gives the affected companies freedom to come up with creative ways in which to achieve compliance. For example, the 26% target can be accomplished through employee share ownership programmes open to employees from historically disenfranchised communities (Watt-Pringle 2010).

Given the vastly different starting points, it is no surprise that as it has moved through the Indian legislative process the Indian provision has been completely transformed. It is now little more than a sector-specific tax. Unfortunately, the Indian legislature has held onto the now meaningless 26% number. No longer being an equity provision, it now has nothing to do with issues of corporate control. Now that the MMDR Bill no longer calls for equity participation, it has essentially morphed into little more than a secondary tax on profits. It is very hard to say that it now bears any significant substantive resemblance to South African policy. This being the case, it is hard to understand why the 26% tax figure remains in relation to coal and lignite mining.

Industry groups are claiming that this additional tax will make Indian mining one of the most highly taxed mining sectors in the world.<sup>38</sup> The 26% figure is not based on an understanding

of where the overall level taxation needs to be in order to accomplish the Indian's government's stated goal of attracting investors to the Indian mining sector. Furthermore, the provision is not grounded in a reasoned understanding of how to adequately compensate the people who will be hurt by a given project – it feels very much like an arbitrary figure.

### Part III – Implications for Horizontal Learning

India's attempt to adopt international best practices by looking to other developing countries such as South Africa for inspiration could be seen as an example of what legal academics have termed horizontal learning – a process in which developing countries look for best practices in peer developing countries rather than just looking for development models from the advanced industrialised world, as has tended to be the case in the last few decades of development policy (Trubek 2010). This method is certainly an improvement on the pursuit of one-size-fits-all models such as those associated with the Washington Consensus, but as this paper has shown it is important that the country seeking to adopt the best practice should take steps to fully understand the underlying purpose of a development approach or model it wishes to emulate. In particular, explicit recognition of the social and political context that informed an attractive model legislation from a peer developing country, is key to understanding the purposes it was meant to serve, and hence the likelihood for successful adaptation to local needs and circumstances.

The case study in this paper suggests that although horizontal learning as an approach to development holds significant promise, it is by no means axiomatic that it is always better to look to similarly situated developing countries when looking for legislative inspiration. Attention to the process of horizontal learning remains paramount. In fact, if there is one characteristic that defines a post-Washington Consensus context, it is the increasing singularity of development models in advanced emerging economies, in the form of hybrids that represent varying forms of state involvement.<sup>39</sup> In this context, a legal formalist approach to borrowing in legislative formulation, instead of networked discussion based on an understanding of local conditions and social and political precursors, may more often display the perils instead of the promise of horizontal learning. As a consequence, this paper has highlighted key elements of the horizontal learning literature that emphasise the effect of local conditions on legal and policy transplants.

Key to this is the networking of experts from similarly situated developing countries who can ensure that – in the process of learning – the legislative frameworks and language retains compatibility between policy motivations in the local context and those in the source context.

The case study examined the influence of South African mining legislation on the formation of India's draft Mines and Minerals (Development and Regulation) Bill, 2011. Specifically, it shows that while there may be a variety of aspects in which India and South Africa are similarly situated nations, the starting point for horizontal learning, the mining sector appears not to be one of them given the significantly different stages of sectoral development. Specifically, the Indian government failed to appreciate the unique history underlying South Africa's 26% equity provision. The provision was designed as a policy response to the disenfranchisement of historically disadvantaged communities from South Africa's profitable extractives industry, not simply as compensation for populations affected by mining activities as in the Indian adaptation.

The case study further suggests that in its current version, the Draft Mines and Minerals (Development and Regulation) Bill, 2011, retains the formal element of the South African legislation reflected in the 26% equity rule, but none of the meanings associated with the value itself. In the South African legislation, 26% as equity represents the reservation of important minority shareholder rights for historically disadvantaged communities. In the Indian legislation, at present, 26% is retained as a profit-sharing provision, a seemingly arbitrary value distanced from its original historically – and sociopolitically rooted policy motivations.

It is important to note that in its final version, the Indian legislative process draft may further amend, or even remove, the 26% language from the Mining Bill. However, this article has sought to illustrate both promise and perils innate to the process of horizontal learning occurring between South Africa and India. It has argued that a process of horizontal learning that fails to consider the social, political and historical roots of policy and legislative models in source countries is flawed. It thus builds on previous literature on horizontal learning in the new political economy of law and development, showing that the deficiencies of legal formalism are as relevant to horizontal learning as they are to legal borrowing in the global North-global South context.

#### NOTES

- 1 Email from Sanjay Reddy, The New School for Social Research (April 2011) (on file with author) (for application of the term "axiomatic" to the horizontal learning context).
- 2 For instance, the Companies Act 1956, is essentially antiquated British corporate law; the SEBI (Acquisition of Shares and Takeover) Regulations, 1997 was taken from the UK City Code on Takeovers and Mergers; See also Samson and Christian (2010:62) for the contention that the Indian Competition Act 2006 was modelled on EC and UK competition law).
- 3 By contrast, the "transferist" perspective on legal transplants views legal and regulatory packages

as autonomous and transferable from one jurisdiction to another. For an example of this view, see Watson (1991). The culturalist perspective is well represented by Legrand (1997). In emerging economies, development models increasingly supplement and interchange neo-liberal prescriptions with state-led development. The singularity of new hybrids such as South Africa, India, and China, reintroduce the "transferist" – "culturalist" legal transplant debate into the horizontal learning context.

- 4 See Hausmann and Rodrik (2003a, 2003b, 2006), Rodrik (2004), Hausmann et al (2007) (for an approach to identify binding constraints to growth).

- 5 As a further indication of the high level of inter-disciplinarity that defines the NPED, Hausmann and Rodrik are economists who teach in a public policy school, Sabel is a political scientist who teaches in a law school, and while Trubek and Unger are both legal scholars in law schools, they are both well-known contributors to law and society and political philosophy, respectively.
- 6 Government of India, National Mineral Policy, §2.2 (2008), [http://mines.nic.in/writeraddata/filelinks/88753b05\\_NMP\\_2008.pdf](http://mines.nic.in/writeraddata/filelinks/88753b05_NMP_2008.pdf)
- 7 Mines and Minerals (Development and Regulation) Bill 2011 (Lok Sabha version). <http://164.100.24.219/BillsTexts/LSBillTexts/asintroduced/Mines%20110%20of%202011.pdf>

- 8 Amendment of the Broad-Based Socio-Economic Charter for the South African mining and minerals industry, Government Notice (GN) No 838/2010, §2.1 (South Africa); M V Ramsurya, "Government May Dilute Profit Sharing Clause in Mining Bill", *Times of India*, 23 February 2011, [http://articles.economictimes.indiatimes.com/2011-02-23/news/28625807\\_1\\_profit-sharing-profits-with-local-communities-higher-royalty](http://articles.economictimes.indiatimes.com/2011-02-23/news/28625807_1_profit-sharing-profits-with-local-communities-higher-royalty).
- 9 The South African provision has been controversial as well but it was put in place in reaction to a much politically heated debate surrounding the role of private sector mining companies in the South African economy. In general, rhetoric surrounding the private sector South African mining industry may even be more heated than in India. Unlike in India, there has actually been talk in South Africa of nationalising the mining industry. See Sapa, "The Debate over Nationalising South Africa's Mines Dominated the Agenda for Mining Companies in 2010", *Times Live*, 13 April 2011, <http://www.timeslive.co.za/Politics/article1018047.ece/Nationalisation-debate-casts-shadow-over-mining-industry-PwC>
- 10 Pursuant to Section 43 (1) of the MMDR, "Every Person or Family Holding Occupation or Usufruct or Traditional Rights of the Surface of the Land over Which the License Has Been Granted" will be eligible for compensation.
- 11 See Special Correspondent, "Different Views on Profit Sharing", *The Hindu*, 24 September 2010, <http://www.thehindu.com/news/national/article793129.ece>
- 12 US Central Intelligence Agency, *The World Fact-Book*, <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html> (last visited 17 April 2011).
- 13 According to Article 1 of the BEE, the central

goal of the Act is:

the economic empowerment of all black people, including women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socioeconomic strategies that include but are not limited to – (a) increasing the number of black people that manage, own and control enterprises and productive assets; (b) facilitating ownership, and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises; (c) human resource and skills development; (d) achieving equitable representation in all occupational categories and levels in the workforce; (e) preferential procurement; and (f) investment in enterprises that are owned or managed by black people.

In other words, these are the BEE designed to both increase the levels of ownership on the part of traditionally disadvantaged communities as well as more generally assist in uplifting these segments of society through skills development. To accomplish these aims, the BEE authorises the minister of trade and industry to issue codes of good practice. Individual companies are then rated according to their level of compliance with these codes of conduct. The specific factors that affect this rating are things such as the level of ownership and control in the company by historically disadvantaged communities as well as preferential procurement, skills development, employment equity, enterprise development, and other socioeconomic empowerment initiatives designed to benefit these prescribed traditionally disenfranchised groups.

- 14 The preamble also makes mention of the need for the mining industry to operate in an

environmentally sustainable manner. The entire preamble reads as follows:

Recognising that minerals and petroleum are non-renewable natural resources; acknowledging that South Africa's mineral and petroleum resources belong to the nation and that the State is the custodian thereof. Affirming the State's obligation to protect the environment for the benefit of present and future generations, to ensure ecologically sustainable development of mineral and petroleum resources and to promote economic and social development. Recognising the need to promote local and rural development and the social upliftment of communities affected by mining. Reaffirming the State's commitment to reform to bring about equitable access to South Africa's mineral and petroleum resources. Being committed to eradicating all forms of discriminatory practices in the mineral and petroleum industries. Considering the State's obligation under the constitution to take legislative and other measures to redress the results of past racial discrimination. Reaffirming the State's commitment to guaranteeing security of tenure in respect of prospecting and mining operations and emphasising the need to create an internationally competitive and efficient administrative and regulatory regime.

MPRD Act, 2002, [http://www.acts.co.za/mprd\\_act/mineral\\_and\\_petroleum\\_resources\\_development\\_act\\_2002.htm](http://www.acts.co.za/mprd_act/mineral_and_petroleum_resources_development_act_2002.htm)

- 15 See Platmin, *Mining Legislation*, <http://www.platmin.com/p/legislation.asp> (last visited 21 April 2012).

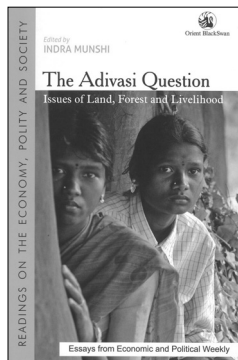
- 16 Amendment of the Broad-Based Socio-Economic Charter for the South African Mining and Minerals Industry, Government Notice (GN) No 838/2010 (South Africa).

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## The Adivasi Question

Edited By

**INDRA MUNSHI**



Depletion and destruction of forests have eroded the already fragile survival base of adivasis across the country, displacing an alarmingly large number of adivasis to make way for development projects. Many have been forced to migrate to other rural areas or cities in search of work, leading to systematic alienation.

This volume situates the issues concerning the adivasis in a historical context while discussing the challenges they face today.

The introduction examines how the loss of land and livelihood began under the British administration, making the adivasis dependent on the landlord-moneylender-trader nexus for their survival.

The articles, drawn from writings of almost four decades in EPW, discuss questions of community rights and ownership, management of forests, the state's rehabilitation policies, and the Forest Rights Act and its implications. It presents diverse perspectives in the form of case studies specific to different regions and provides valuable analytical insights.

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- 17 Amendment of the Broad-Based Socio-Economic Charter for the South African Mining and Minerals Industry, Government Notice (GN) No 838/2010, Definitions for Historically Disadvantaged South Africans (South Africa); See also Watt-Pringle (2010).
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- 19 Government of India Planning Commission, *National Mineral Policy: Report of the High Level Committee* (December 2006), available at [mines.nic.in/writereaddata/Filelinks/46f58fo\\_rep\\_nmp.pdf](http://mines.nic.in/writereaddata/Filelinks/46f58fo_rep_nmp.pdf)
- 20 Government of India, Ministry of Mines, *National Mineral Policy*, 2008, §2.1.
- 21 *National Mineral Policy*, §1 (2008), Preamble
- Minerals are a valuable natural resource being the vital raw material for infrastructure, capital goods and basic industries. As a major resource for development the extraction and management of minerals has to be integrated into the overall strategy of the country's economic development. The exploitation of minerals has to be guided by long-term national goals and perspectives. Just as these goals and perspectives are dynamic and responsive to the changing global economic scenario so also the national mineral policy has to be dynamic taking into consideration the changing needs of industry in the context of the domestic and global economic environment. It is, therefore, necessary to revisit the National Mineral Policy, 1993, as provided in para 4 of the same, and to spell out in a revised statement the different elements of policy, including elements newly evolved, for the development of the mineral resources of the country.
- 22 *Id* at §2.3 and 7.11 (which states the following: "Relief & Rehabilitation of Displaced and Affected Persons". Mining operations often involve acquisition of land held by individuals including those belonging to the weaker sections. In all such cases a social impact assessment will be undertaken to ensure that suitable Relief and Rehabilitation packages are evolved. While compensation is generally paid to the owner for his acquired land, rehabilitation of affected persons in the form of substitute land, land for housing and jobs is not always adequate. Appropriate compensation will form an important aspect of the Sustainable Development Framework mentioned in para 2.3 and 7.10 above. Insofar as indigenous (tribal) populations are concerned the Framework shall incorporate models of stakeholder interest for them in the mining operation, especially in situations where the weaker sections like the local tribal populations are likely to be deprived of their means of livelihood as a result of the mining intervention. In areas in which minerals occur and which are inhabited by tribal communities and weaker sections it is imperative to recognise resettlement and rehabilitation issues as intrinsic to the development process of the affected zone. Thus all measures proposed to be taken will be formulated with the active participation of the affected persons, rather than externally imposed. A careful assessment of the economic, environmental and social impact on the affected persons will be made. A mechanism will be evolved which would actually improve the living standards of the affected population and ensure for them a sustainable income above the poverty line. For this purpose, all the provisions of the National Rehabilitation and Resettlement Policy or any revised policy or Statute that may come into operation, will be followed".
- 23 See Land Acquisition Act, 1894; National Rehabilitation and Resettlement Policy, 2007.
- 24 Mines and Minerals (Development and Regulation) Bill 2011 (Lok Sabha version), <http://164.100.24.219/BillsTexts/LSBillsTexts/asinintroduced/Mines%2011%20of%202011.pdf>
- 25 Articles drawn from a database of over 20,000 articles held by the authors on foreign investment from India's four leading English language newspapers: *Times of India*, *The Hindu*, *Economic Times*, and *Business Standard*. Articles were analysed using *Atlas.ti* qualitative analysis software.
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